

# Interpretation of Convention rights



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## BILL OF RIGHTS (BILL)

- The Bill is available here:

[Bill of Rights Bill - Parliamentary Bills - UK Parliament](#)

- When enacted, it will not become the “Bill of Rights Act 2022”, but (see clause 41) simply the Bill of Rights 2022

# (1) INTERPRETATION OF THE BILL OF RIGHTS (BILL)

- The Bill is drafted in a way that is, by comparison with other domestic legislation including the HRA 1998 and other “constitutional” statutes (e.g. the EU Withdrawal Act 2018), unusual or even strange. Many clauses and sub-clauses can be described as “preamble”, without any direct legal effect, or at best “declaratory”. EG clause 1:

*(1) This Act reforms the law relating to human rights by repealing and replacing the Human Rights Act 1998.*

*(2) In particular, this Act clarifies and re-balances the relationship between courts in the United Kingdom, the European Court of Human Rights and Parliament by ensuring—*

*(a) that it is the Supreme Court (and not the European Court of Human Rights) that determines the meaning and effect of Convention rights for the purposes of domestic law (see section 3(1));*

*(b) that courts are no longer required to read and give effect to legislation, so far as possible, in a way which is compatible with the Convention rights (see paragraph 2 of Schedule 5, which repeals section 3 of the Human Rights Act 1998);*

*(c) that courts must give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about the balance between different policy aims, different Convention rights and Convention rights of different persons are properly made by Parliament (see section 7).*

*(3) It is affirmed that judgments, decisions and interim measures of the European Court of Human Rights (a) are not part of domestic law and (b) do not affect the right of Parliament to legislate.*

- See also clause 9, on jury trial

# (1) INTERPRETATION OF THE BILL OF RIGHTS (BILL)

- The courts will be faced with a difficulty in how to interpret these provisions, and to what extent they should inform its interpretation of other parts of the Bill of Rights. Some of these provisions appear to be aimed, not at lawyers and courts of law, but at the court of public opinion (or a section thereof) and certain preconceptions about how the HRA 1998 operated.
- You cannot understand the Bill without first understanding that it is a reaction to the Human Rights Act and / or to a particular perception (and / or misunderstanding) of the Human Rights Act
- It is possible nevertheless to read these provisions as a Parliamentary declaration of intent, that UK courts should not only be permitted (as they already are) but encouraged to depart from Strasbourg case law in interpreting the ECHR. On that basis the courts might read into
- More generally, there may be difficult questions as to how the Bill is interpreted, which will be important given the many ambiguities. For example, will the principle of legality, that Parliament must use clear language to take away fundamental rights (*R v SSHD, ex p Simms* [2000] 2 AC 115, be used to limit its power to take away fundamental rights?

## (2) NO CONVENTION COMPLIANT INTERPRETATION OF DOMESTIC LEGISLATION

- Section 3 of the HRA 1998 required courts to interpret legislation, “so far as it is possible to do so”, “in a way which is compatible with Convention rights”.
- Important principle in the HRA, key in many ways to its success.
- Section 3, with the rest of the HRA, will be repealed by the Bill, and (unlike other provisions of the HRA) will not be replicated. Clause 1(2)(b) points this out, albeit that is not necessary for the effectiveness of the repeal
- No corresponding principle. Seems bound to lead to more declarations of incompatibility
- Also a recipe for legal chaos, in that it is unclear whether this opens the door to reinterpretation of long-settled understanding of legislation that was given a section 3 interpretation under the HRA. Does the repeal of the HRA thus render uncertain the meaning of all legislation where section 3 was deployed?
- Clause 40 gives strong indication that this is intended, because it gives the Secretary of State power to *preserve* such interpretations by amending legislation (including primary legislation) so that it should be read as if it said what the court had said it meant

## (3) INTERPRETATION OF CONVENTION RIGHTS: Position under the HRA

- Section 2 of the HRA left the interpretation of Convention Rights (i.e. the ECHR rights which the HRA and now the Bill incorporated) to the courts, save that the court must “take account of” various things including judgments of the ECtHR.
- Section 2 did not specify that regard was to be had to the text of the Convention, but that may be said to be implicit. It would have been a bold and unpromising submission that the court should not have regard to the text of the Convention right that it was interpreting, especially when it was doing so by virtue of the inclusion of that very text into the HRA Schedule
- Early statement of approach, still generally followed, is from *Ullah* [2004] 2 AC 323:
 

*20. In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: ... . This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. ... It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.*
- Two points in particular:
  - Aim is to follow the interpretation of ECHR as an international treaty, effective in international law
  - The “*Ullah principle*”, that UK courts should not generally go further than or be more expansive than Strasbourg

## (3) INTERPRETATION OF CONVENTION RIGHTS:

### The Bill of Rights, overview

- A number of provisions address the way in which the courts must henceforth approach the interpretation of Convention Rights. At least:
  - Clause 3, “interpretation of the Convention Rights”
  - Clause 4, “Freedom of Speech”
  - Clause 5, “Positive obligations”
  
- In addition, the following arguably affect that interpretation, or at any affect the way in which the court will approach its task of *applying* Convention Rights:
  - Clause 6, Public Protection
  - Clause 7, “Decisions that are properly made by Parliament”
  - Clause 8, “Deportation”
  
- Some of these will be considered in other talks, so I will focus on clause 3

## (3) INTERPRETATION OF CONVENTION RIGHTS: Interpretation under clause 3

Clause 3 is the most general interpretative clause, to be contrasted with the later clauses (which address particular topics). It says:

*(1) The Supreme Court is the ultimate judicial authority on questions arising under domestic law in connection with the Convention rights.*

*(2) A court determining a question which has arisen in connection with a Convention right—*

*(a) must have particular regard to the text of the Convention right, and in interpreting the text may have regard to the preparatory work of the Convention;*

*(b) may have regard to the development under the common law of any right that is similar to the Convention right;*

*(c) must comply with sections 4 to 8.*

- Clause 3(1) is yet another example of preamble or declaration, with no real legal effect (indeed, it largely repeats clause 1(2)(a), which was already in that category).
- Clause 3(2) *may* be more important. But:
  - As to 3(2)(a), it is surely implicit in any legal text that in interpreting it, one should have regard to its text. It is not generally thought necessary to spell that out. It is not clear what “particular” adds to this.
  - As to clause 3(2)(b), the courts have certainly seen themselves as free to have regard to the common law previously (see for example *Unison* [2020] AC 869).
  - Clause 3(2)(c) is a gateway to other provisions which will be covered in other talks



## (3) INTERPRETATION OF CONVENTION RIGHTS: Interpretation under clause 3

- Clause 3(3) and (4) say:
  - (3) A court determining a question which has arisen in connection with a Convention right—
    - (a) may not adopt an interpretation of the right that expands the protection conferred by the right unless the court has no reasonable doubt that the European Court of Human Rights would adopt that interpretation if the case were before it;
    - (b) subject to paragraph (a), may adopt an interpretation of the right that diverges from Strasbourg jurisprudence.
  - (4) Subsection (3)(a) does not prevent a court from adopting an interpretation of a Convention right where it does so as a result of complying with section 4 (freedom of speech).
- Clause 3(3)(a) is a (stronger?) version of the *Ullah* principle
- Clause 3(3)(b) makes clear that UK courts not bound by Strasbourg
- What are the boundaries of “interpreting” as opposed to “applying” the ECHR. EG:
  - Is “residence” a “status” for the purposes of Article 14 ECHR? That would appear to be a question of *interpretation* in the pure sense.
  - But what about a case where the ECHR has held that A3P1 (rights to free elections etc) gives prisoners the right to vote (*Hirst v UK* [2006] 42 EHRR 41). It is not clear that that case “interprets” the Convention in any radical way, because the controversy was not whether prisoners are in principle covered by A3P1. The controversy was whether a *complete* ban on prisoner voting was proportionate
- Clause 3(4) makes an exception for free speech / Article 10. But section 4 is about giving “weight” to protection of free speech, not about “interpretation”

## (3) INTERPRETATION OF CONVENTION RIGHTS:

### What about status of Strasbourg case law?

- Under section 2 of HRA, courts were required to have *regard* to Strasbourg case law, but not bound by it. Since ECHR was an international treaty, as explained by Lord Bingham in *Ullah* they would generally see themselves as having a duty to follow it
- The Bill does not expressly say that they are required to have regard to it, but it certainly does not prohibit it, and Lord Bingham's reasons for following it may be thought (subject to section 3(3) / the *Ullah* principle, to be equally relevant here.
- But one can go further. Section 3(3) makes *explicit* that regard must be had to ECHR case law in some circumstances, and implicit (at least) that it should do so in all cases:
  - Courts are required to ensure that they don't go beyond Strasbourg, at least other than in free speech cases, by section 3(3)
  - Courts are permitted to depart from Strasbourg in other cases, which necessarily implies a need to have regard to Strasbourg
- Brings one back to key question, whether courts will regard these provisions, and especially section 3(3)(b), as encouraging or requiring departure from Strasbourg, or merely replicating the pre-existing position where they are entitled to do so but will generally not.

# Thank you for listening

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