1. Introduction

As a signatory to the ECHR, the UK is obliged under Article 1 to secure Convention rights[1] within its jurisdiction. Through the Human Rights Act 1998 (HRA)[2], domestic courts must 'take into account'[3] Strasbourg jurisprudence, though they are not strictly bound to follow it. Subsequent rulings in relation to the ECHR in both UK and Strasbourg courts have, on occasion, proven controversial, sparking debate regarding the appropriate balance between individual rights and the public interest.

In the above statement the Lord Chancellor, Shabana Mahmood MP, enters this debate. She argues that the application of rights under the ECHR have not always struck this balance appropriately. This, according to Mahmood, has led to an erosion of public trust in the courts. In her full remarks, the Chancellor makes direct reference to the enforcement of Article 8 rights in the context of prisons and immigration as areas she believes this issue to be most salient.

This essay contends that the Lord Chancellor's critique misconceives the operation of the ECHR and the HRA. Her remarks are better understood as a politically motivated response to populist pressures, in practice both Strasbourg and UK courts, though differing in emphasis, have broadly struck the appropriate balance between individual rights and the public interest.

2. Defining the Appropriate Balance Between Individual Rights and the Public Interest

a. The Theoretical Foundations of the ECHR

It is first necessary to define what an 'appropriate' balance between individual rights and the public interest constitutes. Within constitutional theory, the idea that democracy itself contains within it the risk of oppression of the individual by an unchecked majority is well established. This risk was famously articulated by Alexis de Tocqueville who argued for the potential of democratic societies to create a "tyranny of the majority"[4] that would oppress the rights of minorities under the veil of democratic legitimacy if their power was left unchecked. The ECHR was conceived to guard against the realisation of this danger. The Convention, therefore, imposes obligations that intentionally limit majoritarian will where it risks violating individual rights. This is not a flaw but the Convention's foundational purpose.

However, the ECHR was not conceived to subvert democracy, only to act as a check against these aforementioned dangers. It also contains strong protections to prevent the enforcement of rights going too far in subverting the legitimate democratic aims of governments. This is best illustrated by the inclusion of qualified rights, such as Article 8, in the Convention. Qualified rights incorporate public interest considerations by allowing restriction of these rights if it is necessary, proportionate, and in service of a legitimate aim.

Thus, the ECHR itself takes account of the need to balance the individual rights that it seeks to protect, with the legitimate democratic will of its member states. It includes qualified rights to act as a mechanism through which an appropriate balance can be struck.

Therefore, this essay must analyse how effective the UK and Strasbourg courts have been in striking this balance within the legal framework that ECHR provides. It is crucial not to make a conclusion centered on political or ideological grounds.

There is a popular and legitimate argument that has been advanced stating that ECHR itself makes it impossible for the Strasbourg and UK courts to achieve an appropriate balance. Whilst this is a rich and salient area of debate it is not one that this essay seeks to address.

[1] European Convention on Human Rights (ECHR), art 1.
[2] Human Rights Act 1998.
[3] Ibid
[4] Alexis de Tocqueville, *Democracy in America* (Henry Reeve tr, Saunders and Otley 1835) vol 1, ch XV.

The courts' effectiveness at achieving this balance can only be judged against how effective their use of the framework the ECHR provides has been. To go beyond this scope would be to implicitly undermine the ECHR itself. This essay will argue that the courts have generally been effective when held to this standard.

The framework embedded within the ECHR contains two central legal principles relating to qualified rights that provide the basis for an assessment of their effectiveness: 1) Proportionality and 2) The margin of appreciation.

b. The Doctrine of Proportionality

In the case of qualified rights such as those included in Article 8, for a measure that restricts qualified rights to qualify as "necessary in a democratic society", it must address a "pressing social need" (The Sunday Times v United Kingdom (1979) 2 EHRR 245)[5]. This assessment is carried out through the proportionality test. Where a measure limits an individual's Convention right, it will not be regarded as disproportionate if its scope and effect are narrowly tailored, and if adequate safeguards exist in domestic law to prevent the individual from being subjected to arbitrary interference (MS v Sweden (1997) 3 BHRC 248)[6].

The doctrine of proportionality therefore allows for the public interest to be protected through creating a legitimate pathway for states to restrict the rights of individuals in certain circumstances, whilst also robustly protecting individual rights by ensuring these circumstances are narrow and specific.

c. The Margin of Appreciation

The margin of appreciation is a doctrine of the ECHR which affords member states limited discretion, under Strasbourg supervision, in implementing Convention rights. It recognises the diversity of legal and cultural traditions across states and enables the Court to balance national sovereignty with Convention obligations.

It was first set out in *Handyside v United Kingdom* (1976) 1 EHRR 737[7] where the Court upheld a conviction for obscenity under Article 10(2). It reasoned that national authorities, being closer to social and moral conditions, are best placed to assess the necessity of restrictions. However, this discretion is not unlimited, and the Court retains ultimate authority to determine whether such measures are compatible with Convention rights, ensuring that national discretion operates under Strasbourg supervision. With respect to Article 8 in the case of immigration and prisons, the UK has often sought a 'wide' margin of appreciation owing to the salience of these issues in the British sociopolitical context.

Thus, the margin of appreciation takes account of the social and cultural differences between member states. As such, reasonable variation in what constitutes legitimate grounds for the restriction of qualified rights across member states further shapes the balance between individual rights and the public interest that is implicit within the ECHR.

3. The Application of Article 8 in the Context of Immigration

a. Article 8 and Immigration in the Strasbourg Courts

As has been established, Article 8 ECHR is a qualified right that protects the right to respect for private and family life. The key subject of debate in the immigration context is whether under an individual can prevent their deportation or refusal of residence on the grounds that their Article 8 rights would be violated. However, as a qualified right, governments may lawfully restrict Article 8 rights so long as the courts deem its restriction necessary, prescribed by law, and proportionate to the aim. The Strasbourg courts have robustly applied the doctrine of proportionality and allowed states a reasonable margin of appreciation in this respect. Therefore, they have been able to strike an appropriate balance between individual rights and the public interest.

The Strasbourg courts have applied the doctrine of proportionality by establishing and applying a robust criterion through which to determine if Article 8 rights can be legally suspended by a member state. In Boultif v

[5] *The Sunday Times v United Kingdom (No 1)* (1979–80) 2 EHRR 245 (ECtHR).
[6] *MS v Sweden* (1997) 28 EHRR 313 (ECtHR)
[7] *Handyside v United Kingdom* (1976) 1 EHRR 737 (ECtHR).

Switzerland (2001) 33 EHRR 50[8], the Court found that refusing to renew Mr Boultif's residency after his release from prison violated Article 8. Through this case the Court established the "Boultif criteria" for assessing proportionality in deportation, including the offence's nature, family ties, residence length, and children's interests. Later cases expanded these principles: Maslov v Austria (2008)[9] and Jeunesse v Netherlands (2014)[10] reinforced protection for children and long-settled individuals, while Unuane v UK (2020)[11] stressed explicit consideration of children's welfare. Thus, the Strasbourg courts effectively established, applied and adapted the doctrine of proportionality to Article 8 immigration cases.

Furthermore, the Strasbourg courts struck an appropriate balance between individual rights and the public interest through their respect of the margin of appreciation. In Üner v Netherlands (2006) 45 EHRR 14[12], the Strasbourg Court showed that it would not always favour the individual. Despite Mr Üner's Dutch family and children, the seriousness of his offences distinguished his case from Boultif, and the Court found no breach of Article 8, recognising the Dutch State's ability to exercise its margin of appreciation. Importantly, the judgment also expanded the Boultif criteria to include factors such as the best interests of the child and the applicant's social and cultural ties, further underpinning its proportionality framework. The case illustrates how the Court balances individual rights with state interests in immigration control through maintaining firm respect for the margin of appreciation within the bounds of proportionality.

b. Article 8 and Immigration in the UK Courts

The UK courts, whilst being weighted slightly more towards the protection of the public interest, have applied the doctrine of proportionality to Article 8 immigration cases and have also been able to strike an appropriate balance. This potentially paradoxical statement can be explained through the application of the margin of appreciation.

The Strasbourg Court set out clear proportionality criteria as established above. Yet in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60[13], the Supreme Court upheld deportation despite long residence, stressing the decisive weight Parliament had attached to the public interest in removing foreign offenders. Likewise, in R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11[14], the Court dismissed family life claims made while immigration status was precarious, narrowing the scope of protection, even though Strasbourg had insisted in Jeunesse v Netherlands (2014) 60 EHRR 17 that children's welfare and the genuineness of family ties must always be given primary consideration.

However, the UK courts have also shown respect for the rights of the individual and applied the proportionality framework to this effect. In ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4[15] the Supreme Court reflected Strasbourg's insistence on prioritising children's best interests allowing the appeal and preventing deportation.

These cases show that UK courts attaching greater, sometimes decisive, weight to the public interest in immigration control, without allowing for a margin of appreciation so wide as to undermine the proportionality-driven structure set out by Strasbourg. This deviation reflects the high political salience of immigration in the UK context and demonstrates how, although they strike a different balance, the UK courts are still able to strike an appropriate one.

4. The Application of Article 8 in the Context of Prisons

a. Article 8 and Prisons in the Strasbourg Courts

[8] *Boultif v Switzerland* (2001) 33 EHRR 1179 (ECtHR).
[9] *Maslov v Austria* App no 1638/03 (ECtHR, 23 June 2008).
[10] *Jeunesse v Netherlands* App no 12738/10 (ECtHR, 3 October 2014).
[11] *Unuane v United Kingdom* App no 80343/17 (ECtHR, 24 November 2020).
[12] *Üner v Netherlands* (2007) 45 EHRR 14 (ECtHR).
[13] *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2017] AC 821.
[14] *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 WLR 823.
[15] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166.

In the context of prisons, the Strasbourg court has effectively applied the doctrine of proportionality allowing the court to achieve an appropriate balance. They have done so by strongly resisting blanket measures introduced on all prisoners whilst also allowing states to enjoy a strong margin of appreciation by giving more power to states to lawfully restrict rights in individual cases.

In Khoroshenko v Russia (2015) 61 EHRR 31[16], the Court held that a near-total ban on family visits for life prisoners during the first ten years of their sentence was disproportionate, stressing that maintaining family contact is central to rehabilitation. Similarly, in Vintman v Ukraine (2016) App No 28403/05[17], severe limitations on a prisoner's ability to communicate with his family were found to breach Article 8. These cases demonstrate the courts' willingness to protect the Article 8 rights of prisoners, particularly in opposing crude blanket restrictions on outside communication with their families.

In Messina v Italy (No 2) (2000) 30 EHRR 746, however, the Court allowed the Italian government a wide margin of appreciation, permitting them to restrict family visits for prisoners accused of Mafia activity. They noted in the special context of combatting Mafia criminality, family links often played a role in sustaining organised crime. Therefore, whilst a restriction on their family visitations did interfere with Mafia prisoners' Article 8 rights, in this context such restriction was held to be proportionate.

The opposition to blanket bans and careful consideration of the unique circumstances of each member state, as shown by Messina v Italy (No 2) (2000) 30 EHRR 746[18], demonstrate the Strasbourg court's respect for proportionality and the margin of appreciation in Article 8 cases in the prison context. Thus, they have been able to strike an appropriate balance between individual rights and the public interest within the framework that the ECHR provides.

b. Article 8 and Prisons in the UK Courts

The UK courts by contrast have taken an approach that often stretches the appropriate balance between individual rights and the public interest to its limits. It does so by allowing itself an extremely wide margin of appreciation, sometimes stepping beyond what constitutes its reasonable application.

In R (Daly) v Secretary of State for the Home Department [2001] UKHL 26[19], the House of Lords struck down blanket cell searches of legally privileged correspondence. This demonstrates that the UK courts do recognise Strasbourg's proportional approach to the Article 8 rights of prisoners.

However, in R (Mellor) v SSHD [2001] EWCA Civ 472[20], the Court of Appeal upheld a refusal to allow artificial insemination facilities and Strasbourg found that in Dickson v United Kingdom (2007) 46 EHRR 41[21] that the UK had overstepped the proportionality line by relying on blanket considerations without adequate individualised assessment. Thus, the UK courts have also demonstrated they are capable of placing harsh restrictions on prisoners' Article 8 rights in a blanket manner. This is something Strasbourg has been hesitant to do, citing that such measures are out of step with a proportional approach.

Thus, despite showing some consideration of the doctrine of proportionality, the UK courts have taken an extremely wide margin of appreciation in the context of Article 8 prison cases. Therefore failing to strike an appropriate balance between individual rights and the public interest within the framework allowed by the ECHR by erring too far in favour of the public interest.

5. <u>The Lord Chancellor's Critique</u>

In her statement of June 2025, Shabana Mahmood (then Lord Chancellor) argues that rights, when applied in ways that appear to conflict with "common sense," "fairness," or "legitimate government action," risk undermining public trust. Later on in the same statement she also reaffirms her commitment to the ECHR,

[16] *Khoroshenko v Russia* App no 41418/04 (ECtHR, 30 June 2015).
[17] *Vintman v Ukraine* App no 28403/05 (ECtHR, 23 October 2016)
[18] *Messina v Italy (No 2)* (2000) 30 EHRR 746 (ECtHR)
[19] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.
[20] *R (Mellor) v Secretary of State for the Home Department* [2001] EWCA Civ 472, [2001] 3 WLR 533.
[21] *Dickson v United Kingdom* (2007) 46 EHRR 41 (ECtHR).

declaring it "one of the great achievements of post-war politics". In doing so she renders her critique of the application of rights invalid and paradoxical.

The universal application of Convention rights makes it inevitable that, at times, they will diverge from 'common sense', in so far as this is analogous to majority sentiment. That is a feature of the system, not a flaw, for it ensures protection of unpopular or vulnerable groups. Moreover, it is conceptually incoherent to suggest that rights can conflict with "legitimate government action," since for UK government action to be legitimate in Convention terms it must first comply with the rights framework. Furthermore, the fact declarations of incompatibility are not necessarily binding allows significant protection to the doctrine of parliamentary sovereignty, offering a further safeguard to the public interest. Finally, in appealing to "fairness," the Chancellor overlooks the proportionality analysis inherent to qualified rights.

This is not to say that her criticism is invalid in and of itself, but instead that it is incompatible with her affirmation of support for the ECHR. Prominently, Lord Sumption argued in his 2019 Reith lecture that the "mission creep"[22] of the ECHR has rendered it no longer "consistent with a democratic constitution"[23]. This case holds significant weight, particularly in light of the modern challenges of mass immigration and an ever-increasing prison population, calling into question whether the ECHR itself provides a suitable framework for the protection of individual rights in a modern context. Furthermore, even those associated with Mahmood's party, such as Jack Straw, have called for the UK to "decouple"[24] from the ECHR.

If Mahmood had extended her critique to include this measure, her case would be intellectually consistent and consequently far more persuasive. By asserting her support for the UK's continuing adherence to the ECHR however, she binds herself to the definition of appropriate balance implicit within the Convention and in doing so renders her case incoherent and paradoxical.

6. Conclusion

Mahmood's concern reflects a perennial tension, but the jurisprudence shows that neither Strasbourg nor the UK courts have strayed from the balance between individual rights and the public interest implicitly defined within the ECHR. The sole exception relating to Article 8 in the prison and immigration contexts being the UK court's overzealous use of the margin of appreciation with regard to prisons.

Yet this exception only weakens Mahmood's critique, demonstrating that the UK courts have gone as far as they possibly can, indeed too far, in their efforts to protect the public interest. If the ECHR itself is not to be undermined, as Mahmood makes it clear she does not wish to do, there is no intellectually consistent method through which the balance can be shifted in favour of the public interest without withdrawal from the ECHR.

No doubt Mahmood's statement is a response to very real political pressure from both Reform UK on the right, pushing in favour of a 'common sense' approach to the enforcement of rights, and the metropolitan internationalist wing of her party on the left, which ardently supports the ECHR and abhors any attempt to depart from it. Mahmood attempts to appeal to both, but in doing so her resulting argument is politically appealing yet legally incoherent.

Mahmood, in this sense, cannot realise the best of both worlds. The ECHR contains mechanisms to define the appropriate balance between protecting individual rights and the public interest. The courts in both the UK and Strasbourg have generally been effective at applying these mechanisms. If one is to take issue with the balance that has been struck and wishes to shift it further towards the protection of the public interest, there are legitimate political and ideological grounds on which to do this. Yet the legal reality means that such a path involves withdrawal from the Convention itself.

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[22] Jonathan Sumption, 'Law and the Decline of Politics' (Reith Lectures, BBC Radio 4, 2019).
[23] Ibid
[24] *Jack Straw says the UK should 'decouple' from the ECHR*, *Financial Times* (Online), 28 April 2016 https://www.ft.com/content/b94d5b8d-b234-4199-b820-ea82bfe9292b accessed 12/09/25

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