CONSERVATIVE EUROPEAN FORUM

PATCHWORK QUILTS AND THREADBARE SOLUTIONS:

Why Proposals to Control Irregular Migration by Leaving the ECHR Would Not Work

Rt Hon Dominic Grieve KC
Herbie Stubberfield

May 2026

*The views and ideas expressed in this paper are not necessarily the views and ideas of the Conservative European Forum nor should they be considered to represent Conservative European Forum policy.

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FOREWORD

Any political party aspiring not only to win the next General Election but to then provide an effective government needs a credible plan to tackle irregular migration. The Conservative Party is right to make this a policy priority. But as Dominic Grieve's detailed paper shows, the argument for leaving the ECHR deserves a great deal more scrutiny and scepticism than it has so far received.

There is a powerful case for urgent and significant reform, including through amendment of the Human Rights Act 1998, of the way the Convention is interpreted in immigration cases. Changes to domestic law should be reinforced by the United Kingdom working closely with our fellow European democracies to shape how the Court of Human Rights and other Council of Europe institutions interpret the Convention. Our previous experience in government, whether Ken Clarke's negotiation of the Brighton Declaration to strengthen the "margin of appreciation" granted to national courts, or my own work to resolve successfully the vexed issue of prisoner voting, has shown how the Convention can evolve where the political will exists.

If an Act of Parliament removed any duty for the United Kingdom to comply with the ECHR, our domestic courts would implement it, but that would not solve the grave political and constitutional problems that withdrawal would create. Proposals to leave the Convention altogether would undermine the Belfast/Good Friday Agreement, the devolution settlements that underpin the Union, and the practical law enforcement co-operation we depend upon through the UK-EU Trade and Cooperation Agreement, including our work with Europol and Eurojust. Courts in other European countries would be less likely to agree to extradite suspects for trial here. Our chance of negotiating renewed access to the EU's immigration databases, SIS 2 and Eurodac, something that would be of material benefit in controlling immigration and strengthening our national security, would be weakened further.

Above all, it would isolate the United Kingdom from the rest of democratic Europe at the very moment when European democracies most need to stand together. The security challenges facing our continent are profound, and our partnership with our European neighbours, both within the Council of Europe and with the European Union, will be central to meeting them.

Rt Hon Sir David Lidington KCB CBE
President, Conservative European Forum
Former Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster

EXECUTIVE SUMMARY

a. The proposal to withdraw from the European Convention on Human Rights is a false solution to a serious and pressing European challenge. It would fail to deliver solutions to irregular migration, whilst inflicting serious damage upon our domestic constitutional settlements, our international reputation and our practical security interests. A more honest and pragmatic conversation is required. It is only by working constructively with our European counterparts – in the Council of Europe, with the European Union, and with third countries – that the United Kingdom can address this challenge, to deliver a fairer and more efficient asylum system and to successfully deport foreign criminals.

b. There is a serious problem to be solved. Politicians across Europe are under mounting pressure to tackle irregular migration. The recent migration summit in Chişinău in May 2026 has presented a considerable opportunity for the United Kingdom to take a leading role in shaping a collective European response. The expansive interpretation given to Article 3, particularly concerning healthcare and prison conditions, should be constrained to the most serious issues. The Article 8 proportionality assessment in migration cases is similarly in need of much firmer guidance for domestic immigration tribunals and officials. The Political Declaration takes positive steps in that direction, but continues to fall short of the scale of reform required.

c. A shared European response must extend beyond the Convention itself to the practical mechanisms by which Contracting States return foreign nationals and deport foreign criminals to their countries of origin. The Home Secretary's recent threat of visa penalties to secure co-operation from Namibia, Angola and the Democratic Republic of Congo, demonstrates the value of a more robust, sanctions-based approach. We must now extend that approach on a collective European basis. Domestically, reform of the Human Rights Act, together with the Government's proposals for a strengthened public interest test, a narrower statutory definition of family life, and a single appeal route administered by an independent appeals body based on the Danish model, deserve support. Capacity in the asylum system has also proven a substantial challenge, with unresolved appeals in the UK having risen from 7,000 in early 2023 to 51,000 by the end of March 2025, with average waiting times of 54 weeks. Rebuilding what has become a broken system must be prioritised over ill-founded political discourse about the role of the Convention.

d. The United Kingdom should also consider participating in the new EU Pact on Migration and Asylum when it replaces the Dublin Regulation in June 2026, and must urgently regain access to Eurodac and to SIS II, the absence of which has materially weakened our ability to control irregular migration.

e. Withdrawal from the Convention, by contrast, would address none of these challenges. The argument that the ECHR has played a significant role in undermining the Government's immigration policy is not borne out by the evidence. According to the Bonavero Institute, only 922 foreign national offenders succeeded in appealing deportation on human rights grounds between April 2016 and June 2021 – a success rate of approximately 3.5%, falling to 2.5% on Article 8 alone. There have been only twenty-nine ECtHR judgments concerning appeals against removal from the United Kingdom since 1980, of which thirteen were upheld. The United Kingdom was found to have breached the Convention only once in each of 2023 and 2024, making it one of the most compliant states in the Council of Europe.

f. It is unlikely that simply leaving the ECHR would deprive individuals of many of the protections on which they presently rely. As Lord Briggs has observed, Convention rights have enriched, but have not supplanted, the common law. In this regard, Lord Wolfson makes the point that withdrawal would not amount to the abandonment of fundamental rights protection. It must be asked what the underlying purpose of withdrawal really is. If, as appears to be the case, the intended consequence is subsequent primary legislation to strip back those pre-existing protections in order to enable a more stringent borders policy, the issue then arises whether it is wise to surrender our fundamental rights when, as this paper shows, there are no discernible benefits.

g. The United Kingdom would also remain bound by our international obligations. As the Supreme Court made clear in the Rwanda litigation, the principle of non-refoulement is given effect not only by the ECHR but by other international conventions to which the United Kingdom is party, and may itself form part of customary international law. To free itself entirely, the UK would have to denounce, one by one, the very instruments it played a leading part in bringing into being.

h. In particular, the ECHR is widely regarded as the cornerstone of the Council of Europe. All member states are required to respect their obligations under the Convention and accession to the Council must go together with becoming a party to the Convention. Withdrawal would represent a clear violation of those commitments and would expose the UK to suspension and ultimately expulsion from the Council of Europe, leaving us in the unwelcome company of Russia and Belarus.

i. Convention rights are enshrined as governing the actions of the devolved administrations of Wales, Scotland and Northern Ireland, and legislation to alter their competence would engage the Sewel Convention, with significant political consequences for the stability of the Union. Most importantly, the ECHR forms a central part of the 1998 Belfast/Good Friday Agreement, which expressly commits the UK Government to the incorporation of Convention rights into Northern Ireland law. The suggestion advanced by the Wolfson Review and Policy Exchange that this commitment can be discharged by a Northern Ireland Bill of Rights detached from the Convention and therefore the right of appeal to the Strasbourg Court is a casuistical distortion of the plain words of the Agreement. Withdrawal would open the prospect of a new era of political discord quite apart from the impracticality of our courts having to operate different rights systems in one country. Furthermore, it does not address the fact that actions by the UK Government can also have an impact on Northern Ireland.

j. The Windsor Framework prohibits any diminution in the UK of the protections set out in the Belfast/Good Friday Agreement insofar as this results from our departure from the EU, and based on the Supreme Court's recent decision in *Re Dillon,* it remains a prospect that incompatible legislation could still be challenged and disapplied. Part Three of the UK-EU Trade and Cooperation Agreement may also be terminated upon denunciation of the Convention, imperilling our access to Prüm, to Passenger Name Record data, and to our co-operation with Europol and Eurojust, as well as undermining the streamlined surrender arrangements that operate in place of the European Arrest Warrant. Reversion to the older Council of Europe extradition conventions, if we were even able to remain a member, would reintroduce delays, politicisation and procedural obstacles, increasing the risk of offenders evading justice.

k. If the Conservative Party is to present a credible plan to tackle irregular migration at the next General Election, its commitment to withdraw from the European Convention on Human Rights must be reconsidered. That policy, and the advice upon which it is based – the Wolfson Review – rests principally upon the contention that the ECHR imposes substantial limitations upon the Government's ability to operate a stringent immigration policy, such that withdrawal constitutes a gateway condition for reform. Yet the legal and political consequences raised by Lord Wolfson remain unsolved. The Convention forms part of a patchwork of common law protections and international obligations from which the rights it embodies cannot easily be unpicked, and a policy of withdrawal would carry severe consequences for our domestic constitutional settlement and for our standing on the world stage that are disproportionate to any practical benefit it might secure.

1. INTRODUCTION

1. This year marks the seventy-fifth anniversary of the United Kingdom's ratification of the European Convention on Human Rights (ECHR), presenting a timely opportunity to reflect on the impact of the Convention since it opened for signature by members of the Council of Europe in 1950. Mounting pressure on political leaders in the United Kingdom and across Europe to address concerns about irregular migration has prompted renewed scrutiny over the influence of the ECHR, in particular its dynamic interpretation by the European Court of Human Rights (ECtHR), on the ability of Contracting Parties to control their borders. In May 2025, a joint letter initiated by Denmark and Italy and signed by nine Member States raised concerns that the ECtHR had 'extended the scope of the Convention too far as compared with the original intentions' and 'posed too many limitations on the states' ability to decide whom to expel from their territories'.

2. These criticisms are reflected domestically. In October 2025, the Leader of the Opposition, Kemi Badenoch, announced that a future Conservative government would leave the ECHR if it won the next General Election. This followed advice from the Shadow Attorney General, Lord Wolfson, responding to Kemi Badenoch's speech at the Royal United Services Institute in June 2025, which set out five tests against which the UK's membership of the ECHR would be measured. This was, at least in part, a response to growing support amongst right-wing voters for Reform UK. The relevance of Lord Wolfson's advice lies predominantly in the 'Sovereign Borders Test', which treats the Convention as imposing 'substantial limitations' on the Government's ability to implement a stringent immigration policy and characterises withdrawal as, in effect, a 'gateway condition' for the reforms envisaged.

3. One noticeable consequence followed from this announcement. It largely shut down the conversation within the Conservative Party about the UK's membership of the ECHR. When asked about how the Conservatives would address concerns about irregular migration, the answer would simply be that the Party believes withdrawal from the Convention is the only way to implement a stringent borders policy, and no further questions are asked. For those of us who want to see a Conservative government at the next General Election, a more honest and pragmatic conversation is needed about whether this policy would actually address concerns about irregular migration and deliver a fairer and more efficient asylum system.

4. This is not to say that valid concerns do not exist. Only 48% of refused asylum seekers who applied between 2010 and 2020 had been removed from the country by June 2024. Indeed, between 2018

and 2024, a mere 3% of people arriving by small boat had been returned during that same period. In the last year, over half of asylum seekers arrived in the UK through illegal routes, although these numbers have started to fall. As such, whilst there are signs of improvement in the UK, there is an urgent need for politicians across Europe to address this challenge. But as this paper will demonstrate, the Conservative Party's proposal to withdraw from the Convention is another threadbare solution and one that, if implemented, would have severe consequences for our domestic constitutional settlement and our role on the world stage.

5. The analysis proceeds in three parts. It begins by examining how the ECHR has evolved and operates across Europe, and how it has been woven into the United Kingdom's domestic legal framework. It then evaluates the claim advanced most prominently in the Wolfson Review that the ECHR is a substantial hindrance to the Government's ability to operate a stringent immigration policy. It considers the extent to which withdrawal would, in practice, address these concerns given the patchwork of common law protections and international obligations that underlies our human rights framework. It explores the grave implications our departure would have for the stability of the Union, in particular the peace settlement in Northern Ireland under the 1998 Belfast/Good Friday Agreement and for our membership of the Council of Europe. The relevance of the Windsor Framework in the event of our withdrawal is also considered, in addition to the strain that would be placed on the UK's ability to co-operate with our European counterparts through the UK–EU Trade and Cooperation Agreement.

6. Having established that leaving the ECHR is a threadbare solution with serious adverse consequences, this paper sets out alternative pragmatic proposals, both domestically and at a European level, for the United Kingdom to work constructively with its counterparts in the EU and within the Council of Europe to meet this shared challenge.

2. **PATCHWORK QUILTS:** THE CASE FOR THE ECHR

2.1. Background

7. In considering how the ECHR has impacted upon the UK's human rights framework, it is sensible to start by looking at why we decided to join the Convention in the first place. Much ink has been spilt on whether the Convention was or was not a near perfect British construction, willed by Churchill and David Maxwell Fyfe and crafted by British barristers; or an unfortunate importation of foreign abstract concepts of 'rights' alien to our national common law tradition of liberties and dangerously undermining of them. There is no doubt that the drafting of the Convention and our adherence to it were controversial. The British participants looked to establish a detailed list of clearly defined rights, whereas the French and some other nations preferred a general list of principles that would be left to a supranational court to clarify by its decisions. There was unease at how it would work, with contemporary Foreign Office advice expressing fears that the Convention would be subverted. The advice warned that 'to allow Governments to become the object of such potentially vague charges by individuals is to invite Communists, crooks and cranks of every type to bring actions'.[1]

8. Despite this advice, the United Kingdom acceded to the ECHR in 1950, becoming one of the first countries to ratify the Convention in 1951. For all the criticisms, the ten fundamental rights originally protected under the Convention were, with the exception of Article 8, in fact a patchwork of the 'liberties' which successive generations of British politicians and the British public as a whole have insisted are our shared inheritance. How well they were in practice maintained through the centuries, however, is questionable, with numerous examples of their violation. Yet they are part of an entirely distinctive national narrative, embodying the common law; its confirmation through Magna Carta and its numerous reissues in the Middle Ages; the outcome of the conflict of authority between King and Parliament in the 17th century in the Petition of Right; the abolition of Star Chamber and the prohibition of torture; Habeas Corpus and the Bill of Rights of 1689, Lord Mansfield's ruling on slavery in Somerset's case and the Commentaries of William Blackstone. This national narrative has been so powerful that it has acted as an almost mythic restraint on successive British governments trying to curb freedoms when tempted to do so by threats to public order or national security.

[1] Foreign Office, 'Draft Ministerial Brief' (July 1949) FO 371/78936.

9. Doubtless in the years after the Second World War, most Britons considered that this largely political tradition offered a superior level of protection for freedom than any continental model.[2] In signing up we were therefore doing something novel. We were intent, through the creation of rights that we ourselves enjoyed as liberties, not so much on protecting ourselves but on setting a standard of behaviour for states towards their citizens which would prevent the re-emergence of tyranny in Western Europe.

10. The ECHR has since created its own dynamic. By converting liberties to rights it has facilitated their ownership and assertion by individuals rather than their mere invocation as abstract principles against administrative or policy decisions. The anger of the tabloid press at undeserving claims is the inevitable corollary of the fact that claims by the deserving can also now be made. Deservingness cannot be determined *a priori.* Some argue that this has taken the interpretation of the Convention by the Strasbourg Court and our own courts to places unintended by its original signatories. On the contrary, it appears clear from the outset that this was a possibility and yet the United Kingdom signed up. Indeed, we continued to sign up to Protocols to the Convention, most importantly to recognise the right of individual petition to the European Court of Human Rights in 1966, with little or no argument to the contrary. As Hansard reveals, the principal advocate in the House of Commons was Terence Higgins, a notable right of centre Conservative, almost certainly because he feared the curbs on freedom a socialist government might introduce.

11. This should not surprise us either. It has been the intention and policy of successive United Kingdom governments over the last two centuries to seek to make the world a less dangerous, more predictable and better place by encouraging the creation of international agreements governing the behaviour of states. An enquiry of the Foreign Office in 2013 as to how many treaty commitments to which we were adherent received the reply that since 1834, they had approximately 13,200 treaties and agreements that the UK had signed and ratified. Many thousands are still applicable and range in importance from the UN Charter to local treaties over fishing rights or maritime access. Over 700 contain references to the possibility of binding dispute settlement in the event of disagreements over interpretation, as does of course the ECHR. This number of treaties has since grown to over 14,000. And with the passing years these treaties, be they the UN Charter and the International Convention on the Prohibition of Torture or the creation of the International Criminal Court, have dealt not just with inter-state relations but with standards of behaviour between a state and those over whom it exercises power.

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[2] Paul Johnson, *A History of the English People (*HarperCollins, 1987).

12. So important has been this treaty making that the Ministerial Code specifically states that it is the duty of UK ministers and civil servants to respect our international obligations. It is this duty, which is now seen in Lord Bingham's eighth principle, as being a key underpinning of the Rule of Law.[3] Thus, in 1966 the misgivings that the Wilson government had that in allowing individual petition to the Strasbourg Court, problems would be created for the state, were outweighed by the national interest in promoting this wider agenda.

2.2. The Convention in Europe

13. In the current debate on the impact of the Convention on our country, it appears that very little is said about its positive impact on the other signatory states, the very reason which underlay our decision to sign up. In examining the ECHR's role across Europe, it must first be understood that the tapestry of the Convention at a European level is woven together by two autonomous yet collateral concepts. These are the 'living instrument' doctrine and the 'margin of appreciation'. First propounded in *Tyrer v the United Kingdom*,[4] the Grand Chamber in *Selmouni v France* recognised the inherent nature of the ECHR as a 'living instrument which must be interpreted in the light of present-day conditions' and therefore 'requires greater firmness in assessing breaches of the fundamental values of democratic societies'.[5] It is in this sense that the Strasbourg Court takes a dynamic approach to the text of the Convention, whereby judges must 'consider the development of European social and legal concepts to find grounds for attaching certain meanings to the Convention's terms'.[6]

14. A pivotal counterbalance is the margin of appreciation afforded to Contracting Parties, giving them 'room for manoeuvre' in fulfilling their obligations under the Convention.[7] In *Handyside v The United Kingdom*,[8] the ECtHR set out the rationale that 'state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them'.[9] Respect for the diversity of legal regimes that comprise the forty-six member states forms a central pillar of the court's approach, as can now be seen through the doctrine's place in the preamble of the ECHR.

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[3] Lord Bingham of Cornhill, *The Rule of Law* (Sir David Williams Lecture, Centre for Public Law, University of Cambridge, 16 November 2006).

[4] *Tyrer v the United Kingdom* (5856/72).

[5] *Selmouni v France* (25803/94) [101].

[6] George Letsas, *Rescuing Proportionality* (29 October 2013).

[7] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Human Rights Files No. 17) (2000).

[8] *Handyside v The United Kingdom* (5493/72).

[9] ibid.

15. Where the balance of this framework underlying the Convention has been respected, the impact across Europe has been profound and beneficial. Earlier cases such as *Marckx v Belgium*[10] on the rights of illegitimate children or *Ireland v United Kingdom* on how interrogation techniques constituted inhuman and degrading treatment are well known landmarks in the development of human rights norms for member states which are now taken for granted.[11]

16. Indeed, given the adherence of so many states that had been previously governed by Communist tyranny, the Convention and the Strasbourg Court have been instrumental in facilitating the promotion of the Rule of Law in environments where it has never previously existed. For example, in *Mammadov v Azerbaijan*,[12] an opposition leader in that country published a blog post on a riot that contradicted the government's version of events. He was subsequently accused of inciting the riot in question and was imprisoned for seven years for endangering the lives of public officials. The court held that there had been breaches of Article 5(1) as there was no basis for the reasonable suspicion required to justify his arrest and detention, of Article 5(4), as his claims as to the unreasonableness of his arrest had been dismissed without proper consideration, the court merely copying out the prosecutor's submissions on the matter, and of Article 6(2) as the State had put out a press release indicating his guilt before he was tried.

17. In *Avilkina v Russia*,[13] the St Petersburg local authority was found to have violated Article 8, in ordering all hospitals to disclose medical information on those who had refused blood transfusions with the intention of rooting out Jehovah's Witnesses. It was held that there had been no pressing need for this disclosure of confidential medical information, no prior opportunity to object and no effort to balance the right to ensuring public health with the privacy of the applicants.

18. In *Campeanu v Romania*,[14] the court held a violation of Article 2 where a Romanian young man, abandoned as a child, HIV positive and mentally disabled was transferred aged 18 from a centre for disabled children to a neuropsychiatric hospital where he was found by a local NGO, in an unheated room, with a bed with no bedding, dressed only in a pyjama top and with no assistance to eat or use the lavatory. He died the same day.

19. Thus the ECHR has enabled individuals to assert rights against the state, through a series of cases ranging from beatings and torture in Russian police stations, in the context of a complaints system

[10] *Marckx v Belgium* (6383/74).
[11] *Ireland v United Kingdom* (5310/71).
[12] *Mammadov v Azerbaijan* (15172/13).
[13] *Avilkina v Russia* (1589/09).
[14] *Campeanu v Romania* (47848/08).

that does not work (*Lyapin v Russia*)[15] to a Ukrainian local authority rendering the applicant's house uninhabitable and his land unusable by the construction and development of a cemetery that breached environmental health laws and where compensation was refused (*Dzemyuk v Ukraine*).[16] This is so even before consideration is given to the leading authorities, such as *Abu Zubaydah*[17] and *Al Nashiri*,[18] where Poland was found to have participated in holding terrorist suspects in secret prisons and torturing them after they had been unlawfully rendered there by the United States.

2.3. The Convention in the United Kingdom

20. Since 2000, the Human Rights Act 1998 has woven the ECHR into the UK's human rights framework by incorporating its provisions into domestic law and ensuring they are directly enforceable in UK courts. It is in this sense that the Government was 'bringing rights home', although as will later be discussed in more detail, the HRA had been 'planted in fertile soil' occupied by the common law.[19] Still, the HRA possesses greater bite in terms of the obligations it places upon public authorities to ensure their actions are compatible with these protections. Section 6 of the 1998 Act places public authorities under a legal obligation to ensure their activities are compliant with the Convention. Section 19 compels the Minister responsible for any proposed legislation to make a declaration of compatibility with the ECHR. Under section 3, courts are also required to read and give effect to legislation, as far as possible, in a way which is compatible with the ECHR.

21. In the past twenty-five years, both the Human Rights Act and the ECHR more widely have been subjected to sustained opposition by those who argue that the reach of the Convention has encroached too far onto the margin of appreciation afforded to the United Kingdom as a contracting party. This has led to calls from politicians within and beyond the Conservative Party, for a new 'Bill of Rights' to replace and inevitably weaken the HRA. These have since turned into demands for the UK to withdraw from the Convention in its entirety. In particular, those critical of the ECHR have accused the Strasbourg Court of 'mission creep', in danger of becoming an 'integrationist instrument' in need of self-restraint[20] that is no longer able to 'strike the careful balance

[15] *Lyapin v Russia* (46956/09).
[16] *Dzemyuk v Ukraine* (42488/02).
[17] *Abu Zubaydah v Lithuania* (46454/11).
[18] *Al Nashiri v Poland* (28761/11).
[19] Trevor Allan, *Parliament's Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective* (2006) 59 CLP 27-50.
[20] Ed Bates, *Strasbourg's Integrationist Role, or the Need for Self-restraint?* (2020) 1(1) European Convention on Human Rights Law Review 14-21.

between the requirements of effective human rights protection and the preservation of the Contracting Parties' margin of appreciation'.[21]

22. Criticisms of the workings of the Strasbourg Court are not confined to politicians. From Lord Hoffmann in his speech to the Judicial Studies Board in 2009,[22] and Lady Justice Arden's Thomas More lecture of the same year[23] and more recently the views expressed by Lord Sumption[24] and Lord Hodge,[25] a critique has been made that the Strasbourg Court has failed on occasion to respect national differences of interpretation of the Convention which should be allowed under the margin of appreciation and failed to appreciate sufficiently the practical limits of its authority if it gives judgments which contradict settled democratic will in areas where the margin of appreciation might be reasonably considered to apply.

23. These criticisms are valid. The Strasbourg Court has shown signs of being the victim of its own transformation from an international tribunal dealing with a very limited number of cases into a final court of appeal for over 700 million people. In service to what has been an understandable desire to protect human rights in countries with challenging records, it has sometimes attempted to excessively micro-manage the Convention and sought to impose a uniformity of practice that is not desirable in the interpretation of an international treaty that specifically gives to national parliaments and courts the primary obligation to uphold the Convention's terms.

24. The problem caused by the Strasbourg Court's decision on prisoner voting in the case of *Hirst v United Kingdom* is a good illustration.[26] In itself, the issue was largely symbolic as the question of whether or not convicted and sentenced prisoners should have the vote is of very little practical consequence. However, symbols can matter in the context of parliamentary democracy. The judgment was an unnecessary interference with a policy that enjoys overwhelming parliamentary support and could not be categorised as a substantial interference with a human right. But it is equally noteworthy that this dispute between the UK and ECtHR was eventually resolved by the then Lord Chancellor David Lidington making, without any need for legislation, a minor change to the prison rules allowing prisoners out on license to vote.[27] A decade later, an issue that led to David

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[21] Daniel Thym, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay?* (2008) International and Comparative Law Quarterly 57 87-112.

[22] Lord Hoffmann, *The Universality of Human Rights* (Judicial Studies Board Annual Lecture, 19 March 2009).

[23] Lady Arden DBE, *Peaceful or Problematic? The relationship between national supreme courts and supranational courts in Europe* (Annual Sir Thomas More Lecture, Lincoln's Inn, 10 November 2009).

[24] Jonathan Sumption, *The Challenges of Democracy: And the Rule of Law* (Profile Books 2025).

[25] 'Supreme Court judge says ECHR needs reconsideration' *The Times* (12 September 2025).

[26] *Hirst v United Kingdom* (74025/01).

[27] David Lidington, *'Secretary of State's oral statement on sentencing'* (2 November 2017) <https://www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-sentencing>.

Cameron, at the time, saying that the prospect of prisoners having the vote made him feel 'physically sick' and threaten to 'scrap the HRA' is all but forgotten.[28]

25. Courts are human constructs. Their decisions are as open to criticism as any other, with lawyers and parties on the losing side usually discontented with the outcome. Sometimes history judges them mistaken as well. Nowhere is this more evident than the recent climate change litigation, where the Strasbourg Court extended the scope of Article 8 to include 'a right for individuals to effective protection by the State authorities from the serious adverse effects of climate change on their lives, health, well-being and quality of life'.[29] In his partly dissenting opinion, Sir Tim Eicke KC, the UK's judge at the ECtHR, rightly emphasised that the court had unnecessarily created a new right without a basis in Article 8 and thereby exceeded 'the permissible limits of evolutive interpretation'.[30] The same can be said domestically, for example where the Supreme Court held in *Ziegler* that deliberate physically obstructive protest can be justified through the proportionality defence under Articles 10 and 11 ECHR. This has since been confined by subsequent cases[31] and legislation,[32] and in any event would not find support in the ECtHR, which has developed no such authority.

26. Yet in a number of key cases involving this country, the Strasbourg Court has made adverse findings which an overwhelming majority would now conclude were correct. Few would argue with the contention that *S and Marper v United Kingdom*, in which the Strasbourg Court held that the UK policy in England and Wales of retaining indefinitely the DNA and fingerprint profiles of acquitted individuals (the only jurisdiction in Europe to do this) was unjustified, was wrongly decided.[33] The same can be said of the Strasbourg Court in *Dudgeon v United Kingdom*, which held that the criminalisation of homosexual acts in private in Northern Ireland breached the Convention, despite it being very controversial there at the time.[34] In *Young, James and Webster v United Kingdom*, the Strasbourg Court held that the Trade Union 'closed shop' was inconsistent with Article 11 rights to freedom of association, thus bringing permanent change to industrial relations much welcomed by Conservatives.[35]

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[28] HC Deb 3 November 2010, vol 517, col 921 (David Cameron, Prime Minister).

[29] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* (53600/20) [519].

[30] ibid, Eicke J (partly dissenting) [4].

[31] see e.g. *R. v Brown* [2022] EWCA Crim 6; *Attorney General's Reference No 1 of 2022* [2022] EWCA Crim 1259; *Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; *Leigh and others v Commissioner of Police of the Metropolis* [2022] EWHC 527; *R v Sarti* [2025] EWCA Crim 61.

[32] see e.g. Police, Sentencing and Courts Act 2022; Public Order Act 2023.

[33] *S and Marper v United Kingdom* (30562/04).

[34] *Dudgeon v United Kingdom* (7525/76).

[35] *Young, James and Webster v United Kingdom* (7601/76).

27. Furthermore, there is evidence that the problems disclosed by *Hirst* have since been significantly addressed. In 2012, Ken Clarke as Lord Chancellor negotiated the Brighton Declaration, which sought to improve the backlog of cases, the quality of judicial appointments and most importantly ensured the principles of subsidiarity and the margin of appreciation were contained within the preamble of the Convention so as to steer the Court towards avoiding the type of decision reached in Hirst. In the years since the Brighton Declaration, there have been clear signs of improvement.

28. There was an average of only four judgments against the UK annually between 2012 and 2022. The UK was found to have breached the Convention only once in 2023 and 2024 respectively, making it one of the most compliant states in the Council of Europe.[36] The important shift by our own national courts away from the principles in *Ullah* defining the requirement to 'take into account' under section 2 of the Human Rights Act as being the close mirroring of Strasbourg decisions, has initiated a dialogue that has led to a number of cases in which the Strasbourg Court has shown deference to the reasoning of our own.[37] This can be seen in the way the Court moved from a condemnation by a chamber of the Court of our rules on hearsay in *Al Khawaja* in 2009,[38] to the acceptance of the Supreme Court decision when the Grand chamber revisited *Al Khawaja* in 2011, following the rejection of its previous judgment by the Supreme Court in *Horncastle*.[39] The departure from a more expansive approach to the domestic courts' interpretative role was cemented by the decision in *Elan-Cane*, in which the Supreme Court emphasised that it would not 'leap ahead' of the Strasbourg Court in deciding that the Home Office was not obliged to issue non-gender specific "X" passports under Articles 8 and 14 ECHR.[40] Proactivity by our own judges pays jurisprudential dividends.

29. There is, of course, a more fundamental objection raised to the ECHR. As set out in the previous section, this focusses on its interpretation as being a 'living instrument' which it has been argued has developed to undermine the intentions of its signatories. The implication if taken to its logical conclusion must be that the Convention should have remained fixed in the moral and ethical norms of 1950.

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[36] Victoria Adelmant, Alice Donald and Başak Çalı, *The European Convention on Human Rights and Immigration Control in the UK: Informing the Public Debate* (Bonavero Report No 3/2025, Bonavero Institute of Human Rights, University of Oxford, 4 September 2025).

[37] *R(Ullah) v Special Adjudicator* [2004] UK HL26; [2004] 2 AC 323.

[38] *Al Khawaja v United Kingdom* (26766/05).

[39] *Horncastle and Others v United Kingdom* (4184/10).

[40] *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 [98].

30. Yet, as Baroness Hale has stated, judicial interpretation to reflect modern times is not new and is rooted in our common law tradition:

> *'…it is in a comparatively rare case that an Act of Parliament has to be construed and applied exactly as it would have been applied when it was first passed. Statutes are said to be always speaking and so must be made to apply to situations which would never have been contemplated when they were first passed. Thus in 2001, "a member of the family", first used in 1920, could be held to include a same sex partner. In 1998, "bodily harm" in a statute of 1861 could be held to include psychiatric harm. And in 2011, "violence" could be held to extend beyond physical violence into other sorts of violent behaviour…in all these examples, the court is seeking to further the purpose of the legislation in the social world as it is now, rather than as it was when the statute was passed'.*[41]

31. This is exactly what the Strasbourg Court has done in cases such as *Rantsev v Cyprus and Russia* in holding that trafficking fell within the definition of slavery in Article 4 and placing a positive obligation on states to halt it.[42] The same principle was used in *S and Marper v United Kingdom* in identifying the blanket retention of DNA as being in breach of the right to a private life in Article 8, even if the existence of DNA was not known in 1950.[43]

32. Another complaint is that the Convention is encroaching on our ability to conduct military operations. It must be recognised that the bare possibility of a claim being successful through the extension of the ECHR to the deaths or injuries of our own servicemen abroad in an active service setting, arising from the judgment in *Smith and others v MOD* in the Supreme Court in 2013, raised understandable concerns.[44] But in practice the decision has led to no such outcomes. It can also be conceded that the overlap between international humanitarian law and the ECHR lacks clarity, so that uncertainty exists as to when the ECHR will apply to the investigation of improper acts against enemy military or civilians abroad. Nevertheless, the principles of the standards of behaviour required of our own armed forces in conducting operations are identical whether the ECHR applies or not. Even the issues such as the legality of detention arising from cases such as *Al-Jedda*,[45] have been subsequently clarified by *Hassan v United Kingdom*[46] on the compatibility of detention under the Geneva conventions with Article 5 ECHR. The reality is that the Convention has not altered the standards to be expected from our armed forces in a situation of armed conflict at all as they mirror

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[41] Lady Hale, *'Beanstalk or Living Instrument? How Tall Can the ECHR Grow?'* (Barnard's Inn Reading, 16 June 2011).
[42] *Rantsev v Cyprus and Russia* (25965/04).
[43] *S and Marper v United Kingdom* (n 33).
[44] *Smith & Ors v Ministry of Defence* [2013] UKSC 41.
[45] *Al-Jedda v United Kingdom* (27021/08).
[46] *Hassan v United Kingdom* (29750/09).

existing principles of International Humanitarian Law. But it has provided possible remedies for their breach, where none in reality existed previously, unless the Government voluntarily accepted responsibility.

33. An analysis of ECtHR caselaw over the past twenty-five years reveals the paucity of the complaint that the Strasbourg Court is on 'mission creep'. For example, there was resistance following the Strasbourg Court's ruling in *Dickson* that the UK Government should allow more prisoners to go through artificial insemination with their partners in order to uphold their rights under Article 8.[47] This ignored the fact that this was already allowed on grounds of maintaining family relationships before the ruling and that the ruling did not confer an absolute right to this service at all, with the Justice Secretary considering each case on its merits.

34. The same can be said of criticism that the ECHR made Whole Life Tariffs impossible in the United Kingdom because in its judgment in *Vinter*, it insisted that there had to be some possibility of review of such sentences in order to ensure compliance with Article 3 of the Convention.[48] Yet as was made clear by the Court of Appeal in the case of *R v McLoughlin*,[49] such a review mechanism has always existed and has to be operated compatibly with Convention rights by the Justice Secretary or risk judicial review. Again, therefore, this example of mission creep is hypothetical and of no practical effect.

35. Finally, the ECHR is blamed for allowing foreign nationals who have had their asylum applications declined or who have committed serious crimes in the UK to use protections under the Convention to resist removal or deportation. It is to this particular complaint, which has gained increasing traction in recent years and led to calls for the UK to withdraw from the ECHR altogether, that this paper will now turn.

[47] *Dickson v United Kingdom* (44362/04).
[48] *Vinter v United Kingdom* (66069/09).
[49] *R v McLoughlin* [2014] EWCA Crim188.

3. THREADBARE SOLUTIONS

36. Growing concern amongst politicians and much of the media surrounding the supposed 'mission creep' of the Strasbourg Court, and the influence of the ECHR more widely on the United Kingdom's ability to control its borders, has led to calls for our status as a party to the Convention to be reviewed. Most notably, in June 2025, the Leader of the Opposition set out in a speech to the Royal United Services Institute (RUSI), five tests upon which the Conservative Party's policy on the UK's membership of the ECHR would be determined. These tests form the basis of the advice to the Leader of the Opposition by the Shadow Attorney General, Lord Wolfson, which was published in October 2025.[50] Lord Wolfson's advice explores the role of the ECHR across a range of areas, including claims against veterans, the allocation of social housing and benefits, protests, prison sentences, and infrastructure projects.

37. However, the critical test for present purposes and the one that has garnered the most public interest is the 'Sovereign Borders Test', which examines how far the ECHR hinders the Government's ability to decide its immigration policy. Lord Wolfson advises that the ECHR places 'substantial limitations' on the Government in the context of immigration and border control and is 'the area where the most urgent and extensive changes are needed'.[51] In this context, the advice says that 'a powerful case can be made that many of the problems identified in the tests cannot be dealt with adequately unless the UK withdraws from the ECHR', making our departure a 'gateway condition' for addressing these concerns.[52] Indeed, this was the approach ultimately taken by the Leader of the Opposition, who announced in her speech at the Conservative Party Conference that 'we must leave the ECHR and repeal the Human Rights Act…the next Conservative manifesto will contain our commitment to leave. Leaving the Convention is a necessary step, but not enough on its own to achieve our goals'.[53] This is now reflected in the Conservative Party's Borders Plan[54] and its proposals for a 'Withdrawal from the ECHR and Constitution Restoration Bill' and a 'Protecting our Borders Bill', recently published as a 'shadow bill'.[55]

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[50] Lord Wolfson of Tredegar KC, *Advice to the Leader of the Conservative Party on the European Convention on Human Rights* (Wolfson Review, June 2025).

[51] ibid [367].

[52] ibid [12].

[53] Kemi Badenoch, *Kemi Speaks at Conference Day 1* (Conservative Party, 5 October 2025) <https://www.conservatives.com/news/kemi-speaks-at-conference-day-1>.

[54] Conservative Party, *'Our Borders Plan'* (October 2025) <https://www.conservatives.com/our-borders-plan>.

[55] Conservative Party, *Alternative King's Speech* (11 May 2026) <https://www.conservatives.com/alternative-kings-speech>.

38. This step is misguided. The UK's departure from the Convention would have grave implications both for our international reputation and for our domestic constitutional settlement, particularly the arrangements from which the whole United Kingdom has benefitted since the 1998 Belfast/Good Friday Agreement. Further still, far from being a silver bullet - a reality Lord Wolfson acknowledges[56] - the contention that withdrawal will in any way help to solve the UK's concerns about immigration simply misses the eye of the needle.

3.1. The ECHR's Influence on Removals and Deportations

39. The Wolfson Review says that the ECHR can be used in broadly four ways to delay or prevent deportations and removals, which have led to the 'substantial limitations' which have been placed on the Government's ability to implement its immigration policy. Such mechanisms consist of (1) a substantive challenge to the primary decision to remove or deport, usually under Articles 3 or 8 of the Convention; (2) additional claims or new evidence introduced at a late stage to avoid or delay removal; (3) challenges to processes, conditions, or secondary decisions; and (4) interim measures issued on an exceptional basis by the ECtHR under Rule 39 where there is an 'imminent risk of irreparable harm'.[57]

40. However, this does not go so far as to address the practical impact of these mechanisms on delaying and preventing significant numbers of deportations and removals, and whether leaving the Convention would make a material difference to the UK's ability to control its borders, as has so widely been claimed. Research published in September 2025 by the Bonavero Institute of Human Rights highlights that distorted reporting by media outlets has led to widespread misunderstanding as to the role of the ECHR in influencing immigration policy. The report found that between January and June 2025, 75% of the 379 media reports which mentioned the ECHR referenced solely its role in immigration control, focusing in particular on foreign offenders seeking to resist deportation by making human rights-based appeals.[58]

3.1.1. Deportations

41. Despite this popular misconception, the Bonavero Institute has found that, according to the most recent Home Office data, covering the period of over five years from April 2016 to June 2021, only

[56] Wolfson Review [12].

[57] see e.g. *Rackete and Others v Italy* (32969/19).

[58] Victoria Adelmant, Alice Donald and Başak Çalı, *The European Convention on Human Rights and Immigration Control in the UK: Informing the Public Debate* (Bonavero Report No 3/2025, Bonavero Institute of Human Rights, University of Oxford, 4 September 2025).

922 foreign national offenders succeeded in appealing deportation decisions on human rights grounds before the First-Tier Tribunal.[59] Over the same period, 26,091 foreign national offenders were deported from the UK. Accordingly, successful human rights-based appeals merely accounted for approximately 3.5% of all deportations carried out.[60] When considering appeals based on Article 8 alone, this figure falls to 2.5% of the total number of deportations in the same period.[61] Indeed, in the fifteen months preceding June 2021, the number of foreign national offenders who brought a successful human rights-based appeal against deportation represented only 0.73% of the total number of sentenced foreign national offenders in the UK.[62] The report emphasises that this figure is likely to overstate the true impact of human rights-based appeals, given that some First-Tier Tribunal decisions may subsequently have been overturned on appeal to the Upper Tribunal, for which we currently have no statistics.

3.1.2. Removals

42. The success rate is higher for foreign nationals appealing removal, at least domestically, but it is impossible to extrapolate from the Home Office data whether these appeals succeeded on an invocation of the Convention and the Human Rights Act, or on the basis of a genuine refugee claim under the Immigration Rules. It is in this respect that reform of the UK's interpretation of the Convention is necessary. At a European level, however, there have been only twenty-nine ECtHR judgments that have concerned appeals against removal from the UK since 1980. In only thirteen of these appeals has the Strasbourg Court found that the removal of a foreign national by the Government would breach the ECHR.[63] The scarcity of ECtHR judgments against the UK's immigration policy is reflected more widely, as demonstrated in the preceding section. It is important to emphasise that this does not mean that the ECHR and the UK's interpretation of the obligations it imposes are beyond reproach, nor that the Convention does not require reform to ensure it retains the confidence of its Contracting Parties, particularly in relation to the approach taken towards Articles 3 and 8. Yet, the notion that the ECHR has played a significant role in undermining the Government's immigration policy has been greatly overstated.

[59] ibid [26].
[60] ibid.
[61] ibid.
[62] ibid [25].
[63] ibid [29].

3.2. Common Law Considerations

43. Where Convention rights are at issue, it is unlikely, at least at first glance, that simply departing from the ECHR would prevent individuals from still relying upon many of those same protections. It is in the nature of the UK's human rights framework as a patchwork of common law and Convention rights that, notwithstanding any move to leave the ECHR, the rights that existed prior to the UK's ratification of the Convention in 1951 and the passing of the Human Rights Act in 1998, in addition to those rights that have since been 'patched onto the quilt', will subsist in our domestic law.

44. This was a point made recently by Lord Briggs, who emphasised that 'the starting point must remain the common law, not the Convention articles themselves'.[64] This is reflected in the caselaw, most notably in *R(Daly) v Secretary of State for the Home Department*, which concerned the examination of prisoners' correspondence in their absence and has since enshrined proportionality as the relevant test in human rights cases. Lord Cooke said that 'while the case is one in which the Convention and the common law produce the same result, it is of great importance, in my opinion, that the common law by itself is being recognised as a sufficient source of the fundamental right to confidential communication with a legal adviser for the purpose of obtaining legal advice'.[65] The same approach was taken in a more recent line of cases, namely *R(Osborn) v Parole Board*[66] and *Kennedy v Charity Commission*.[67] In *Osborn*, Lord Reed confirmed that 'the importance of the [Human Rights] Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate'.[68]

45. Thus, as Lord Briggs observes, 'Convention rights may be regarded as having enriched the common law'[69] and have worked in tandem to uphold our human rights framework 'by employing a patchwork quilt of common law and statutory causes of action'.[70] This is a point recognised by Lord Wolfson, who emphasises that any policy of withdrawal from the ECHR and repeal of the HRA 'would not be abandoning fundamental rights protection' and 'would retain established common law

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[64] Lord Briggs of Westbourne JSC, *Protecting Human Rights: The Common Law as the Starting Point* (Speech delivered at the JUSTICE Annual Conference - 25 Years of the Human Rights Act, 10 November 2025).
[65] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [30] (Lord Cooke).
[66] *R (Osborn) v Parole Board* [2013] UKSC 61 at [57] (Lord Reed).
[67] *Kennedy v The Charity Commission* [2014] UKSC 20.
[68] *Osborn* (n 66) [57].
[69] Lord Briggs (n 64) 3.
[70] ibid.

principles and legislation which provide such protections'.[71] It must then be asked what the underlying purpose of leaving the Convention would be.

46. If, as the Wolfson Review and proponents of withdrawal have contended, the ECHR places 'substantial limitations' on the Government's ability to operate a stringent borders policy, the inevitable intended consequence of our departure must then be subsequent primary legislation to weaken those pre-existing protections which are also a cause of this problem. Lord Briggs postulates such an outcome, saying that 'there is a legitimate concern that these types of statutory safeguards for human rights would be lost if the UK jettisoned the HRA' but this would require Parliament to 'manifest that intention through express language or necessary implication'.[72]

47. The central fault line then becomes whether we, as rights-holders, wish to abrogate those fundamental protections to enable the implementation of a policy which has not even been shown to have disproportionately impacted upon our ability to operate a stringent borders policy. We would be surrendering fundamental rights in exchange for no discernible benefit. A posthumous article by Professor Conor Gearty puts into sharp focus the consequences of satisfying what has become an insatiable thirst to detach ourselves from our current human rights framework:

> *'to get rid of such obstacles, it would be necessary to repeal the Human Rights Act, and also – to ensure that you won't be liable at the international level – to leave the Council of Europe, joining Belarus and Russia in their denial of the jurisdiction of the European Court of Human Rights. You would then need to pass special laws allowing people to be sent to near certain death, after being treated with a harshness that is explicitly inhuman or degrading'.*[73]

48. The assertion by Professor Gearty that the UK would have to leave the Council of Europe is addressed below. These concerns are echoed by Professor Elliott, who argues that whereas the HRA 'foregrounds in the domestic legal and political arenas obligations that are binding upon the UK in international law', common law rights would ultimately yield to this legislation should Parliament do 'the unthinkable' and overturn various fundamental rights in an ill-designed attempt to achieve its desired outcome on immigration policy.[74] Elliott notes *dicta* countenancing how courts might

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[71] Wolfson Review [349].

[72] Lord Briggs (n 64) 7.

[73] Conor Gearty, *Unwelcome Remnant: Erasing the Human Rights Act* (London Review of Books, Vol 47 No 18, 9 October 2025) <https://www.lrb.co.uk/the-paper/v47/n18/conor-gearty/unwelcome-remnant>.

[74] Mark Elliott, *Misplaced Optimism? Lord Briggs on the Common Law's Capacity to Protect Human Rights in the Event of ECHR Withdrawal* (Public Law for Everyone, 14 November 2025) <https://publiclawforeveryone.com/2025/11/14/misplaced-optimism-lord-briggs-on-the-common-laws-capacity-to-protect-human-rights-in-the-event-of-echr-withdrawal/>.

respond in this eventuality, a subject which is beyond the scope of this paper. However, it is worth briefly referencing the words of Lord Steyn in *Pierson*, namely that:

> *'Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial presumption'.*[75]

49. For Parliament to overturn these principles and traditions would set us on a radical and dangerous path for our traditional liberties, depriving entirely deserving cases of the opportunity to assert rights that long predate the ECHR.

3.3. International Obligations

50. In addition to the threads that have fused the ECHR with the common law, the United Kingdom is also a signatory to numerous international human rights conventions, some of the provisions of which are woven into this patchwork either by incorporation into legislation or by virtue of their status as customary international law (CIL).[76] The most relevant international provisions to which the UK is a signatory include the 1951 Refugee Convention, the 1984 United Nations Convention Against Torture (UNCAT), the 2005 European Convention Against Trafficking, and the 1966 United Nations International Covenant on Civil and Political Rights (ICCPR). These are the international agreements identified in the Wolfson Review as having the most important effect in the sphere of immigration policy.[77] Even if the UK were to leave the ECHR, it would still be bound by these international obligations.

51. The effect of international law beyond our membership of the ECHR came into sharp focus in the Rwanda litigation. This concerned the UK Government's decision to remove asylum seekers whose claims had been deemed inadmissible to Rwanda, pursuant to the Migration and Economic Development Partnership (MEDP) between the UK and Rwanda. In finding that the Rwanda policy was unlawful, as there were substantial grounds for believing that asylum seekers would face a real risk of suffering ill treatment as a consequence, the Supreme Court did not root its judgment in Article 3 ECHR alone, but in the 'principle of non-refoulement'.[78] The court emphasised that 'the principle of non-refoulement is therefore given effect not only by the ECHR but also by other international conventions to which the United Kingdom is party. It is a core principle of international

[75] *R v Secretary of State for the Home Department, ex parte Pierson* [1997] 3 WLR 492; [1998] AC 539 (Lord Steyn).
[76] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 3 WLR 969 (Lord Templeman).
[77] Wolfson Review at [57].
[78] *AAA v Secretary of State for the Home Department* [2023] EWCA Civ 745.

law, to which the United Kingdom government has repeatedly committed itself on the international stage, consistently with this country's reputation for developing and upholding the Rule of Law'.[79] In particular, the court referred to article 33(1) of the Refugee Convention, which prohibits both the direct and indirect return of refugees to the country where they fear persecution. Similar obligations are reflected in article 3(1) of the UNCAT and the ICCPR. It was also indicated *obiter* that the principle of non-refoulement may form part of CIL, as the UK had acknowledged this in the 2001 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees.[80]

52. Therefore, it would seem that, reminiscent of the common law considerations discussed earlier, the UK would still be bound by its international obligations in determining its immigration policy, regardless of a policy to withdraw from the ECHR. Lord Wolfson acknowledges that, at least in the case of the Refugee Convention, this 'will necessarily add some level of complexity to the borders regime adopted that might otherwise be avoided…and there is the possibility that the Refugee Convention may be used by litigants in ways that are unexpected, requiring further legislation'.[81] The same is said of the Torture Convention, from which Lord Wolfson says it is not necessary to withdraw 'at this time'.[82] With regard to the ECAT, however, it is argued that 'it would be prudent to consider withdrawal'.[83] This has subsequently been adopted in the Conservative Party's proposed 'Protecting our Borders Bill'.[84] In terms of the necessary 'further legislation' regarding the Refugee and Torture Conventions, it is clear that were the UK to go down this route, it would also culminate in our departure from these international agreements. This would seriously diminish our influence on the global stage, in addition to marking an abject failure by the UK in its mission to protect those who have been subjected to or who are fleeing torture.

3.4. The Council of Europe

53. Conceived in the aftermath of the Second World War, the Council of Europe's founding objective was to uphold human rights, fundamental freedoms and the Rule of Law in Europe. This is reflected in article 3 of the Treaty of London.[85] As one of the founding fathers, Winston Churchill, emphasised, the strength of the Council of Europe was rooted in the respect for and recognition of its values:

[79] ibid [26].
[80] ibid [25].
[81] Wolfson Review [73.6].
[82] ibid [74] (emphasis in original).
[83] ibid [73].
[84] *Alternative King's Speech*, 27.
[85] Statute of the Council of Europe (London, 5 May 1949) ETS No 1 art 3.

> *'there is no reason why we should not succeed in achieving our aims and establishing the structure of this united Europe whose moral concepts will be able to win the respect and recognition of mankind, and whose physical strength will be such that no one will dare to hold up its peaceful journey towards the future'.*

54. In this context, it is unsurprising that the ECHR is widely considered to be its cornerstone. There is also therefore a serious risk that following the UK's withdrawal from the ECHR, our place in the Council of Europe would become untenable. The Wolfson Review claims that although ECHR membership is required in order for a state to join, 'there is nothing in its founding statute which expressly requires continued ECHR membership'.[86] Whilst it is correct to assert that the founding statute does not stipulate such a requirement, this is something of a distortion. The idea that ECHR membership and the commitments to the Rule of Law, human rights and fundamental freedoms that it entails can simply be dropped having joined is doubtful. This is particularly true given the reasons why the Council of Europe itself was founded.

55. Even so, Lord Wolfson and other commentators ignore the fact that continued ECHR membership by a member state is expressly required, having acceded to the Council of Europe. This is set out in Resolution 1031 of the Parliamentary Assembly:

> *1. The Assembly observes that all member states of the Council of Europe are required to respect their obligations under the Statute, the European Convention on Human Rights and all other conventions to which they are parties.*[87]

> *9. The Assembly recalls in this connection that accession to the Council of Europe must go together with becoming a party to the European Convention on Human Rights. It therefore considers that the ratification procedure should normally be completed within one year after accession to the Statute and signature of the Convention.*[88]

56. Accordingly, the UK's withdrawal from the Convention would represent a clear violation of the requirement to respect its obligations under the ECHR and would risk expulsion from the Council altogether under Article 8. Further still, were the UK to pass legislation that 'seriously violated' its commitments under Article 3 to accept the Rule of Law, human rights and fundamental freedoms,

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[86] Wolfson Review [356].
[87] Council of Europe Parliamentary Assembly, Resolution 1031, *Honouring of commitments entered into by member states when joining the Council of Europe* (14 April 1994).
[88] ibid.

this would also provide grounds for the UK to be suspended and ultimately expelled. This would render the UK isolated amongst European democracies, and we would find ourselves in the unwelcome company of Russia and Belarus as the only other European states outside of the Council of Europe.

57. At the very least, the United Kingdom would do severe damage to its influence as a leading voice within the Council of Europe. The notion that we could, for example, continue to sit on the Steering Committee for Human Rights (CDDH) having left the ECHR and diverged from its protections, is absurd. These concerns are particularly prevalent against the background of the growing security challenges facing Europe, which underscore the need to co-operate with our fellow European democracies to strengthen rather than undermine our shared institutions.

3.5. Implications for the Union

58. Withdrawal from the ECHR would also have serious implications for the UK's devolution settlements for Wales, Scotland and Northern Ireland, which enshrine Convention rights as governing all their actions.[89] Parliament at Westminster could, of course, legislate to change the position, but there is evidence that this would be against the will of the devolved administrations. The Sewel Convention emphasises that 'the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislatures'.[90] This has since been recognised in the Scotland Act 2016 and the Wales Act 2017.[91] Any attempt to alter the scope of the competence of those bodies by legislating to withdraw from the Convention and diminishing our obligations therein would trigger the Sewel Convention and require the consent of the devolved administrations. Whilst, as the Supreme Court concluded in *Miller I*, 'its operation does not lie within the constitutional remit of the judiciary' and would therefore be unlikely to withstand a legal challenge,[92] the political consequences for the stability of the Union could nonetheless be significant if Parliament were to legislate without the consent of the devolved nations.

59. In Northern Ireland, the Convention forms a central part of the 1998 Belfast/Good Friday Agreement (BGFA), an international treaty. The BGFA was concluded against the background of prolonged political instability and conflict in Northern Ireland and followed multi-party negotiations

[89] Scotland Act 1998, ss 29(2)(d), 53, 54, 57(2); Northern Ireland Act 1998, ss 6, 24, 71; Government of Wales Act 2006, ss 81, 158.

[90] Cabinet Office, *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee* (October 2013) 8.

[91] Wales Act 2017, s 2 (c 4); Scotland Act 2016, s 2 (c 11).

[92] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [151].

involving the British and Irish governments, and the principal political parties in Northern Ireland. The Agreement established a new framework based on devolved, power-sharing institutions, alongside arrangements for co-operation between Northern Ireland and the Republic of Ireland, in addition to co-operation between the British and Irish governments. It was endorsed by referendums held in both Northern Ireland and the Republic of Ireland, conferring democratic legitimacy on the settlement and embedding the principle that any change to Northern Ireland's constitutional status would require the consent of a majority of its population.

60. The BGFA was intended to provide a comprehensive constitutional settlement, rooted in the foundations of 'the mutual respect, the civil rights and the religious liberties of everyone in the community'.[93] Indeed, the Multi-Party Agreement contains an explicit provision on 'Rights, Safeguards and Equality of Opportunity' (RSEO), which commits the British Government to ensuring the incorporation of the ECHR into Northern Ireland law:

> *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.*[94]

61. This commitment is also referenced in Strand One of the Multi-Party Agreement, providing that:

> *there will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including:*
>
> *(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* [95]

[93] The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland (10 April 1998) 16.
[94] ibid.
[95] ibid 16.

62. It has been suggested both by the Wolfson Review and a report by Policy Exchange[96] that the UK can withdraw from the ECHR without undermining the explicit provisions set out in the BGFA and thus causing significant damage to the peace settlement that has existed since 1998. Indeed, Lord Wolfson argues that the only requirements of the BGFA are the 'incorporation of the substantive rights embodied in the text of the ECHR into the law applicable for Northern Ireland, without prescribing any particular means of incorporation'.[97] In the event that the UK withdrew from the Convention, it would be possible, Lord Wolfson claims, to pass a Northern Irish Bill of Rights to ensure the substantive rights contained within the Convention are incorporated within the law of Northern Ireland, although 'the political arguments at play are complex'.[98] This is something of an understatement as this argument is a casuistical distortion of the plain words of the Agreement, which makes clear that it is 'Convention Rights' which are to be incorporated, which carries with it the requirement that ultimately the rights must be capable of interpretation by the ECtHR. In any event, it is unlikely that other states in Europe would be willing to interpret the BGFA in this way.

63. Indeed, a recent report by the Committee on the Administration of Justice (CAJ) suggests that the commitments contained within the BGFA do not only apply to Northern Ireland but that 'at a minimum, the BGFA requires the same level of ECHR commitment by the UK, including incorporation into Northern Ireland as a jurisdiction, as currently exists'.[99] The report proceeds to emphasise that by including 'public bodies' within the text of the Agreement, the commitment to the ECHR 'plainly extends beyond [devolved institutions] into the general activity of public bodies within Northern Ireland law. Northern Ireland law is made by the UK Parliament as well as by the Northern Ireland Assembly and is administered and enforced by UK public bodies as well as by devolved bodies'.[100] It is therefore doubtful that, despite claims to the contrary by the Wolfson Review and Policy Exchange, their proposed solution of a Northern Ireland Bill of Rights detached from the ECHR and the ECtHR would avoid a fundamental breach of the BGFA.

64. The Review does not seek to discuss the severe implications our departure from the ECHR would have for Northern Ireland and the United Kingdom more widely, and the Conservative Party's proposal for a 'Withdrawal from the ECHR and Constitution Restoration Bill' dedicates just thirty-six words to the issue.[101] The notion that an outcome whereby Northern Ireland operates a different

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[96] Conor Casey, Richard Ekins KC (Hon) and Sir Stephen Laws KCB KC (Hon), *The ECHR and the Belfast (Good Friday) Agreement* (Policy Exchange, 31 August 2025).
[97] Wolfson Review [266.5].
[98] ibid [266.6].
[99] Colin Murray and Aoife O'Donoghue, *The Belfast/Good Friday Agreement 1998 & European Convention on Human Rights: Explainer* (Committee on the Administration of Justice, September 2025) 7.
[100] ibid.
[101] *Alternative King's Speech*, 23.

human rights framework to the rest of the United Kingdom provides a satisfactory and sustainable solution, particularly in light of the Unionist concerns that arose during the Brexit debate, is entirely unconvincing. Withdrawal would open the prospect of a new era of political discord quite apart from the impracticality of our courts having to operate different rights systems in one country.

3.6. The Windsor Framework

65. When the United Kingdom formally left the European Union on 31st January 2020, the Withdrawal Agreement came into force and governed the terms of our departure.[102] It covered several critical areas, including provisions to avoid a hard border between Northern Ireland and the Republic of Ireland through the Northern Ireland Protocol. This later became the Windsor Framework, which addressed many of the contentious issues surrounding the Protocol and introduced new arrangements to ease the movement of goods to Northern Ireland from Great Britain, reducing the bureaucratic burden and responding to the concerns of communities in Northern Ireland.[103] Importantly, article 2(1) of the Windsor Framework provides that:

> *'The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.'*

66. Article 2(1) therefore imposes a requirement on the UK to ensure that there is no diminution of RSEO as set out in the Belfast/Good Friday Agreement, as far as this results from our departure from the European Union. Section 7A of the European Union (Withdrawal) Act 2018 ensures that this requirement has direct effect in domestic law. Thus, incompatible legislation can be challenged and ultimately disapplied by the courts to maintain compliance with article 2(1). In *SPUC*, the Court of Appeal in Northern Ireland set out a six-stage test to establish a breach of article 2:

> *(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast (Good Friday) Agreement is engaged.*

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[102] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (19 October 2019).

[103] Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework (24 March 2023).

(ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020.

(iii) That Northern Ireland law was underpinned by EU law.

(iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU.

(v) This has resulted in a diminution in enjoyment of this right; and

(vi) This diminution would not have occurred had the UK remained in the EU.[104]

67. This raises the possibility that in the event that the UK withdraws from the Convention, subsequent incompatible legislation or executive action could still be disapplied in the courts as a breach of article 2(1). The issue has most recently been considered by the Supreme Court in *Re Dillon*, which determined the relevant test to be whether 'having regard to the wording and to the purpose and nature of the RSEO chapter and of article 2(1) of the Windsor Framework, those provisions read together impose a clear and precise obligation which satisfies the test for direct effect.'[105] The decision left open the potential for article 2(1) to have direct effect in certain circumstances. Firstly, where article 2(1) operates in conjunction with the six 'anti-discrimination' EU Directives listed in Annex 1. Secondly, where article 2(1) is taken with another EU instrument that falls within the RSEO chapter. The judgment has also left open the possibility of a more far-reaching challenge under article 2(1), namely on the basis of the EU Charter of Fundamental Rights (CFR).

68. At first glance, however, the Supreme Court appears to exclude any role for the CFR in this context. Paragraph 145 of the judgment emphasises that the CFR cannot operate on a freestanding basis as it was excluded by section 5(4) of the 2018 Withdrawal Act and so must be 'implementing' EU law in order to be effective, which the applicants failed to demonstrate on the facts of the case.[106] Yet, as Professor McCrudden suggests, the judgment taken as a whole does not support the conclusion that the CFR cannot ever have a role in relation to article 2(1), but rather curtails its application 'in this appeal'.[107] Pointing to paragraph 148, which says that 'for the Charter to apply on a freestanding basis it is therefore necessary to identify how the rights mentioned in the Charter are so "set out"', it is argued that this does not deny the CFR freestanding status under any circumstances and creates the possibility that such rights could be upheld in future cases.

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[104] *Society for the Protection of the Unborn Child Pro-Life Ltd v Secretary of State for Northern Ireland* [2023] NICA 35.
[105] *In the matter of an application by Martina Dillon, John McEvoy, Brigid Hughes and Lynda McManus for Judicial Review* [2026] UKSC 15 [113].
[106] ibid [145], [157].
[107] Christopher McCrudden, *'Reading Dillon'* (UK-EU Relations Law, 7 May 2026) <https://eurelationslaw.com/blog/reading-dillon>.

69. McCrudden identifies three cumulative conditions under which a Charter right becomes directly relevant in article 2(1) litigation:

    a) *the Charter right falls within the ambit of a right "set out" in the RSEO chapter of the Belfast-Good Friday Agreement (in practice, one of the bullet-point rights, since the Court rejected "civil rights" in paragraph 1 as too general to anchor the Charter);*
    b) *it is "anchored" to other directly effective EU law operating within that ambit; and*
    c) *the Charter right itself satisfies the EU-law test for direct effect.*

70. In respect of condition (c), McCrudden rightly notes that the Court of Justice of the European Union (CJEU) has held on multiple occasions that various Charter provisions are directly effective and so would fall within the scope of article 2(1).

71. There remains the question of how the ECHR interacts directly with the CFR in this context. As noted above, paragraph 2 of the RSEO chapter requires the ECHR to be incorporated into Northern Ireland law, which was achieved through the Human Rights Act 1998. The Supreme Court observed that there had been no diminution of those (non-EU) ECHR rights, so the question did not arise on the facts.[108] McCrudden asks what would happen if ECHR rights *were* diminished and how this would affect how the Charter operates under article 2(1).[109] The answer is unclear, but it is likely to generate further litigation.

72. For present purposes, it is sufficient to recall Professor McCrudden's conclusion that 'CFR rights are capable, not only as having an interpretative role, but also of being considered as having significant direct implications in the context of article 2(1).'[110] In any event, should the UK leave the ECHR and Parliament proceed to pass legislation that breaches the Windsor Framework, it may be that the domestic courts disapply the offending provisions. The only way to overcome this would be for Parliament to repeal section 7A of the Withdrawal Agreement, which in turn would have severe implications for our relationship with the EU.

3.7. The UK-EU Trade and Cooperation Agreement

73. Whereas the Withdrawal Agreement established the terms of the UK's exit from the European Union, the UK-EU Trade and Cooperation Agreement (TCA) set out the framework for our future

[108] *Re Dillon* [147].
[109] McCrudden (2026).
[110] ibid.

relationship. The final point to be made in this section relates to the potential implications of withdrawal from the ECHR on the TCA and UK-EU relations more broadly. Part Three of the TCA concerns 'Law Enforcement and Judicial Co-operation in Criminal Matters'. The stated objective is the 'prevention, investigation, detection and prosecution of criminal offences and the prevention of and fight against money laundering and financing of terrorism'.[111] Part Three is divided into thirteen titles covering a range of measures including: exchanges of DNA, fingerprints, and vehicle registration data (Prüm); transfer and processing of passenger Name Record Data (PNR); co-operation on operational information; co-operation with Europol and Eurojust; surrender and Exchange of Criminal Record Information. The Partnership Council's Specialised Committee on Law Enforcement and Judicial Co-operation oversees the operation of Part Three.

74. Importantly, article 524(1) of the TCA, in relation to Part Three, provides that:

> *'the co-operation provided for in this Part is based on the Parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically'.*

75. Article 692 affirms that: *'if this Part is terminated on account of the United Kingdom or a Member State having denounced the European Convention on Human Rights or Protocols 1, 6 or 13 thereto, this Part shall cease to be in force as of the date that such denunciation becomes effective or, if the notification of its termination is made after that date, on the fifteenth day following such notification'.*

76. As the Wolfson Review concedes, the UK's withdrawal from the ECHR would provide the EU with a ground to terminate Part Three of the TCA.[112] This would end formal UK-EU co-operation on criminal matters and would entail the termination of the UK's access to Prüm, the PNR, and its co-operation with Europol and Eurojust, amongst other strategic advantages to joint law enforcement operations. In particular, the termination of the surrender agreement outlined in Title VII would create serious practical obstacles to extradition. This agreement established a streamlined process for the extradition of criminals and criminal suspects between the UK and EU States, maintaining a high level of co-operation in law enforcement. The TCA's surrender arrangements, while more limited than the European Arrest Warrant, still provide a streamlined framework for mutual surrender. Reversion to Council of Europe extradition conventions, if we are even able to remain members,

[111] UK-EU Trade and Cooperation Agreement, Article 522 (December 2020).
[112] Wolfson Review [273].

would reintroduce delays, politicisation, and procedural obstacles, increasing the risk of offenders evading justice.

77. Beyond the termination of Part Three of the TCA, there is an argument that leaving the ECHR would undermine our relationship with the European Union more widely, given the emphasis placed by EU Member States on the Convention. At the very least, it is unlikely that there would be scope for future co-operation to build on other parts of the TCA to foster a more constructive and mutually beneficial economic partnership. In practice, were the UK to leave the Convention and declare that the Belfast/Good Friday Agreement does not require our continued membership, prior to passing any incompatible legislation, it would do critical damage to our relationship with our fellow European democracies. Even without the formal collapse of the TCA arrangements, there would be a serious risk that the courts in other European countries would decline to allow extradition on the grounds that they could not be certain that suspects or convicts would be treated in accordance with Convention rights.

78. Thus, despite the aim to implement a more stringent borders policy, withdrawal from the ECHR would ultimately operate to undermine the UK's ability to co-operate on criminal matters with our European counterparts, significantly compromising our ability to ensure the security of our own borders and endangering our wider partnership with the European Union, with the potential to cause severe economic harm as a result.

4. PROPOSALS TO SOLVE A SHARED EUROPEAN CHALLENGE

79. The UK's withdrawal from the ECHR would not assuage current concerns surrounding immigration but would inevitably lead to fundamental protections currently enshrined in our domestic human rights frameworks being displaced, whilst compromising our domestic constitutional settlement and diminishing our role on the world stage. But this is not to say that there is not an issue that needs to be tackled. This paper presents an alternative approach to solve what will increasingly become a shared European challenge. It is only by co-operating closely with our counterparts in the Council of Europe that we can attempt to address immigration concerns and ensure a fair and efficient borders policy. Importantly, Lord Wolfson says his advice should be reconsidered if member states achieve significant reform of the ECHR, or of its interpretation by the ECtHR[113] - a possibility that the Leader of the Opposition's announcement dismissed.

4.1. A Shared European Response

80. In response to the letter sent by European leaders in May 2025, a meeting of the Justice Ministers of the Council of Europe was held on 10th December 2025 to begin the work of addressing the concerns raised at a European level. In a joint statement following the meeting, ministers emphasised that:

> *'our governments have a duty to guarantee our populations' human rights and fundamental freedoms, including the right to live in peace, freedom and security, to preserve the values of our societies, and to effectively protect borders, prevent unlawful border crossings and counter migrant smuggling networks. Yet, the rights and freedoms of our populations are challenged by people who take advantage of our hospitality by committing serious crime; trafficking in human beings and instrumentalisation of migrants'.*[114]

[113] Wolfson Review [13].

[114] UK Government, *'Joint statement to the Conference of Ministers of Justice of the Council of Europe'* (10 December 2025).

81. The principal challenges agreed at the meeting included: the expulsion of foreigners convicted of serious crimes, clarity about inhuman and degrading treatment, innovative and durable solutions to address migration, decision-making in migration cases and the instrumentalisation of migration.[115] It was emphasised that in order to retain the confidence of states and 'ensure that the Convention framework is fit to address today's challenges', a European response is required.[116] The groundwork for this has been laid in the form of a political declaration on migration at the Committee of Ministers in Chişinău, Moldova in May 2026. The summit has created a considerable opportunity for the UK to work closely with its fellow European democracies to tackle this challenge and help set the future direction of the Convention. This section sets out proposals both for reform of the Convention's interpretation at a European level and other measures to address the concerns held by European leaders.

4.1.1. Reform of the ECHR

82. Ensuring that the Convention retains the confidence of its Contracting Parties – and is interpreted as a living instrument capable of meeting current challenges – is essential. It is therefore necessary for the expansive way in which the ECHR has been interpreted by the Strasbourg Court to be reformed to give Contracting States more control over their respective immigration policies. In particular, states have collectively asked for clarity about inhuman and degrading treatment and a rebalancing of the Article 8 proportionality exercise as they claim these are the greatest obstacles to securing removals and deportations.

Article 3

83. The Joint Statement stresses that Article 3 'should be constrained to the most serious issues in a manner which does not prevent State Parties from taking proportionate decisions on the expulsion of foreign criminals, or in removal or extradition cases, including in cases raising issues concerning healthcare and prison conditions'.[117] It is important to reiterate at this point that the Article 3 right not to be subjected to torture or inhuman or degrading treatment is absolute, and cannot be derogated from or qualified under any circumstances. However, as previously mentioned, the scope of Article 3 has been expanded from its original meaning following the Strasbourg Court's decision in *Soering* to include situations where there are substantial grounds to believe that the applicant would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which they are being extradited.

[115] ibid.
[116] ibid.
[117] ibid.

84. There is a strong argument that the evidential standard to prove inhuman and degrading treatment is too low and invites appeals from applicants who would not – on the balance of probabilities – be subjected to such ill treatment. Indeed, following *F.G. v Sweden*, in determining whether the evidential bar has been met, the benefit of the doubt will be given to the applicant 'when it comes to assessing the credibility of their statements and the documents submitted in support thereof'.[118] This leads to the question of what should constitute 'the most serious issues' falling within Article 3 that succeed in attaining the 'minimum level of severity' required.[119] It is submitted that issues relating to inadequate healthcare and poor prison conditions should not normally meet this criteria, unless the evidence shows a deliberate intention to inflict inhuman and degrading treatment. It is therefore welcome that Chişinău underlines that the quality of accessible healthcare should only give rise to a real risk of Article 3 in very exceptional circumstances.[120]

Article 8

85. Concerns have also been raised about the expansive interpretation taken by the ECtHR towards the Article 8 right to private and family life. In contrast to Article 3, Article 8 is a qualified right and so Contracting Parties can justify its interference where it is proportionate to the legitimate interest being pursued. The criteria relevant to this proportionality assessment in migration cases were set out in *Üner v the Netherlands*, which affords considerable discretion to domestic courts and immigration officials in undertaking this balancing exercise.[121] This has led to the scope of Article 8 becoming vague and indeterminate in its domestic application to foreign national offenders, whose family ties to their host country have too often been prioritised over the seriousness of their offending.

86. Chişinău makes clear that the Strasbourg Court must provide 'strong reasons' for substituting its assessment of proportionality for that of domestic courts.[122] Alongside this, proposals should also be introduced to provide more detailed guidance to domestic immigration tribunals and officials as to the undertaking of this balancing exercise, with greater weight placed on the seriousness of the offending and the margin of appreciation afforded to Contracting Parties to prioritise the implementation of their immigration policies. The need for further guidance on decision-making in migration cases has been acknowledged in the Political Declaration, but the nature of this guidance remains to be seen.[123]

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[118] *F.G. v Sweden* (43611/110) at [113].
[119] *Savran v Denmark* (57467/15).
[120] CDDH, Preliminary Draft Text, 24.
[121] *Üner v the Netherlands* (46410/99).
[122] CDDH, Preliminary Draft Text, 25.
[123] ibid 26.

4.1.2. A Collective European Sanctions Regime

87. A reformed interpretation of the Convention is only effective insofar as Contracting States are then able to return illegal migrants and deport foreign criminals to their countries of origin. Indeed, the importance of efficient procedures for the return of persons found not to be in need of international protection is emphasised in the Political Declaration.[124] This requires the co-operation of the authorities in these countries to process the relevant paperwork and provide travel documents to enable the return of their citizens. As of October 2024, the UK had agreed bilateral returns agreements with eighteen countries, having previously benefitted from the EU's Readmission Agreements under the Returns Directive.[125] However, the University of Oxford Migration Observatory has drawn attention to studies showing that this does not necessarily lead to more returns and that formal agreements often break down when implemented due to limited incentives for origin countries to follow through.[126] The same problem applies to informal agreements, which do not carry sufficient weight with origin countries.

88. There must therefore be a more effective sanctions-based mechanism through which Contracting States can ensure co-operation on returns with third countries. Indeed, this was demonstrated recently, when the Home Secretary secured co-operation from Namibia, Angola and the Democratic Republic of Congo (DRC) on the removal and deportation of over 3,000 people within three months by threatening their authorities with visa penalties if they refused.[127] This formed a part of the Government's plans in November 2025 to reform the UK's asylum system by introducing visa penalties for countries that did not co-operate. The emphasis that was placed at the recent summit on efficient return procedures creates an opportunity to go further by introducing a wider, collective European sanctions-based approach towards non-co-operative third countries, which it is submitted will prove effective in ensuring returns and deportations proceed as planned.

4.2. Domestic Reform

4.2.1. The Human Rights Act

89. Alongside progress at the European level, the UK's domestic interpretation of the ECHR may also benefit from reform. Although challenges that arose from the Human Rights Act have substantially

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[124] ibid.

[125] Mihnea Cuibus and Peter William Walsh, *'Deportation and removal: what is driving the numbers?'* (Migration Observatory, University of Oxford, 24 March 2025) <https://migrationobservatory.ox.ac.uk/resources/commentaries/deportation-and-removal-what-is-driving-the-numbers/>.

[126] ibid.

[127] Home Office, *'Three countries to take back illegal migrants after visa threat'* (GOV.UK, 6 February 2026) <https://www.gov.uk/government/news/three-countries-to-take-back-illegal-migrants-after-visa-threat>.

been addressed by the domestic courts' shift away from closely mirroring Strasbourg caselaw towards a more restrictive approach under section 2, obligations imposed by sections 3 and 6 have been suggested to be problematic for public authorities. With regard to the interpretative obligation or 'reading down' principle under section 3, it has been contended that this results in strained interpretations of otherwise clear and express language and should be amended to give effect to the normal interpretation of legislation where Parliament has made its intent clear. This suggestion is a reasonable one, but where legislation is ambiguous, that ambiguity should be resolved in a way which is compatible with Convention rights. This would strike the correct balance between giving effect to our ECHR obligations and respecting the will of Parliament going forward, but it is unlikely to have any bearing on issues around deportations and removals.

90. It has also been argued that notwithstanding adverse court decisions, section 6 of the HRA has led to a 'chilling effect' on the ability of public authorities to take executive decisions. The difficulty is that it is unquantifiable how great such a problem might or might not be. There is no evidential basis for this claim, but insofar as it is a problem, there is no reason why public authorities should not be advised to take more robust decisions within the parameters of the HRA, for which there is clearly scope, given that the UK has among the fewest adverse decisions of any Council of Europe member.

4.2.2. The UK's Asylum System

91. The Government has presented wide-ranging proposals to address challenges to the asylum system, which contain reforms as to how certain Convention rights are interpreted in immigration cases, in particular Articles 3 and 8.[128] The Government's plans to limit the application of Article 8 in immigration cases are threefold, namely by strengthening the public interest test, legislating to restrict the definition of family life to immediate family in the majority of cases, and defining how people can make Article 8 applications. In terms of the absolute right not to be subjected to 'inhuman or degrading treatment' under Article 3, the Government has also committed to restricting how it is interpreted. Given the UK's status as one of the most compliant Contracting Parties, there is considerable scope to reform its strict interpretation of the Convention so as to give immigration authorities more extensive powers to refuse asylum applications, without the risk of falling foul of the Strasbourg Court. Thus, despite the relatively low risk of the Government's proposals being successfully challenged, they need to form part of a wider response by European democracies to bring about constructive change in the Council of Europe.

[128] Restoring Order and Control: A statement on the government's asylum and returns policy (CP 1418, November 2025).

92. More important, however, is the Government's commitment to reduce the backlog of cases in the courts by reforming the appeals system. Capacity has proven a substantial challenge, with the Government citing in its policy paper that unresolved appeals have risen from 7,000 in early 2023 to 51,000 at the end of March 2025 and an average appeal wait time standing at fifty-four weeks.[129] In response, it intends to create a single appeal route, whereby claimants will be swiftly removed from the UK should this appeal fail. This will be supplemented by the creation of a new independent appeals body, similar to the approach taken in Denmark. Whilst it remains to be seen how these proposals will be achieved by the Government, expanding the capacity of what has become a broken system must be prioritised over ill-informed political discourse about the ECHR.

4.3. UK-EU Co-operation

4.3.1. The new EU Migration Pact

93. Prior to our departure from the European Union in December 2020, the United Kingdom was part of the Dublin Regulation (Dublin III),[130] which operated as a principal mechanism within the framework of the EU's Common European Asylum System (CEAS). The Dublin Regulation was first adopted by the EU in 2003, replacing the Dublin Convention that had initially been agreed in 1997 by the United Kingdom, France, Germany, Belgium, Denmark, Greece, Ireland, Italy, Spain, Portugal, the Netherlands, and Luxembourg. Dublin III is now adopted and enforced by all EU Member States, in addition to Iceland, Liechtenstein, Norway and Switzerland.

94. The primary objective of the Dublin Regulation was to provide a clear mechanism to determine which Member State is responsible for deciding an asylum claim, thereby ensuring that each asylum application is examined by only one Member State. This will generally be the state where the asylum seeker first arrives upon entering the EU. Dublin III seeks to guarantee effective access to asylum procedures for all applicants, ensuring that individuals can lodge and pursue their claims quickly. Importantly, the Dublin Regulation enabled the UK to return asylum seekers to the participating state where they first arrived without having to consider their asylum claims and that could potentially have a powerful impact on preventing dangerous crossings across the English Channel. It is also the case that it provided a safe and legal route for people to reunite with separated family members in the UK.[131]

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[129] ibid.

[130] Regulation (EU) No 604/2013.

[131] Melanie Gower, *Brexit: the end of the Dublin III Regulation in the UK* (House of Commons Library Research Briefing, 21 December 2020).

95. In June 2026, the Dublin Regulation will be replaced by the New Pact on Migration and Asylum, approved by the European Union in May 2024. The Pact aims to provide a 'European solution' to migration challenges by strengthening borders, enabling faster, more efficient procedures for returns and ensuring a fairer allocation of asylum claims amongst participating states.[132] Whilst the UK Government has been in the process of negotiating bilateral returns agreements with other European countries, including a welcome returns agreement with France to prevent small boat crossings,[133] this cannot replicate the freedom it had to return asylum seekers to other participating states under the Dublin Regulation. The UK should play a leading role through this Pact in ensuring that other European countries take a fairer share of asylum claims, further reducing the burden on our domestic asylum system.

4.3.2. Eurodac and SIS II

96. Notwithstanding the potential for the UK to participate in the new Migration Pact, at the very least the Government must urgently pursue an agreement with the European Union to unlock access to the European Asylum Dactyloscopy Database (Eurodac) and the Schengen Information System II (SIS II), both of which we ceased to participate in following the end of the Brexit transition period.

97. Eurodac is the EU's centralised biometric database - introduced in 2003[134] and significantly expanded in 2024[135] - that stores fingerprints and facial images of asylum seekers, irregular migrants, and third-country nationals, enabling twenty-seven member states and four associated countries to check whether an individual has previously applied for asylum elsewhere in the bloc or crossed an EU border irregularly. The database is the cornerstone of the Dublin Regulation but operates separately to it. This would afford the UK an automatic means of determining whether an applicant's claim has already been refused elsewhere in Europe, thereby removing the need for the current lengthy process of assessing each claim afresh.

98. The second mechanism on which we relied as members of the European Union was SIS II, the bloc's largest shared law enforcement database. Operational since 2013 and used by thirty-one countries, SIS II enables real-time alerts on wanted or missing persons, stolen documents and vehicles, and individuals subject to return decisions, functioning as the backbone of cross-border policing and

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[132] European Commission, *Statement by President von der Leyen at the joint press conference on the adoption of the Pact on Migration and Asylum* (Press release, 24 April 2024) <https://ec.europa.eu/commission/presscorner/detail/en/statement_24_1953>.

[133] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic on the Prevention of Dangerous Journeys (Command Paper CP 1377; France No. 2/2025, August 2025).

[134] Regulation (EC) No 2725/2000.

[135] Regulation (EU) 2024/1358.

border control in the European Union. Without access to this database, the current arrangements upon which the UK now relies for law enforcement information are more complex and protracted. This has weakened our ability to control irregular migration. Whilst the UK Government has expressed a desire to participate in both Eurodac and SIS II, hitherto the EU has been reluctant to give the UK access to its data-sharing arrangements.[136] Given the shared interest both parties have in tackling irregular migration and serious crime, this position is increasingly difficult to justify - the EU must now engage pragmatically and recognise that excluding the UK from these mechanisms benefits neither side.

99. The UK-EU Summit in the summer of 2026 will mark the first review of the UK-EU Trade and Cooperation Agreement,[137] providing an opportunity to strengthen the UK's relationship with the European Union more broadly. It is recommended that we consider participating in the EU's Migration Pact when it comes into force in June 2026. This will enable us to reclaim the advantages we had, alongside our European neighbours, under the Dublin Regulation. We must also collaborate constructively with the European Union on regaining access to Eurodac and SIS II to tackle this shared challenge.

[136] 'EU rejects UK plea to use crime and illegal migration databases', The Times (4 May 2025) <https://www.thetimes.com/uk/politics/article/eu-rejects-uk-plea-to-use-crime-and-illegal-migration-databases-hv5zm9qg5>.
[137] Trade and Cooperation Agreement, Article 776.

5. CONCLUSION

100. Over the past seventy-five years, the European Convention on Human Rights has been at the heart of the protection of fundamental freedoms across Europe. Challenges posed by irregular migration nonetheless require the Convention to adapt if it is to endure. Indeed, it is in the very nature of the Convention as a living instrument that its interpretation must evolve to meet the changing needs of society, whilst remaining steadfast in its mission to safeguard the rights upon which we and our fellow European democracies rely.

101. There is an urgent need for politicians across Europe to respond to growing pressure about the ability of Contracting Parties to control irregular migration. But the claim advanced most prominently in the Wolfson Review, that the Convention imposes substantial limitations on the Government's ability to operate a stringent immigration policy such that withdrawal is, in effect, a gateway condition for reform, does not withstand scrutiny. The notion that the ECHR has played a significant role in undermining the Government's immigration policy has been greatly overstated, and if 'stringent' entails repealing both the liberties we have enjoyed for centuries and the international agreements that the UK helped bring into being, we as Conservatives must offer an alternative, credible path towards a fairer and more efficient immigration system.

102. Withdrawal would also have grave implications for our domestic constitutional settlements, in particular for Northern Ireland under the Belfast/Good Friday Agreement, for our membership of the Council of Europe, and for the UK's relationship with the European Union. A policy to leave the ECHR therefore represents a threadbare solution with serious adverse consequences.

103. The United Kingdom should instead work constructively with our counterparts in the Council of Europe to ensure that the Convention evolves to respond to current challenges, whilst pursuing domestic reforms and prioritising practical co-operation on returns with third countries and the European Union. The meeting of the Committee of Ministers in Chișinău was a key moment in laying the groundwork for these ambitions to be achieved. It is an opportunity which the United Kingdom should now seize, not by retreating from the Convention, but by exercising the leadership that has long defined its role in shaping a rules-based European order.

ABOUT THE AUTHORS

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The Rt. Hon Dominic Grieve KC is a barrister and was the Member of Parliament for Beaconsfield from 1997 to 2019. Dominic was the Shadow Attorney General from 2003-09, Shadow Home Secretary from 2008-09, Shadow Justice Secretary from 2009-10 and Attorney-General from 2010–2014. He is a member of the CEF Executive Committee.

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ABOUT CEF

The Conservative European Forum (CEF) was launched in January 2021 by Rt Hon. Sir David Lidington KCB CBE and Stephen Hammond MP. CEF is committed to strengthening political, economic, social, environmental and security cooperation between the UK and the democracies of Europe. Closer strategic cooperation, to tackle shared challenges, will make all parties safer, more prosperous and more influential on the world stage.

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