

RESPONSE BY JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS TO THE COMMISSION ON A BILL OF RIGHTS DISCUSSION PAPER: DO WE NEED A UK BILL OF RIGHTS?

Joint Council for the Welfare of Immigrants (“JCWI”) is an independent, voluntary organisation working in the field of immigration, asylum, nationality law and policy. Established in 1967, JCWI provides legally aided immigration advice to migrants and actively lobbies and campaigns for changes in immigration and asylum law and practice. Its mission is to promote the welfare of migrants within a human rights framework.

Executive summary

Whilst we advocate for a human rights based approach to immigration, asylum and nationality law and policy making, we take the view that the UK does not need a bill of rights as such – the Human Rights Act (“HRA”) which exhibits many of the features of a bill of rights, in our view offers an appropriate mechanism to safeguard and promote the rights of all in our jurisdiction. We are extremely concerned by the prospect of its repeal. We also feel that a UK bill of rights would be legally, politically, and constitutionally challenging from the perspective of the devolved nations.

In our opinion a more effective way to promote the rights of all would be through precisely drafted and targeted legislation that reflects both human rights principles and standards. This could be better achieved principally through strengthening the role of Parliament, but also through mainstreaming the language of human rights into parliamentary debates.

On the question of public ownership of the Human Rights Act, we feel that responsible political discourse, and a public promotional and educative campaign would be a better way to secure ownership rather than simply creation a new bill of rights.

If however there is to be a bill of rights, then in our view it must enhance the protection afforded by the Human Rights Act, and in no way diminish it. Possible approaches might include incorporating the remaining protocols that the UK has yet to ratify such as Protocol 12, and from JCWI’s perspective, extending the section 19 procedure to the making of Immigration Rules given the frequency with which the rules engage ECHR articles.

The content of the Bill of Rights previously proposed by the Parliamentary Joint Committee on Human Rights, and the Northern Ireland Human Rights Commission also warrant further consideration. However given that a principle function of a bill of rights is to protect the rights of minorities, consideration should be given to including appropriate protections for migrants and asylum seekers. These groups are particularly vulnerable to breaches of their rights. Inspiration for these rights could be drawn from the International Migrants Bill of Rights.

Finally, we feel it is regrettable that in 2011 a Commission of this kind should itself be so lacking in diversity in its make-up. This not only raises issues about compliance with the Equality Act 2010, but also substantially impairs the breadth of experience and opinions that ought to be brought to bear in an exercise of this kind. This deficiency in the constitution of the Commission is in our opinion already reflected in the procedure the Commission has thus far adopted in relation to this consultation. Indeed the Commission has failed to produce educative material which properly sets out the relevant issues in an accessible way that would enable/encourage others not at the Bar - ordinary citizens and the very groups that a Bill of Rights should seek to protect - asylum seekers, immigrants and other socially excluded groups, to participate meaningfully in a consultation about rights protection.

Questions

(1) Do you think we need a bill of rights?

No, we do not believe that we need a bill of rights for the UK. The HRA of course exhibits many of the characteristics of a bill of rights. In so far as promoting and protecting human rights goes, when viewed in a global context, and comparative to other models, we take the view that it is relatively effective in performing this function. The Act secures the correct balance between upholding rights via the interpretative obligation (s.2-3 HRA) and the obligation on public authorities under s.6 (1) HRA to act compatibly with the ECHR, whilst also displaying appropriate respect for democracy through the operation of section 6(2) HRA and the declaration of compatibility mechanism (s.4 HRA). We comment below on further aspects of the Act that have been identified as shortcomings by the Conservative party.¹

a. Section 2 HRA

The duty in section 2 HRA to ‘take into account’ judgements, decisions and opinions of the ECtHR in our opinion reflects the correct relationship between the domestic courts and the ECtHR – the one body empowered by Article 19 ECHR to interpret the ECHR. It is sufficiently flexible to enable domestic courts to both depart from Strasbourg’s judgements², and to integrate Strasbourg principles in a way that takes account of domestic considerations.³

Where principles are unclear there exist mechanisms which would already permit dialogue with the ECtHR. These include third party interventions and requests for advisory opinions through the Committee of Ministers.

Given in any event, that the Government has committed itself not to withdraw from the ECHR,⁴ and would therefore as a signatory to the ECHR eventually, in any event, under Article 46 ECHR ultimately be bound by any subsequent ECtHR judgment *directly against it*, it is difficult to see what useful function limiting consideration of existing judgments from Strasbourg would serve. Ultimately this would simply lead to a greater time lag between the introduction of an offending piece of

¹ Dominic Grieve, *European Convention on Human Rights- Current Challenges*, Lincoln’s Inn, London, 24 October 2011.

² See *EM (Lebanon) v SSHD* [2008] UKHL 64 and *R (Limbuella) v SSHD* [2005] UKHL 66 as examples.

³ *R v Horncastle* [2009] UKSC 14 and see

⁴ Dominic Grieve, *European Convention on Human Rights- Current Challenges*, Lincoln’s Inn, London, 24 October 2011.

legislation and the point at which a finding of a breach was made, whilst also adding to the backlog of ECtHR cases.

Furthermore, any attempt to limit the impact of Strasbourg would appear to be inconsistent with the current direction of travel amongst the majority of COE states. Indeed the Interlaken Action Plan (2010)⁵ specifically calls on member states to *take into account* the developing case law of the ECtHR. That action plan received further endorsement only this year under the Izmir Declaration.⁶

b. Deportation and the Human Rights Act

We note that the Home Secretary has expressed a desire for some change in relation to human rights and deportation of foreign national criminals to 'better reflect public interests'⁷ though it is not entirely clear what is being proposed. In our view this is entirely unnecessary given that such protection is already contained within the structure for Article 8 ECHR and the test for proportionality. Furthermore, there is no evidence to suggest that Courts are exceeding limits in their application of Article 8 ECHR. Indeed statistics show that a mere 12% of these appeals ultimately succeed on ECHR grounds.⁸

It has been suggested that the Government will not be awaiting the outcome of this Consultation to instigate changes.⁹ We feel that in so far as this affects the application of ECHR standards to immigrants, *changes should not* be placed before Parliament until the Commission has concluded its report.

⁵ The Interlaken Action Plan (19.02.10) Point B calls upon member states to take into account 'the Courts developing case law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another member states, where the same problem of principle exists within their own legal system.'

⁶ This reaffirms the Interlaken Action Plan at para. 4.

⁷ *Family Migration A Consultation*, UK Border Agency, 15 August 2011, p.61-64

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/>

⁸ See Human Rights Futures Project, LSE, October 2011.

<http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/2011/KlugDeportation.pdf>.

⁹ Theresa May speech, Conservative Party Conference, Manchester, 04 October 2011.

c. Public acceptance of the Human Rights Act

So far as the separate issue of ownership and general public acceptance of the Human Rights Act¹⁰ goes by way of justification for this bill of rights exercise, in our view any deficiency could be better addressed by more responsible political discourse about the issue. Theresa May's recent comments about 'Maya the cat,'¹¹ and David Cameron's partial attribution of recent rioting to the HRA¹² are current examples of how irresponsible discourse can impair ownership and acceptance of the HRA.

Given the general historical absence of promotional and educative Government backed material about the HRA, we feel that a Government backed educational and promotional campaign could do much to secure public acceptance and ownership of the Act.

d. Other means for safeguarding human rights and promoting democracy

Whilst we do not favour a new UK bill of rights as a means of furthering rights protection in the UK, we do favour precise and targeted legislation that reflects international standards and obligations in relation to asylum seekers, immigrants and others. A more effective way of achieving this in our opinion would be to strengthen the role of Parliament through enhancing available mechanisms and procedures for amending, scrutinising and checking primary legislation, secondary legislation and policy (such as the Immigration Rules).

We also feel that given that the language of human rights (ECHR) has yet to embed itself properly in Parliamentary discourse (outside that of the Parliamentary Joint Committee on Human Rights) MPs and peers should be given basic training in this area. Our feedback from parliamentarians is that they do not feel confident employing the language of ECHR rights and principles in their debates, and still find it 'unfamiliar.'

¹⁰ *European Convention on Human Rights- Current Challenges*, speech by the Attorney General, Lincoln's Inn, 24 October 2011.

¹¹ Theresa May, speech to the Conservative party conference, Manchester, 4 October 2011, http://www.politicshome.com/uk/article/36737/theresa_may.html

¹² David Cameron, speech on the fight back after the riots, 15 August 2011, <http://www.number10.gov.uk/news/pms-speech-on-the-fightback-after-the-riots/>

(2) If so, what do you think a UK Bill of Rights should contain?

We do not believe that there is a need for a UK bill of rights. If however there is to be a bill of rights, we believe that it should continue to show respect for democracy whilst also ensuring that it does not in any way undermine the following:¹³

- (i) the scope and content of the rights under the HRA
- (ii) HRA mechanisms for enforcement
- (iii) available remedies
- (iv) the impact of the ECHR through its de-incorporation (e.g. by excluding from consideration ECtHR judgements, opinions etc)
- (v) obligations under international law and the universal application of human rights.
- (vi) devolution settlements.

a. Some possibilities for consideration

One less radical option might therefore involve amending the Human Rights Act with a view to incorporating the remaining ECHR entitlements including Protocol 12 ECHR (freestanding right to equality) and Protocol 4 (Article 3 prohibits expulsion of nationals and Article 4 prohibits collective expulsions of aliens). Consideration could also be given to extending the section 19 (audit procedure) to Immigration Rules in line with the JCHR's recommendations given the extent and frequency that immigration rules engage human rights.¹⁴

Another option might be to consider the content proposed by the Parliamentary Joint Committee on Human Rights in its report¹⁵ and the Northern Ireland Human Rights Commission in its Advice to the Secretary of State.¹⁶ Both of these offer reasonable documents that warrant further discussion.

On the specific question of immigrants and asylum seekers, given that the function of bills of rights is to protect minorities, and given that they are legally and practically limited in the extent to which they can participate in the democratic process, consideration ought also to be given to enhanced

¹³ See for (i)-(iv) *A Bill of Rights that is a Human Rights Plus: What are the minimal indicators?* Human Rights Futures Project, LSE

<http://www2.lse.ac.uk/humanRights/research/projects/humanRightsFutures.aspx#generated-subheading1>.

¹⁴ JCHR Twentieth report of Session 2006-7 HL 172 HC 993.

¹⁵ JCHR Twenty-ninth report of Session 2007-2008 HC150-I.

¹⁶ A Bill of Rights for Northern Ireland, Advice to the Secretary of State for Northern Ireland, Northern Ireland Human Rights Commission, 10 December 2008.

http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/51/A_Bill_of_Rights_for_Northern_Ireland_%28December_2008%29.pdf

protection for these groups. To this extent, the Commission could look to the International Migrants Bill of Rights¹⁷ for inspiration - this attempts to pull together international treaty and customary law whilst also speaking to the distinct and unique experiences of migrants. Alternatively it could consider the various international treaties that underpin the document.¹⁸ It might also wish to consider the standards in the recast EU Procedures and Reception Conditions Directives for asylum seekers which the UK has chosen to opt out of.

(3) How do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?

If a UK Bill of Rights were introduced covering the devolved jurisdictions this would require amendments to the devolution statutes, and would also probably breach the Belfast (Good Friday) Agreement in so far as such a proposal envisages the repeal/amendments to those parts of the ECHR already given domestic effect. As such the introduction of any 'UK Bill of Rights' would/should require the consent of the devolved legislatures in Scotland and Northern Ireland. This is likely to prove to be an extremely challenging from a legal,¹⁹ political²⁰ and constitutional perspective²¹ not least because the Northern Ireland Human Rights Commission has already, after many years, of consultation and discussion drafted its own bill of rights.

¹⁷ *International Migrants Bill of Rights*, Georgetown Law, The Scholarly Commons, 2010, http://scholarship.law.georgetown.edu/spps_papers/7.

¹⁸ For example the 1990 United Nations Convention for the Protection of the Rights of All Migrant Workers and Members of their Families.

¹⁹ *Devolution and Human Rights*, Justice, February 2010 <http://www.justice.org.uk/data/files/resources/30/Devolution-and-Human-Rights-8-February-2010.pdf>

²⁰ Colin Harvey Listen to Northern Ireland's advice on a UK Bill of Rights, UK human Rights Blog, 10 November 2011, <http://ukhumanrightsblog.com/2011/11/10/listen-to-northern-irelands-advice-on-a-uk-bill-of-rights-colin-harvey/>.

²¹ A Donald et al (2010) Developing a Bill of Rights for the UK, Equality and Human Rights Commission, Research Report 51 http://www.equalityhumanrights.com/uploaded_files/research/developing_a_bill_of_rights_for_the_uk_report_51.pdf

(4) having regard to our terms of reference, are there any other views which you would like to put forward at this stage

a. The constitution of the Commission

There are serious shortcomings in the composition of this UK Bill of Rights Commission which in our view seriously limit the range of viewpoints that could emanate from the process. Firstly, with the exception of Baroness Kennedy, it is striking that all Commission members are male and white. This is arguably inconsistent with statutory obligations and/or the spirit of section 149 of the Equality Act 2010.²²

Secondly, whilst we are aware that there is a separate advisory group on the devolved nations, it is surprising that there is no representation on the Commission at all from Northern Ireland or Wales given the constitutional implications that arise from the establishment of a UK Bill of Rights.

Thirdly, eight out of nine members of the Commission are QCs whilst not one member is drawn from the human rights NGO sector, civil society or academia.

Whilst we do not doubt the commitment of Commission members to diversity, equality, human rights and the principles that underlie them, this narrow composition seriously limits both the approach to this exercise, and the kinds of experiences that are likely to shape viewpoints emanating from this process.

Indeed limitations arising from the composition of the Commission are already evident at this stage by the format of this consultation. There is for example no active attempt to engage those who might most need a bill of rights such as asylum seekers, immigrants and other socially excluded groups for example. Nor is there any real attempt to engage ordinary citizens in the process.

Furthermore, the format and content of the consultation is seriously lacking. The production of one twenty page document which totally fails to explain any of the surrounding issues as to why we might need a bill of rights, the possible options, and the advantages and disadvantages of each, is not at all conducive to facilitating serious public discussion around this issue. Without inclusive

²² Connor Gearty, The Commission looking into the possibility of a British Bill of Rights is supposed to support diversity and inclusivity, but is fatally compromised by its narrow membership base, LSE blog, 15 April 2011 <http://eprints.lse.ac.uk/35784/1/blogs.lse.ac.uk-The Commission looking into the possibility of a British bill of rights is supposed to support divers.pdf>

discussions it will be monumentally difficult to ever secure public ownership of whatever ultimately emanates from this process.

The Commission *should at a minimum* have sought to explain the above issues in its paper. It could also have used relatively inexpensive means e.g. a few public meetings around the UK, on line videos translated into a few different languages in order to make this accessible to ordinary people, and the engagement of devolved assemblies, trade unions, and the NGO sector who work with asylum seekers, immigrants, elderly and disabled people with a view to trying to involve the very people who are most in need of a Bill of Rights.

b. Consultation process adopted by the Commission

Donald et al did research²³ into the process of successful creation of bills of rights through drawing upon the experiences of various other countries. They concluded that the process for creating a bill of rights should exhibit certain characteristics. We thought that it would be useful to reproduce some of these in the light of our above criticisms. In particular the process should amongst other things be:

- i. Non-regressive – it should not dilute protection of the HRA.
- ii. Transparent – there should be transparency about the purpose of a bill of rights and the methods through which it is intended to create it.
- iii. Democratic- this recognises that bills of rights are instruments to enable powerless groups to have a say in the democratic process.
- iv. Inclusive – The process should place a high premium on the views and experiences of groups whose human rights are most vulnerable to being breached, and should give these voices an elevated status in the assessment.
- v. Deliberative and participative- the process should provide multiple opportunities for participation, and be used to educate and invigorate the wider process.

²³ Alice Donald et al, Developing a Bill of Rights for the UK, Equality and Human Rights Commission, Research Report 51, 2010
http://www.equalityhumanrights.com/uploaded_files/research/developing_a_bill_of_rights_for_the_uk_report_51.pdf

- vi. Educative- the public should be informed to the greatest extent possible about human rights protections and options for building upon them. At a minimum there should be a requirement for accessible and impartial information and the correction of myths and misconceptions about the HRA.
- vii. Reciprocal – the process should be a two way dialogue in which the Commission and the Government is educated.
- viii. Rooted in human rights – the process must be consistent with human rights principles such as non-discrimination and respect for human dignity.
- ix. Respectful towards devolution settlements - Choice should reside with devolved assemblies and the process should respect their competency and self determination.