Public Law Project

Public Law Project briefing on the Bill of Rights Bill for House of Commons Second Reading

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Summary

PLP opposes the Government's Bill of Rights. It is a Bill which, despite its name, extinguishes our most effective mechanisms for enforcing rights. Regressive in its substance and faulty in its drafting, it will provoke years of expensive litigation while doing little, if anything, to extend the protection of cherished rights.

The previous Lord Chancellor, Robert Buckland QC, has described the legislation as a "cure in search of a problem".[1] This echoes the conclusions of the Government's Independent Human Rights Act Review (IHRAR), which found that the Human Rights Act 1998 (HRA) was broadly working well.[2] Schedule 5(2) of the Bill makes explicit that "The Human Rights Act 1998 is repealed", thus going well beyond any manifesto promise made to the electorate to "update" the HRA.[3]

This Bill, which weakens the protection of human rights domestically, will impede access to justice at home, with the effect that people in Britain will be required to go abroad to the European Court of Human Rights in Strasbourg to effectively defend their human rights. This will produce excessive delay, waste and expense. At the same time, it will abolish effective remedies; stifle independent judicial protection of human rights; and generate expensive litigation for years to come.

Given the constitutional significance of the HRA, PLP would have expected a reform programme to adhere to three principles:

- Caution and moderation, going only as far as necessary to resolve problems
- A reliable evidence-base demonstrating that those problems in fact exist[4]
- Maximum opportunities for scrutiny by parliamentarians, whose constituents' rights will be weakened by this Bill

The Government has adhered to none of these.

There is little caution in this Bill, which represents a significant weakening of existing human rights protections. All this is done using contested or non-existent evidence and with no serious attempt to address concerns raised in consultation submissions.[5] Moreover, the

[1] Joshua Rozenberg, 'A cure in search of a problem' A Lawyer Writes (July 2022) available at: https://rozenberg.substack.com/p/a-cure-in-search-of-a-problem

[2] Sir Peter Gross, 'Independent Human Rights Act Review ' (December 2021) available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

[3] Conservative Party 2019 Manifesto, available at: https://www.conservatives.com/our-plan/conservative-party-manifesto-2019 (p.48).

[4] Lee Marsons, 'We need to be cautious about human rights act reform' Bright Blue (July 2022) https://www.brightblue.org.uk/lee-marsons-we-need-to-be-cautious-about-human-rights-act-reform/

[5] Lee Marsons, 'What to make of the government's Human Rights Act consultation?' The Law Gazette (March 2022) available at: https://www.lawgazette.co.uk/commentary-and-opinion/what-to-make-of-the-governments-human-rights-act-consultation/5111756.article

Government has rejected cross-party calls for pre-legislative scrutiny,[6] despite the seriousness of the Bill. This contrasts with the publication of the Draft Mental Health Bill,[7] for example, which, while important, does not have the constitutional status of this Bill.

Finally, the Government asserts a need to "rebalance" the relationship between Parliament, the government and the judiciary in the application of human rights law.[8] But the HRA, far from creating a juristocracy where the political preferences of the courts are supreme, works well precisely because it does not do this. It contains no powers for judges to invalidate Acts of Parliament, and outcomes in any legal cases can be overruled by Parliament on a simple majority vote.

Instead, the HRA supports the UK's compliance with its international obligations, exceeds the protections previously available at common law, and respects the independence of our domestic courts from the Strasbourg Court, all without upsetting the right of the government to govern and Parliament to legislate. Its repeal is a loss for the many people in Britain who – in court and out – rely on its provisions to ensure that the state respects their rights.

This briefing examines selected provisions of the Bill under the following five themes:

(1) **Weakening the protection of human rights domestically**, including by repealing the obligation on judges to interpret laws to be compatible with human rights

(2) **Empowering the executive and undermining accountability**, including by allowing ministers to pick and choose which previous human rights judgments to preserve and requiring judges to presume that a minister's decision in some deportation cases is correct

(3) **Imposing unnecessary and costly procedural burdens**, particularly through imposing a new "human rights permission stage" requiring individuals to prove that they have suffered "significant disadvantage" before bringing a claim to court

(4) **Violating the UK's international human rights obligations**, by compelling British judges to ignore interim measures from the European Court of Human Rights; and

(5) **Weakening the universal and equal protection of human rights**, particularly for prisoners and foreign national offenders.

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[6] Joint Letter to the Justice Secretary by the Public Administration and Constitutional Affairs Committee, Justice Committee, Joint Committee on Human Rights and the House of Lords Constitution Committee, 'Pre-Legislative Scrutiny of a 'Bill of Rights' (May 2022) available at https://committees.parliament.uk/publications/22567/documents/166044/default/

[7] Department of Health and Social Care and the Department of Justice, 'Draft Mental Health Bill 2022' (June 2022) available at: https://www.gov.uk/government/publications/draft-mental-health-bill-2022

[8] Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights, Consultation Response' (July 2022) available at: https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/outcome/human-rights-act-reform-a-modern-bill-of-rights-consultation-response (Chapter 3).

1. Weakening the protection of human rights domestically

The Bill contains many provisions that would weaken the current legal mechanisms available for protecting human rights by:

- **Repealing the use of judicial power under section 3 of the HRA to interpret legislation to be compatible with human rights, which provides a much stronger mechanism for protecting rights than any alternative (*Schedule 5(2)*);**
- **"Declarations of incompatibility" are made the main remedy for many human rights violations, which does not provide an effective remedy to claimants (*Clause 10*);**
- **Limiting the ability of a court to make an independent assessment of whether primary legislation is compatible with human rights by requiring judges to put the "greatest possible weight" on Parliament's assessments (*Clause 7(2)(b)*);**
- **Barring courts from holding public bodies to any new positive obligation to protect human rights and significantly limits the operation of existing positive obligations, including for the most fundamental such as the right to life and the prohibition of slavery (*Clause 5*);**
- **Weakening the protection of freedom of speech by excluding protection where the state criminalises speech or where the state claims restrictions are necessary for national security (*Clause 4*);**
- **Codifying a right to trial by jury which merely restates existing law and which provides no mechanism to enforce that right when it is undermined (*Clause 9*).**

In this section, we specifically examine the impact of repealing section 3 of the HRA.

Repeal of Section 3: the "knock-on effect"

Section 3 of the HRA requires the judiciary to interpret and give effect to primary and secondary legislation "so far as it is possible to do so" to be compatible with human rights. It is a justifiable and effective compromise between Parliament's twin goals of improving the protection of human rights and maintaining its legislative sovereignty.

The repeal of section 3 via Schedule 5(2) of the Bill should be opposed for four reasons, expanded on further below.

First, section 3 provides a powerful instrument to give effect to legislation in a way that is compatible with human rights, which exceeds any alternative protections available.

Second, this proposal will compel British courts to issue more declarations of incompatibility as an alternative to using section 3. Declarations of incompatibility are not effective remedies for claimants, as confirmed in the case law of the European Court of Human Rights.

Third, this proposal will diminish British influence in Strasbourg because many claimants will pursue litigation in Strasbourg at the earliest opportunity, rather than seeking to resolve their disputes domestically.

Fourth, the courts are clear that section 3 interpretations, despite being powerful, must "go with the grain" of Parliament's intention and will. Section 3 preserves the constitutional balance between the judiciary and Parliament by retaining Parliament's ability to overturn any section 3 cases.

Section 3: effective protection of human rights

Prior to section 3 of the HRA, courts could use the European Convention on Human Rights (ECHR) as a guide to interpreting legislation only where there was ambiguity in the statutory language. If there was no ambiguity, the court had to give effect to the ordinary language of the statute, even if this violated human rights.[9] By contrast, whether there is ambiguity or not, courts can use section 3 to give the most protective reading of legislation possible. In this way, section 3 has enabled courts to avoid outcomes that would otherwise violate human rights.

For example, in *R (Vanriel and Tumi) v Secretary of State for the Home Department*,[10] the Administrative Court was concerned with victims of the Windrush scandal who had applied for British citizenship. Vanriel and Tumi had been in the UK since the 1960s and had established a family and livelihood in the UK over those decades. However, they decided to return to their country of origin for several years. All parties agreed that an ordinary reading of the British Nationality Act 1981 gave the Secretary of State no discretion to allow a citizenship application where the applicant had been outside of the UK for more than five years.

The judge decided that although the statute was not ambiguous, section 3 granted the power to achieve an interpretation that was compatible with human rights, by giving the Secretary of State a discretion (but not a duty) to disapply the five-year rule. Without such an ability to interpret a statute in a human rights compatible way where there is no ambiguity in the language, the rights of these Windrush victims would have been violated. This is why section 3 is such an essential protection and why its repeal should be opposed.

A strong example of this relates to the protection of freedom of speech. Alongside other reforms in this Bill, the repeal of section 3 will severely reduce the protection afforded to

[9] R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696.
[10] [2021] EWHC 3415 (Admin).

this important right. Clause 4 of the Bill purports to ensure "great weight" is accorded to the right to freedom of speech.[11] The Bill will not in practice achieve this. Subsection (3) of that Clause provides that it does not apply in criminal proceedings or where the state claims that restrictions on speech are necessary for national security. By contrast, under section 3 of the HRA, courts were able to give effect to statutory provisions which criminalised, say, "grossly offensive" language in a manner that remained compatible with freedom of speech.[12] This Bill extinguishes that power and in doing so markedly weakens the protection of freedom of speech where the state seeks to criminalise or restrict speech for national security reasons. This is done even when the purported aim of the Government is to enhance "quintessentially UK rights such as freedom of speech."[13]

Declarations of incompatibility: denying claimants effective remedies

A further consequence of repealing section 3 is that the courts will be forced to issue a greater number of "declarations of incompatibility" under Clause 10 of the Bill. A declaration of incompatibility is a statement by the court that a particular provision in legislation violates human rights. As Clause 10(3)(a) of the Bill makes clear, a declaration of incompatibility does not affect the validity of the legislation in issue. The court will be compelled to give effect to the legislation, even though it violates human rights. This will happen because courts will be unable to read legislation using section 3 to make the language compatible with human rights.

Therefore, under these proposals, the claimant will receive no redress and no remedy to alleviate the violation of their human rights. Instead, the individual will be left hoping that Parliament not only changes the law eventually but that it changes the law **retroactively** to cover their case. This is very far from guaranteed.

In *Burden v United Kingdom*, the European Court of Human Rights expressly concluded that a declaration of incompatibility is not an effective remedy for the purposes of Article 13 ECHR because it provides the claimant no serious redress in their case.[14]

As the Joint Committee on Human Rights summarised *Burden*:

> The European Court of Human Rights (ECtHR) confirmed that applicants may be required to pursue their claim in the domestic courts if the only possible remedy is a declaration of incompatibility under the Human Rights Act. As it is for the Government to decide whether or not to amend the legislation which has been declared to be incompatible, and whether to change the law in a way which provides an adequate remedy for the individual applicant, the ECtHR concluded that the

[11] Bill of Rights Bill, available at: https://publications.parliament.uk/pa/bills/cbill/58-03/0117/220117.pdf
[12] Connolly v DPP [2007] EWHC 237 (Admin).
[13] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, Consultation Response, available athttps://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/outcome/human-rights-act-reform-a-modern-bill-of-rights-consultation-response (Foreword).
[14] Application No 13378/05, Judgment, 12 December 2006 [40].

> declaration of incompatibility cannot be considered an effective remedy for the purposes of the requirement that domestic remedies be exhausted.[15]

Therefore, the repeal of section 3 is retrograde and regressive for the protection of human rights. The result will be a denial of justice for claimants.

Diminishing British influence in Strasbourg

In practice, declarations of incompatibility mean many claimants will simply seek to avoid domestic courts altogether because of the weak remedies available and will instead pursue litigation in Strasbourg at the earliest opportunity.

Under Article 35 ECHR, the Strasbourg Court will only hear a claim after "all domestic remedies have been exhausted." At the same time, the domestic remedy must be practical and effective. When a declaration of incompatibility – the main remedy under the Bill of Rights Bill – is not considered an effective remedy by Strasbourg, many more claimants may be able to successfully pursue cases at Strasbourg without first bringing proceedings in domestic courts.[16]

This means that a British court may have never had the opportunity to hear a case, weakening the influence of the British judiciary in Strasbourg. In important cases, British judges have been decisive in causing Strasbourg to change course and even reverse previous rulings,[17] but under these proposals this British influence could end.

Respecting Parliament's intentions and sovereignty

Crucially, section 3 has been applied in a way that respects the will of Parliament. Specifically, the courts do not use section 3 to interpret language in a way that "goes against the grain" of Parliament's will in the legislation, as Lord Rodger explained in *Ghaidan v Ghodin-Mendoza at* [121]:

> If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of

[15] Joint Committee On Human Rights, 'Sixteenth Report, 4. Declarations of Incompatibility' (June 2007) available at: https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/128/12807.htm para. 111.
[16] Rosalind English, 'How do you "exhaust local remedies" for the purpose of applying to Strasbourg?' UK Human Rights Blog (September 2012) available at: https://ukhumanrightsblog.com/2012/09/17/how-do-you-exhaust-local-remedies-for-the-purpose-of-applying-to-strasbourg/
[17] Al-Khawaja and Tahery v United Kingdom 26766/05 [2011] ECHR 2127.

interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.[18]

Lord Nicholls reiterated this as [33]:

> Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must…go with the grain of the legislation.

This sentiment is also evident in the decision in *Re S*: "[A] meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate."[19]

It is clear that the judicial approach to section 3, while powerful and protective, does not permit courts to depart from a fundamental feature of Parliament's intention in the legislation.

A virtue of the HRA is that whenever Parliament disagrees with an interpretation under section 3, it retains the power to overturn any case through primary legislation. Parliament's sovereignty is unchanged and the judges recognise this. For example, independent research by JUSTICE estimates that between 2013 and 2020, there were just 25 cases out of 593 where courts or tribunals had used section 3 to interpret legislation that would otherwise have been incompatible with human rights. In the majority of cases mentioning section 3, it was not used. A leading reason was that to do so would go beyond the court's institutional competence.[20]

Section 3 has permitted a more robust protection of human rights than would be available without it while preserving Parliament's sovereignty and while limiting the power of the courts to alter legislation.

As section 3 HRA is a workable, elegant compromise between parliamentary sovereignty and Parliament's commitment to human rights, PLP urges Members to oppose its repeal.

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[18] [2004] UKHL 30.

[19] [2002] UKHL 10.

[20] Florence Powell and Stephanie Needleman, 'How Radical an instrument is Section 3 of the Human Rights Act' UK Constitutional Law Association (March 2021) available at: https://ukconstitutionallaw.org/2021/03/24/florence-powell-and-stephanie-needleman-how-radical-an-instrument-is-section-3-of-the-human-rights-act-1998/

2. Empowering the executive and undermining accountability

This Bill contains several provisions which empower the executive while weakening its accountability:

- **Grants ministers a Henry VIII power giving them the right to decide whether to preserve any cases which protected human rights using section 3 HRA (*Clause 40(2)-(3)*);**
- **Reforms declarations of incompatibility to cover a greater range of secondary legislation than the HRA (*Clause 10*);**
- **Requires judges in appeals against deportation orders involving the right to a fair trial to presume that the Minister's deportation decision is correct and conclusive of the appeal (*Clause 20*);**
- **Prevents legitimate claimants who have suffered human rights violations at the hands of the British military abroad from bringing proceedings in the UK to vindicate their rights (*Clause 14*);**

In this section, we address the first three proposals.

This Bill empowers the executive and weakens the legal mechanisms which enable individuals to hold it to account. Its effect is to make government or public bodies much less accountable. In this section, we focus on three proposals in this theme:

- The Henry VIII power in Clause 40 grants ministers the exclusive right to decide whether to preserve any judgments which protected human rights using the section 3 HRA interpretive obligation;
- Declarations of incompatibility would be available for secondary as well as primary legislation; and
- Judges would be required to presume that a minister's decision is correct and conclusive in some deportation appeals.

A Henry VIII power to overrule or save section 3 cases

Clause 40 of the Bill envisages that all previous court judgments using the section 3 interpretive duty (see above) will be abolished. Clause 40(2) grants ministers a Henry VIII power to amend an Act of Parliament or secondary legislation to "preserve or modify (to any extent) the effect of" a judgment using section 3 HRA.

Simply stated, the Bill assumes that all rulings that protected human rights using section 3 will fall. Their salvation will depend on a unilateral act of the executive using a Henry VIII power to rescue the case. A minister would have the power to decide which past court judgments that protected human rights they agree with and wishes to save and which they

do not. This is both a substantial grant of unilateral power to the executive and a troubling retroactive repeal of cases that protected human rights.

Furthermore, it is problematic for legal certainty that the Bill plans to repeal all past section 3 cases in this way. This change, if it is to occur, should be prospective only. In many cases, it will also be unclear whether a court used a section 3 interpretation or whether they used ordinary principles of statutory construction.[21] Therefore, there will be a considerable degree of confusion, uncertainty and discretion for government as to how it chooses to exercise this radical power.

This plan is therefore unfair to the individuals who succeeded in court, a major grant of unilateral power to government, and for many cases could be unworkable.

Declarations of incompatibility and secondary legislation

Clause 10 of the Bill concerns declarations of incompatibility. In effect, a declaration of incompatibility from a court provides that a provision in primary or secondary legislation violates a human right. The legislation continues in force despite breaching rights – which is an important reflection of parliamentary sovereignty but as noted above leaves victims without a remedy.

Section 4 of the HRA currently grants the courts a power to declare primary legislation incompatible with human rights. This also applies to secondary legislation, but only where its "parent Act" - the Act of Parliament from which it derives – prevents removal of the incompatibility. The purpose of this mechanism is to preserve Parliament's sovereign power to legislate as it wishes: an argument which applies to primary legislation but with much less force to secondary legislation which is largely an executive power (see below).

Clause 10 of the Bill would give the courts a broader general power to declare secondary legislation incompatible with human rights.

PLP opposes this plan because a more general power adds nothing to existing law and risks creating needless complexity as to which powers should be used, when and why. Parliament has very recently passed legislation which has the same effect: section 1 of the Judicial Review and Courts Act 2022 permits judges to issue suspended or prospective-only quashing orders. Section 1(5) of the 2022 Act reads that: "Where…an impugned act is upheld…it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect." Therefore, if a court were to issue a suspended or prospective-only quashing order under section 1 of the 2022 Act, the validity of secondary legislation would not be affected.

Accordingly, it is difficult to see what purpose the extension of declarations of incompatibility serves. The current law already provides for this, and what is proposed will add complexity and confusion as to which remedy should be used and why.

[21] Ibid.

Clause 20 and presumptions favouring the executive

Clause 20 relates to appeals against deportation orders when the Home Secretary is deporting an individual while relying on an assurance from a foreign country that it will respect the right to a fair trial of the person being deported. This Clause is presumably the political reaction to the decision of the European Court of Human Rights in *Othman (Abu Qatada) v United Kingdom*, that it would be a violation of the right to a fair trial and a "nullification" of that right for the applicant to be deported to face trial and convicted on the basis of evidence obtained by torture, despite diplomatic assurances.[22]

In particular, Clause 20(3)(a)-(b) requires a court to "presume that the Secretary of State's assessment of those assurances is correct" and "treat the assurances as determinative of the appeal…and dismiss the appeal… unless the relevant tribunal considers that it could not reasonably conclude that the assurances would be sufficient to prevent a breach of the right to a fair trial so fundamental as to amount to a nullification of that right."

Therefore, this clause is an attempt to weaken the judicial scrutiny of assurances received from a foreign country that that country will respect the right to a fair trial prior to a deportation. Given the long and cherished history of the right to a fair trial in the United Kingdom and given the serious personal consequences to deportees of unfair trials, including very lengthy terms of imprisonment, this objective is objectionable in principle.

Assurances made by foreign countries, especially where those countries have records of human rights abuses, can be highly unreliable. Not least, this is because those assurances are not legally binding. They are just that: political assurances, not legal commitments.[23] As Lord Anderson of Ipswich, the former Reviewer of Terrorism Legislation, ended his 2017 report on deportation with assurances (DWA):

> It is right to end this assessment on a negative note. After all, much is stake…not only the reputations of two states and the moulding of their criminal justice systems but also, and more crucially, the protection of vulnerable individuals from torture and other outlawed treatment. The survey has found that doubts and problems abound about the DWA project. To deliver the DWA will be challenging enough in terms of negotiations and the delays caused for the suspected terrorists and their potential victims… [T]he effective reduction of risk of torture is always going to leave some residual level risk in receiving states where some agencies remain

[22] Application 8139/09, 17 January 2012.
[23] Eric Metcalfe, 'The false promise of assurances against torture' in Justice Journal (June 2009) available at: https://www.statewatch.org/media/documents/news/2009/jun/The%20false%20promise%20of%20assurances%20against%20torture%20-%20uk-torture-assurances-eric-metcalfe-justice.pdf

> untrustworthy and where the human rights situation may not be settled. Furthermore, DWA is not at all realistic for chronically 'problematic' countries...[24]

Clause 20 is an attempt to reduce the judicial scrutiny of a deportation or extradition where serious human rights abuses could result for the individual concerned.

Beyond this principled objection, there are two pragmatic objections to Clause 20.

The first is that this provision will only apply to a vanishingly small number of cases. The number of instances where a person due for deportation or extradition resists removal on the basis of the right to a fair trial is extremely small. Indeed, in the view of immigration law specialist, Colin Yeo: "I would estimate the average number of people to whom this applies on an annual basis is zero."[25] If there is a practical problem for the government to be resolved through this clause – and for reasons explained below, we do not believe that there is – it would better be dealt with through specific immigration legislation where the consequences for human rights and specific international and foreign relations issues can be debated and examined in detail by Parliament, experts and other interested parties, rather than in a "Christmas tree" human rights Bill.

The second is that we doubt whether this clause responds to a real pressing problem in that the clause's language strongly resembles – indeed, arguably replicates – the current approach of the courts in any event. Clause 20(2)-(3) states that a court or tribunal can only interfere with the Secretary of State's reliance on diplomatic assurances where it could not reasonably conclude that the assurances would be sufficient to prevent "a breach of the right to a fair trial so fundamental as to amount to a nullification of that right." At [260] in *Othman (Abu Qatada) v United Kingdom*, the European Court of Human Rights used this exact phrase:

> It is noteworthy that...the Court has never found that an expulsion would be in violation of Article 6. This fact, when taken with the examples given in the preceding paragraph, serves to underline the Court's view that "flagrant denial of justice" is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial...which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right..."[26]

Therefore, the Government's preferred legal position appears to be current legal test.

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[24] David Anderson QC and Clive Walker QC, 'Deportation with Assurances' (July 2017, Cmd 9462), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/630809/59541_Cm_9462_Accessible.pdf

[25] Colin Yeo, 'What will be the impact of the Bill of Rights Bill on immigration cases?' (1 August 2022, *Free Movement Blog*). Available at https://freemovement.org.uk/what-will-be-the-impact-of-the-bill-of-rights-bill-on-immigration-cases/

[26] Application 8139/09, 17 January 2012.

Nor are the courts likely to disregard or interfere with a Minister's reliance on diplomatic assurances. As the House of Lords put it in *Abu Qatada*'s case:

> It is obvious that if a State seeks to rely on assurances that are given by a country with a record for disregarding fundamental human rights it will need to show that there is good reason to treat the assurances as providing a reliable guarantee that the relevant circumstances of which assurances form part, there are no substantial grounds for believing that a deportee will be at real risk of inhuman treatment, there will be no basis for holding that deportation will violate [human rights].*27*

Consequently, it is not clear what problem this clause seeks to resolve. The courts already treat diplomatic assurances and the Secretary of State's right to rely on them with considerable respect and rarely intervene, and the Government's preferred legal test of a "nullification" of the right to a fair trial is already the law. Therefore, this clause may be an attempt to bind the hands of the courts so that they cannot adjust their approach even in future cases where a more interventionist, protective judicial approach might be warranted. The clause seeks to prevent future developments in case law, rather than deal with current problems. This is wrong because, given what is at stake – the fundamental right to a fair trial – the courts should have the flexibility to adjust their approach in future if they regard it to be justified.

Consequently, Clause 20 is largely redundant in that it replicates the existing legal approach of the courts towards removal in fair trial cases. If there are specific problems that the Government believes exists, it should deal with those through more specific legislation so that the implications can be debated in greater detail by the public, immigration experts, foreign relations specialists and Parliament.

3. Imposing unfair procedural burdens and increasing costs of litigation

This Bill:

- **Creates a "human rights permission stage" requiring claimants to prove that they have suffered "significant disadvantage" (*Clause 15*);**
- **Invents at least six new legal tests which will need to be litigated and defined by the courts.**

As well as weakening the protection of human rights, this Bill will significantly increase costs and satellite litigation if enacted. Beyond the creation of at least seven new legal tests which will need to be litigated and defined by the courts (see below), the most significant

[27] *RB (Algeria) and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10.

procedural impediment is the imposition of a new "human rights permission stage" in Clause 15. This means that claimants will have to prove that they have suffered a "significant disadvantage" prior to bringing a human rights claim in any court.

PLP opposes Clause 15 for seven reasons.

First, this measure is not sufficiently connected to its aim. The Government's stated aim is to bar "trivial" human rights claims so that the courts can focus on "genuine human rights abuses".[28] If the Government had wanted to deter "trivial" claims, it could have introduced a test of "triviality" in Clause 15. It has not done so. Instead, it has introduced a test which will bar claims which are not merely "trivial".

Second, the Government justifies this proposal on the basis that the Strasbourg Court also uses a test of "significant disadvantage".[29] This reasoning is not sufficient because domestic courts are not in a comparable position to the Strasbourg Court. The Strasbourg Court is an international court with a secondary and supervisory jurisdiction. It deals with cases only where domestic proceedings have proved inadequate. It also deals with a population of 820 million people in the Council of Europe. To function effectively, it could not hear cases from all these individuals and there are, therefore, special reasons to require a robust case management system. By contrast, there is zero possibility of domestic courts facing a similar volume of litigation; indeed, there are well under 1000 cases in the Administrative Court each year.[30] On top of this, domestic courts are not secondary, subsidiary or last resort courts like Strasbourg. They are designed to be the primary means of resolving human rights disputes and this proposal will weaken that important role.

Third, there is already a mandatory permission stage in ordinary judicial review proceedings in s.31(3) of the Senior Courts Act 1981 which is working well. Judicial review proceedings are where many human rights issues are claimed and litigated. Independent research has demonstrated that there are around 2000 applications for judicial review each year and around half of those will fall at the permission stage. The vast majority of even the modest number remaining do not relate to human rights but relate only to basic questions about statutory interpretation.[31] As such, the permission stage for judicial review is already proving an adequate filter and no additional filter is needed in those proceedings.

Nor is the judicial review permission stage a mere formality. Cases about very important matters have been refused permission. In *R (Hotta) v Secretary of State for Health and*

[28] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, Consultation Response, available at https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/outcome/human-rights-act-reform-a-modern-bill-of-rights-consultation-response (Chapter 2).
[29] Ibid.
[30] Lewis Graham, Lee Marsons, Professor Maurice Sunkin, and Dr Joe Tomlinson, 'A guide to reading the Official Statistics on judicial review in the Administrative Court' (October 2020) available at: https://administrativejusticeblog.files.wordpress.com/2020/10/a-guide-to-reading-the-official-statistics-on-judicial-review-in-the-administrative-court-october-2020.pdf
[31] Ibid.

Social Care,[32] the Administrative Court refused permission for a challenge to the Government's policy on mandatory coronavirus-related hotel quarantine for international travellers. While recognising the importance of the issue, the judge decided that the claimant had no realistic prospect of success given that the Court of Appeal has previously upheld the legality of national lockdowns.[33]

Fourth, because Clause 15 states that "significant disadvantage" in the Bill of Rights will be given the same meaning as in Article 34 of the ECHR, a court will have to consider a substantial amount of Strasbourg jurisprudence under Article 34, and how it might apply to the facts of each case, before even hearing a claim. This will increase satellite litigation and waste time that could be used to hear a legitimate claim.

Fifth, this proposal will lead to perverse incentives. Claimants will be encouraged to pursue claims via conventional non-human rights grounds of judicial review rather than via the Bill of Rights. This will also delay the development of case law under the Bill of Rights, as litigation regarding its meaning and effects could be rare and take years to develop.

Sixth, in general there is already a higher legal threshold for individuals to argue human rights matters. Section 7(1) of the HRA provides that a person may argue a human rights matter only where he or she is or would be a "victim" of the unlawful act. This is much stricter than the test for standing in judicial review, which requires only a "sufficient interest" in the matter under s.31 of the Senior Courts Act 1981.

An example of this is *R (Reprieve, David Davis MP and Dan Jarvis MP) v Prime Minister*,[34] where the Court of Appeal found that the claimants were not "victims" for section 7 HRA purposes. Therefore, they could not challenge the Prime Minister's decision not to hold a public inquiry into allegations of illegal rendition and torture breaching Article 3 ECHR, committed during the War on Terror. Therefore, in most circumstances, it is already more difficult to pursue human rights challenges than ordinary judicial review challenges and an additional barrier has not been justified.

The exception is that some statutory bodies, such as the Equality and Human Rights Commission (EHRC) and Northern Ireland Human Rights Commission (NIHRC) are permitted under their respective statutes to bring proceedings on behalf of others in order to raise important points of principle or practice in the courts. This is an important way of protecting human rights where individuals do not have the money, time, resources and confidence to bring proceedings personally. This could include children, disabled people, those economically marginalised, prisoners and people in immigration detention, and people who cannot speak English or otherwise navigate the legal system effectively.

This Bill is ambiguous about whether it intends those EHRC and NIHRC powers to continue. While the Bill does not remove these powers expressly, Clause 13(6) defines a "victim" as

[32] [2021] EWHC 3359 (Admin).
[33] [2020] EWCA Civ 1605.
[34] [2021] EWCA Civ 972.

person would be regarded as a victim for the purposes of an individual application to the Strasbourg Court via Article 34 of the ECHR. By definition, an organisation such as the EHRC is not an individual so the strong implication is that the Bill intends to remove these powers. This would be a significant weakening of human rights protection for the most vulnerable individuals who are not able to pursue their own litigation.

Seventh, there has been insufficient consideration of the procedural logistics of this requirement. Judicial review is a common procedural route for human rights claims. However, this is not the only option to raise a human rights issue. Such an issue could be raised, for example, as a defence to criminal proceedings in the Crown Court, as a ground of appeal in a statutory appeal to the Court of Appeal, or via claim for damages in the County Court. This means that, for example, a judge sitting in a Crown Court, before allowing a defendant to argue a defence, would need to carry out a separate procedure to consider the human rights issue and whether the individual has been significantly disadvantaged. In short, an entirely new procedure would need to be added. This would increase complexity, raise costs and promote satellite litigation that would take up more of the criminal courts' time at a point where there is a serious backlog.

We therefore urge parliamentarians to oppose the introduction of a human rights permission stage in Clause 15.

Inventing six new legal tests

Beyond imposing unjustified new hurdles to legitimate legal proceedings, this Bill will also increase costs to the taxpayer and litigants by inventing at least six new legal tests which will have to be defined by the courts over several years.

These tests consist of:

- Compelling judges to place "great weight" on certain factors when making decisions about damages, positive obligations and the disclosure of journalistic sources, without providing any definition of this test *(Clauses 5, 18 and 21)*;
- Requiring judges to place the "the greatest possible weight" on Parliament's assessment of proportionality when balancing competing human rights, without providing any guidance as to what this means *(Clauses 6 and 7)*;
- As explained above, creating a "significant disadvantage" test in the new human rights permission stage, which will require judges to take account of considerable new Strasbourg case law before even hearing the legal dispute in issue *(Clause 15)*. This has an exception for cases of "wholly exceptional public interest", which is again not defined *(Clause 15)*; and
- In deportation cases, creates new tests of "extreme harm" *(Clause 8)* and "exceptional and overwhelming harm", the application and meaning of which is unclear *(Clause 8)*.

This Bill, therefore, increases costs to the taxpayer, litigants and the courts and we urge parliamentarians to oppose it.

4. Violating the UK's international human rights obligations and denying effective remedies

This Bill contains several provisions which violate the UK's international legal obligations:

- **Orders British judges to ignore Rule 39 interim measures granted by the European Court of Human Rights (*Clause 24*);**
- **Violates Article 13 ECHR, which requires the UK to offer effective remedies for breaches of Convention rights, by making the principal remedy for many human rights violations a declaration of incompatibility, which Strasbourg has found does not satisfy Article 13 (*Clause 10*);**
- **Introduces a test for the deportation of foreign national offenders which could violate Article 8 of the ECHR (the right to respect for private and family life) (*Clause 8 and Clause 20*);**
- **Removes the obligation on British judges under section 2 of the HRA to take account of cases decided by the European Court of Human Rights (*Schedule 5(2)*).**

In this section, we will focus on the requirement on domestic judges to disregard "Rule 39" decisions from the Strasbourg Court.

Under this Bill, the Government's commitment to the international rule of law is in doubt. This is further evident across other pieces of legislation, including the Northern Ireland Protocol Bill, which repudiates core aspects of a treaty mutually agreed only recently on questionable legal grounds.[35] The Bill of Rights Bill weakens the UK's reputation and its commitment to international law still further.

Over time, given the rising number of complaints against the UK in the European Court of Human Rights, the weakening of domestic enforcement mechanisms, and the Government's ambivalent public attitude towards the ECHR, this Bill could put at risk the UK's membership of the ECHR. The ECHR has proved to be an important external check on domestic laws and practices that unduly interfere with human rights, a practical tool to resolve injustices, which has received cross-party support over many years.[36]

[35] Northern Ireland Protocol Bill, available at: https://bills.parliament.uk/bills/3182
[36] See also: *S and Marper v United Kingdom* [2008] ECHR 1581 related to the DNA Database and *Gillian and Quintan v United Kingdom* [2010] ECHR 28 on randomised terrorism stop and searches.

This has included *Smith & Grady v United Kingdom*, where, after failing in the British courts, the Strasbourg Court determined that the UK's ban on openly gay people serving in the armed forces was unlawful discrimination.[37] This decision is now celebrated across the political spectrum and, indeed, the Government itself recently established a commission to review the consequences of this historic discriminatory ban.[38] PLP supports membership of the ECHR and opposes any move to withdraw from, or weaken the UK's commitment to, that treaty.

Decisions on Rule 39 interim measures

Clause 24 of the Bill would preclude domestic courts from considering ECtHR interim measures when deciding whether to grant interim relief, such as an injunction prohibiting deportation.

It is already the case that domestic courts are not bound by Rule 39 interim measures. However, Clause 24(2)-(3) precludes domestic courts from having "regard" to ECtHR interim measures when "considering whether to grant any relief which, if granted, might affect the exercise of a Convention right". This would increase the chances of domestic courts refusing interim relief in cases where the ECtHR has already granted an interim measure.

This is wrong for two reasons. Firstly, this change increases the likelihood of the UK breaching its obligations under the Convention as a matter of international law. Article 34 ECHR provides that High Contracting Parties may not hinder individuals' right to apply to the ECtHR claiming to be the victim of a breach of the ECHR. It is well-established in the ECtHR's case law that failure to comply with an interim measure is a breach of Article 34 ECHR.[39]

Secondly, non-compliance with Rule 39 interim measures would weaken rights protection. The purpose of interim measures is to avoid irreversible situations that would prevent the court from examining the application and, where appropriate, from securing the applicant's Convention rights. For this reason, interim measures apply only where there is an "imminent risk of irreparable damage".[40]

In *Evans v UK* the applicant sought to prevent her former partner from withdrawing consent to the storage and use by her of embryos created jointly by them. This would have

[37] (1999) 29 EHRR 493.
[38] Cabinet Office, Ministry of Defence, LGBT Veterans Independent Review, Office for Veterans' Affairs and Leo Docherty MP, 'Press release Chair of the review into the treatment of LGBT veterans announced' available at: https://www.gov.uk/government/news/chair-of-the-review-into-the-treatment-of-lgbt-veterans-announced
[39] *Mamatkulov and Ashkarov v Turkey* (Applications Numbers 46827/99 and 46951/99) (2005) 41 EHRR 494 [Grand Chamber]; *Paladi v Moldova* (Application Number 39806/05) [2009] ECHR 450 [Grand Chamber].
[40] *Mamatkulov and Ashkarov v Turkey*, [104].

had the effect of preventing the applicant from ever having a child to whom she would be genetically related. The Court requested under Rule 39 that the UK Government take appropriate measures to prevent the embryos being destroyed by the clinic before the ECtHR had been able to examine the case.[41] More recently, the ECtHR indicated an interim measure requiring Russia not to carry out the death penalty imposed on two British nationals captured whilst serving in the Ukrainian armed forces.[42]

In both cases, the point of the interim measure is clear: it preserves the status quo in an extreme situation where not preserving the status quo would have the effect of making the benefit of Convention rights non-practicable and theoretical. The UK is committed to remaining party to the ECHR, which means, under Article 34, endeavouring to give practical effect to the rights contained in the Convention.

We therefore urge parliamentarians to oppose Clause 24 of the Bill.

5. Weakening the universal and equal protection of human rights, particularly for prisoners and foreign national offenders

This Bill:

- **Weakens the universal and equal protection of human rights by making it more difficult for certain claimants to bring successful human rights claims in domestic courts.**
- **In doing so the bill creates a tiered system of rights, where those deemed 'undeserving' do not have protection equal to that of their 'deserving' counterparts.**
- **The differentiation between groups particularly puts at risk the rights of prisoners (*Clause 6*) and migrants (*Clauses 8 and 20)*.**

This Bill undermines the fundamental principle that we all have human rights by virtue of the fact that we are human. It proposes a tiered system under which people are considered deserving or undeserving, and will experience unequal protection of rights, targeting already marginalised groups and depriving them of access to justice.

[41] *Evans v the United Kingdom* (2008) 46 EHRR 34 [Grand Chamber]. Interim measures were made requiring the clinic to preserve the embryos until the end of proceedings, see *Evans v the United Kingdom* (2003) 43 EHRR 21, [3]-[4], [76]-[77].
[42] *Pinner and Aslin v Russia and Ukraine* (Application Numbers 31217/22 and 31233/22) (30 June 2022). See also: *Saadoune v Russia and Ukraine* (Application Number 28944/22) (16 June 2022).

One of the Government's stated aims in its repealing of the HRA was to bar "trivial" human rights claims so that the courts can focus on "genuine human rights abuses".[43] We see this aim articulated in Clause 15 of this Bill which PLP opposes in its entirety, for the reasons set out above. Yet the Bill goes further still in making it difficult for some vulnerable and "politically unloved individuals",[44] to be able to bring successful human rights claims in the domestic courts. PLP has particular concerns that three of the proposed clauses (Clauses 6, 8 and 20) will put the rights of vulnerable groups at risk and act as significant hurdles to access to justice. It is these same groups to whom protections are most vital.

Clause 6 of the Bill tilts the scales under the label of 'public protection' against prisoners where they bring a claim of a breach of their human rights claims. The proposal applies to all Convention rights apart from the right to life, prohibitions of torture and slavery, and the guarantee of no punishment without law. The courts would have to take a narrow approach when interpreting and applying the majority of Convention rights, where the person bringing such a claim is a prisoner. Subsection (3) paints a troubling image, emphasising the applicability of the clause "in particular", to alleged breaches of Convention rights that arise in connection to whether an individual should be released from custody, or whether they should be placed in a particular part of a prison.

Clause 8 poses equal concern. The Government has been consistent in packaging the Bill as a means to prevent foreign national offenders (FNOs) from relying on their rights in appeals of deportation orders – and this proposal goes some way to achieving that. The clause carves out FNOs from the equal protection of Article 8 of the Convention (right to respect for private and family life) by creating a near insurmountable Article 8 test, specifically in the context of deportation appeals, save for in the most extreme circumstances.

Under clause 8(2) deportation provisions could only be contrary to the right to private life if they would 'result in manifest harm … that is so extreme that the harm would override the otherwise paramount public interest in removing' the person from the UK. In the consultation process for the reform of the HRA, the Government acknowledged that the amendments made to the immigration system by the 2014 Immigration Act already produce their preferred legal position.[45] Since then, successful appeals against deportation have had to overcome significant procedural hurdles and be able to demonstrate personal circumstances that meet the high threshold required to outweigh the broad statutory codification of 'public interest'.

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[43] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, Consultation Response, available at https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/outcome/human-rights-act-reform-a-modern-bill-of-rights-consultation-response (Chapter 2).
[44] Marko Milanovic, 'The Sad and Cynical Spectacle of the Draft British Bill of Rights' (23 June 2022, EJIL:Talk), available at https://www.ejiltalk.org/the-sad-and-cynical-spectacle-of-the-draft-british-bill-of-rights/
[45] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights. Available at https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation (p.38).

In the Government's response to the consultation, they confirmed that 1,783 responses engaged with the three options presented on how to "make sure deportations that are in the public interest are not frustrated by human rights claims". Of these responses, 82% preferred none of the options and 1,373 (77%) respondents said that they believe no change is required to the current framework.[46]

Nonetheless, the Government have proposed a change that would significantly raise the high threshold. 'Extreme' harm is to be defined under subsection (3) as one that is 'exceptional and overwhelming' and not 'capable of being mitigated to any significant extent or is otherwise irreversible.' Subsection (4) would further limit 'extreme harm' solely to relationships between the deportee and their children, and not any other relationships that the deportee might have, subjecting these to an additional 'most compelling circumstances' test. It is difficult to imagine how a (childless) young adult offender who has foreign nationality, but who grew up in the UK and has no real ties to his or her country of nationality, could access the protection of their rights under Article 8 ECHR.

As a counterpart to the barring of migrants, specifically FNOs, from the protection of certain rights, Clause 20 limits courts' powers to allow appeals against deportations. Subsection (3)(a) creates a legislative presumption in favour of the Secretary of State's assessment of the decision to make a deportation order. Yet, as articulated above, this provision will only apply to a small number of cases as the number of instances where a person due for deportation or extradition resists removal on the basis of the right to a fair trial is extremely small.[47]

Ultimately, it is not clear what the proposals under Clause 20 seek to resolve, other than to bind the hands of the courts so that they cannot adjust their approach even in future cases where a more interventionist, protective judicial approach might be warranted. The clause would prevent future developments in case law, and again carve out FNOs from the equal protection of the fundamental right to a fair trial.

We therefore urge parliamentarians to oppose Clauses 6, 8 and 20 which weaken the universal and equal protection of human rights.

[46] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, Consultation Response. Available at https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/outcome/human-rights-act-reform-a-modern-bill-of-rights-consultation-response (Chapter 3).
[47] Colin Yeo, 'What will be the impact of the Bill of Rights Bill on immigration cases?' (1 August 2022, *Free Movement Blog*). Available at https://freemovement.org.uk/what-will-be-the-impact-of-the-bill-of-rights-bill-on-immigration-cases/

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About Public Law Project

Public Law Project (PLP) is an independent national legal charity. One of our five strategic priority areas is a constitution that promotes accountability. This includes legislative and policy reforms that risk undermining the mechanisms by which marginalised groups can check the unfair or unlawful exercise of executive power and enforce rights guaranteed under laws made by Parliament. PLP's vision is a world in which individual rights are respected and public bodies act fairly and lawfully.