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Welcome to Landmark Chambers'

'Bill of Rights Bill' webinar series – Session 2

The recording can be accessed here.

Your speakers today are…

Landmark Chambers

Samantha Broadfoot QC (Chair)

Alex Goodman

Topic:
Positive Obligations

Yaaser Vanderman

Topic:
Devolution Issues

Alex Shattock

Topic:
Procedural changed, including interim measures

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Positive Obligations

Alex Goodman

Clause 5(1)

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(1) A court may not adopt a post-commencement interpretation of a Convention right that would require a public authority to comply with a positive obligation.

…

(7) In this section "positive obligation" means an obligation to do any act.

Positive Obligations under the ECHR

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

Articles 2, 3, 4

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Article 2(1):

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

Article 3

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

Article 4(1) and (2)

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

Positive Obligations under articles 2, 3, 4

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- Obligation on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life etc- implies a requirement for an effective judicial system, legal means capable of establishing the facts and providing redress to victims.
- Operational Duty – state must take "appropriate steps" to safeguard lives; prevent torture; prevent forced labour. Case law is express that this must no place an impossible or disproportionate burden on authorities.

  E.g. *VCL v UK [*2021] 73 EHRR 9 (article 4)
- Procedural duty on effective public investigation, see for example:
  - *R* (*Amin) v Secretary of State for the Home Department* [2004] 1 AC 653
  - *R (Middleton) v West Somerset Coroner* [2004] 2 A.C. 182
  - *R (MA and BB) v SSHD* [2019] EWHC 1523 (Admin) (article 3)

Article 6

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

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

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

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

Article 5(2) Express Positive Obligation

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Article 5(2) provides:

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

Saadi

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

Lord Slynn:

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

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

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

Theoretical Impact of Clause 5(1)

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

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

Theoretical Impact of Clause 5(1)

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- Living instrument doctrine curtailed.

Goodwin v UK (2002) 35 EHRR 18

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

Theoretical Impact of Clause 5(1)

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

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

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

Clause 5(2) of the Bill of Rights Bill

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

(a) have an impact on the ability of the public authority or of any other public authority to perform its functions;

(b) conflict with or otherwise undermine the public interest in allowing public authorities to use their own expertise when deciding how to allocate the financial and other resources available to them, including in particular the professional judgment of those involved in operational matters;

(c) require the police to protect individuals who are involved in criminal activity or otherwise undermine the police's ability to determine their operational priorities;

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

(e) affect the operation of primary legislation (including primary legislation relating to supply and appropriation).

5(3)-5(6)

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

(4) The first condition is that—

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

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

(5) The second condition is that—

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

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

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

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

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

Would Clause 5(2) make any difference?

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

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

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

Sweep up on articles 8, 10 , 11, A1P1

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

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Devolution Issues

Yaaser Vanderman

Issues

- Current position
- Future position
- Case study
- Procedure

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Current position

Current position

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1. Legislation "*incompatible with any of the Convention rights*" outside competence of devolved legislatures and so not "law":
   - Scotland Act 1998, s.29(2)(d)
   - Government of Wales Act 2006, s.108A(2)(e)
   - Northern Ireland Act 1998, s.6(2)(c)

- Offending law struck down – e.g. US Supreme Court

Current position

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2. Acts of public bodies which are incompatible with "*Convention rights*" can be challenged as long as a victim:

- Scotland Act 1998, s.100(1)
- Government of Wales Act 2006, s.81(2)
- Northern Ireland Act 1998, s.71(1)

- ""*the Convention rights" has the same meaning as in the Human Rights Act 1998"* – s.126(1) of SA 1998; s.81(6) and 158(1) GWA 2006; ss.71(5) and 98(1) NIA 1998 .

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Future position

Future position

- Clause 37 of Bill of Rights Bill – "*Schedule 5 contains consequential and minor amendments*"

- Schedule 5
  - Amends references in SA 1998, GWA 2006 and NIA 1998 to "*the Human Rights Act 1998*" to "*the Bill of Rights 2022*".

Future position

1. Legislation "*incompatible with any of the Convention rights*" outside competence of devolved legislatures and so not "law":
   - Scotland Act 1998, s.29(2)(d)
   - Government of Wales Act 2006, s.108A(2)(e)
   - Northern Ireland Act 1998, s.6(2)(c)

- BUT "*Convention rights*" now defined as: "'*the Convention rights' has the same meaning as in the Bill of Rights 2022*"

Future position

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2. Acts of public bodies which are incompatible with "*Convention rights*" can be challenged as long as victim:

- Scotland Act 1998, s.100(1)
- Government of Wales Act 2006, s.81(2)
- Northern Ireland Act 1998, s.71(1)

- Again "*Convention rights"* now defined as: "'*the Convention rights' has the same meaning as in the Bill of Rights 2022"*

Outcome

- Subtle change with big effect
- Means devolved authorities will have to comply with Convention-lite

Future position

- NB - Clause 16 – For JRs in S, W and NI challenging an act of a public authority, C has to be a "*victim of the act*".

Belfast Agreement?

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- Strand 1 – "Safeguards" to ensure all sections of community can participate and work together in operation of institutions and all sections of community protected, including – "*the European Convention on Human Rights…which neither the Assembly nor public bodies can infringe*"

- Rights, Safeguards and Equality of Opportunity – "United Kingdom Legislation" – "*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.*"

- *Re Allister* [2022] NICA 15, [244] (huge challenge to NI Protocol)

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Case Study

Case study

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- Abortion Services (Safe Access Zones) Bill
  - Private Members' Bill – Clare Bailey
  - Completed final stage on 24 March 2022
  - Criminalises certain protests outside abortion clinics:

    "5.(2) It is an offence for D to do an act in a safe access zone with the intent of, or reckless as to whether it has the effect of—

    (a) influencing a protected person, whether directly or indirectly,

    ..."
- Referred by AG to Supreme Court
  - Blanket prohibition on pure protest without "*reasonable excuse*" defence breaches Articles 10 and 11 ECHR
  - Therefore, outside competence of NI Assembly

Case study

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- How would this be affected by Bill of Rights 2022?
  - Safe Access Zones Bill outside competence if incompatible with Bill of Rights 2022
  - Clause 7(2) – "*The court must— (a) regard Parliament as having decided, in passing the Act, that the Act strikes an appropriate balance as between the matters mentioned in subsection (1)(b)(i) to (iii), and (b) give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about how such a balance should be struck are properly made by Parliament.*"
  - Sch 1 Interpretation Act 1978 – "*Act means an Act of Parliament*".

Case study

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- Clause 4(1) – "*a court must give great weight to the importance of protecting the right [Article 10 ECHR]"* but exception in clause 4(3)(a) would apply – "*whether a provision of primary or subordinate legislation that creates a criminal offence is incompatible with a Convention right*"

- Clause 10 – "Declaration of Incompatibility"
  - 10(2) applies where "*a provision of subordinate legislation is incompatible with a Convention right, and (ii) does not quash the provision, or declare it invalid, by reason of the incompatibility."*

  10 (2) says: "*The court may make a declaration that the provision is incompatible with the Convention right."*

Case study

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- Clause 23(2) – In considering whether to grant any relief which might affect the exercise by a religious organisation of Article 9 ECHR rights, "*The court must have particular regard to the importance of the right.*"

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Procedure

Procedure

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- Westminster has power to legislate for S, W, NI.
- But Sewell Convention
  - Contained in Memorandum of Understanding
  - the UK parliament "w*ill not normally legislate with regard to devolved matters without the consent*" of the devolved legislatures.
- Will refusal stop UK Govt?
- Other pushback?

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Procedural changed, including interim measures

Alex Shattock

This talk

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- ~~Procedural changes, including~~ **interim measures**
- Talks on other procedural changes available here: https://www.youtube.com/channel/UCy-sje-ySXHVChW2NE-Balg
- We will cover:
  - What the Bill Bill says about interim measures
  - When interim measures are used
  - The legal basis for interim measures
  - Consequences of the Bill Bill's approach

The new changes in full

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24 Interim measures of the European Court of Human Rights

(1) For the purposes of determining the rights and obligations under domestic law of a public authority or any other person, no account is to be taken of any interim measure issued by the European Court of Human Rights.

(2) Subsection (3) applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of a Convention right.

(3) The court may not have regard to any interim measure issued by the European Court of Human Rights.

What are interim measures?

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- Most international courts can impose interim measures: see e.g. the *LaGrand* case in the International Court of Justice (Germany v. United States of America) (2001)
- The ECHR does not specifically mention interim measures: they are found in Rule 39 of the Rules of Court

What are interim measures?

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Rule 39[2] – Interim measures

1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.

2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.

3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.

4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.

When are interim measures applied by the ECtHR?

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- Applied only where there is an imminent risk of irreparable damage: *Mamatkulov and Askarov v. Turkey* [GC]
- Not applied where e.g:
  - Imminent damage to property
  - Imminent insolvency
  - Imminent enforcement of a military service obligation
  - Applicant in prison
  - A political party is about to be dissolved
  - A constitutional amendment is about to take effect

When are interim measures applied by the ECtHR?

Landmark Chambers

- Applied only where there is an imminent risk of irreparable damage: *Mamatkulov and Askarov v. Turkey* [GC]
- Applied where e.g:
  - There is a threat to life (Article 2)
  - There is a risk of ill treatment/ torture (Article 3)

- Basically there has to be a risk of something pretty appalling happening before the Court will even think about interim measures!

The legal basis for interim measures

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- Where does the power to issue interim measures come from?
  - Nothing in the Convention that precludes them
  - Pretty standard stuff for Courts to do this
  - The rights in the Convention would be meaningless if right holders could be tortured or killed before exercising them

- Why are they binding under international law?
  - ECHR Article 1 and 34

The legal basis for interim measures: binding nature

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ARTICLE 1

Obligation to respect Human Rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

The legal basis for interim measures: binding nature

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ARTICLE 34

Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

The legal basis for interim measures: binding nature

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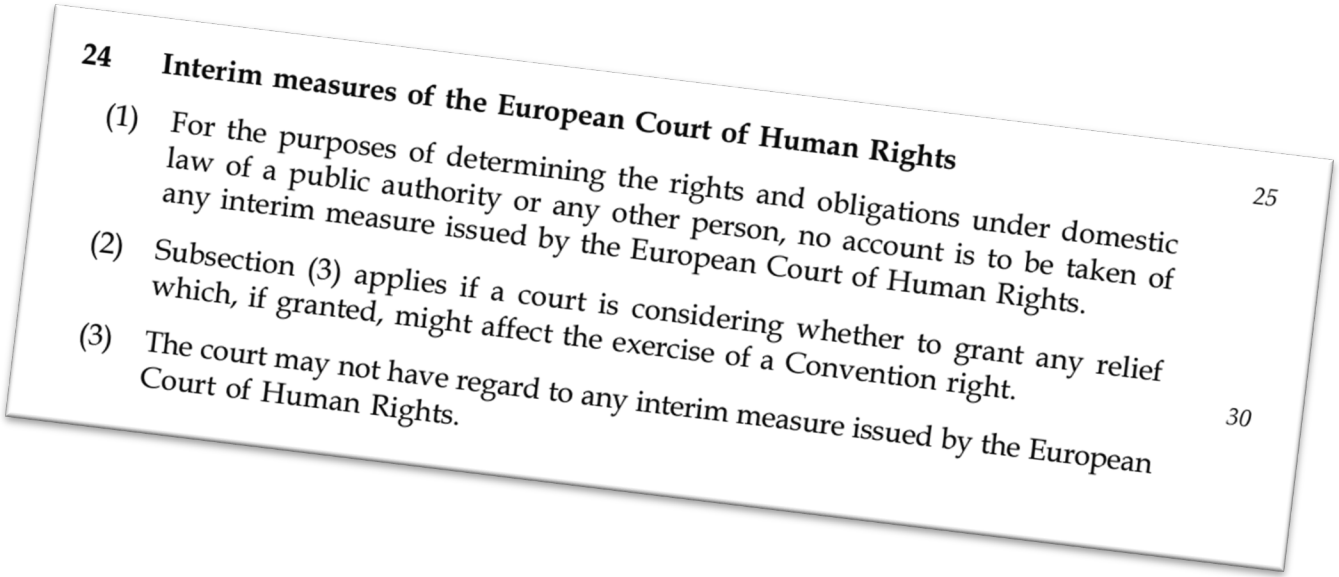
- *Mamatkulov and Askarov v. Turkey,* 4 February 2005 (Grand Chamber – judgment)
  - a failure by a State which had ratified the Convention to comply with interim measures would undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms in the Convention.
  - by virtue of Article 34, States which had ratified the Convention undertook to refrain from any act or omission that might hinder the effective exercise of an individual applicant's right of application. A failure to comply with interim measures had to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34.
- See also *Paladi v. the Republic of Moldova,* 10 March 2009 (Grand Chamber – judgment)

The legal basis for interim measures: binding nature



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(3) The court may not have regard to any interim measure issued by the European Court of Human Rights.

- It follows that this provision of the Bill is a direct instruction to judges to ignore the binding judgments of an international court
- Given the very limited circumstances in which interim measures are indicated by the Strasbourg Court, such an instruction will undoubtedly put lives at risk
- It is also a direct instruction to breach international law

Why the issue with interim measures?

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- Not in the original consultation on the Bill
- No previous indication the government disliked them
- This clause appears to have been added to the Bill in late June 2022

Final thought: interim measures in action

EUROPEAN COURT OF HUMAN RIGHTS
OUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
issued by the Registrar of the Court

ECHR 222 (2022)
30.06.2022

European Court grants urgent measures in cases lodged by two British prisoners of war sentenced to death in the so-called "Donetsk People's Republic"

The European Court of Human Rights has decided to grant interim measures in the cases of **Pinner v. Russia and Ukraine** and **Aslin v. Russia and Ukraine** (application nos. 31217/22 and 31233/22) concerning two British nationals who are members of the Armed Forces of Ukraine who surrendered to the Russian forces during recent hostilities and have since been sentenced to death in the so-called "Donetsk People's Republic" ("the DPR").

- Other states will be paying close attention to our arguments regarding human rights and international law

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Thank you for listening

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