

## Positive Obligations



**Alex Goodman**

## Clause 5(1)

- (1) A court may not adopt a post-commencement interpretation of a Convention right that would require a public authority to comply with a positive obligation.
- ...
- (7) In this section “positive obligation” means an obligation to do any act.

## Positive Obligations under the ECHR

- Positive obligations are found in the text of the Convention and the jurisprudence of the European Court of Human Rights in (at least) articles 2, 3, 4, 5, 6, 8, 10, 11, A1P1
- Some are express in the text: E.g. Article 5(2)
- Other positive obligations derive from:
  - the overarching obligation on the state under Article 1 of the Convention to ‘secure that everyone within their jurisdiction’ has the rights and freedoms set out in the Convention.
  - Article 13 right to an effective remedy.
  - Convention principle that rights are not theoretical or illusory but practical.

## Articles 2, 3, 4

### Article 2(1):

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

### Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment

### Article 4(1) and (2)

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.

## Positive Obligations under articles 2, 3, 4

- Obligation on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life etc- implies a requirement for an effective judicial system, legal means capable of establishing the facts and providing redress to victims.
- Operational Duty – state must take “appropriate steps” to safeguard lives; prevent torture; prevent forced labour. Case law is express that this must not place an impossible or disproportionate burden on authorities.

E.g. *VCL v UK* [2021] 73 EHRR 9 (article 4)

- Procedural duty on effective public investigation, see for example:
  - *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653
  - *R (Middleton) v West Somerset Coroner* [2004] 2 A.C. 182
  - *R (MA and BB) v SSHD* [2019] EWHC 1523 (Admin) (article 3)

## Article 6

Article 6 – *Airey v Ireland* (1979-80) 2 E.H.R.R. 305

- Convention intended to guarantee rights that are practical and effective, particularly in respect of right of access to courts. Not realistic to suppose Airey could conduct her own divorce proceedings that were complex and emotional. Appearing in person not an adequate safeguard. Article 6 not limited in application to obstacles to accessing justice, it could compel the state to provide legal assistance.

*R Gudanaviciene v Director of Legal Aid Casework* [2015] 1 W.L.R. 2247

- legal aid guidance incompatible with article 6 for being too restrictive.

## Article 5(2) Express Positive Obligation

Article 5(2) provides:

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

## Saadi

*R (Saadi) v SSHD* [2002] 1 W.L.R. 3131 (no reasons for fast-track immigration detention)

*Lord Slynn:*

48. It is agreed that the forms served on the claimants here were inappropriate. It was, to say the least, unfortunate but without going as far as Collins J in his criticism of the Immigration Service, I agree with him that even on his approach the failure to give the right reason for detention and the giving of no or wrong reasons did not in the end affect the legality of the detention.

*Saadi v United Kingdom* [2008] 47 E.H.R.R. 17:

Violation of article 5(2) for failure to give reasons for detention promptly in “fast track” immigration detention. No violation of article 5(1).



## Theoretical Impact of Clause 5(1)

Section 27 of the Nationality and Borders Act 2022 re-introduces the detained fast track. It is now called a system of “accelerated detained appeals”.

- Suppose somebody like Mr Saadi is detained without reasons given for his detention.
- Does that remain a violation of the positive obligation to give reasons in article 5(2) (applying *Saadi* to the new legislation) or would that involve the Court adopting an interpretation that would require a public authority to comply with a positive obligation to give reasons (contrary to section 5(1))?
- If the former, then the right to reasons on arrest is being legislated away.
- Common law- *Christie v Leachinsky* [1947] A.C. 573?

## Theoretical Impact of Clause 5(1)

- Living instrument doctrine curtailed.

*Goodwin v UK* (2002) 35 EHRR 18

- Post-operative male to female transsexual. Although domestic law permitted the applicant to change her name, she was unable to change a number of official government records which listed her as male. The result of this was that she continued to be treated as a male for purposes of *inter alia* social security, national insurance, pensions and retirement age. Further, she alleged that this information could be available to other persons, such as her employers, hence enabling her to be identified as a transsexual.
- Held to be a violation of positive obligation under article 8 to respect private life

## Theoretical Impact of Clause 5(1)

*Goodwin v UK* (2002) 35 EHRR 18 at [74]:

*Court departed from three previous cases regarding transsexuals in the UK “in light of present day conditions”:*

“However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.”

## Clause 5(2) of the Bill of Rights Bill

(2) In deciding whether to apply a pre-commencement interpretation of a Convention right that would require a public authority to comply with a positive obligation, the court must give great weight to the need to avoid applying an interpretation that would—

- (a) have an impact on the ability of the public authority or of any other public authority to perform its functions;
- (b) conflict with or otherwise undermine the public interest in allowing public authorities to use their own expertise when deciding how to allocate the financial and other resources available to them, including in particular the professional judgment of those involved in operational matters;
- (c) require the police to protect individuals who are involved in criminal activity or otherwise undermine the police's ability to determine their operational priorities;
- (d) require an inquiry or other investigation to be conducted to a standard that is higher than is reasonable in all the circumstances;
- (e) affect the operation of primary legislation (including primary legislation relating to supply and appropriation).

## 5(3)-5(6)

(3) For the purposes of this section an interpretation of a Convention right is a “pre-commencement interpretation” if either of the following conditions is met.

(4) The first condition is that—

(a) at any time before the coming into force of this section, a superior court of record adopted the interpretation, and

(b) that interpretation has not been overruled by a subsequent judgment of such a court (whether given before or after the coming into force of this section).

(5) The second condition is that—

(a) at any time before the coming into force of this section, the European Court of Human Rights adopted the interpretation, and

(b) that court has not resiled from that interpretation in a subsequent judgment (whether given before or after the coming into force of this section).

(6) For the purposes of this section an interpretation of a Convention right is a “post-commencement interpretation” if it is not a pre-commencement interpretation.

## Example: If *R (AM and BB) v SSHD* were litigated now

- Credible evidence (including undercover filming by Panorama) showing potential torture and inhuman and degrading treatment contrary to article 3 ECHR on immigration detainees in Brook House
- Home Office argued article 3 investigative duty had been discharged by a number of disparate investigations, the criminal process and civil claims for damages and a public inquiry would be disproportionately costly (para 52)
- Claimants argued successfully there needed to be a public inquiry. Relied on article 3 ECHR investigative duty and need for compulsion of witnesses, public hearings and funded representation.
- Marginal decision, but it was held applying “pre-commencement interpretation” that the investigative duty required, to be effective, that there be a public inquiry.

## Would Clause 5(2) make any difference?

(2) In deciding whether to apply a pre-commencement interpretation of a Convention right that would require a public authority to comply with a positive obligation, the court must give great weight to the need to avoid applying an interpretation that would...

(d) require an inquiry or other investigation to be conducted to a standard that is higher than is reasonable in all the circumstances

Question is whether this provision is capable of allowing an *ineffective* inquiry because an effective inquiry would be conducted at a standard that is higher than is reasonable.

## Sweep up on articles 8, 10 , 11, A1P1

- *Connors v UK* (2005) 40 EHRR 9 – positive obligation under article 8 to facilitate the gypsy way of life
- Many other positive obligations under article 8 e.g. to provide housing to vulnerable people; to protect against environmental pollution; legal recognition of transsexuals (*Goodwin v UK* (2002) 35 EHRR 18). Restraint of this part of the living instrument may be a significant effect of Clause 5(1)
- *Centro Europa 7 Srl v Italy* [2012] 6 WLUK: failure of the state authorities to allocate broadcasting frequencies to a television company breached article 10
- *Ollinger v Austria* (2008) 46 EHRR 38: positive obligation on states to protect demonstrations against counter-demonstrations
- A1P1 requires a legal system that sufficiently protects property rights



# Thank you for listening

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## London

180 Fleet Street  
London, EC4A 2HG  
+44 (0)20 7430 1221

## Birmingham

Cornwall Buildings  
45 Newhall Street  
Birmingham, B3 3QR  
+44 (0)121 752 0800

## Contact

✉ [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)  
🌐 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

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