Nr. 719E
20.03.2026

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Brexit Part 2?

The UK, Migration, and the European Convention on Human Rights

As we approach the ten-year anniversary of the UK's decision to leave the European Union, sentiment is stirring once again for major reform to Europe's international organisations. This time, the UK has joined twenty-six other Council of Europe members to call for a change in how migration cases are handled under the European Convention on Human Rights (ECHR/the Convention). In a joint statement published on 10 December 2025, those countries (which include 19 EU Member States) outlined the changes to the ECHR migration framework they deem necessary to tackle contemporary challenges, including greater discretion to deport migrants convicted of crimes, and a tightening of the threshold for inhuman and degrading treatment under Article 3.

This joint statement was published following an "informal ministerial conference" convened by the Secretary General of the Council of Europe (CoE) to address the issue of migration. Given this context, the ECHR appears to be facing a flashpoint: with migration numbers higher than ever, and Member States openly discussing border externalisation policies with non-Member States, there is an urgent need to reassert the importance of robust migration laws at a regional level. This blogpost aims to highlight ongoing discussions on the ECHR's application to migration cases that have sparked a debate in the UK and Europe. We conclude that in the dialogue on assessing migrant integration and criminality, evidence-based approaches to migrant integration and criminality should be prioritized over State tendencies to pursue narratives centred on external threats.

ECHR Migration Reform

In an open letter issued in May 2025, 9 countries led by Denmark and Italy called for a discussion on how the Convention can meet contemporary challenges regarding migrants who have "chosen not to integrate, isolating […] and distancing themselves from [European] fundamental values of equality, democracy and freedom". These migrants were particularized as "[the ones who] have not contributed positively to the societies welcoming them and have chosen to commit crimes". The letter criticises how the Strasbourg Court (ECtHR) interprets the Convention in this context and asks whether the Court has gone too far in shifting the balance from "the interests which should be protected: safety and security for the victims and [many] law-abiding citizens". The letter calls for more discretion for Member States on whom to expel, how to expel and how to counter hostile countries of origin for criminal migrants. The Secretary General's response to this letter included the rejection of any attempt which politicizes or weaponizes the ECtHR as an institution that protects fundamental rights.

Half a year later, the 27-country joint letter echoes those concerns and identifies five challenges to the framework of the Convention to be considered: (1) the expulsion of foreigners convicted of serious crimes even though they have established family ties in the host country; (2) clarity on Article 3 of the Convention, seeking a constrained application of the prohibition of torture to only the most serious issues, allowing State parties to take proportionate decisions on foreign criminals' expulsion (including cases concerning healthcare and prison conditions); (3) border externalization efforts under the ECHR framework, calling for a revaluation of Article 8 in balancing individual

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rights with the public interest; (4) balancing individual rights with the public interest in timely decision-making; and (5) the instrumentalization of migration by hostile regimes and individual applicants with ulterior motives, which the statement argues has an adverse effect on the Convention system. These debates have reignited the discussion of immigration on the European level.

The UK under the ECHR

Scepticism of the ECHR is hardly a new phenomenon in the UK. Discussions of replacing ECHR obligations with a "British Bill of Rights" date as far back as 2010, with a failed legislative attempt as recently as 2022. The crux of these proposals is always the same: to repeal the Human Rights Act 1998 and transpose certain rights to a UK-based framework divorced from the influence of the Strasbourg Court. As recently as October 2025, an attempt to introduce a bill to leave the Convention was defeated in the House of Commons despite support from the Conservatives and Reform (it was Reform's leader, ex-UKIP leader Nigel Farage, who introduced the motion). Reform, who strongly oppose ECHR membership, seem poised to win the popular vote at the next UK election – although that is likely still some years away.

While the notion of leaving the Convention has so far only been endorsed by right-wing opposition parties, criticism of the ECHR – in particular, the Article 8 right to privacy – has also been voiced by the UK government, which recently published a policy paper indicating an intention to restrict the application of Article 8 in immigration cases by statute.

The joint statement's identification of border externalisation as a key issue is particularly relevant for the UK (among other signatories such as Denmark), which have in the recent past made attempts to externalise their asylum policies through agreements with third countries (in the UK's case, Rwanda). A 2024 Bofax co-written by one of the current authors explored the UK-Rwanda agreement as it stood in May 2024. At that time, the UK Parliament passed the Safety of Rwanda Act 2024, giving the policy a legislative foundation to combat the judicial pushback it had faced. While that statute was repealed in early December 2025, it is nevertheless worth raising two relevant points here regarding the debate around ECHR reform in the UK.

Point 1: The UK Parliament is sovereign

As the 2024 Bofax noted, parliamentary sovereignty is one of the core principles of the UK constitution, meaning that no UK statute can be deemed unlawful by courts. The Human Rights Act is constructed in such a way as to not override this sovereignty: if courts are faced with a statute that is incompatible with the ECHR, they may issue a declaration of incompatibility (sec. 4(2)) that does not affect the validity of the law in question (sec. 4(6)). The Safety of Rwanda Act 2024, for instance, was constructed in such a way as to acknowledge its own inconsistency with Convention rights, confirming for courts and public authorities that it should be enforced despite the views of the ECtHR. Parliamentary sovereignty, mixed with the UK's dualist legal system, entitles British lawmakers to contravene the country's international legal obligations without violating domestic law. Framed this way, the push to leave the Convention represents an impulse to confirm the hierarchy of legal authority within the UK that is already broadly accepted by all British legal institutions. Compared to Brexit, the conflict between Parliamentary sovereignty and supremacy under EU law was more restrictive than it is with the ECHR (see *Factortame*, in which the

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predecessor to the UK Supreme Court confirmed that the supremacy of EU law was enforceable in British courts).

Point 2: The externalisation policy was illegal for reasons beyond the ECHR

Before the UK-Rwanda policy was given a legislative foundation, the UK Supreme Court rejected its legality as a government policy. Advocates for leaving or reforming the ECHR point to this judgment as an example of how the ECHR interferes with UK discretion to realise its own migration policies.

One problem with this assertion is that it overrepresents the significance of the ECHR in the court's reasoning. While the court *does* acknowledge the ECHR as an example of the non-refoulement principle's relevance for UK law, it names various other sources including the Convention Against Torture (CAT) (para. 21), the ICCPR (para. 22), and customary law (para. 25) as binding the UK under international law. Leaving the ECHR, then, would free British courts from following the Strasbourg Court's interpretation of the principle of non-refoulement, but would not nullify the principle itself. Instead, one can view leaving the ECHR as the next step in the process that began with Brexit and could ultimately lead to the abandonment of more wide-reaching universal human rights protections, all with a view to curbing migration.

What effect does all of this have on the regional and international level?

The debate beyond the national discussion has the risk of jeopardizing the rights enshrined in the Convention for 75 years. The risks revolve around two main themes that are deemed contemporary challenges in migration by the signatory countries to the statement: increased discretion to deport migrants convicted of crimes and a tightening of the threshold under Article 3. Both challenges have been addressed in several platforms (see official statements here, here and here, factsheet here and report here).

The speech delivered by the CoE's Commissioner for Human Rights at the December 10th Conference urges the signatory states to use an evidence-based approach, especially when it comes to linking migration with criminality. By this, the Commissioner expresses concern about inaccuracies in the report's claim and warns Member States against allowing the discussion to shift towards assumptions unsupported by reliable data. The report also highlights the universality of human rights by urging Member States to move away from a discourse that constructs a hierarchy of right-holders based on a perceived level of merit.

Contrary to presuppositions articulated by some Member States and echoed in media reporting, it is important to remember that the rights of everyone under the jurisdiction of a CoE Member State are equally protected. The University of Oxford's 'Bonavero Report: Examining 10 reasons to stay in the ECHR' clarifies that it is legally and factually inaccurate to suggest that human rights are primarily claimed by foreign national offenders, people convicted of criminal offences, and terror suspects. On the contrary, the report points to evidence showing a wide range of people and organisations in the UK who rely on ECHR rights in their day-to-day interactions with public services (p. 8). It also reminds states of their overarching obligation to put in place laws and

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regulations to deter and sanction criminal offences that pose a threat to life and to provide redress to victims (see *L.C.B. v UK*).

For cases concerning the expulsion of criminal migrants who have acquired ties to their host country, Article 8 already permits a balancing exercise that is backed by the Court's developed criteria on proportionality (see here). To what extent States take these criteria into their judgments is up to them, with the judgments subject to supervision by the Committee of Ministers regarding their compatibility with the Court's judgments. This shows that States can already exercise discretion in terms of balancing the right to family enshrined under Article 8 and the public interest. The call in the joint statement seems to take the discussion beyond balance and towards compartmentalization of expulsion against "migrant criminality."

The same logic persists in the call to tighten the threshold of the Article 3 prohibition of torture. The statement calls for constraining the scope of Article 3 "to the most serious issues in a manner which does not prevent state parties from taking proportionate decisions on the expulsion of foreign criminals […]." However, ECtHR case law on Article 3 in the context of migrant expulsion concerns their possible return to a state where they risk facing inhuman and degrading treatment. In these cases, the Court does not consider the merits of the asylum claim but verifies whether effective guarantees exist to protect the applicant against arbitrary refoulement (some examples include *Soering v. UK*, *Chahal v. UK*, *Saadi v. Italy*, *M.S.S. v. Belgium and Greece*, and *Tarakhel v. Switzerland*). Responses from human rights commentators to the open letter underline the fundamental nature of Article 3 and argue that proposing a reinterpretation of Article 3 would set the discussion on the wrong course (see here and here). This applies not just within the scope of the ECHR but to a wider body of international law including the Refugee Convention, the CAT, the ICCPR, the EU Charter of Fundamental Rights and EU asylum law. These responses also stress that limiting the application of rights to specific groups is contrary to the notion of the universality and inalienability of human rights.

Concluding remarks

The desire expressed by many within the UK for a change in direction in how migration is implemented under the Convention is shared by several other Member States and appears to be gaining significant traction. In response to the call for a "new and open-minded conversation" around ECHR reform, the Informal Ministerial Conference of December 2025 invited the Committee of Ministers to prepare a draft political declaration. It is evident that the dialogue regarding the need to assess integration and migrant criminality must prioritise an evidence-based approach which ensures that the human rights protections granted to migrants are not overshadowed by States' self-identified general interests.

VERANTWORTUNG: Die BOFAXE werden vom Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht der Ruhr-Universität Bochum herausgegeben: IFHV, Massenbergstra ße 11, 44787 Bochum, Tel.: +49 (0)234/32 -27366, Fax: +49 (0)234/32 -14208, Web: http://www.ruhr -uni-bochum.de/ifhv/. Bei Interesse am Bezug der BOFAXE wenden Sie sich bitte an: ifhv -publications@rub.de. **FÜR DEN INHALT SIND DIE JEWEILIGEN AUTORINNEN UND AUTOREN ALLEIN VERANTWORTLICH.**