

Mandates of the Special Rapporteur on the independence of judges and lawyers; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on trafficking in persons, especially women and children

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17 August 2022

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the independence of judges and lawyers; Working Group on Arbitrary Detention; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of slavery, including its causes and consequences and Special Rapporteur on trafficking in persons, especially women and children, pursuant to Human Rights Council resolutions 44/8, 42/22, 44/5, 50/17, 43/6, 42/10 and 44/4.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning some of the provisions of the draft Bill of Rights that may undermine the enjoyment of human rights in the United Kingdom of Great Britain and Northern Ireland (UK), including, in particular, the rights to fair trial, effective remedy, equality before the courts, equality before the law, and non-discrimination.

In this communication, we do not aim at providing a comprehensive analysis of the current version of the draft Bill of Rights that has been presented before Parliament, which seeks to repeal and replace the Human Rights Act of 1998, and its compatibility with international human rights standards. We focus on those provisions that fall within the scope of the mandates entrusted to us by the Human Rights Council.

According to the information received:

The draft Bill of Rights was published and presented to the House of Commons on 22 June 2022, and seeks to repeal and replace the Human Rights Act of 1998 and re-balance “the relationship between courts in the United Kingdom, the European Court of Human Rights and Parliament” in a concerning manner.¹ In particular, if adopted, the draft Bill would fundamentally change the role and independence of UK courts by establishing a list of considerations and restrictions that UK courts must apply when adjudicating and interpreting the rights established in the European Convention of Human Rights (ECHR) and limiting the power of the UK courts to enforce ECHR rights. For example:

- The draft Bill repeals section 3 of the Human Rights Act of 1998, which stipulates that “primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the

¹ See clause 1.

Convention rights”. It is unclear what will happen to the interpretations that were made under this repealed section if the Bill is passed.

- In lieu of section 3 of the Human Rights Act of 1998, clause 3 introduces a form of “originalism” by introducing the requirement that UK courts “must have particular regard to the text of the Convention right, and in interpreting the text may have regard to the preparatory work of the Convention”.
- Clause 3 also provides that UK courts “may not adopt an interpretation of the right that expands the protection conferred by the right unless the court has no reasonable doubt that the European Court of Human Rights would adopt that interpretation if the case were before it”, while also allowing UK courts to “adopt an interpretation of the right that diverges from Strasbourg jurisprudence”.
- Clause 4 stipulates, subject to certain delineated exceptions, that UK courts “must give great weight to the importance of protecting” the right to freedom of speech when determining a question related to that right, which would hinder the independence and ability of UK courts to undertake appropriate balancing exercises in cases where rights are in conflict (e.g. freedom of expression vs. right to privacy) under already well established methodologies in international and European human rights law and which would undermine the principle that all rights are indivisible and interdependent.
- Clause 5 restrains the ability of UK courts to impose positive human rights obligations onto public authorities by restricting judges from placing ‘new’ positive obligations on public authorities to protect human rights and requiring judges to avoid interpretations that impose established positive obligations in accordance with a series of new and vague conditions.
- As it relates to people deprived of liberty, clause 6 essentially requires courts to narrowly interpret and apply all ECHR rights of individuals in custody except for the right to life, prohibitions of torture and slavery, and the guarantee of no punishment without law, subjecting all other rights of prisoners to the need to give the “greatest possible weight to the importance of reducing the risk to the public from persons who have committed offences in respect of which custodial sentences have been imposed.”
- When adjudicating whether a provision of an Act or the actual or proposed implementation of a provision of an Act by a public authority is incompatible with an ECHR right, clause 7 mandates UK courts to give the “greatest possible weight” to the principle that Parliament properly struck the appropriate balance when passing the Act between different policy aims, different Convention rights, or between the Convention rights of different people. This draft provision, among other things, would hinder the ability of UK courts to conduct necessity and proportionality assessments of conditional rights in accordance

with well-established international human rights law principles and European Court of Human Rights case law.

- In deportation proceedings concerning foreign criminals,² clause 8 prohibits UK courts from determining that primary or secondary legislation relating to the deportation is “incompatible with the right to respect for private and family life” unless the provision requires a public authority to act in respect of the person in question in a manner that “would result in manifest harm to a qualifying member of [the person’s] family that is so extreme that the harm would override the otherwise paramount public interest in removing [the individual] from or requiring [the individual] to leave the United Kingdom”.
- In addition, clause 20 limits power of UK courts to allow appeals against deportation decisions. In particular, a court must dismiss such appeals based on the right to a fair trial unless the removal of the person from the UK “would result in a breach of the right to a fair trial so fundamental as to amount to a nullification of that right”. In cases where the Secretary of State’s decision to issue a deportation order based on deportation assurances, it further stipulates that UK courts must presume the Secretary of State’s assessment of those assurances is correct, consider those assurances to be determinative of the appeal, and the dismiss the appeal.
- Clause 13 introduces a limit not previously contained in corresponding section 7 of the Human Rights Act of 1998, under which victims claiming that public authorities have acted or proposed to act in a manner that would be incompatible with their ECHR rights can only do so in relation to an act (or proposed act) outside the British Islands, and only if said act (or proposed act) is within the jurisdiction of the UK for the purposes of article 1 of the ECHR.
- Regarding proceedings in court for human rights cases, clause 14 excludes the possibility of domestic judicial proceedings based on the ECHR for the conduct of British armed forces in overseas military operations, thereby limiting the normal judicial gatekeeping function of UK courts for such claims and limiting the possibility for victims of human rights violations during such operations to exercise their right to effective remedy in order to obtain judicial remedies against any breaches of such obligations.
- Clause 15 also limits the normal and well-established gatekeeping role and function of UK courts by imposing a new “permission stage” under which individuals must establish that they have suffered or would suffer a “significant disadvantage” before being allowed to bring cases against public authorities for acts or proposed acts that allegedly violate the ECHR before UK courts.

² As per Clause 36, which incorporates by reference [section 32 of the UK Borders Act 2007](#), “foreign criminal” is defined as a person who is not a UK citizen who has been convicted of a criminal offence in the UK and who is either (1) sentenced to at least 12 months of imprisonment or (2) sentenced to any period of imprisonment in relation to an offence specified by order of the Secretary under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal).

- Compared to the corresponding provision in the Human Rights Act of 1998, clause 18 appears to limit the ability of UK courts to award damages for alleged violations of ECHR rights by introducing additional considerations and circumstances that courts must take into account when deciding whether to award damages.
- Clause 24 provides that UK courts may not have regard to interim measures ordered by the European Court of Human Rights when deciding whether to grant any relief that, if granted, might affect the exercise of a right in the ECHR.

By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. Through ratification of international and regional human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. We are concerned that the proposed Bill is going back on the commitments undertaken by the UK when it ratified the European Convention on Human Rights, but also, on those commitments that relate to universal human rights instruments. In particular, we are concerned that if adopted as is, the Bill may be in violation of the rights to a fair trial, effective remedies, and equality before the courts, and it may be placing individuals in certain situations at risk of less human rights protection; and may also constitute a contravention of the Vienna Convention on the Law of Treaties.

Furthermore, we are concerned that it would significantly modify the enforcement of the European Convention on Human Rights in the UK, including the right of individuals in the UK to effective remedy for any violations thereof. We are worried that the draft Bill would therefore have a far-reaching systemic impact on the enjoyment of all ECHR rights in the UK, including, but not limited to, the right to a fair trial (ECHR article 6) and the freedom of peaceful assembly and association (article 11 ECHR).

In this context, we would like to recall article 14 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United Kingdom of Great Britain and Northern Ireland in 1976, as well as the Universal Human Rights Declaration. The right to a fair trial is protected in both instruments mentioned above. Article 10 of the Universal Declaration on Human Rights (UDHR) guarantees everyone the right to a fair and public hearing by an independent and impartial tribunal, while article 14 of the ICCPR stipulates that: “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. In addition, article 8 of the UDHR and article 2 of the ICCPR guarantee to all people the right to effective remedy. Article 7 of the UDHR and article 26 of the ICCPR also guarantee the right to equality before the law and non-discrimination. The European Convention on Human Rights, which was ratified by the UK in 1951, also recognises the rights to a fair trial (article 6), effective remedy (article 13), and non-discrimination (article 14).

The rights to equality before the courts and tribunals, equality before the law, non-discrimination, a fair trial, and effective remedies are key elements of human rights protection and serve as a procedural means to safeguard the rule of law. We would like to take the opportunity to provide some initial reactions to the proposed

provisions below.

Independence of judges

Article 14 of ICCPR enshrines the requirements of independence and impartiality of said tribunal, a body established by law, independent of the executive and legislative, with independence in deciding legal matters in proceedings that are judicial in nature. As affirmed by the Human Rights Committee, the requirement of competence, independence and impartiality of a tribunal is an absolute right, and not subject to any exception (General Comment No. 32, paras. 18 and 19).

The Basic Principles on the Independence of the Judiciary, adopted by the United Nations in 1990, establish that all governmental and other institutions must respect and conform to the independence of the judiciary (Principle 1) and that judges will decide cases impartially, on the basis of the facts and in accordance with the law, “without any restriction and without undue influence, incitement, pressure, threat or interference, direct or indirect, from any sector or for any reason” (Principle 2).

The draft Bill, by listing criteria for the courts and judges to use when interpreting the Convention rights in the UK (clause 3) and by requiring them to give “great weight” to the importance of protecting the freedom of speech in relation to other rights (clause 4), may weaken judicial independence in deciding matters that are judicial in nature. For example, these criteria may be construed as interference in the deliberations of the Court. Similarly, clause 6 requires courts to narrowly interpret and apply all ECHR rights of individuals, with the exception of the right to life, prohibitions of torture and slavery, and the guarantee of no punishment without law. Furthermore, the draft provisions as they stand would limit the discretion of courts and judges to analyse a case and rule in accordance with current law, including international refugee law.

Additionally, the provisions included in clauses 7 (deference to Parliament) and 8 (in relation to deportation proceedings) may also touch upon the independence of the judiciary and the separation of powers by forcing UK courts to assess the compatibility of legislation with ECHR rights in a certain manner, a key task of an independent judiciary in the balance of power in a democracy. Similarly, clause 24 requires UK courts to ignore interim measures ordered by the European Court of Human Rights when deciding whether to grant any relief that, if granted, might affect the exercise of a right in the ECHR.

In 2009 report to the United Nations Human Rights Council, the mandate on Independence of Judges and Lawyers recalled that “[t]he principle of the separation of powers, together with the rule of law, are key to the administration of justice with a guarantee of independence, impartiality and transparency” (A/HRC/11/41, para. 18). Furthermore, in the 2017 report to the Human Rights Council, the Special Rapporteur on that mandate highlighted that “respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy” (A/HRC/35/31, para. 16).

Furthermore, as regards the enjoyment of human rights in the UK, restrictions imposed on the interpretative function and role of the courts may also limit the human rights protection available to individuals in the United Kingdom, as the provisions stipulate that interpretations should not “expand the protection conferred by the right

unless the court has no reasonable doubt that the European Court of Human Rights would adopt that interpretation if the case were before it". If the bill is approved as presented, we are concerned that more legislation in the UK could be approved in breach of Convention rights.

The right to fair trial and effective remedies

Article 14 of ICCPR contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. It entitles everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law (General Comment No. 32, paras. 3 and 4).

Article 2 of ICCPR states that States must ensure that any person whose rights were violated shall have an effective remedy, and that the competent authorities enforce such remedies when granted. Also, States must ensure that any person claiming such a remedy shall have their right thereto determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

In this regard, we take this opportunity to express our concerns regarding the provisions that may represent barriers to individuals wishing to bring their cases to court, such as the "permission stage" included in draft clause 15, the exclusion of domestic judicial proceedings for the conduct of British forces overseas under clause 14, and the limitations on UK courts to hear appeals relating to deportation proceedings in clause 20. Clause 5 is also of concern with regard to the right to effective remedy as it restrains the ability of UK courts to impose positive obligations on public authorities, while clause 18 appears limit the ability of UK courts to award damages for alleged violations of ECHR rights. On the one hand, some of the amendments would run the risk of essentially creating a form of domestic immunity from jurisdiction for certain cases, while, on the other hand, deterring individuals from bringing human rights cases to domestic courts, hindering UK courts from exercising their normal and well-established gatekeeping function, and limiting the power of UK courts to grant effective remedies. These provisions may, in addition, place limitations on the protection that the regional system human rights may provide those living in the UK.

Equality before the court, equal protection under the law, and the right to non-discrimination

Article 14 of ICCPR guarantees the right to equality before courts and tribunals. This guarantee must also be respected whenever domestic law entrusts a judicial body with a judicial task. This right to equality before courts and tribunals, in general terms, guarantees, equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination (General Comment No. 32, paras. 7 and 8).

Article 26 of ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth

or other status. Furthermore, we would like to refer to General Comment No. 31 of the Human Rights Committee on “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, where the Committee emphasizes that the enjoyment of the rights guaranteed by the ICCPR “is not limited to the citizens of State parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party” (CCPR/C/21/Rev.1/Add.13 (2004), para. 10).

The Basic Principles mentioned above also establish that “[n]o undue or unwarranted interference shall be made with the judicial process” (principle 3), and that everyone has the right to be tried by the ordinary courts of justice in accordance with the procedures legally established (principle 5).

In this regard, we would like to express our concern that clauses 6 and 8 may impinge on the right to equality before the court and the right to equal treatment under the law by stipulating provisions that apply only to certain groups, namely persons serving custodial sentences and foreign criminals subject to deportation proceedings. We would like to highlight the very specific and crucial role that courts have in protecting all the rights of those deprived of liberty and the requirement of ensuring the protection of their human rights, as they are under the responsibility of the State while in custody.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned analysis.
2. Please explain how the proposed Bill is compatible with Your Excellency’s Government’s obligations under articles 2, 8, 14, 21, 22 and 26 of the ICCPR and articles 4, 7, 8, 10 and 20 of the UDHR.
3. Please describe the measures taken to ensure that legislation complies with the international human rights obligations undertaken by the UK.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency’s Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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