

# **Clause 54 of the Illegal Migration Bill: A Rule of Law Analysis for House of Lords Report Stage**

**Monday 3 July 2023**



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## About the Rule of Law Monitoring of Legislation Project

This Report is part of the Bingham Centre's Rule of Law Monitoring of Legislation Project. Rule of Law Monitoring of Legislation Reports subject provisions in Government Bills which have significant Rule of Law implications to robust independent scrutiny. They aim to explain relevant legal concepts and terms and describe the effect of provisions with significant implications for the Rule of Law. They test the Government's assertions about why the relevant provisions are necessary against the evidence base. They also examine the legal compatibility of the relevant provisions with the European Convention on Human Rights, the UK's other international legal obligations, and internationally recognised Rule of Law standards. They seek to explain these evidential and legal issues as accessibly as possible for a non-legal audience. The goal is to provide independent, high quality expert analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation.

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# Executive Summary

This Report summarises the Bingham Centre's Rule of Law analysis of the Government's proposal in **clause 54 of the Illegal Migration Bill** that Parliament authorise Ministers to choose not to comply with "interim measures" of the European Court of Human Rights. The purpose of the Report is to inform consideration of clause 54 by the House of Lords on the second day of the Bill's Report stage, on Monday 3 July. The House will be considering an amendment to delete the clause.

The Report sets out exactly what is proposed in clause 54 and explains its effect. It summarises the Government's explanations of why the provision is necessary and the arguments made by Professor Richard Ekins in Policy Exchange's publication *Rule 39 and the Rule of Law* which the Government invokes in support of clause 54. It considers the Government's explanations of why the clause is compatible with the ECHR. It distinguishes between arguments about the *process* by which interim measures are made and arguments that the European Court of Human Rights does not have *jurisdiction* to make binding interim orders. Clause 54 is not purely about the Rule 39 process; it also accepts the Policy Exchange argument that the Court's interim measures can be ignored because they are made without jurisdiction.

The Report goes on to evaluate the Rule of Law arguments for and against clause 54. It considers the process by which interim measures are indicated, and concludes that there are a number of improvements that could be made to that process. These are legitimate matters for the UK to pursue through the usual intergovernmental processes in the Council of Europe, but they do not affect the Court's jurisdiction to indicate binding interim measures and therefore cannot justify giving ministers a power not to comply with such measures.

However, the Report also concludes that, contrary to the central argument made in the Policy Exchange paper, interim measures of the European Court of Human Rights *are* binding in international law and the Court *does* have jurisdiction to indicate such binding interim measures. Policy Exchange's jurisdictional analysis overlooks the significance of a central provision in the Convention. As the Venice Commission recently had to remind Russia, when States signed up to the ECHR they expressly accepted, in Article 32, two significant propositions about the jurisdiction of the Court. First, that the jurisdiction of the Court extends to all matters concerning the "interpretation" as well as the application of the Convention. And second, "**in the event of dispute as to whether the Court has jurisdiction, the Court shall decide.**" The States' express agreement to that unequivocal provision in the text of the Convention is the principal answer to the jurisdictional argument made by Policy Exchange and others seeking to defend clause 54 as a Rule of Law-promoting measure. Taken together with Articles 1, 19 and 34 of the Convention, there is a clear legal basis in the Convention for interim measures being legally binding.

In any event, far from being the sudden power grab by the Court depicted by Professor Ekins, subverting the original intent of the drafters, the consistent and widespread acceptance by Council of Europe Member States of the binding nature of interim measures has been the result of the steady evolution of the Court over time. This evolution has happened with the Member States' clear agreement, into an international court of the stature requiring recognition of the inherent jurisdiction which follows from the nature of the judicial function conferred on it by the parties to the Convention. That normative evolution is reflected in consistent State practice across the Council of Europe's 46 member states, not merely by complying in practice but also in frequent intergovernmental statements demonstrating acceptance of the legal basis for binding interim measures and underlining the importance of treating interim measure as binding.

The UK Government has itself long accepted that interim measures are binding, not only by acquiescing in this exercise of the Court's jurisdiction (by routinely treating the measures as binding and complying with them), but by proactively promoting their binding force in those intergovernmental statements and advocating that other States, such as Russia, treat them as binding and comply with them.

In the light of such consistent and well-established State practice accepting that there is a legal basis for binding interim measures, including the UK's own State practice, the Report concludes that for the UK Government now suddenly to assert that the Court has no jurisdiction to make binding interim measures would be contrary to the Rule of Law in a number of respects. It would go against the UK's express agreement in Article 32 of the Convention that the Court has jurisdiction to interpret the Convention and to decide disputes about whether it has jurisdiction. It will inevitably lead to breaches



by the UK of its obligation not to hinder the right of individuals to seek legal remedies for violations of their human rights in Article 34. It will undermine legal certainty and go against the legitimate expectations that arise from consistent State practice.

The Report goes on to point out the degree of international concern being caused by clause 54, in particular in the Council of Europe because it will undermine the authority of the Court of Human Rights and encourage other States to refuse to comply with interim measures. It also calls into question the UK Government's recent reaffirmation of its "deep and abiding commitment" to both the European Convention and the European Court of Human Rights in the Reykjavik Declaration.

**Parliament therefore should not agree to give the Government the power to disregard interim measures if a Minister chooses not to comply, because that would be to authorise breaches of international law by the Government, which the House of Lords has previously refused to do in relation to other Bills such as the UK Internal Market Bill.**

**Clause 54 should therefore be removed from the Bill by the House of Lords, just as it removed an equivalent provision from the UK Internal Market Bill.**

The Explainer in the Appendix to this Report explains in more detail what "interim measures" are and why binding interim measures are an essential part of any effective system of human rights protection, including international systems such as the European Convention on Human Rights.

# Background

## A new discretion not to comply with interim measures

Clause 54 of the Illegal Migration Bill would make compliance with interim measures of the European Court of Human Rights a matter of ministerial discretion.

It provides that where the European Court of Human Rights indicates an interim measure in proceedings relating to the intended removal of a person from the UK under the Illegal Migration Act, the minister *may* determine that the duty to make arrangements for removal<sup>1</sup> does not apply in relation to the person, but *need not* so determine.<sup>2</sup>

In other words, if, after the passage of the Bill, the European Court of Human Rights indicated interim measures preventing removal of a person from the UK pending the determination of their claim that their removal would breach their Convention rights (as the Court did in relation to individuals who were due to be removed to Rwanda under the Rwanda policy), it would be up to the Minister to decide whether or not to comply with the Court's interim measures by disapplying the statutory duty to make arrangements for removal. **Compliance with the interim measures would be a matter of ministerial choice, not obligation.**

The clause goes on to provide that, in considering whether or not to comply with the interim measures, the Minister “may have regard to any matter that the Minister considers relevant”,<sup>3</sup> including in particular the *procedure* surrounding the indication of the interim measures.<sup>4</sup>

Features of the procedure which are expressly made relevant to the exercise of the minister's discretion whether or not to comply include:<sup>5</sup>

- Whether the Government had an opportunity to present observations and information to the Court of Human Rights before the interim measures were indicated;
- The form of the decision
- Whether the Court will take account of any representations by the Government seeking reconsideration, without undue delay, of the decision to indicate the interim measures; and
- The likely duration of the interim measures and the timing of any substantive determination by the Court.

These are the procedural deficiencies which the Government has identified in the Rule 39 process following the grant of interim measures in the Rwanda case, and which it is seeking to persuade the Court to remedy in bilateral discussions with the Court.

In other words, the Minister can choose not to comply with interim measures if they consider the process surrounding the indication of the interim measures (both preceding and following the indication of the measures) to be deficient.

The discretion not to comply is much wider, however, than a discretion not to comply because the Minister considers the procedure to have been unfair. It is an unlimited discretion, because the Minister “may have regard to any matter the Minister considers relevant.”

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<sup>1</sup> Under clause 2(1) of the Bill.

<sup>2</sup> Clause 54(2).

<sup>3</sup> Clause 54(4).

<sup>4</sup> Clause 54(5).

<sup>5</sup> Clause 54(5)(a)-(d).

Clause 54 also spells out the consequences of an exercise of ministerial discretion not to comply with the interim measures: relevant decision-makers with functions under the Act, including immigration officers, the Secretary of State, the Upper Tribunal, or any court or tribunal considering an appeal or application relating to a removal decision “may not have regard ... to the interim measure.”<sup>6</sup> In other words, if the Minister chooses not to comply with the interim measures, they are to be disregarded by all decision-makers under the Act, including courts and tribunals. The interim measures are, in short, deprived of having any legal effect.

## The Government’s explanations of the need for and effect of clause 54

Clause 54 was introduced by the Government at the Bill’s Report stage in the Commons.

The Bill as introduced contained a placeholder provision on interim measures, and following concerns expressed in Committee of the Whole House by Sir William Cash MP, Danny Kruger MP and John Gray MP, the Government brought forward what is now clause 54 at Report stage in the Commons to meet those concerns.

Introducing the new clause, the minister, Robert Jenrick MP, said that the Court was conducting a review of the Rule 39 process and that the former Deputy Prime Minister and Lord Chancellor Dominic Raab and the Attorney General have had constructive discussions about reform of the process, but “we can and should do more.”

Pressed by the Acting Chair of the Joint Committee on Human Rights, Joanna Cherry MP, and David Simmonds MP on whether the clause effectively introduces a presumption that the UK will breach international law by not complying with interim measures, and by former Attorney General Geoffrey Cox MP on whether the clause is in effect asking Parliament “to give legislative sanction to at least the possibility that a Minister of the Crown will deliberately disobey this country’s international law obligations”, the Minister denied that the new clause is incompatible with the ECHR or with international law.

He claimed, in effect, that Rule 39 indications of interim measures are not always binding in international law. He stressed that the clause does not mandate the Minister to ignore Rule 39 interim measures, but makes clear that there is a ministerial discretion to do so and that

“this ministerial discretion will be exercised judiciously and in accordance with our treaty obligations. We take international law and our treaty obligations extremely seriously.”<sup>7</sup>

In other words, the Government’s position appears to be that interim measures of the European Court under Rule 39 are *sometimes but not always* binding on the UK as a matter of international law, and that a ministerial discretion to choose not to comply is therefore not on its face incompatible with the Convention. That proposition is analysed in detail below as a matter of ECHR law.

Lord Murray’s explanation of the clause in Committee stage in the House of Lords was that the inclusion of the clause “reflects the concerns we have raised with the Strasbourg Court about its interim measures process.” However, he also referred “for broader context” to the “recent and well substantiated paper by Professor Ekins of Policy Exchange” which was referred to at greater length by Lords Sandhurst and Wolfson. The Government is therefore explicitly invoking the Policy Exchange report in support of clause 54.

This is also apparent in the equivocal answer given by Justice Minister Lord Bellamy to a question from Lord Anderson in the House of Lords on 6 June:<sup>8</sup>

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<sup>6</sup> Clause 54(6) and (7).

<sup>7</sup> HC Deb 26 April 2023 col 840.

<sup>8</sup> HL Deb Vol 830, 6 June 2023 *European Court of Human Rights: Rule 39*.

Lord Anderson: "... does the Minister agree that interpretation of a treaty is informed not just by the court that is set up to adjudicate on it, but by state practice? The member Governments of the Councils of Europe, including our own, have repeatedly confirmed the binding nature of interim measures under Rule 39 – in the Committee of Ministers, and in the Izmir and Brighton Declarations. Is the Minister proud of the United Kingdom's record of compliance with interim measures?"

Lord Bellamy: "On the general point about acceptance in practice of the position of interim measures under the convention, there are two legal views."

## Policy Exchange's arguments about interim measures

In its Report *Rule 39 and the Rule of Law*, by Professor Richard Ekins, Policy Exchange argues that the widely held view that interim measures from the European Court of Human Rights are binding in international law, and that disregarding them would therefore be contrary to the Rule of Law, is mistaken. Professor Ekins and Policy Exchange argue that the European Court of Human Rights has no jurisdiction to grant binding interim relief because there is no express treaty basis for such a power, and that States can therefore simply disregard such interim measures. The argument goes further and claims that this position has the true claim to the Rule of Law mantle: by refusing to accept the Court's assertions that it has such jurisdiction, "the UK would be vindicating the Rule of Law, not flouting it."<sup>9</sup>

Policy Exchange makes a number of arguments in support of its central claim that the Court lacks jurisdiction to grant binding interim relief. There is no express power to grant binding interim relief in the text of the ECHR itself. The only provision in the Convention about binding judgments is in relation to final judgments of the Court, which States undertake to abide by under Article 46. Moreover, the absence of an express power from the treaty, according to Professor Ekins, is no coincidence: the drafting history, he argues, reveals a decision by the drafters not to include such a power to make binding interim measures. The power to indicate interim measures is contained in a Rule of Court, Rule 39, made by the Court itself, and their binding nature is also the result of a decision by the Court that a failure to comply with interim measures is a breach of the right of individual petition in Article 34, in which States undertake not to hinder in any way the effective exercise of the right. In these circumstances, Policy Exchange argues, States are entitled to ignore interim measures of the European Court of Human Rights because the Court does not have jurisdiction to make them binding.

## Process or jurisdiction?

Some ministerial statements in response to questions about the Government's position in relation to interim measures have focused primarily on the Government's concern about the process. Lord Bellamy, for example, in response to a question from Baroness Chakrabarti on 6 June, said that the Government recognise that interim measures can be an important mechanism for securing individuals' Convention rights in exceptional circumstances, but "want the interim measures process to achieve a better balance between transparency, fairness and the fair administration of justice." Other ministerial statements suggest that this is the real focus of the Government's efforts on interim measures.

Clause 54, however, goes well beyond the Government's professed focus on process. The process surrounding the grant of particular interim measures is one set of considerations to which the Minister may have regard when deciding whether or not to comply with interim measures. But the Minister can have regard to any matter they consider relevant when exercising the new discretion whether or not to comply.

By giving ministers an express power to choose not to comply with interim measures, at the same time as claiming that the UK takes its international treaty obligations seriously, clause 54 presupposes that interim measures are not always binding in international law, and therefore implicitly relies on

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<sup>9</sup> *Rule 39 and the Rule of Law*, p. 9.



the Policy Exchange jurisdictional argument that interim measures are not legally binding – whether or not to comply with them is a matter of ministerial discretion.

That is the central proposition that needs careful analysis: are interim measures always binding, or can ministers sometimes choose not to comply with them?

The remainder of this Report analyses that proposition as a matter of international law and from the perspective of the minister's professed commitment to the Rule of Law.

# Analysis

## The process for indicating interim measures

There is clearly scope to improve the process for the determination of applications for interim measures from the European Court of Human Rights under Rule 39.

There is no reason in principle, for example, why the **identity of the judge** who indicates interim measures should not be made public. This would be a beneficial improvement in the interests of transparency.

It is also undesirable that the **reasons** for the interim measures are only set out in a Press Release from the Court's press office, rather than a reasoned judgment of the Court. Requiring interim measures to be indicated in a reasoned judgment of the Court would also be a beneficial improvement to the Rule 39 process.

There may also be scope for greater clarity about the extent to which the Court will **seek information from the Government** before indicating interim measures, and, in cases where the urgency of the risk of irreparable harm made that impossible, whether the Court will provide an opportunity for the Government to **request a reconsideration** of interim measures after they have been indicated. Under current practice, information is sought from the Government in advance where time permits, and the Court will consider representations from the Government after interim measures have been granted, which sometimes lead to the measures being modified or lifted, but there is likely to be scope to clarify procedures and expectations in relation to the process both before and after Rule 39 interim measures are granted.

It is worth recalling, however, that the context in which Rule 39 interim measures are sought is always one of urgency, and that the degree of urgency is often the responsibility of the Government. The urgency which necessitated the *ex parte* procedure in the case of the Rwanda flight, for example, was created by the UK Government, by setting a time and date for the departure of the flight to Rwanda without regard to the possibility of the applicants seeking interim measures from the European Court of Human Rights. If the UK Government wishes to be heard by the Strasbourg Court at an *inter partes* hearing about interim relief, it should be prepared to give an undertaking not to deport when domestic interim remedies have been exhausted, pending such an application for interim measures being heard by the European Court of Human Rights.

It is also important to point out that the Court does permit Governments to make representations about interim measures after they have been indicated. Indeed, it did so in relation to the interim measures concerning the Rwanda flight. The UK Government submitted written representations to the Court. The Court considered those representations but decided to maintain the interim measures in place. There might be scope to formalise this opportunity for Governments to make representations after interim measures have been indicated *ex parte*, but it is worth pointing out that the opportunity already exists and was availed of, unsuccessfully, by the UK in the case of the Rwanda flight.

It is entirely appropriate for the UK to raise its concerns about deficiencies in the Rule 39 procedure with other Council of Europe member states, and for them to pursue them through the usual intergovernmental processes of the Council of Europe. The Court keeps its own processes and procedures under constant review, and the UK is very familiar with the processes by which it can feed into that ongoing review.

However, concerns about the Rule 39 process, no matter how well founded they might be in some respects, do not go to the Court's jurisdiction to indicate interim measures which are binding on Member States in international law. Whether or not there is a legal basis for the Court's jurisdiction to indicate such binding interim measures depends on other considerations. If such a legal basis exists, deficiencies in the process do not affect the Court's jurisdiction and do not entitle States to choose to ignore interim measures. It is therefore wrong for clause 54 to provide a discretion to ministers to

choose to ignore interim measures on the basis that the process surrounding the indication of the measures was flawed. Such a power could only be justified if it were the case that interim measures are either never binding in international law or are sometimes binding and sometimes not. This report now turns to consider that question.

## The Court's jurisdiction to indicate binding interim measures

### Convention basis

Policy Exchange argue that there is no legal basis for the Court's jurisdiction to indicate binding interim measures because there is no express power to do so in the text of the Convention.

The Convention basis for the jurisdiction to indicate binding interim measures is succinctly explained by the Joint Committee on Human Rights in its recent Report on the Bill.<sup>10</sup> As also explained in more detail in the Explainer in the Appendix to this Report, failure to comply with interim measures indicated under Rule 39 of the Rules of Court has been held by the Grand Chamber of the Court to be a breach of the right of individual application in Article 34 of the Convention. Binding interim measures are a necessary and inherent part of any adjudicative process, an integral part of an international court created by States to ensure the observance by them of their obligations under the Convention. A failure by a State to comply with interim measures would undermine the effectiveness of the right of individual application guaranteed under Article 34 and the State's undertaking in Article 1 to protect Convention rights. It amounts to a breach of the State's undertaking in the second sentence of Article 34 "not to hinder in any way the effective exercise of this right."

During the Bill's Committee stage in the Lords, Lord Wolfson, who advocates the Policy Exchange position that the Court lacks jurisdiction, disagreed with this part of the JCHR's Report, which he considered to be circular reasoning:<sup>11</sup>

"Because the Strasbourg court has held ... that it would be a violation of Article 34, it is therefore a binding obligation. With the greatest respect to the Committee ... that is .. an ipse dixit. ... you simply cannot justify the jurisdiction by saying that the court itself says that it has jurisdiction. That is an entirely circular argument."

This reflects the central argument in Professor Ekins's paper that the Court cannot enlarge its jurisdiction by its own bootstraps. Lord Wolfson's and Policy Exchange's jurisdictional analysis, however, overlooks the significance of a central provision in the Convention.

The Court was established by the State Parties under Article 19 ECHR "to ensure observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto." Article 32(1) provides that the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and its Protocols. Article 32(2) provides that "in the event of dispute as to whether the Court has jurisdiction, the Court shall decide."

The Court's jurisdiction therefore expressly covers "all matters concerning the interpretation and application of the Convention and the Protocols thereto". As the Venice Commission has recently pointed out in an Opinion concerning the Russian Federation, "upon becoming a party to the Convention, the State Parties expressly accepted the competence of the ECHR to interpret, and not only apply, the Convention."<sup>12</sup>

The importance of Article 32 to the whole ECHR system was recently emphasised in the strongest terms by the Court in a case against Russia:<sup>13</sup>

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<sup>10</sup> *Legislative Scrutiny: Illegal Migration Bill*, Twelfth Report of Session 2022-23, paras 129-133.

<sup>11</sup> HL Deb 12 June 2023 col.s 1794-1795.

<sup>12</sup> CDL-AD(2016)005, *Interim Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation* (15 March 2016), para. 45; and CDL-AD(2020)009, *Opinion on the draft amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights* (18 June 2020), para. 55.

<sup>13</sup> *Pivkina and Others v Russia*, No. 2134/23 (6 June 2023) at para. 45.

“The Court’s ability to determine its own jurisdiction is essential to the Convention’s protection system. By acceding to the Convention, the High Contracting Parties have undertaken to comply not just with its substantive provisions but also with its procedural provisions, including Article 32, which gives the Court exclusive authority over disputes regarding its jurisdiction. The Court’s jurisdiction cannot therefore be contingent upon events extraneous to its own operation, such as domestic legislation that seeks to affect or limit its jurisdiction in pending cases. Accordingly, Russia’s domestic legislation ... cannot change or diminish the scope of the Court’s jurisdiction.”

**When States signed up to the ECHR they also expressly accepted that “in the event of dispute as to whether the Court has jurisdiction, the Court shall decide.”** The States’ express agreement to that unequivocal provision in the text of the Convention is the principal answer to the jurisdictional argument made by Policy Exchange and others seeking to defend clause 54 as a Rule of Law promoting measure. Together with the obligation the States have assumed in Article 1 ECHR to secure the Convention rights to everyone within their jurisdiction, the Court’s role under Article 19 ECHR to ensure the observance by States of that basic obligation, and the States’ undertaking in Article 34 not to hinder in any way the effective exercise of the right of individual petition, Article 32 is part of the legal basis for binding interim measures which Policy Exchange argues does not exist.

States are therefore under **a clear legal obligation under the Convention to comply with interim measures, the legal basis for which is a combination of Articles 1, 19, 32 and 34 of the Convention.**

### State Practice

In addition to this clear legal basis in the Convention for binding interim measures, there is also consistent and widespread State practice over nearly two decades demonstrating that Council of Europe States accept the Court’s explanation of the legal basis for its jurisdiction to indicate such binding measures.

### Intergovernmental resolutions and declarations

Lord Wolfson, speaking in Committee, acknowledged the force of the argument that state practice reflects the widespread view of states that interim measures are legally binding, but sought to diminish its force by arguing that mere acquiescence by states is not enough:

“... the mere fact that states abide by Rule 39 indications will not, I suggest, be enough for state practice as a matter of international law. The fact that a court tells me to do X and I do it does not show that I accept that the court has jurisdiction to tell me to do it. I might choose to do it because I do not want to pick a fight with the court. One has to find a more detailed and forthright statement that is sufficiently unambiguous, and then look at that coupled with everything else.”

State practice, however, has gone well beyond mere acquiescence, and generated precisely the sort of more detailed, forthright and unambiguous statements of the kind Lord Wolfson would expect. The 2010 Resolution of the Committee of Ministers on member states’ duty to respect and protect the right of individual application to the European Court of Human Rights, the intergovernmental Izmir Declaration in 2011 and Brussels Declaration in 2015 all expressly acknowledge that interim measures are legally binding and go further by calling on States to comply with interim measures. Professor Ekins’s Policy Exchange paper fairly acknowledges the extent of subsequent State practice, but seeks to avoid the devastating implications for his jurisdictional argument by arguing that “subsequent practice ... cannot change the treaty itself.”

But nobody is arguing that State practice is capable of being the sole legal basis for the Court’s jurisdiction to indicate binding interim measures. Its relevance is wholly interpretive. Article 31 of the Vienna Convention on the Law of Treaties sets out the “General rule of interpretation” of treaties, and states that, *in the interpretation of a treaty*, there shall be taken into account, together with the context, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”<sup>14</sup> The State practice so powerfully and consistently demonstrated in the numerous intergovernmental statements since 2005 is to be considered

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<sup>14</sup> Vienna Convention on the Law of Treaties (1969), Article 31(3)(b).

alongside the provisions in the Convention which provide the legal basis for binding interim measures (Articles 1, 19, 32 and 34), to inform their proper interpretation. Such powerful evidence of subsequent State practice reinforces the Court's interpretation of Article 34 as requiring States to comply with interim measures indicated by the Court.

In short, far from being the sudden power grab by the Court depicted by Professor Ekins, subverting the original intent of the drafters, the consistent and widespread acceptance by Council of Europe Member States of the binding nature of interim measures has been the result of the steady evolution of the Court over time, and with the Member States' clear agreement, into an international court of the stature requiring recognition of the inherent jurisdiction which follows from the nature of the judicial function conferred on it by the parties to the Convention. That normative evolution is reflected in consistent State practice across the Council of Europe's 46 member states, not merely by complying in practice but also in frequent intergovernmental statements underlining the importance of treating interim measures as binding.

### **Significance of discussions about a possible amendment to the Convention**

The Policy Exchange paper seeks to attribute interpretive significance to an intergovernmental process that took place in 2012-13 in the Council of Europe's Steering Committee on Human Rights ("CDDH"), considering whether or not to amend the Convention to include an express power to make interim measures. It is suggested that the fact that no treaty change eventuated from that process is important, because it indicates a conscious decision by the States not to empower the Court to grant binding interim relief. However, the full context of that process is important to appreciate.

The question considered by CDDH during that process was whether certain matters not found in the Convention (including interim measures) "may be suitable for 'upgrading' (enhancement of their normative status) to a Statute or the Convention. CDDH concluded that interim measures under Rule 39 should have their normative status enhanced by "upgrading" either into the Convention or, preferably, a Statute. The report of the detailed discussion of the matter records:<sup>15</sup>

"The great majority agreed that the Statute should contain the essential principle underpinning the Court's competence to indicate interim measures and States' obligation to abide by them and that all aspects of the issue should be addressed in a single, separate article, for clarity and visibility. Such an article should be placed in proximity to a provision on individual applications."

It seems clear from this record of the discussion that CDDH's starting point was that the Court already has competence to indicate interim measures and States are under an obligation to abide by them. What was being discussed was not whether the Convention needed to be amended in order to confer on the Court jurisdiction to make binding interim measures, but whether the normative status of such interim measures would be enhanced by expressly referring to that competence and their binding nature of such measures in either a Statute of the Court or the Convention itself.

The discussion, in other words, was similar in nature to the discussion which culminated in the amendment of the Convention to include express reference in the Preamble of the Convention to the principle of subsidiarity, referred to in the Policy Exchange paper. That principle, while not mentioned expressly in the Convention, was already well established in the case-law of the Court, and the UK initiated and drove a process to amend the Convention to include it in the text of the Convention. This was similarly to enhance its normative status, not to fill a gap in the Convention. No-one would suggest that until the amendment to the Preamble came into force, the principle of subsidiarity was not already an important part of the Convention system.

The significance attributed by Professor Ekins to the discussion about a possible amendment of the Convention to include an express reference to interim measures is therefore misplaced. The detailed discussions in fact provide further evidence of State practice accepting the Court's interpretation of Article 34 of the Convention as the legal basis for binding interim measures.

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<sup>15</sup> [CDDH Final Report on a simplified procedure for amendment of certain provisions of the Convention](#) (22 June 2012)



## UK State Practice

The UK Government has itself long accepted that interim measures are binding, not only by acquiescing in this exercise of the Court's jurisdiction (by routinely treating the measures as binding and complying with them), but by proactively promoting their binding force in the intergovernmental statements referred to above, and advocating that other States, such as Russia, treat them as binding and comply with them. This much is accepted by the Policy Exchange paper:<sup>16</sup>

"The UK has not objected to the Strasbourg Court's practice since 2005, has largely complied with Rule 39 interim measures, and has called on other states to comply with such measures."

Home Office Minister Robert Jenrick told the House of Commons at the Bill's Report Stage that

"there are circumstances in which Ministers have chosen not to apply them [Rule 39 indications] – a small number of circumstances but a number."

In fact, the UK has *always* complied with interim measures indicated under the ECHR, going back as far as the 1950s when the Court's predecessor, the Commission of Human Rights, first requested stays of execution. The Bingham Centre is aware of only one case in which the UK has failed to comply with interim measures, *Al-Saadoon & Mufdhi v UK*, in which the UK said that complying with the Court's indication not to transfer two Iraqi nationals to Iraqi custody was an "impossibility" because it was beyond the Government's power and control to comply. As the Court noted in its judgment:

"The Government were proud of their long history of co-operation with the Court and their compliance with previous Rule 39 indications. They had failed to comply with the indication in this case only because there was an objective impediment preventing compliance."<sup>17</sup>

As well as actively participating in all the various intergovernmental statements referred to above, the UK has also called on other States to comply with interim measures. In 2021, the Court granted interim measures against Russia requiring that opposition leader Alexei Navalny be immediately released from prison due to the risk to his life and health. Russia's response was to challenge the jurisdiction of the Court to indicate binding interim measures. In a press release from Tass, the Russian news agency, Russia said it would not be able to release Navalny under the interim measures:<sup>18</sup>

"because this would be a flagrant intervention in the operation of a judicial system of a sovereign state.

"The Ministry explained that, in accordance with the principle of subsidiarity, the ECHR cannot replace national court, cancel or change its rulings, adding that all member states of the Council of Europe recognize this.

"Second, interim measures are not mentioned in the Convention on Human Rights; they are rather being implemented under the good will of member states. Its implementation is not supervised by the Ministerial Council of the Council of Europe, unlike the 'routine' ECHR rulings," the Ministry added.

The UK publicly called for Russia to comply with the Court's interim measures, in a speech by Ambassador Neil Bush:<sup>19</sup>

"The UK is deeply concerned by reports of Mr Alexey Navalny's deteriorating health, and **repeat our call for his immediate and unconditional release in line with the interim measure indicated by the European Court of Human Rights under Rule 39 of the Rule of the Court** on 16 February this year. This determined that the measures put in place by the

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<sup>16</sup> *Rule 39 and the Rule of Law*, p. 35.

<sup>17</sup> *Al-Saadoon & Mufdhi v UK*, at para. 155.

<sup>18</sup> [Russia not to release Navalny under ECHR interim measures, says Ministry of Justice](#)

<sup>19</sup> [Concerns relating to the detention of Alexy Navalny: UK statement](#) (22 April 2021)

Russian authorities to protect Mr. Navalny could not provide sufficient safeguards for his life and health.”

After reminding Russia that it has freely signed up to a series of international commitments, including “upholding the rule of law”, the statement concluded:

“We call – again – upon the Russian authorities to take all measures necessary to fulfil their obligations under the OSCE’s human dimension and other international human rights commitments, to provide Mr Navalny with adequate medical care, and to release him from his politically motivated imprisonment as a matter of urgency.”

Against this background of consistent UK practice over many years, including very recently, by bringing forward clause 54, and equivocating in response to parliamentary questions, the UK now casts doubt on whether interim measures are binding.

## Compatibility of clause 54 with ECHR

In light of the above, we return to the central question of whether it is compatible with the ECHR for the Bill to make compliance with interim measures of the European Court of Human Rights a matter of ministerial discretion in the way that clause 54 does.

The Government argues, in its Supplementary ECHR Memorandum, that clause 54 is compatible with the Convention rights, because the ministerial discretion is “capable of being operated compatibly with Convention rights” in the sense that it will not *necessarily* give rise to an unjustified interference with Convention rights, so “the legislation itself will not be incompatible”.<sup>20</sup> In other words, in the Government’s view, the legislation is not incompatible on its face with the Convention rights, because it provides for a ministerial discretion whether or not to comply, which is capable of being exercised compatibly.

However, **the clause presupposes that there are circumstances in which compliance with interim measures is not an obligation on the Government. In fact, because there is a clear legal obligation on ministers to comply with interim measures, which are binding in international law, the very provision of a discretion not to comply is incompatible with the Convention and makes the Bill incompatible on its face.**

## International concerns about clause 54

Grave concerns have been expressed internationally about clause 54, particularly in the Council of Europe where the provision is seen as seriously undermining the authority of the Court. In a [Joint Statement](#) by two rapporteurs in the Parliamentary Assembly of the Council of Europe, the rapporteur for the Implementation of Judgments of the European Court of Human Rights and the rapporteur for the European Convention on Human Rights and national constitutions, the rapporteurs expressed their grave concerns about the message that clause 54 would send internationally, and urged the House of Lords to remove the clause from the Bill:<sup>21</sup>

“In two resolutions adopted this week, based on reports we have prepared, the Parliamentary Assembly of the Council of Europe (PACE) calls on all Council of Europe member States to comply with interim measures issued by the European Court of Human Rights. The Court has made clear that failing to abide by interim measures is itself a breach of the Convention.

The Assembly also urges States to ‘refrain from taking any steps which could exacerbate any potential conflict between the national constitutional order and the European Court of Human Rights’.

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<sup>20</sup> Supplementary ECHR Memorandum (25 April 2023), para. 51.

<sup>21</sup> <https://pace.coe.int/en/news/9069/pace-rapporteurs-react-to-vote-on-uk-s-illegal-migration-bill>

The UK Government's amendment to the Illegal Migration Bill, voted on by the House of Commons tonight, would place on the statute book a provision that contemplates the UK Government deliberately breaching its international obligation to comply with interim measures.

It is of grave concern that this draft legislation foresees the UK breaching international law, thus undermining the rule of law. If such a provision becomes law, this would send a negative message, not only in the UK but also internationally.

We believe that, given the UK's positive record before the Court to date and key role in developing this system, that is a matter of regret."

As this Bill continues its passage through Parliament, we urge UK parliamentarians in the House of Lords not to support the inclusion of this clause in the Bill."

These concerns about the implications of clause 54 for the whole European system of human rights protection were echoed in the recent report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe on *UK reform of its human rights legislation: consequences for domestic and European Human Rights Protection*.<sup>22</sup>

The Council of Europe's Commissioner for Human Rights, in a letter to the Speaker of the House of Commons, the Lord Speaker and members of both Houses about the Bill, said:

"I wish to reiterate that interim measures issued by the European Court of Human Rights, and their binding nature, are integral to ensuring that member states fully and effectively fulfil their human rights obligations."

The President of the European Court of Human Rights, in her Press Release marking the Reykjavik Summit, "welcomed the States' reaffirmation of their commitment to the Convention system and to the binding nature of the Court's judgments and decisions, *including interim measures*."<sup>23</sup>

It is not difficult to see why so many of the institutions of the Council of Europe are extremely concerned by clause 54 of the Illegal Migration Bill. In February this year the Polish Government informed the Court that interim measures in a number of Polish judiciary cases would not be respected.<sup>24</sup> To justify its refusal to comply, the Polish Government referred to a statement by the President of the Warsaw Court of Appeal stating that the interim measure is not binding, does not constitute a judgment, and that a judgment of the Constitutional Court of Poland questioned the authority of the European Court to intervene in cases concerning the judiciary. This was the first time that Poland had refused to comply with an interim measure in such cases. More recently, there are reports that Poland has refused to comply with interim measures requested by the European Court of Human Rights and expelled a citizen of Tajikistan from the territory of Poland.

**In the current climate of increasing willingness by a number of States to push back against the Court, there are very real concerns that if the UK enacts clause 54 it will increasingly be copied and invoked, and potentially deal a devastating blow to the Court's authority to indicate effective interim measures capable of preserving people's rights pending determination of their Convention claim. In its short-sighted rush to immunise its controversial immigration policies and laws from the legal challenges to be expected in a democracy, the UK Government is at risk of bringing down the house for the 675 million fellow Europeans who depend on an effective Court of Human Rights for the defence of their fundamental rights in an increasingly dangerous world.**

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<sup>22</sup> Doc 15782 (5 June 2023), at paras 47-49.

<sup>23</sup> European Court of Human Rights Press Release, ECHR 149 (2023), *European Court President attends Reykjavik Summit* (17 May 2023).

<sup>24</sup> [Non-compliance with interim measures in Polish judiciary cases](#) (16 February 2023)

## Conclusion

In UK law, disregard of Court orders, including interim orders, by the Government is contempt of court, for which ministers can be personally punished by the courts, so important is compliance with court orders to the Rule of Law.<sup>25</sup> Yet, in clause 54 of this Bill, the UK Government is bringing forward a provision which, in effect, empowers Ministers of the Crown to treat the Court of Human Rights with the contempt they are prohibited from showing to our own courts by choosing to disregard interim measures.

For the reasons set out in this Report, this would be in clear breach of the UK's legal obligations under the ECHR. It is also a radical departure from consistent UK State practice, and State practice across the Council of Europe. By undermining the authority of the Court of Human Rights, it risks depriving British nationals, such as the two British national prisoners of war who were sentenced to death in Russian-occupied Ukraine (see Explainer below), of crucial protections against other states. It calls into question the UK's avowed continuing commitment to the ECHR and the Court of Human Rights. Signatories cannot pick and choose the parts of the Convention system with which they wish to comply. It also undermines the UK's international reputation as a Rule of Law regarding nation and a champion of a rules-based international order.

**Parliament therefore should not agree to give the Government the power to disregard interim measures if a Minister chooses not to comply, because that would be to authorise breaches of international law by the Government, which the House of Lords has previously refused to do in relation to other Bills such as the UK Internal Market Bill.**

**Clause 54 should therefore be removed from the Bill by the House of Lords, just as it removed an equivalent provision from the UK Internal Market Bill.**

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<sup>25</sup> *M v Home Office* [1994] 1 AC 377.

# Appendix: Explainer on Interim Measures

## What are “interim measures”?

Interim measures are **urgent measures** which the European Court of Human Rights in Strasbourg can indicate must be taken **to prevent an imminent risk of irreparable harm to a person’s human rights**. The Court can indicate such measures to any Government signed up to the Convention. They are only indicated by the Court in the most exceptional cases where the applicant would otherwise face a real risk of serious and irreversible harm. They are temporary measures intended only to prevent breaches of Convention rights pending determination of legal proceedings which will determine the substantive question of whether the Government is acting in breach of the applicant’s rights. The sorts of exceptional cases in which interim measures have been granted can be found in the Court’s [Factsheet on Interim Measures](#). Most interim measures require suspension of a removal to another country, but they can also require the suspension of other extreme measures such as those which carry a risk to life or some other serious harm.

### Example 1: Risk of Death Penalty

In [Pinner and Aslin v Russia](#) (30 June 2022) the European Court of Human Rights granted interim measures under Rule 39 in relation to two British nationals held as prisoners of war in the Donetsk Region of Ukraine and sentenced to death by a “court” in the self-proclaimed “Donetsk People’s Republic”. The Court indicated to the Russian Government that they should ensure that the death penalty is not carried out, ensure appropriate conditions of detention and provide any necessary medical assistance and medication.





*British nationals Aiden Aslin (left) and Shaun Pinner (centre) were granted interim measures against Russia by the European Court of Human Rights in June 2022 to protect their right to life. They were released in September 2022 as part of a prisoner exchange.*

## Example 2: Risk of Sexual Exploitation

In [M v United Kingdom](#) (2009), M alleged that she had been trafficked and forced into prostitution in Uganda, her country of origin. She alleged that if she were returned to Uganda there was a real risk that she would be found by the traffickers and subjected again to forced sexual exploitation. The Court gave interim measures under Rule 39, asking the UK to refrain from deporting M pending the outcome of her legal challenge to her deportation. The case settled when the Government agreed to grant M three years' leave to remain in the UK and to pay her legal costs.

The Court's power to indicate interim measures dates back to 1974 when a predecessor body (the European Commission of Human Rights) first introduced it in its rules. The current power comes from Rule 39 of the Court's Rules of Court. The power to adopt the Rules of Court was conferred on the plenary Court by the States themselves in Article 25(d) of the Convention.

## Why are "interim measures" important?

Interim measures are an integral part of any legal framework, national or international, in which courts have a role in the protection of legally recognised rights. They provide courts with the means to maintain the status quo pending the Court's determination of the merits of an application. Without the possibility of such interim measures, legal rights risk becoming theoretical if they cannot be protected against an imminent risk of irreparable harm before an application to vindicate the right can be fully determined.

As the Court's Factsheet shows, interim measures have undoubtedly saved lives and prevented irreparable harm from happening to people's enjoyment of their Convention rights in numerous cases, especially by preventing them from being removed to another country where they would be at real risk of death, torture, ill-treatment, sexual exploitation or other serious harm.

**"... the application of Rule 39 has preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable"**

**President of the European Court of Human Rights**

## How common are "interim measures" against the UK?

Interim measures are only granted by the Court of Human Rights on an exceptional basis, where the very high threshold of a real risk of serious and irreversible harm is satisfied.

[Court Statistics on Rule 39](#) requests for the three years 2019, 2020 and 2021 show that the total number of requests for interim measures against all States was 5,518, of which only 625 were granted.

**Over the three year period 2019-2021, 180 requests for interim measures were made against the UK of which only seven were granted by the Court.**

It has been very rare in recent years for the Court to grant interim measures against the UK. Seven cases in the three years 2019-21 is considerably lower than the number of interim measures granted against comparable states such as the Netherlands (23) or France (47).

## What is the UK's record in complying with interim measures?

Home Office Minister Robert Jenrick told the House of Commons at Report Stage on the Illegal Migration Bill that “there are circumstances in which Ministers have chosen not to apply them [Rule 39 indications] – a small number of circumstances but a number.”

In fact, the UK has always complied with interim measures indicated under the ECHR, going back as far as the 1950s when the Court's predecessor, the Commission of Human Rights, first requested stays of execution. The Bingham Centre is aware of only one case in which the UK has failed to comply with interim measures, *Al-Saadoon & Mufdhi v UK*, in which the UK said that complying with the Court's indication not to transfer two Iraqi nationals to Iraqi custody was an impossibility because it was beyond the Government's power and control to comply. As the Court noted in its judgment:

**“The Government were proud of their long history of co-operation with the Court and their compliance with previous Rule 39 indications. They had failed to comply with the indication in this case only because there was an objective impediment preventing compliance”**

***Al-Saadoon & Mufdhi v UK*, para. 155**

## Why does the Government now want the power to disregard “interim measures”?

**On 14 June 2022, in *N.S.K. v the United Kingdom*, the European Court of Human Rights granted an urgent interim measure indicating that an Iraqi national, who had arrived in the UK on a small boat across the Channel and claimed asylum on arrival, and had a UK doctor's report that he might have been a victim of torture, should not be removed to Rwanda under the Memorandum of Understanding between the UK and Rwanda, until three weeks after the final domestic decision in his ongoing judicial review proceedings challenging the lawfulness of his removal.**

Interim relief had been refused by the High Court, and both the Court of Appeal and the UK Supreme Court had refused to interfere with the trial judge's exercise of discretion in refusing interim relief. The Court of Human Rights, however, decided that there was a risk of treatment contrary to the applicant's Convention rights, having regard to the concerns of the UN High Commissioner for Refugees that asylum-seekers transferred from the UK to Rwanda will not have access to fair and efficient procedures for the determination of refugee status, and to the High Court's finding that there were serious triable issues as to whether the decision to treat Rwanda as a safe third country was irrational or based on insufficient enquiry.

Following the grant of interim measures, other asylum-seekers due to be removed on the same flight obtained injunctions from UK courts preventing their removal.



***The effect of the interim measures granted by the European Court of Human Rights was to prevent asylum-seekers being removed to Rwanda until their challenge to the lawfulness of the Government's Rwanda policy has been determined in UK courts.***

Although the Government complied, Ministers were swift to condemn in the media the decision of the Court of Human Rights to grant interim measures. The Home Secretary, Priti Patel, criticised the decision as “[scandalous](#)”, suggesting the decision was “politically motivated”. The then Deputy Prime Minister, Dominic Raab, who was also the Justice Secretary and Lord Chancellor, said it was “[quite wrong](#)” for the Strasbourg Court to intervene to ground the flight to Rwanda, and announced his intention to “stop and change the ability of the Strasbourg Court to issue what amounts to effective injunctions when they have no power grounded in the European Convention to do so.”

## **What evidence is there of a need for change?**

There has been no consultation by the Government about the need to change the legal status of interim measures in UK law. It was not part of the Terms of Reference of the Independent Human Rights Act Review, nor was it proposed in the Government's own Consultation. There is therefore no evidence base to support the Government's claim that change is necessary. There is also no evidence that the UK has ever objected to the Court's jurisdiction to grant interim measures, but there is extensive evidence of consistent State practice, including by the UK, of complying with such measures (see above). A provision on interim measures was included in the Bill of Rights Bill at the very last minute, in hasty response to the interim measures granted against the UK in relation to the recent Rwanda flight, and the provision in the Illegal Migration Bill was also only introduced at Report stage in the Commons.

There is, on the other hand, evidence about the value and importance of interim measures in the ECHR system.

**“Insufficient and ineffective national legal remedies were identified ... as the predominant reason behind the necessity of recourse to the European Court of Human Rights ... . As long as Convention rights are not secured at the national level there will continue to be a need to submit Rule 39 requests and have recourse to the European Court of Human Rights.”**

**[Research on ECHR Rule 39 Interim Measures, April 2012](#)**

## Is it lawful under the ECHR to disregard “interim measures”?

States are under a **clear legal obligation under the Convention to comply with interim measures**. Failure to comply with interim measures indicated under Rule 39 of the Rules of Court is a breach of the right of individual application in Article 34 of the Convention.

### Article 34 of the Convention – The right of individual application

The Court may receive applications from any person ... claiming to be the victim of a violation ... of the rights set forth in the Convention .... *The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.* (Emphasis added)

Interim measures, the Court has consistently explained, play a **vital role in avoiding irreversible situations** that would prevent the Court from properly examining an individual application and, where appropriate, securing to the applicant the practical and effective benefit of their Convention rights. A failure by a State to comply with interim measures would therefore undermine the effectiveness of the right of individual application guaranteed under Article 34 and the State’s undertaking in Article 1 to protect Convention rights. It amounts to a breach of the State’s undertaking in the second sentence of Article 34 (italicised above) “not to hinder in any way the effective exercise of this right.”

### Example of a national court disregarding interim measures

In [Ecodefence v Russia](#) (14 June 2022), the Court indicated an interim measure under Rule 39, that enforcement of the dissolution order of the Russian NGO International Memorial should be suspended for a period. International Memorial asked the Supreme Court of Russia for a stay of execution by reference to the interim measure, but its application was declined by the Supreme Court and International Memorial was liquidated while the Court’s interim measure was still in force. The Court held (paras 192-195) that interim measures “must be strictly complied with” and by allowing the dissolution to proceed the State had frustrated the purpose of the interim measure “in violation of their obligation under Article 34 of the Convention.”

It is therefore clear from [well-established case-law](#) of the Court, applying general principles of international law, the law of treaties and the case law of international courts, that a State’s failure to comply with interim measures is a violation of its obligation under Article 34 ECHR. As the Court’s [Practice Direction on Requests for Interim Measures](#) makes clear, they are binding on the State concerned. Clause 54 of the Bill, which presupposes that interim measures can be disregarded by States, is therefore **incompatible on its face with Article 34 ECHR**. It will lead to inevitable breaches of that Article when interim measures are disregarded as a result of its provisions in future cases.

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