PREM 19/1756

PART ONE

Confidential Filing

European Convention on Human Rights

EUROPEAN POLICY

PART ONE.

NOVEMBER 1980

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
~~21.6.84~~		~~22.1.85~~					
~~3.7.84~~		~~23.1.85~~					
~~5.7.84~~		~~24.1.85~~					
~~16.7.84~~		~~29.1.85~~					
~~19.7.84~~		~~6.3.85~~					
~~24.7.84~~		~~29.8.85~~					
~~26.7.84~~		~~4/9/85~~					
1.2.85		~~16.10.85~~					
~~15/6/84~~		~~18.10.85~~					
~~4.3.85~~		~~22.10.85~~					
~~6.3.85~~		25.10.85					
~~28.3.85~~		~~29.11.85~~					
~~17.5.85~~		~~6.12.85~~					
~~20.5.85~~		~~9.12.85~~					
~~24.5.85~~		~~27.2.86~~					
~~3.6.85~~		~~17.3.86~~					
~~4.6.85~~		~~18.3.86~~					
~~7.6.85~~		~~4.4.86~~					
~~21/6/85~~		~~6/4/86~~					
~~24/6/85~~		~~22.4.86~~					
~~25/6/85~~		~~1.5.86~~					
~~8.7.85~~		~~13.5.86~~					
~~11.7.85~~		15.5.86					
~~12.7.85~~							
17.7.11		ENDS					

PART 1 ends:-

FCO to Home Office. 15.5.86

PART 2 begins:-

MEA to PM 6.6.86

TO BE RETAINED AS TOP ENCLOSURE

Cabinet / Cabinet Committee Documents

Reference	Date
CC(86) 8th meeting, item 2	27/02/1986

The documents listed above, which were enclosed on this file, have been removed and destroyed. Such documents are the responsibility of the Cabinet Office. When released they are available in the appropriate **CAB** (CABINET OFFICE) CLASSES

Signed _____ Date 28/09/2014

PREM Records Team

Published Papers

The following published paper(s) enclosed on this file have been removed and destroyed. Copies may be found elsewhere in The National Archives.

1. Cmnd 503, Statement of Changes in Immigration Rules
Laid before Parliament on 15 July 1985 under section 3(2) of the Immigration Act 1971
Ordered by The House of Common to be printed 15 July 1985
Printed by HMSO ISBN 010-250385 6

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2. European Court of Human Rights
Case of Abdulaziz, Cabales and Balkandali
(15/1983/71/107-109)
Judgment
Strasbourg 28 May 1985

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3. House of Commons Hansard, 28 January 1985, columns 38 - 116
"Education (Corporal Punishment) Bill"

Signed _____ Date 28/09/2014

EUROPEAN COURT OF HUMAN RIGHTS

CASE OF ABDULAZIZ, CABALES AND BALKANDALI

(15/1983/71/107-109)

JUDGMENT

STRASBOURG

28 May 1985

A printed version of this judgment will be published shortly as volume 94 of Series A of the Publications of the Court, obtainable from Carl Heymanns Verlag K.G., Gereonstrasse 18-32, D-5000 Köln 1.

CCRC

Foreign and Commonwealth Office

London SW1A 2AH

15 May 1986

CDP/575

Dear Claire,

Strasbourg - Proofing

Thank you for your letter of 1 May, enclosing a draft Private Secretary letter from No 10 to accompany the proposed guidance note from the Cabinet Office.

FCO Legal Advisers have been in touch with Richard Gardiner (Law Officers' Department). They have agreed a redraft of the Private Secretary letter (copy enclosed) and some amendments to the guidance notice. These are:

Paragraph 1, line 1 - delete "signatory of" and substitute "party to";

Paragraph 4 - expand as follows:

"Settlement of Strasbourg Cases

4. Where applications to Strasbourg have been referred to the Government and there is a serious risk of an adverse finding by the Commission or Court, Departments should also consider the possibility of friendly settlement if this seems likely to offer a less damaging outcome. The Convention expressly provides for settlement to be considered after the Commission's decision on admissibility, but cases can also be terminated on the basis of a friendly settlement before or after that stage, including during proceedings before the Court."

I am copying this letter and enclosure to the recipients of yours.

Yours sincerely,

Colin Budd

(C R Budd)
Private Secretary

Ms C Pelham
Home Office

DSR 11 (Revised)

DRAFT: minute/letter/teleletter/despatch/note	**TYPE:** Draft/Final 1+
FROM: PS to PM **DEPARTMENT:** **TEL. NO:**	Reference
TO: To accompany Cabinet Office guidance on Strasbourg proofing	Your Reference Copies to:

SECURITY CLASSIFICATION

Top Secret
Secret
Confidential
Restricted
Unclassified

PRIVACY MARKING

.....In Confidence

CAVEAT.....

Enclosures—flag(s).....

SUBJECT: STRASBOURG - PROOFING

Since the UK is a party to the European ~~Court~~ Convention of Human Rights it is necessary to ensure so far as possible that any proposed domestic measures affecting our law, procedures, and practices, should be compatible with our obligations under that Convention. Ministers have decided that the best way of securing this is to set up a routine procedure under which new proposals, whether legislative or administrative, which might have implications for human rights are considered from the point of view of their compatibility with our ECHR obligations in the light of the case law of the Commission and Court of Human Rights.

The attached guidance from the Cabinet Office sets out the procedure to be followed by Departments when first considering proposals, and later when submitting any measure for collective Ministerial approval, where these proposals might have a bearing on human rights. It also stresses the desirability of making more use of the opportunities for friendly settlement of cases brought against the Government in Strasbourg where

/there

there is serious risk of an adverse finding by the Commission or Court; and that they should consider whether action is needed on existing measures where there is a danger of an adverse finding in Strasbourg which will affect them.

It is recognised that one cannot predict with complete confidence how the Convention would be interpreted in relation to a given measure, and that there are likely to be cases where policy needs outweigh the risk of an adverse finding. But Ministers attach particular importance to the full recognition within Whitehall of the need for these procedures, and would be grateful if the attached circular of guidance could be brought to the attention of all policy and legal branches of your Department.

Euro. Pol: Human Rights.
Nov '80

cc PL

K01265

All right
CDP
13/5

MR C POWELL

cc Mr Stark
Mr Eland

STRASBOURG PROOFING

We spoke about Ms Pelham's letter to you of 1 May enclosing attached a draft Private Secretary letter from your office to cover the proposed guidance to be issued by the Cabinet Office. As I explained, Sir Robert Armstrong is about to have a meeting with Permanent Secretaries about the review of legal challenges to ministerial decisions that was carried out following David Norgrove's letter of 9 December to Joan MacNaughton in the Lord President's office. He has decided that since these two exercises raise very similar issues it would be best to handle them together. The Strasbourg-proofing exercise will, therefore, be held up a little to be fitted into the wider context.

AJL

A J LANGDON

13 May 1986

EURO POL : Human Rights, Nov 80

From: THE PRIVATE SECRETARY

cc PK

CF

Please ensure that the recipients are content with

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SWIH 9AT

1 May 1986

Dear Charles, this draft. If I will sign & return

STRASBOURG-PROOFING

Thank you for your letter of 6 April. attached

..... I attach, as requested, a draft Private Secretary letter from No 10 to accompany the guidance. I believe that all copy recipients of the Home Secretary's minute of 17 March are content for this to issue.

I am copying this letter to the Private Secretaries to the Lord President, the Lord Chancellor, the Foreign and Commonwealth Secretary, the Secretaries of State for Education & Science, Scotland, Social Services, Employment and Northern Ireland, the Attorney General, the Lord Advocate and Sir Robert Armstrong.

Yours Clare

MS C PELHAM

Charles Powell, Esq.,

FILE NUMBER .....

DRAFT LETTER

ADDRESSEE'S REFERENCE .....

TO	ENCLOSURES	COPIES TO BE SENT TO
To accompany Cabinet Office guidance on Strasbourg proofing		
(FULL POSTAL ADDRESS)		(FULL ADDRESSES, IF NECESSARY)

LETTER DRAFTED FOR SIGNATURE BY PS to PM

(NAME OF SIGNATORY)

STRASBOURG - PROOFING

It is clearly desirable that any proposed domestic measures affecting our law, procedures, and practices, should be compatible with our obligations under the European Convention on Human Rights. It has been decided that the best way of securing this is to evolve a routine system by which new proposals, whether legislative or adminsitrative which might have implications for human rights are considered from the point of view of the effect of Strasbourg jurisprudence.

The attached guidance from the Cabinet Office is designed to assist Departments when first considering proposals, or later when submitting any measure for collective Ministerial approval, where these proposals or measures might have a bearing on human rights. It also stresses that it is desirable for Departments to make more use of the friendly settlement procedure to avoid cases coming to

the Court which have been decided against the United Kingdom by the Commission; and that the Government might take action on existing measures where there is a danger of an adverse finding in Strasbourg.

It is not suggested that anticipating Strasbourg's jurisprudence will be a necessarily simple or straightforward task; but Ministers do attach particular importance to the full recognition within Whitehall of the need for these procedures, and would be grateful if the attached circular of guidance could be brought to the attention of all policy and legal branches of your Department

EURO POL : Human Rights 11/80

CCPC

Secretary of State NIO

N
S
B

Prime Minister
Lord President
Lord Chancellor
Foreign Secretary
Attorney for General
SOS for Education and Science
SOS for Scotland
SOS for Social Services
SOS for Employment
Lord Advocate
Secretary to the Cabinet

Rt Hon Douglas Hurd CBE MP
Secretary of State for
Home Affairs
Home Office
50 Queen Anne's Gate
LONDON SW1

22 April 1986

CDP
29/4.

STRASBOURG-PROOFING

Thank you for sending me a copy of your minute to the Prime Minister of 17 March. I agree both with your diagnosis and your proposed remedy.

Because we will automatically be receiving copies of correspondence between other Departments and FCO and because of the special legislative procedures for Northern Ireland, it will be necessary for complementary guidance to be issued to both the NIO and Northern Ireland Departments. It would therefore be very helpful if my officials could be kept in touch with the drafting of the Cabinet Office circular of guidance, so that they may both take account of it in their own drafting and, if possible, issue the Northern Ireland guidance at the same time.

I also see advantage in correspondence being copied to NIO, not only when FCO advice is being sought, but when the issues explored by Departments with their own legal advisers seem likely to affect us. Correspondence, for example, with Home Office or Scottish Office legal advisers about prisons issues would often be of particular importance. I hope that this point could be addressed in the Cabinet Office circular. My officials will be in touch about the details.

I am copying this letter to the recipients of yours.

Euro. pol: Human
Rights
Nov 1980

File

DG2420

bc: PC

10 DOWNING STREET

From the Private Secretary

6 April 1986

Dear Stephen,

STRASBOURG - PROOFING

The Prime Minister has considered the Home Secretary's minute of 17 March in which he sets out a number of proposals for improving the machinery for "Strasbourg-Proofing" future legislation.

The Prime Minister agrees with the points which the Home Secretary proposes should be included in a circular of guidance to be issued by the Cabinet Office. She also agrees that it would be helpful for this to be accompanied by a statement of Ministers' concern that the need for these procedures should be fully recognised within Whitehall. I should be grateful, therefore, if you could let me have a draft for a Private Secretary letter from No. 10 to accompany the guidance.

I am copying this letter to the Private Secretaries to the Lord President, the Lord Chancellor, the Foreign Secretary, the Secretaries of State for Education and Science, Scotland, Social Services, Employment, and Northern Ireland, the Attorney General, the Lord Advocate and Sir Robert Armstrong.

yours sincerely,

Charles Powell

Charles Powell

Stephen Boys Smith, Esq.,
Home Office.

DS

B1SS138

DEPARTMENT OF EDUCATION AND SCIENCE
ELIZABETH HOUSE YORK ROAD LONDON SE1 7PH
TELEPHONE 01-934 9000

FROM THE SECRETARY OF STATE

4th April 1986

Dear Douglas,

STRASBOURG - PROOFING

I have seen your minute of 17 March to the Prime Minister and am content with the arrangements being proposed.

Copies of this minute go to the Prime Minister, the Lord President, the Lord Chancellor, the Foreign Secretary, the Secretary of State for Scotland, the Secretary of State for Social Services, the Secretary of State for Employment, the Secretary of State for Northern Ireland, the Attorney General, the Lord Advocate and the Secretary to the Cabinet.

Yours ever, Keith

The Rt Hon Douglas Hurd MP
Secretary of State for the
Home Department
Home Office
50 Queen Anne's Gate
LONDON SW1H 9AT

Euro Pol; Human Rights, 11/80

cc/C

ATTORNEY GENERAL

The Rt.Hon. Douglas Hurd, CBE, MP.
Secretary of State for Home Affairs
Home Office
50 Queen Anne's Gate
London SW1

27 March 1986

Dear Douglas.

STRASBOURG - PROOFING

I have seen your minute of 17 March to the Prime Minister. I agree with your proposals for issuing guidance of the kind you describe, which I think are very helpful.

I am copying this letter to the Prime Minister, the Lord President, the Lord Chancellor, the Foreign Secretary, the Secretary of State for Education and Science, the Secretary of State for Scotland, the Secretary of State for Social Services, the Secretary of State for Employment, the Secretary of State for Northern Ireland, the Lord Advocate and the Secretary to the Cabinet.

Best wishes for Easter

Yours ever,

Michael.

Euro Rol: Human Rights 11/80

CC SPC

Lord Advocate's Chambers
Fielden House
10 Great College Street
London SW1P 3SL

Telephone Direct Line 01-212 0515
Switchboard 01-212 7676

The Rt Hon Douglas Hurd CBE MP
The Secretary of State for the Home Department
50 Queen Anne's Gate
London SW1H 9AT

18 March 1986

CJP 19/3

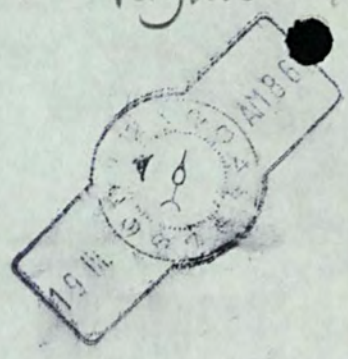
STRASBOURG - PROOFING

I have seen your minute of ~~17~~ attached March to the Prime Minister and am content to proceed in the manner proposed by you.

Copied to the Prime Minister, the Lord President, the Lord Chancellor, the Foreign Secretary, the Secretary of State for Education and Science, the Secretary of State for Scotland, the Secretary of State for Social Services, the Secretary of State for Employment, the Secretary of State for Northern Ireland, the Attorney General and the Secretary to the Cabinet.

CAMERON OF LOCHBROOM

EURO POL
Human Rights 11/80



Prime Minister:
Colleagues are content.
Agree this approach?

Yes - I think there is nothing more we can do

Prime Minister

STRASBOURG - PROOFING

You held a meeting with colleagues last summer to discuss possible ways of reducing the impact of the findings of the European Court on Human Rights in Strasbourg. In deciding that we should maintain the status quo, it was agreed that we should renew our acceptance of the right of individual petition and the compulsory jurisdiction of the Court (which has now been done) and should not incorporate the European Convention into domestic law.

The meeting also concluded, however, that further consideration should be given to improving the machinery for "Strasbourg-proofing" future legislation. Officials here have been looking at this in consultation with other interested Departments and I am now in a position to circulate proposals to colleagues.

We face the obvious difficulty that we are not dealing here with issues of fact, nor can we (as we know to our cost) make absolutely confident predictions of the way in which Strasbourg will move. Our Strasbourg obligations moreoever amount to a much more open-ended commitment than (say) our Community obligations. In the case of legislation and other measures having a bearing on Strasbourg obligations, colleagues may well experience acutely the difficulty of having to balance the risks of future adverse Strasbourg findings with their own immediate Departmental policy objectives.

This suggests a less formal approach than we have adopted for EC matters and I do not consider that the situation calls for any formal committee structure whether at official or Ministerial level for dealing specifically with these matters. I suggest that individual Departments should take first responsibility for assessing the vulnerability of the proposed measures to ECHR

jurisprudence, with the option of a collective Ministerial view later if necessary. Machinery of the EQO type could get weighed down with casework, have difficulty in obtaining definitive legal advice and might generally interrupt the efficient despatch of Government business.

In my view this points to the need for central guidance from the Cabinet Office on the procedure to be adopted when proposals are being considered in Departments; and an established procedure for bringing ECHR considerations forward when collective Ministerial approval is sought for any given measure.

If you and colleagues agree, therefore, I propose that we invite Cabinet Office to prepare a circular of guidance, on the following lines:

(i) that individual Departments, in consultation with their legal advisers, should always consider the effect of existing (and predicted) Strasbourg jurisprudence on any proposed legislative or administrative measures;

(ii that if Departments are in any doubt about the likely implications of the Convention in connection with any particular measure, they should seek ad hoc guidance from FCO, copying the request to the Law Officers, the Lord Advocate's Office, and any other Departments facing comparable problems. Exchanges of correspondence would also be copied to the Home Office, the Scottish Office and the Northern Ireland Office because of their general oversight of the domestic application of the Convention;

(iii) that any memoranda submitted to a policy committee of Cabinet, or accompanying a Bill submitted to Legislation Committee, should

include an assessment of the impact, if any, of the ECHR on the action proposed (much as Departments now do for Community implications).

I think it would also be helpful if the guidance could stress the need, where this is right, to pay more regard to the possibility of friendly settlements where they seem to offer s politically less damaging outcome than determination by the Court or Commission. Departments could also be reminded of the need to consider action on existing measures where it is clear that there is a risk of an adverse finding at Strasbourg which will affect them.

I think it would be desirable if the issue of this guidance were accompanied by a statement of Ministers' concern that the need for these procedures should be fully recognised within Whitehall. One possibility might be for such a statement to issue in the form of a Private Secretary letter from No 10 and my officials would be glad to suggest a text.

I should be glad to know if you and colleagues agree that this is the right way to proceed.

Copies of this minute go to the Lord President, the Lord Chancellor, the Foreign Secretary, the Secretary of State for Education and Science, the Secretary of State for Scotland, the Secretary of State for Social Service, the Secretary of State for Employment, the Secretary of State for Northern Ireland, the Attorney General, the Lord Advocate and the Secretary to the Cabinet.

Douglas Hurd.

17 March 1986


17. III.
AM 8-6

CS

P.M

cc

SECRETARY OF STATE FOR EMPLOYMENT

Caxton House Tothill Street London SW1H 9NF

Telephone Direct Line 01-213 ....6460.....
Switchboard 01-213 3000

The Rt Hon Douglas Hurd MP
Home Secretary
Home Office
50 Queen Anne's Gate
London
SW1H 9AT

CDP 9/12.

9 December 1985

Dear Douglas,

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS BILL

Thank you for copying to me your letter of 29 November to John Biffen about this Bill which was introduced by Lord Broxbourne and is due for a second Reading on 10 December.

I agree fully with the proposals in paragraph 9 of your letter that we should set out the Government's objections to the Bill, but in the event of a division ask Ministers to abstain and if necessary make arrangements to block it in the House of Commons.

I am sending copies of this letter to the recipients of yours.

Yours ever,

Norman

Euro Pol NOV. 80

Human Rights

ce BC

PRIVY COUNCIL OFFICE
WHITEHALL. LONDON SW1A 2AT

6 December 1985

CDP
6/12.

Dear Douglas,

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS BILL

You wrote to me on 29 November with your recommendations for handling the Bill introduced by Lord Broxbourne seeking to incorporate the provisions of the European Convention on Human Rights into United Kingdom statute law.

I share your view that there is no reason to depart from our previously agreed line that it would be inappropriate for us to incorporate the Convention. I also agree with your proposal that the Government spokesman should set out our objections to the Bill at Second Reading in the Lords, that Ministers should abstain in the event of a division and that action be taken to block the Bill at Second Reading in the Commons should it progress that far. You may take it that you have the agreement of Legislation Committee to proceed accordingly.

I am copying this letter to the Prime Minister, and members of Legislation Committee and to First Parliamentary Counsel and Sir Robert Armstrong.

Yours
John Biffen

JOHN BIFFEN

Rt Hon Douglas Hurd MP
Home Secretary
Home Office
Queen Anne's Gate

Human Rights: EURO. POL Nov 80.

HOME SECRETARY

QUEEN ANNE'S GATE LONDON SW1H 9AT

29th November 1985

Dear John,

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS BILL

Lord Broxbourne introduced this Bill on 21 November and it is provisionally set down for Second Reading on 10 December.

Purpose and Effect

2. The Bill seeks to incorporate the provisions of the European Convention on Human Rights into UK statute law. Any acts done by or for the purposes of the Crown or a Minister of the Crown, or by various public authorities, which infringe any of the fundamental rights and freedoms of the Convention, would be contrary to UK law.

Background

3. The UK is party to the European Convention on Human Rights and Fundamental Freedoms. It must therefore, under Article 53, abide by the decision of the European Court in any case to which it is a party. It has also accepted the optional article 46 (until at least 1991) which recognises the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention. If the Court finds UK law, procedures or practice in breach of the Convention, the UK is under treaty obligation to provide an effective remedy to the person whose rights or freedoms have been violated. Once the UK has been found in breach, the Government takes immediate steps to seek changes in the law or administrative practice to remedy the grievance. Yet Parliament remains the supreme legislative body and cannot necessarily be compelled to legislate in the sense required, as the fate of the Education (Corporal Punishment) Bill shows.

4. The incorporation of the ECHR has been suggested at intervals in the past. Lord Wade presented similar Bills on four occasions since 1976; in 1981 his Bill was passed in the Lords but talked out in the Commons. More recently, in two Early Day Motions, MPs have requested the Government to incorporate the European Convention; and early this year the Constitutional Reform Centre, headed by Lord Scarman, was set up to press for incorporation. This Bill is understood to have originated with Lord Scarman.

5. The more important arguments for and against incorporation are set out in the attached conclusions of a Select Committee of the Lords on a Bill of Rights, whose report was published in 1978, and who concluded by 6 to 5 that the UK should not have a Bill of Rights. These arguments are still to the point; but in the intervening period the UK has been found in breach of the Convention in a number of cases and there has been pressure on the one side for the UK to distance itself from Strasbourg (eg by not renewing the right of individual petition) and on the other side, by further calls for incorporation. It has been suggested by those in favour of incorporation that it would reduce

/the number

The Rt Hon John Biffen, MP

the number of cases where the UK is found in violation by the European Court and (something that we do not accept) that Article 13 (that everyone whose rights under the Convention are violated shall have an effective remedy by a national authority) requires incorporation.

Policy

6. In the debate on Lord Wade's Bill in 1981, the Solicitor-General stated that the Government was not committed on the Bill, but stressed the need for all-party talks. The matter was discussed by H Committee on 1 June 1981 but the Prime Minister finally agreed in early 1982 not to pursue talks. No publicity was given to this decision. More recently, the Prime Minister asked officials to consider various ways of mitigating the influence of Strasbourg on the United Kingdom, but a meeting chaired by the Prime Minister on 17 July decided, inter alia, not to seek to incorporate the European Convention. Our public line since then has been that we have no present plans to incorporate the Convention; but the Prime Minister said in reply to a Parliamentary Question on 14 November that she did not think it right to incorporate the Convention into our law.

Financial, manpower and EC implications

7. The consequences of incorporation are difficult to predict but there are significant resource implications. There could be a heavy burden on the domestic courts because, although the avenue to Strasbourg would not be closed, the domestic path - given publicity by the legislation - might attract many litigants. If these are unsuccessful, there could be an increase in cases at Strasbourg. Because of the greater risk of litigation, consideration would need to be given to vulnerable areas of administration (prison overcrowding) and policy (immigration). Parliamentary business would be at risk of disruption if a judicial decision found existing provisions of the law incompatible with the incorporated provisions.

8. EC Implications. The Commission is currently debating a proposal for the Community itself to become a party to the European Convention. We are resisting this but were we to incorporate, we would need to reconsider our stance. (Of the other EC countries, Ireland and Denmark have not incorporated the European Convention.)

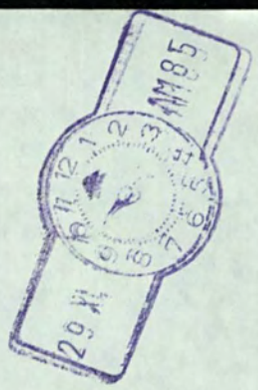
Conclusion

9. I invite colleagues to agree that we should set out the Government's objections to the Bill at Second Reading in the House of Lords but that, in line with convention, Ministers should abstain in the event of a division. If the Bill makes progress arrangements should be made to block it in the House of Commons.

10. I am sending copies of this letter to members of Legislation Committee, the Prime Minister, First Parliamentary Counsel, Sir Robert Armstrong and the secretaries to Legislation Committee.

Yours,

Douglas.


AM85

HOME SECRETARY

WITH
THE COMPLIMENTS OF THE
PRIVATE SECRETARY

HOME OFFICE
50 QUEEN ANNE'S GATE
LONDON SW1H 9AT

could this please be attached to the letter dated 29/Nov. from Mr Hurd to Mr Britten (Human rights Fundamental Freedoms Bill)
Thankyou 29/11

doc (2)

MSC 186/5/7.
78

of those advocating a Bill of Rights, including a number of witnesses before the Committee, pitch thier case too high. Similar considerations equally suggest that the case against a Bill of Rights has also been exaggerated. It is from this standpoint that the Committee now set out what they see as the most important arguments on either side.

The Arguments For and Against

32. The Committee summarise in this paragraph the most important arguments (as they see it) put to them in favour of a Bill of Rights.

(a) The individual citizen might be better off, and could not be worse off, if the European Convention were made part of United Kingdom law, since in the event of conflict between the Convention and other provisions of United Kingdom law whichever was more favourable to the plaintiff would prevail.

(b) Embodying the Convention in our domestic law would provide the individual citizen with a positive and public declaration of the rights guaranteed him, thus complementing the United Kingdom's traditionally "negative" definition of his common law rights.[1] This would have special value at the present time for the many individuals and groups who tend to feel impotent in the face of the size and complexity of the public authorities which seem to dominate their lives.

(c) Although when the United Kingdom acceded to the Convention, and thus allowed the right of individual petition to the Court at Strasbourg, it was believed that our law had nothing to fear from any appeal to the Articles of the Convention, a number of doubts have emerged since that time. Experience has shown that there are a number of areas where the British subject must at present take the long road to Strasbourg as a court of first instance (as Golder[2] did, since the domestic law provides no remedy in the courts of the United Kingdom.

(d) The Commission and Court at Strasbourg were not established as a "court of first instance", but rather as a "court of appeal" to which the citizen can have recourse only when domestic procedures have been exhausted. Although there is no obligation on a Member State to incorporate the Convention, the Strasbourg Court has said that the intention of the drafters of the Convention that the rights set out should be directly secured to anyone within the jurisdiction of the contracting States finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law. The United Kingdom is at present the only signatory which neither has a charter of fundamental human rights nor has incorporated

[1] There is, for example, no law positively conferring freedom of speech. The citizen's freedom in this respect lies in his right to say anything that does not fall foul of any laws imposing restrictions in that regard, such as those concerning defamation, contempt of court, blasphemy, sedition, official secrets, etc.

[2] Mr. Golder, while serving a sentence in a United Kingdom prison, was refused permission to write to his solicitor to seek advice about possible defamation proceedings against a prison officer. He complained to the Human Rights Commission, who upheld his complaint and, in the absence of a friendly settlement, brought the matter to the Human Rights Court. The Court upheld the complaint, holding that Mr. Golder's rights had been infringed under both Articles 6 and 8 of the Convention.

the Convention into domestic law. So long as the Convention remains only an international treaty and forms no part of United Kingdom law, it suffers from the disadvantage of being both remote and expensive. Moreover the United Kingdom is exposed to unflattering world publicity. Our compliance with the Convention can already be tested judicially at Strasbourg. There is no reason to suppose that our own courts are not equally capable of determining these issues. Any uncertainty there may be about the impact of the Convention on our domestic law already exists and can be argued out at Strasbourg. Why not in the Strand?

(e) An Act incorporating the Convention would not be an alternative to the continued exercise by Parliament of its traditional sovereignty, but would complement other Acts by which Parliament may wish to make law affecting human rights, including any amendment of the law that Parliament thinks desirable in the light of a United Kingdom court decision. Meanwhile, however, the Convention, if embodyied in our domestic law, would, in Lord Scarman's words, "freshen up the principles of the common law" and when read with the common law would "provide the judges with a revised body of legal principle upon which they could go on slowly developing the law, case by case, as they have been doing for centuries", without waiting until the opportunity for legilsation occurred. Q. 793 Q. 792

(f) Our membership of the European Economic Community reinforces the value of the European Convention on Human Rights and makes it the more desirable that United Kingdom citizens should become increasingly aware of the European dimension. It is therefore all the more important that our legal system and jurisprudence should be developed as part of the European Community and not in splendid isolation.

(g) The Act would constitute a framework of human rights guaranteed throughout the United Kingdom and this would have special value if Scottish and Welsh Assemblies are established with powers devolved from Westminster, to ensure the exercise of such powers (e.g. those respecting local government and education) by the Assemblies with due regard to the United Kingdom's international commitments under the Convention. Significance is attached to the unanimous recommendation of the Northern Ireland Standing Advisory Commission on Human Rights favouring the incorporation of the Convention into legilsation applying to the whole of the United Kingdom. This the Northern Ireland Commission believed to be in the long-term interests of that province.

(h) The incorporating Act, though not limiting Parliamentary sovereignty, would nevertheless be a continuing reminder to legislators of the international commitment undertaken when the United Kingdom government ratified the Convention. Indeed, the Convention seems likely to have far more practical effect on legislators, administrators, the executive, the judiciary and indi-

vidual citizens as well as legilsators if it ceases to be only an international treaty obligation and becomes an integral part of the United Kingdom law, guaranteeing the citizen specific minimum rights enforceable in the first instance in the United Kingdom courts.

33. The Committee now summarise in this paragraph the arguments against a Bill of Rights which seem to them to be the most important.

(i) Incorporation of the Convention would be to graft on to the existing law an Act of Parliament in a form totally at variance with any existing legislation and indeed incompatible with such legislation. Hitherto, it has been an accepted feature of our constitution that Parliament legislates in a specific form and that it is the role of the courts to interpret such legislation. Incorporation of the Convention would, for the first time, open up wide areas in which legislative policy on such matters as race relations, freedom of speech, freedom of the press, privacy, education and forms of punishment would be effectively handed over to the judiciary. All these are matters which our constitution has hitherto reposed in the hands of the legislature.

(ii) Nor is it right to say that the role the courts would have under a Bill of Rights would be no more than the kind of role they have always had under the common law. Under the common law the courts have developed legal principles slowly and empirically, from case to case. Under a Bill of Rights they would start with principles of the widest generality and would have a free hand to decide how those principles operated in the cases that came before them.

(iii) Parliament has on numerous occasions shown its readiness to intervene in new areas where fresh social problems have arisen, and it is better for Parliament to enact detailed legislation as it has done, for instance, on such matters as race relations and sex discrimination, rather than to look to the unelected judges to develop both the policy on such matters and the way in which it should be dealt with.

(iv) So far as possible, the law should be clear and certain, whereas if the European Convention, framed as it is in broad and general terms capable of a variety of interpretations, were to become part of our domestic law, it would introduce a substantial and wide-ranging element of uncertainty into our law. (The same would be true of a Bill not based on the European Convention because it is in the nature of any Bill of Rights to be framed in the same sort of way as the Convention.) Individuals and companies would no longer be able to obtain confident advice as to what their rights, powers, obligations and liabilities were. That in itself would be a price too high to pay for flexibility—and answers the point that the individual citizen could not on any footing be worse off with a Bill of Rights. The uncertainty thus brought into our law would itself afford opportunity for exploiting endless challenges in the courts or before any tribunal to the validity of the existing laws. No one would know where he stood until each question had been tested afresh, and the least that can be said is that there is the prospects of a very great extension of litigation in the courts.

To take only one example, the introduction of Article 10 of the European Convention into our domestic law would introduce serious

doubts into such important areas of the law as those relating to defamation and contempt of court, and official secrets.

(v) It is fallacious to suggest, as some witnesses suggested, that to make the Convention part of our domestic law would simply to be give to our judges the same sort of role, in relation to the Convention, as is played by the judges in Strasbourg. There is a great difference between the Commission or the Court at Strasbourg from time to time measuring our domestic law against the yardstick of the Convention, and the United Kingdom courts applying the Convention as an instrument of our domestic law. As a set of principles of domestic law, the Convention would have a life of its own quite independent of its international existence. The Convention could then be invoked daily in our Courts and they would constantly have to give decisions on it without any guidance from the jurisprudence at Strasbourg (where the number of cases adjudicated is very limited). Moreover, our Courts would be free to give the Convention a wider effect than was required by such Strasbourg jurisprudence as was available. In doing so they would be acting quite consistently with our international obligations.

(vi) The present situation in the United Kingdom is in accord with the original philosophy of the European Convention. The Convention was intended to lay down minimum standards of human rights which it was assumed would be in accord with the spirit of all the legal systems of the signatories to the Convention. It was always contemplated, as in fact has proved to be the case, that from time to time there would be conflicts between the domestic laws of the signatory states and the Convention, and for this reason the Convention set up machinery by way of the European Commission and the European Court to deal with such cases. Such conflicts have inevitably arisen in all signatory states, whether or not the Convention is part of their domestic law. It is in accordance with the spirit of the Convention that, when it emerges that there is such a conflict in the case of the United Kingdom, this should be put right.

Where necessary this can be done by legislation, but often the deficiency will call for no more than a change of administrative regulation or instructions. But it is no more unflattering to this country than it is to any other signatory of the Convention if the kind of dispute contemplated by the drafters of the Convention from time to time goes to Strasbourg for argument: and it is not the case, as some of the witnesses assumed, that relatively more cases have gone to the Commission from the United Kingdom than from other countries.

(vii) Even on the most unfavourable view of the extent to which United Kingdom law at present falls short of the standards of the Convention[1], there are no more than a few marginal situations where the incorporation of a Bill of Rights might bestow a remedy where present law does not do so. They have mainly related to privacy and the conduct of the prison services. As to privacy, this has already been the

[1] In a written answer in the House of Lords on 23rd March the Minister of State, Home Office, stated that

"The Government have at present no reason to suppose that there is a conflict between any of the provisions of the Convention and the law of the United Kingdom or the general rules governing administrative practice in this country."

subject of a thorough investigation by the Younger Committee, which made various suggestions for reform but came down against a general law of privacy. As to the conduct of the prison services, there has been one case so far, the *Golder* case, where a complaint has succeeded, and where the matter was dealt with by a change in the relevant regulations. The Committee are aware that there are several other cases now before the Commission but cannot properly comment on these.

(viii) There is no reason for supposing that the Government, and Parliament, are likely to proceed in ignorance of the country's international commitments; and indeed the Committee were given examples of proposals which had been modfied by the Government in their preliminary stage to take account of our commitments under the European Convention. It is not realistic to fear that there is any risk of this country—whether at Westminster or in the devolved assemblies —legislating in "splendid isolation" and without regard to the treaty provisions by which we are bound. The effect of incorporating the Convention into United Kingdom law in the event of devolution to Scotland would be to introduce similar uncertainties into the operation of any legislation emanating from the Scottish Assembly as those injected into the law of the United Kingdom generally.

(ix) It is felt that adequate weight is not given in the Report of the Northern Ireland Standing Advisory Commission to the arguments against incorporation from the point of view of its effect on the legal system as a whole; and that the argument that what is good for Northern Ireland must be good for the United Kingdom as a whole is unproven.

34. The foregoing paragraph briefly summarise the main arguments for and against a Bill of Rights which were reviewed by the Committee. Much has been written in the various publications but the Committee hope that they have picked out those arguments which will seem to the House to be the most important. Which of the arguments have the greater force, as has already been indicated, is a question on which the Committee are irreconciliably divided. They can, however, offer certain conclusions on the second question—what form a Bill of Rights should take—and the Report now turns back to these.

The form a Bill of Rights should take

35. The primary conclusion here was indicated at the beginning of this Report, namely, that, if there is to be a Bill of Rights at all, it should take the form of a Bill giving effect in our domestic law to the European Convention. To that extent the Committee are in broad agreement with the form of Lord Wade's Bill. As already explained, however, the Committee think that it would require amendment, and they have considered some of the questions that arise in this regard.

36. There is first the question whether the whole of the European Convention, and its Protocols, should be included, as in Lord Wade's Bill. Only the first 18 Articles of the Convention, and parts of the Protocols, actually set out the rights to be protected. The rest of the

the Department which prepares the proposals, and the Committee were told that any Department which was in doubt about the effect of proposed legislation could obtain advice from the Foreign and Commonwealth Office or from the Law Officers. The Committee were told that care was taken to ensure that no Government proposals were laid before Parliament which might conflict with the international obligations of the United Kingdom. P. 101

47. The Committee were sceptical of the usefulness of a Parliamentary Committee. It did not seem likely that such a Committee would succeed in detecting a breach of the Convention in proposed legislation which had escaped notice at the various stages of preparation through which it would already have passed. In that matter, the Committee agreed with the views expressed in evidence by Lord Hailsham. Q. 24

Summary

48. The first section of this Report (paragraphs 1–12) is introductory. It explains that the Committee regarded their terms of reference as requiring them to consider the case for a Bill of Rights in the light of the existing constitutional arrangements. It records that, on the two questions posed in the Committee's terms of refrence (a) they were agreed that, if there was to be a Bill of Rights, it should be based on the European Convention on Human Rights; but (b) they were not agreed on whether a Bill of Rights was desirable.

49. The second section (paragraphs 13–31) goes on to discuss the scope of a Bill of Rights. In particular it considers the question of entrenchment, and the possible impact of any Bill of Rights, within the present constitution, on our law. It also examines the extent to which the European Convention already plays a part in our domestic law; and it records the Committee's view that the advantages and disadvantages of having a Bill of Rights tend to be exaggerated by advocates on both sides.

50. The third section (paragraphs 32–34) sets out what seemed to the Committee the most important arguments for and against having a Bill of Rights.

51. The fourth section (paragraphs 35–45) makes comments and proposals on the form a Bill of Rights should take, if there was to be such a Bill.

52. The fifth section (paragraphs 46 and 47) deals with the possibility of introducing formal scrutinising machinery.

Conclusions

53. The Committee are agreed in concluding that, if there is to be a Bill of Rights, it should be a Bill based on the European Convention; and that, in the event of such a Bill proceeding, there should be some changes in the Bill as introduced by Lord Wade last Session (and attached as an Appendix to this Report). Whether there should be a Bill at all is an issue on which the Committee are divided. Six members of the Committee (Lord Blake, Lady Gaitskell, Lord Jellicoe, Lord

O'Hagan, Lord Recliffe-Maud and Lord Wade) were in favour of a Bill; five members (Lord Allen of Abbeydale, Lord Boston of Faversham, Lord Foot, Lord Gordon-Walker and Lord Lloyd of Hampstead) took the opposite view. Although the Committee were thus unable to give an undivided answer to the first question put to them in their terms of reference, they nevertheless hope that the arguments and considerations to which the Report draws attention will be of help to members of the House in formulating their own views.

cc PC

NORTHERN IRELAND OFFICE
WHITEHALL
LONDON SW1A 2AZ

SECRETARY OF STATE
FOR
NORTHERN IRELAND

CDP
25/X

The Rt Hon Douglas Hurd CBE MP
Home Secretary
Home Office
50 Queen Anne's Gate
LONDON
SW1

25 October 1985

Dear Douglas

EUROPEAN CONVENTION ON HUMAN RIGHTS : RENEWAL OF OPTIONAL CLAUSES 25 AND 46 (RIGHT OF INDIVIDUAL PETITION AND COMPULSORY JURISDICTION OF THE COURT)

Thank you for sending me a copy of your letter of 8 October to the Foreign Secretary.

I was pleased with your proposal to announce our intention to renew Articles 25 and 46 for a further 5 years.

A large part of any debate on the decision is likely to be devoted to controversial Northern Ireland issues. There would be no advantage to the Government either in giving them an airing or in my view in accepting the principle that we should debate the renewal of Articles 25 and 46.

I therefore agree with you that a debate should be resisted. If, however, there were to be a debate, I am certain that it should not take place until after the conclusion of the present Anglo-Irish dialogue.

I am copying this letter to the Prime Minister, the Lord President, the Lord Chancellor, the Secretary of State for Trade and Industry,

/the

the Secretary of State for Foreign and Commonwealth Affairs, the Secretary of State for Defence, the Secretary of State for Education and Science, the Secretary of State for the Environment, the Secretary of State for Employment, the Lord Privy Seal, the Attorney General, the Lord Advocate, the Chief Whip and the Secretary to the Cabinet

Human Rights : RUKO POL
Nov 80.

VM

LCPC.

SECRETARY OF STATE FOR THE ENVIRONMENT

2 MARSHAM STREET
LONDON SW1P 3EB

01-212 3434

My ref: B/PSO/17930/85

Your ref:

MBPM

23 October 1985

Dear Douglas.

EUROPEAN CONVENTION ON HUMAN RIGHTS: RENEWAL OF OPTIONAL CLAUSES 25 AND 46 (RIGHT OF INDIVIDUAL PETITION AND COMPULSORY JURISDICTION OF THE COURT)

Thank you for copying to me your letter of 8 October to Geoffrey Howe.

I agree that we should again renew our acceptance of these two Articles for five years. A shorter extension might be seen as a diminution in concern for human rights. A longer one could be criticised by those who think the Strasbourg court is far from perfect. You may have seen it recently described in The Times as a place where "all things can happen".

I agree that you will have to consider the question of a debate in the light of reaction to the announcement of renewal. I think this is primarily a matter for the Leader in the House and the business managers.

Copies of this letter go to recipients of yours.

Yours

KENNETH BAKER

The Rt Hon Douglas Hurd CBE MP

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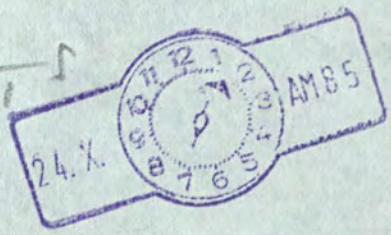

cc PC

Foreign and Commonwealth Office

London SW1A 2AH

From The Minister of State

22 October 1985

NBPM

Dear Douglas,

EUROPEAN CONVENTION ON EUROPEAN RIGHTS: RENEWAL OF OPTIONAL CLAUSES 25 AND 46 (RIGHT OF INDIVIDUAL PETITION AND COMPULSORY JURISDICTION OF THE COURT)

I am writing in Geoffrey Howe's absence to thank you for your letter to him of 8 October. We have consulted Geoffrey Howe in Nassau; he entirely agrees with the procedure you propose.

In view of the likely interest in this subject, I wonder whether you might wish to consider arranging for a parallel question to be inspired in the House of Lords for answer the same day.

I am copying this letter to the recipients of yours.

Yours ever

Janet

Baroness Young

The Rt Hon Douglas Hurd CBE MP
The Secretary of State for the Home Department
Home Office
Queen Anne's Gate
London

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HUMAN RIGHTS

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MINISTRY OF DEFENCE WHITEHALL LONDON SW1A 2HB

TELEPHONE 01-218 9000
DIRECT DIALLING 01-218 2111/3

MO 21/8/5M

18th October 1985

Thank you for your letter of 8th October about renewal of Articles 25 and 46 of the European Convention on Human Rights.

I agree that these optional articles should be renewed for a further period of 5 years, and that the opportunity offered by Teddy Taylor's Parliamentary Question on 24th October should be taken to announce renewal. I also agree that as we are not seeking a mandate from Parliament for renewal, the case for a Parliamentary debate should be considered in the light of the reaction to the announcement.

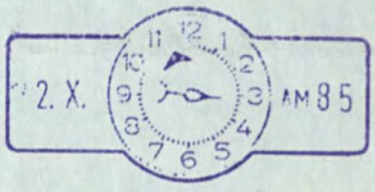
I am sending copies of this letter to the Prime Minister, the Lord President, the Lord Chancellor, the Secretary of State for Trade and Industry, the Secretary of State for Education and Science, the Secretary of State for the Environment, the

The Rt Hon Douglas Hurd CBE MP

Secretary of State for Employment, the Secretary of State for Northern Ireland, the Lord Privy Seal, the Attorney General, the Lord Advocate, the Chief Whip and the Secretary of the Cabinet.

Michael Heseltine

Human Rights: EURO. POL. NN 80.



FROM:
THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.

LORD CHANCELLOR

HOUSE OF LORDS,
LONDON SW1A 0PW

18 October 1985

MBPN

My dear Douglas,

European Convention on Human Rights : Articles 25 and 46

Thank you for copying to me your letter of 8 October to the Foreign Secretary.

I agree with you and with the Lord Advocate that the announcement that the Government intends to renew its declarations in respect of Articles 25 and 46 of the European Convention on Human Rights should be made in reply to the Parliamentary Question put down for 24 October.

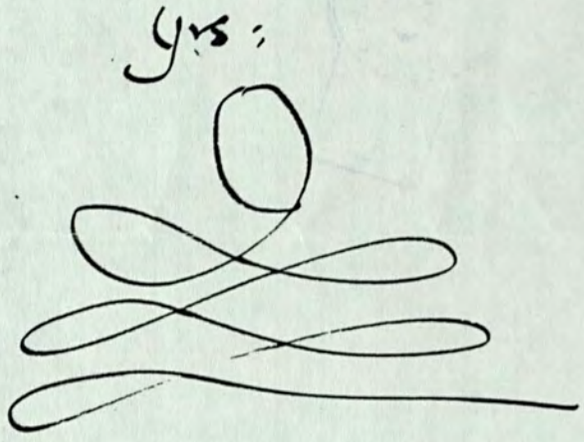
I also agree that any debate should follow, and not precede, this announcement. The case for a debate can be considered in the light of Parliamentary reaction to the announcement. In this regard I would remind colleagues that it seems probable that Lord Broxbourne will introduce a Bill to incorporate the provisions of the European Convention into domestic law, so the renewal of the declarations is likely to be ventilated in the Lords in any event.

I am copying this letter to the Prime Minister, the Foreign Secretary, the Lord President, the Secretary of State for Trade and Industry, the Secretary of State for Defence, the Secretary

/...2

The Right Honourable
Douglas Hurd MP CBE
The Secretary of State
for the Home Department
Home Office
Queen Anne's Gate
London

of State for Education and Science, the Secretary of State for the Environment, the Secretary of State for Employment, the Secretary of State for Northern Ireland, the Secretary of State for Scotland, the Lord Privy Seal, the Attorney General, the Lord Advocate, the Chief Whip and the Secretary of the Cabinet.



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HUMAN RIGHTS

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RESTRICTED

DEPARTMENT OF TRADE AND INDUSTRY
1-19 VICTORIA STREET
LONDON SW1H 0ET 5422
TELEPHONE DIRECT LINE 01-215
SWITCHBOARD 01-215 7877

Secretary of State for Trade and Industry

16 October 1985

The Rt Hon Douglas Hurd MP
Secretary of State for Home Affairs
Home Office
50 Queen Anne's Gate
LONDON
SW1H 9AT

Dear Douglas,

EUROPEAN CONVENTION ON HUMAN RIGHTS: RENEWAL OF OPTION CLAUSES 25 AND 46

FILE WITH TF 21/10

You wrote on 8 October to Geoffrey Howe about the answer to be given to Teddy Taylor and the desirability or otherwise of a debate.

2 I agree with your proposal. As to the question of a debate, you should be aware that the European Court is expected to rule, probably in December, on the case of Lithgow and Others v. the United Kingdom. This case concerns the compensation paid to the former owners of the nationalised aircraft and shipbuilding companies. Some of our supporters feel strongly that we should have provided additional compensation particularly given that when we were in Opposition we severely criticised the proposed compensation in the Nationalisation Bill as unjust and inadequate. Some have also argued in the light of our defence of these issues at the European Court that we ought to have legislation against unfair compensation for nationalised assets particularly given our privatisation programme. A debate would provide a forum for a further airing of all these topics. I do not consider that this would be helpful, and I would be grateful if this could be borne in mind.

3 Copies of this letter go to recipients of yours.

Yours,
Leon

LEON BRITTAN

JF2AHX

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10 DOWNING STREET

From the Private Secretary

16 October 1985

The Prime Minister has seen the Home Secretary's letter of 8 October to the Foreign and Commonwealth Secretary about the question of a debate on the renewal of Optional Clauses 25 and 46 to the European Convention on Human Rights.

The Prime Minister agrees with the Home Secretary's inclinations against a debate, subject of course to the views of colleagues.

I am copying this letter only to Joan MacNaughton (Lord President's Office), Len Appleyard (Foreign and Commonwealth Office) and David Morris (Lord Privy Seal's Office).

TIMOTHY FLESHER

Stephen Boys Smith, Esq.,
Home Office.

010

ECPC

Lord Advocate's Chambers
Fielden House
10 Great College Street
London SW1P 3SL
Telephone Direct Line 01-212 0100
Switchboard 01-212 7676

The Rt Hon Douglas Hurd Esq MP CBE
The Secretary of State for the Home Department
Home Office
Queen Anne's Gate
LONDON

14 October 1985

EUROPEAN CONVENTION ON HUMAN RIGHTS:
RENEWAL OF OPTIONAL CLAUSES 25 AND 46

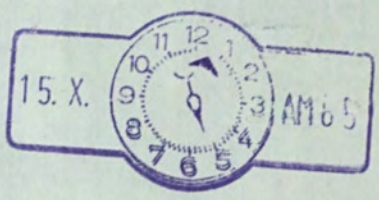
CDP
WITH ~~EC~~

Thank you for copying to me your letter of 8 October to Geoffrey Howe.

I agree that we should not postpone our announcement of renewal of these Articles for 5 years until after any debate, and that the announcement should be made in reply to Teddy Taylor's Question. I also agree that we should consider the case for a debate in the light of Parliamentary reaction to the announcement.

Copied to the Prime Minister, the Foreign Secretary, the Lord President, the Lord Chancellor, the Secretary of State for Trade and Industry, the Secretary of State for Defence, the Secretary of State for Education and Science, the Secretary of State for the Environment, the Secretary of State for Employment, the Secretary of State for Northern Ireland, the Lord Privy Seal, the Attorney General, the Chief Whip and the Secretary of the Cabinet, and also (with your letter) to the Secretary of State for Scotland.

CAMERON OF LOCHBROOM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AM 6

(1)

10 DOWNING STREET

I should resume debate-ment

Prime Minister

The meeting you chaired in July concluded that there was no realistic option but to renew.

The only question is whether to embark a debate to the opposite of renewal.

Agree Home Secretary's proposed line?

C.D. 14/9

SECNO ①

Prime Minister
Agree to no debate before announcement of the decision to renew the optional clauses: but maybe one afterwards?
CDP 9/x

But why do we want to renew them - they [illegible] [illegible] trouble and I thought the proposal to renew was only because of the effect of not doing so on public opinion at [illegible]

QUEEN ANNE'S GATE LONDON SW1H 9AT

8th October 1985

Dear Foreign Secretary

EUROPEAN CONVENTION ON HUMAN RIGHTS: RENEWAL OF OPTIONAL CLAUSES 25 AND 46 (RIGHT OF INDIVIDUAL PETITION AND COMPULSORY JURISDICTION OF THE COURT)

In his letter to you of 29 July, Leon Brittan recorded for the benefit of colleagues who were not at the Prime Ministerial meeting on 17 July that it had been decided to renew Article 25 (the right of individual petition) and 46 (the compulsory jurisdiction of the court). He proposed that we renew for a five year period.

He also said that the form and timing of an announcement would have to take account of Parliamentary pressure for a debate and vote on the issue; and that though we were not committed to a debate we should perhaps discuss it with John Biffen when Parliament returned.

Teddy Taylor has now put down a Parliamentary Question for 24 October about Government policy on renewal of the right of individual petition. I would like to use this opportunity to announce our intention to renew both optional articles for 5 years; but we need to consider how to respond to the further demands for a debate which will undoubtedly follow.

We did not debate accession to the European Convention on Human Rights and we have never debated acceptance or renewal of the optional articles; and in reply to a Parliamentary Question on 2 May 1985 from Mr Fred Silvester (who is opposed to renewal), David Mellor said that no undertaking could then be given that Parliamentary time could be made available for a debate on renewal.

My inclinations are therefore against a debate. However, there was some pressure in Parliament in the Immigration Rules debate for a debate and vote on renewal. Mr Kaufman (who is in favour of renewal) accepted that it is the Government not the House which had final responsibility, but said that the Government should first ensure that there was a majority in the House for renewal. Mr Powell referred to Parliament's "legislative servitude" to Strasbourg which had never been justified to Parliament or to the country through debate. He considered that "we have secured what I hope can be understood to be an undertaking from both sides of the House" that the opinion of the House would be sought in debate for renewal.

The Rt Hon Sir Geoffrey Howe, QC, MP

I do not think we can possibly contemplate a vote before announcement of renewal since we are not seeking a mandate from Parliament. If there is to be a debate I think it should follow the announcement and we shall have to consider the case for it in the light of Parliamentary reaction to the announcement.

I should be grateful if colleagues could indicate their agreement to announcing, in reply to Teddy Taylor's Question, the renewal of the optional articles for a further period of 5 years. I would also welcome observations by colleagues - and in particular from John Biffen - at this stage as to the desirability or otherwise of a debate. I really need replies by 22 October at the very latest as the Question is tabled for the 24th.

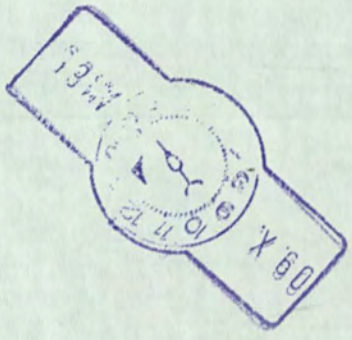
Copies of this letter go to the Prime Minister, the Lord President, the Lord Chancellor, the Secretary of State for Trade and Industry, the Secretary of State for Defence, the Secretary of State for Education and Science, the Secretary of State for the Environment, the Secretary of State for Employment, the Secretary of State for Northern Ireland, the Lord Privy Seal, the Attorney General, the Lord Advocate, the Chief Whip and the Secretary of the Cabinet.

Yours ever

S. W. Bygott

Approved by the Home Secretary
and signed in his absence

Euro Pol: Human Rights 11/80



CC HMB

H.STEEL,CMG OBE
LEGAL SECRETARY

LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

9-Sep

Cameron

Could you check X with Eaton please?

Dave.

David Norgrove Esq.
Private Secretary
10 Downing Street
London SW1

4 September 1985

Dear David,

Thank you for your letter of 29 August - which reached us only yesterday - enclosing a further letter from Lord Weinstock about the nationalisation cases in Strasbourg. As requested, I enclose a draft reply to Lord Weinstock for the Prime Minister's consideration. May I, however, make two related points on it.

The first is to remind you of what I said in my letters to Andrew Turnbull of 19 July and 31 July about where the responsibility lies for giving advice and briefing on representations such as these. For the reasons which I there explained, I am therefore copying your letter and this letter, and their respective enclosures, to Martin Eaton at the FCO and I would suggest that you check with him that he is content with my suggested draft before you act on it.

X

My second comment is that you will see that I have not dealt with the point made in the last two sentences of Lord Weinstock's latest letter. My own view is that it is a point best passed over in silence. But in case you do not share that view, I have to add that it is in any event not a point for the lawyers to deal with. As I explained at the end of the first substantive paragraph of my letter of 19 July, the issue (i.e. whether to pay further compensation to the Applicants) is a policy issue which Ministers collectively decided in 1980 - long before the Strasbourg proceedings hit us - and have re-affirmed more than once subsequently. If you do decide that you need material to enable the Prime Minister to deal with it, I suggest that you turn on this point to the DTI.

Yours ever,

H STEEL

Human Rights:
Euro Pol: 11/80

L.O.D. No. 6

DRAFT

Please type.

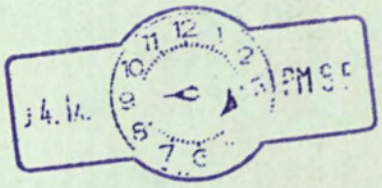
FROM: The Rt.Hon. Margaret Thatcher MP
Prime Minister

TO: The Lord Weinstock

Thank you for your letter of 17 August. I understand your strong feelings on this matter but I can only repeat that your criticisms are misdirected. The European Court of Human Rights is a court of law and proceedings before it are legal proceedings whose sole purpose is to answer, in each case, a precise legal question. That question is whether, in the particular respect alleged, the State concerned has or has not violated a specific legal obligation imposed on it by one or more of the provisions of the Convention. The Government's submissions t o the Court were directed in this case (as they are in every case in which we are concerned) solely to that legal question and to nothing else. As I said in my earlier letter, the issue on which the Commission itself focussed ~~had identified as the relevant issue~~ for the purposes of the proceedings in this case was whether the method of assessing compensation provided for by the 1977 Act was or was not within a State's legitimate margin of appreciation. The Commission had concluded that it was. The Commission further

concluded that the United Kingdom had therefore not violated the particular legal obligations that were alleged to have been violated. The Government's submissions were to the same effect. It was not relevant to the issues of law before the Court for the Government's arguments to concern themselves with the wider question whether the compensation actually received in a particular instance was fair or just and they therefore did not do so. Accordingly, nothing that was said on the Government's behalf at Strasbourg can fairly be criticised as inconsistent with what I or my colleagues have previously said on this matter.

Human Rights: Euro Pol.
11/80



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10 DOWNING STREET

29 August 1985

From the Private Secretary

The Prime Minister has received a further letter from Lord Weinstock following one of 26 July to which the Prime Minister replied on 6 August on the basis of a draft provided by you. I should be grateful for a draft reply to this latest letter by Monday 9 September.

David Norgrove

Henry Steel, Esq., CMG, OBE,
Law Officers' Department.

CCHB

DEPARTMENT OF TRADE AND INDUSTRY
1-19 VICTORIA STREET
LONDON SW1H 0ET
TELEPHONE DIRECT LINE 01-215 5422
SWITCHBOARD 01-215 7877

Secretary of State for Trade and Industry

6 August 1985

Andrew Turnbull Esq
Private Secretary to the
Prime Minister
10 Downing Street
LONDON
SW1

Better late!

Dear A.

AIRCRAFT AND SHIPBUILDING NATIONALISATION : EUROPEAN CONVENTION OF HUMAN RIGHTS

Having seen Henry Steel's letter of 19 July to you, I should add that this Department also has been careful to make it clear that the Government's position is that there was no breach of the Convention in the nationalisation of the aircraft and shipbuilding industries. We have never implied that nationalisation without compensation could be legitimate; and we have rebutted suggestions that success for the Government at Strasbourg would imply that a future nationalisation could be undertaken without compensation for nationals.

Yours sincerely,

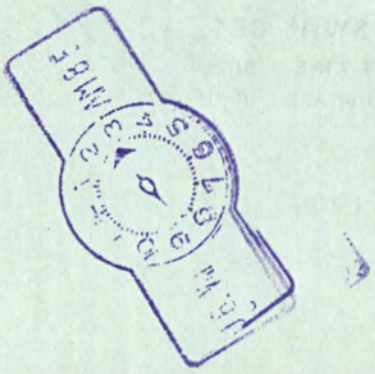
ANDREW D LANSLEY
Private Secretary

JF5ACB

Euro Pol

Nov. 80

Human Rights



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LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

H.STEEL,CMG OBE
LEGAL SECRETARY

31 July, 1985

A Turnbull Esq
The Prime Minister's Office
10 Downing Street
London SW1

Dear Andrew,

Thank you for your letter of 29 July about Lord Weinstock's letter to the Prime Minister. As requested I enclose a draft reply.

It concentrates on the central issue of whether the Government have been speaking with two voices. It does not directly deal with incorporation since what Lord Weinstock says about that is based on the false premise that there has indeed been a discrepancy between what Ministers have said domestically and what was said in Strasbourg. Nor does it deal with Lord Weinstock's point about the profit made on the sale of British Aerospace shares. The Prime Minister may think that that is a point which need not be answered but, in any event, it is not one for the lawyers.

As I explained in my letter of 19 July, all this is as much a matter for the FCO as for the Law Officers and I have therefore cleared my draft with the FCO Legal Advisers and indeed have made some alterations to it at their suggestion. I am sending a copy of this letter and its enclosure, and also of your letter and Lord Weinstock's letter, to Martin Eaton at the FCO - he was the UK Agent in the case - and I would suggest that, if you have any more representations of this kind, you should invite his comments as well as - or instead of - mine.

Yours ever,

H STEEL

L.O.D. No. 6

DRAFT

LETTER FOR PRIME MINISTER'S SIGNATURE
TO LORD WEINSTOCK

Thank you for your your letter of 26 July about the Aircraft and Shipbuilding Industries Nationalisation Case in Strasbourg.

I am sorry that my correspondence with Alan Beith has troubled you in the way you describe. I really do not see why it should have done. My letter to Mr. Beith was perfectly correct in saying ~~- and I knew what I was talking about when I said it -~~ that neither I nor any of my colleagues had ever resiled from the criticisms that we had previously made about the compensation that was paid in some of these cases. Nothing that was said to the Court on the Government's behalf disproves that. At no stage did the Government contend before the Court that fair and just compensation had been paid. That was not the issue. The issue to which both the Commission's Report and the Government's submissions were directed was whether the method of assessing compensation which was provided for by the 1977 Act fell within the legitimate "margin of appreciation" which the Convention leaves to sovereign Governments and Parliaments in these matters. If it did, then, whatever criticism might be levelled at the compensation

DRAFT

paid, there was no violation of the United Kingdom's obligations under Article 1 of the First Protocol to the Convention. Our case was simply that we were indeed within that legitimate margin of appreciation. That was our submission to the Court (and it was also the Commission's own conclusion) and we did not address the question of compensation in any other way.


PM 6

CONFIDENTIAL

CC(85)

QUEEN ANNE'S GATE LONDON SW1H 9AT

29th July 1985

Dear Geoffrey,

EUROPEAN CONVENTION ON HUMAN RIGHTS: RENEWAL OF OPTIONAL CLAUSES 25 AND 46 (RIGHT OF INDIVIDUAL PETITION AND COMPULSORY JURISDICTION OF THE COURT)

At a meeting on 17 July chaired by the Prime Minister to discuss the impact of European Convention on Human Rights it was agreed that failure to renew Articles 25 and 46 (right of individual petition and compulsory jurisdiction of the court respectively) was not a practicable option as it would be seen as threatening the integrity of international measures to protect human rights and lead to a weakening of our international reputation.

The United Kingdom ratified the Convention in 1951 and it came into force in 1953; we made declarations under Articles 25 and 46 (for 3 years) in 1966. The periods of our acceptance of these optional Articles have been 1966 - 1969 - 1972 - 1974 - 1976 - 1981.

It would be possible for us to renew for a shorter or a longer period than the present five years. Whilst a shorter period might be regarded by some as a suitable riposte to recent unpalatable judgments from Strasbourg, I do not think it would be to our advantage to send out such a signal to the international community. At the same time, I see no significant advantage in looking to a longer renewal time. I therefore propose that we renew for a further five year period.

In the 1980 round, the Cabinet decision to renew was announced in response to timely questions in the Lords and Commons (neither arranged). This time - and bearing in mind the real possibility of further Parliamentary interest in the issue - I am inclined to make the announcement by arranged Parliamentary Question early in the new session. Until then, I suggest our public line should be that the matter is still under consideration.

The form and timing of an announcement will have to take into account the fact that there is some pressure (which surfaced again during Tuesday's debate on the new

/Immigration Rules

The Rt Hon Sir Geoffrey Howe, QC, MP

CONFIDENTIAL

Immigration Rules) for a debate and vote on the issue. We are not committed to such a debate but whether we should have one is perhaps something we should discuss with John Biffen, once Parliament has returned. I shall, therefore, be in touch again on this nearer the time.

Copies of this letter go to the Prime Minister, Willie Whitelaw, Quintin Hailsham, John Biffen, Michael Heseltine, Norman Tebbit, Keith Joseph, Patrick Jenkin, Tom King, Douglas Hurd, Michael Havers, Lord Cameron, John Wakeham and Sir Robert Armstrong.

Yours ever,

Leon

Human Rights : Euro Pol. Nov 1980

Lord WEINSTOCK

918

ECL

10 DOWNING STREET

From the Private Secretary

Act) 29 July 1985

I attach a copy of a letter the Prime Minister has received from Lord Weinstock.

I should be grateful if you could provide a draft reply for the Prime Minister's signature, to reach me by Friday 9 August to enable the Prime Minister to sign it before she leaves for her holiday on 12 August.

(Andrew Turnbull)

Henry Steel, Esq., C.M.G., O.B.E.,
Law Officers' Department.

file Remand

10 DOWNING STREET

24 July 1985

From the Private Secretary

AIRCRAFT AND SHIPBUILDING NATIONALISATION: EUROPEAN CONVENTION OF HUMAN RIGHTS

The Prime Minister has seen your letter to me of 19 July. She was grateful for and content with the further explanations provided.

I am copying this letter to John Ballard (Department of the Environment), John Mogg (Department of Trade and Industry) and Len Appleyard (Foreign and Commonwealth Office).

(Andrew Turnbull)

Henry Steel, Esq., C.M.G., O.B.E.

BS

NBPM
AT 23/7

MR TURNBULL

23 July 1985

AIRCRAFT AND SHIPBUILDING NATIONALISATION

The letter from Henry Steel cites two passages from leading Counsel. This may appear confusing, so for the record may I explain that both these Silks represented to the Government: Donald Nichols QC, at the Commission stage, and Robert Alexander QC, at the Court stage. Both advocates responded to the applications on behalf of all 6 or 7 aircraft and shipbuilders.

If these quotations are used, please note that paragraph 4 on page 3 repeats the hostage to fortune in the Government's position, in saying that the Government denies the requirement that compensation be adequate, prompt and effective for British nationals.

pp HARTLEY BOOTH

QUEEN ANNE'S GATE LONDON SWIH 9AT

22 July 1985

CDP
22/7

Dear Sir Michael

IMMIGRATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Immigration Rule changes agreed at the Prime Minister's meeting on 2 July have now been laid before Parliament and will be debated in the House of Commons on 23 July.

As agreed the rules contain the necessary saving for the admission of wives of Commonwealth citizens settled here on 1 January 1973 in accordance with the protection afforded by section 1(5) of the Immigration Act 1971. You made it clear at the meeting that the Government would have to give an undertaking to change this provision if this element of discrimination in the new rules was not to fall foul of the European Court again.

I have considered how to present this issue in Tuesday's debate carefully with David Waddington and officials and attach a copy of what I intend to say.

Copies go to those who attended the Prime Minister's meeting,

Yours sincerely

Approved by the Home Secretary
and signed in his absence.

Sir Michael Havers, QC, MP

"The Immigration Rules must of course be framed in accordance with the Immigration Act. Section 1(5) of the Act preserved certain entitlements which Commonwealth immigrants and their dependants had when the 1971 Act was passed. Reflecting the principles on which immigration and nationality legislation prior to 1971 were founded the protection provided by section 1(5) distinguishes between the sexes in the benefits it accords. This is inevitably reflected in the Immigration Rule changes. The saving is confined to Commonwealth citizens settled on 1 January 1973 and their dependants. This is designed to be transitional in character and effect. [Hon Members opposite have argued that these benefits constitute a further breach of the European Convention.] The Government believes that there is an objective and reasonable justification for a saving for those settled here before the 1971 Act came into force as allowed under Article 14 of the Convention and that this covers the distinctions in the provisions for the admission of wives and husbands in the Rules. But the framing of the 1971 Act provision is indeed sexually discriminatory and the Government intends as part of its response to the European Court judgment to introduce legislation in due course to put an end to this anachronistic anomaly.

CHTB

Prime Minister (2)
Content with these explanations?
AT 22/7

H.STEEL,CMG OBE
LEGAL SECRETARY

LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

19 July, 1985

A Turnbull Esq
The Prime Minister's Office
10 Downing Street
London SW1

Yes - much clearer now

Dear Andrew,

AIRCRAFT AND SHIPBUILDING NATIONALISATION:
EUROPEAN CONVENTION OF HUMAN RIGHTS

Thank you for your letter of 16 July. I am sorry that it has taken a little while to reply to it but, as you will understand, I wanted to verify my facts, and, so to speak, get chapter and verse, and this required checking with the FCO.

In that connection, I should perhaps explain that it is not the Law Officers but the FCO and the DTI (or DOE in the Duke of Westminster's case) who are in the lead in these proceedings - the FCO in a coordinating role and as the formal Agent of the Government in cases before the Commission and the Court, and the DTI as the Department responsible for policy. Though the Attorney-General has, as I have explained, exercised an active superintendence at all stages over the development of our case and the shaping of our arguments and tactics and has been alert to ensure that, when these might have political implications, they were brought to the attention of the relevant Ministers and carried their approval, he has not himself conducted the case or, to use your own phrase, "deployed arguments in Strasbourg". I think it necessary to make this point because there sometimes seems to be an impression - especially in the press and in Parliament - that he personally has been arguing the case for the Government and, indeed, has not only determined the arguments to be used but has also determined the policy which those arguments have sought to defend. From the Attorney-General's point of view (and I think also from the FCO's point of view) we need to remind ourselves that what the lawyers are defending in this case is essentially a policy which was decided by

/Ministers

Ministers collectively in 1980 and reaffirmed more than once subsequently, i.e. that no further compensation should now be paid to the applicants; and in so far as the arguments to be used in themselves involved policy considerations, these, too, had the authority of the Ministers concerned.

Turning now to the Prime Minister's question (ie whether at any time the Government has made it clear that it accepts the need for compensation where assets are nationalised or expropriated), the answer is "yes". There was more than one context in which it was thought necessary or helpful for us to address this point but perhaps the clearest expositions of where we stand on it were given in the oral argument which was put before the Commission by Donald Nicholls QC (as he then was) and in the oral argument put before the Court by Robert Alexander QC. The relevant passage from Nicholls's speech read as follows:

> "Mr President, suggestions have been made, both in the written submissions and in these oral pleadings that the Government's reading of Article 1 entails the most dire consequences for the human rights of nationals and that they are left without a remedy for violation of their property rights.
>
> The case is argued as if our claim on the facts was to a nationalisation without compensation, and as if our interpretation will thus open the floodgates to uncompensated takings of nationals' property. This Commission is not conducting an academic seminar. It is conducting legal proceedings which surely must be rooted in the facts of the cases before you.
>
> The Commission is not concerned with hypothetical arguments about what might result if unlikely hypothese are accepted. With respect, it surely is concerned with whether on the facts before you and no other facts, there has been a violation of the Convention. And the facts in the present case do not show any claim to nationalise without compensation - though large parts of the applicants' submissions have been couched in those terms and addressed to that totally imaginary scenario.
>
> It is the normal and, indeed, the unbroken practice in the United Kingdom, as we have stated, to pay compensation for nationalisation. The 1977 Act provided for compensation. It is the compatibility of those provisions with the Convention, and not the compatibility of imaginary and wholly unreal threats, which is the matter before the Commission."

/The

The relevant passage from Robert Alexander's speech is the following:-

> "I pause there for a moment to speak of how our argument, and the Commission's finding, have been portrayed by the Applicants. They have sought to put about the view that the Government was telling the Commission that it could take property without compensation; and that the Commission had failed, in the Report of March 1984, to harness the European Convention to the task of protection against non-compensated expropriation.
>
> The Applicants' version of the Government's claim, widely canvassed in the British press, was coupled with frequent repetition of the assertion that the Government had not denied the validity of Applicant's own valuation assessments.
>
> The idea was thus put about that the Government accepted that the Applicants' claimed figures represented fair compensation, but insisted that they were entitled to take the property of nationals without any compensation at all if they so chose; and that the Commission had upheld this retrograde position. Whatever political purposes its version of events may have been thought by the Applicants to serve, it is, of course, wholly incorrect.
>
> As we have explained at 2.23 of our Memorial, the position was always otherwise. The Government has never advanced, in the context of these cases, a claim to be entitled to nationalise without compensation, or on the basis of "unfair" compensation. It argued, rather that the international law requirement that compensation be "adequate, prompt and effective" did not apply to the treatment of nationals.
>
> As compensation is nowhere else alluded to, even indirectly, in the text of Article 1, the Government had taken the logical consequence to be that "the question of sufficiency of compensation for nationals is beyond the remit of the organs of the European Convention in their determination of obligations under the Convention" (2.23 UK Memorial). The fact that the Applicants had fought so assiduously to make the international law principles made applicable to nationals would seem to indicate that they thought so too. However, the Commission has held (albeit with qualifications) that there is inherent within Article 1 a right to compensation for the taking of the property of anyone within the jurisdiction (Report, para. 381). After careful consideration, the Government accepted this finding. This finding, after all accorded with the well established practice in our country of ensuring proper compensation for public-purpose takings. More specifically, the Government submits that this particular nationalisation meets the test of inherent right to compensation suggested by the Commission. The Government had doubts as to the jurisdiction of the European organs over this issue. The Government had no such reservations about the conformity of U.K. practice with the requirements of the Convention if the jurisdiction existed."

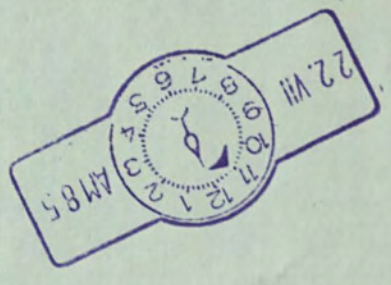
I am copying this letter to John Ballard (DOE), John Mogg (DTI) and Len Appleyard (FCO).

Yours ever,

H STEEL

Human Rights: Europol.

Nov. 1980



CONFIDENTIAL

10 DOWNING STREET

From the Private Secretary

17 July 1985

Dear Hugh,

EUROPEAN COURT OF HUMAN RIGHTS

The Prime Minister held a meeting this afternoon to consider the Home Secretary's paper on ways of reducing the impact of the findings of the European Court in Strasbourg on our law. The Lord President, the Lord Chancellor, the Home Secretary, the Northern Ireland Secretary, the Attorney General, the Chief Whip, the Lord Advocate, the Minister of Health, the Parliamentary Secretaries at the Foreign and Commonwealth Office, the Scottish Office, the Department of Education and Science and the Department of Employment and Sir Robert Armstrong were present.

It was noted that there was growing criticism in Parliament about what was perceived as the political nature of many of the European Court's decisions. There was a risk that Parliament would increasingly be disinclined to accept legislation stemming from the decisions of the Court, as was already evident in the case of the Education (Corporal Punishment) Bill. Against this background there might well be quite wide support for withdrawing the right of individual petition under Article 25 of the European Convention on Human Rights or for failing to renew the optional provisions of Article 46 providing for the compulsory jurisdiction of the Court. But it was recognised that the Convention and particularly the right of individual petition enjoyed wide support in the country. Withdrawing the right of individual petition or failing to renew Article 46 would be seen by many as threatening the integrity of the international measures to protect human rights and weaking our international reputation.

No support was expressed for incorporation of the Convention into English law. Partial incorporation in the form proposed in the Home Secretary's minute of 10 July to the Prime Minister might well lead to a proliferation of cases in the English courts, would not avoid recourse by individual petitioners to Strasbourg, and would increase pressure on the Government to legislate promptly to implement decisions of the Courts. It was also thought undesirable to increase the number of cases in which the judiciary appeared to be delivering political judgments against the Government of the day.

In a discussion of how to proceed over the Education (Corporal Punishment) Bill, it was agreed that it would not be appropriate to make use of the Parliament Act to overbear the opposition in the House of Lords. One possibility would be reintroduce the Bill in the next session of Parliament, but this risked running into the same opposition. As an alternative, advice should be sought on whether the Court's judgment could be implemented by a circular issued by the Secretary of State for Education to local education authorities (as had happened in Scotland). However this would not be mandatory, and might be resented by the Lords as an attempt to by-pass them. Another course would be to go back to the European Court and explain that the Government had used its best endeavours to implement the judgment in the Campbell and Cosans case but had found it impossible to get the legislation through Parliament. But this would leave us in breach of our international obligations; and it was not necessarily the case that it was impossible to get legislation through Parliament.

Summing up the discussion, the Prime Minister said that withdrawal from the Convention was not a practicable option, nor was a decision against renewing our acceptance of Articles 25 and 46. Equally there was no support among colleagues for incorporation of the Convention into English law: and there were major practical obstacles in the way of the Home Secretary's proposal for partial incorporation. The conclusion was therefore that we should maintain the status quo. But efforts should be made to Strasbourg-proof future legislation. Further consideration should be given to improving the machinery for this. Recourse should also be had to settlements where these seemed to offer the least damaging outcome to cases before the Court. The Lord President and the Secretary of State for Education should consider further the options for implementing the Court's judgment in the Campbell and Cosans case, and report back in due course. No further action should be taken over the Education (Corporal Punishment) Bill in the current parliamentary session.

I am copying this letter to the Private Secretaries to the Lord President, the Lord Chancellor, the Secretaries of State for Education, Foreign and Commonwealth Affairs, Employment, Northern Ireland, Scotland, Health and Social Security, the Attorney General, the Advocate-General and Sir Robert Armstrong.

yours sincerely,

Charles Powell

Hugh Taylor Esq
Home Office

CONFIDENTIAL

10 DOWNING STREET

From the Private Secretary

16 July 1985

Dear Henry

AIRCRAFT AND SHIPBUILDING NATIONALISATION: EUROPEAN COMMISSION ON HUMAN RIGHTS

The Prime Minister has seen your letter of 3 July to Tim Flesher. She was grateful for the further explanation of the basis of the case which the Law Officers have deployed in Strasbourg. She has asked, however, whether at any time the Government has made it clear that it accepts the need for compensation where assets are nationalised or expropriated. The duty to pay compensation seemed to her to be made only by reference to Article 1 of the First Protocol.

I am copying this letter to John Ballard (Department of the Environment), John Mogg (Department of Trade and Industry) and Len Appleyard (Foreign and Commonwealth Office).

Yours sincerely

Andrew Turnbull

Andrew Turnbull

Henry Steel, Esq., CMG, OBE,
Law Officers' Department.

CONFIDENTIAL

PRIME MINISTER

HUMAN RIGHTS
(Home Secretary's minutes of 13 May and 10 July)

BACKGROUND

At a meeting on 31 January, you asked the Home Secretary, in consultation with the Foreign Secretary and other Ministers, to look again at ways of reducing the impact of the findings of the European Court in Strasbourg on our law. The Home Secretary sent you a minute on 13 May covering a paper by officials covering the possible options open to the Government. The Attorney General (21 May), the Lord Chancellor (3 June) and the Lord Advocate (6 June) commented on this. The Home Secretary held a meeting with the Lord Chancellor, the Foreign Secretary, the Attorney General, the Lord Advocate, the Chief Whip and Ministers fromthe Scottish and Northern Irish Offices on 11 June. As a result, he has developed a further option which is set out in his minute to you of 10 July.

Statistical background

2. From 1966, when the UK accepted the right of individual application until 31 December 1984 the Court dealt with 86 cases, 18 of which came from the UK. The country with the next largest number of cases was Belgium, with 14 (and a population of 10,000,000). 46 of the total number of cases dealt with were judged to be in violation of the Convention. 11 of these came from the UK with Belgium again providing the second highest figure of 9.

3. In addition, some cases which are dealt with by the Council of Europe Committee of Ministers. Over the same period the Committee dealt with 62 cases, 16 of which came from the UK. Of 11 violations, 7 were from the UK. In this case, the next highest total of cases came from the Federal Republic of Germany.

4. There are a number of reasons why the UK has a higher number of "violations" than other countries. These range from the shorter period over which the right of individual application has been granted in some other countries to the fact that groups of applications are brought against the UK which all deal with the same complaint.

However, the factor perhaps most likely to affect the number of cases going to the Court is that the European Convention on Human Rights is incorporated into the domestic law of most of the other states concerned. Since an individual can only go to the Court when all domestic remedies have been exhausted, a country which incorporates the Convention is less likely to be taken to the European Court, because in a proportion of cases its own courts will have ruled it to be in violation of the Convention before that stage is reached. In the case of the UK, the domestic courts cannot take account of the Convention. We have no reliable information about the number of cases in domestic courts in foreign countries where the Government has been found in violation.

5. A wider base for statistical comparison lies in the total number of cases communicated for observation to the UK. 823 such cases have been communciated since 1966, of which 217 have been declared inadmissable after submission of observations, 11 cases have been disposed of by way of friendly settlement after the case has been declared admissable and 361 have been struck off the Commission's list. There is some evidence that the number of cases is on a declining trend.

Historical and legal background

6. The objective of those who drafted the Convention was to prevent the kind of wholesale denial of human rights which took place in the totalitarian regimes of the 1930s, especially in Nazi Germany. An independent and international enforcement system was therefore seen as essential. Whether or not the Convention has been applied in practice to this end, it is clear that any attempt to avoid the enforcement system would be seen as a move away from the intention of the originators.

7. However the great majority of countries subscribing to the Convention have legal systems which are significantly different to those of the UK. In particular, the UK legal system does not in general expressly enunciate and protect human rights as such; instead the basic rights of each citizen are protected indirectly by the existence of ordinary laws that prohibit or restrict others from interfering with person or property and that are enforceable in the courts through ordinary criminal or civil proceedings. In the Convention and in most Continental systems those rights are conferred positively and in rather general terms, subject to exceptions. Moreover, the UK relies more on administrative discretion, subject to the control of Ministers who are answerable to Parliament, rather than a separate system of administrative law. The development in UK law of the

concept of judical review of specific statutory provisions is moving in the direction that other Convention countries already adopt. However, the wide scope of the rights guaranteed by the Convention and the differences in approach between Strasbourg organs and our own system means that the UK is probably more at risk of adverse findings than member states which have a structure of administrative courts specifically set up to deal with claims against the Executive.

Objection to the decisions of the European Court

8. The most important objections as expressed in Parliament and elsewhere, are:

i. Too many findings against the UK (see paras 2-5 above).

ii. Too many perverse or evolutionary decisions. In part this stems from the general drafting of the Convention and the differences in legal systems in the Member States, in part from the use which is being made of the Convention, which differs from the ideas of its originators.

iii. Intervention by a foreign court. National sovereignty is a powerful emotional concept and the Strasbourg record is not helped by confusion with the European Court in Luxembourg.

MAIN ISSUES

9. The main issues are:

i. what is the objective of making a change? Is it to reduce the number of Strasbourg judgements in those cases where our law does not comply with the Convention or is it to ensure that the impact on our law of the Convention itself is reduced?

ii. What is the best method of achieving the objective? There are three broad categories of action:

a. withdrawal - either from the Convention, from the right of individual access, or from the compulsory jurisdiction of the Court.

b. the provision of some form of filter so that fewer cases reach the Court.

c. the incorporation of the Convention in UK law in whole or in part.

iii. Is any action necessary or worthwhile in view of the criticism which will result, or is it better to stay with the status quo ante?

Objectives

10. It is important to distinguish between the political consequences of being forced to change UK law by decisions of the Strasbourg Court and the nature of those changes. To the extent that Ministers think it undesirable to alter UK law at the behest of a foreign court, the case for withdrawing from the Convention, or strictly limiting our involvement, is strengthened. If, on the other hand, it is accepted that, as the Attorney General said (minute of 21 May) there are some cases which Governments ought to lose, the need is to minimise the political impact of changes which are inevitable. This strengthens the case for working within the terms of the Convention, so that decisions are taken by UK courts, or at least decisions taken by the Strasbourg Court take full account of the views of our domestic courts.

Method of achieving the objective

11. Total withdrawal from the Convention (Option A in the Home Office paper) is the only way of ensuring that the UK Government is never forced to alter its laws by the Court. Such action would be very controversial and is not supported by the Ministers who met on 11 June.

12. Almost the same effect could be produced by withdrawing the right of individual petition under Article 25 of the Convention (Option B). This could be done ~~in~~ January 1986, when our acceptance of this optional provision expires. Only High Contracting Parties would then be in a position to challenge the United Kingdom. We would then join Cyprus, Greece, Malta and Turkey, the only other states out of the 21 member states who have not accepted Article 25. Non renewal of our acceptance of Article 25 would be almost as damaging politically in the UK as denunciation of the Convention.

13. One further option would be to fail to renew (again in January 1986) the optional provisions of Article 46 which provides for the compulsory jurisdiction of the Court (Option C). This would enable the Government to send cases to the Court, but the Commission would no longer be able to refer UK cases in the absence of Governmental agreement. This option would possibly be less damaging than either of the two previous ones, but it would look as though the UK were attempting to avoid the unpopulr cases whilst still benefitting from those which it found politically acceptable (eg closed shops).

Filters

14. The Commission for European Rights acts as a filter for cases going before the Court. However, there is no specifically national filter in the UK. In those countries which have incorporated the Convention, a filter is provided by their domestic courts. The Home Office paper considers (Option E) the possibility of a Protocol to the Convention which would set up a system of national filters. All member states would need to agree to such a Protocol and, given the attitudes of a number of them, unanimous support seems most unlikely. This is not therefore a serious option.

15. (Option F) A de facto filter could be introduced by "Strasbourg-proofing" future legislation so that questions relating to the Convention were taken into account in the formulation of policy and the drafting of new legislation. This would be akin to the procedure already employed for European Community legislation. There seems little objection to this procedure and it might reveal potential conflicts at an earlier stage than would otherwise be the case. Such a system could not however deal with the problems inherent in existing law or practice. One way to deal with cases brought under existing legislation would be the greater use of pre-emptive settlements in cases where the Government defence under the Convention is weak and the consequences of adverse findings damaging. This could be done either at a domestic stage or after a hearing by the Commission. Action on these lines is favoured by the Home Secretary and other Ministers concerned.

Incorporation

16. Incorporation would ensure that those cases in which the Government is in clear breach of the Convention were settled by domestic courts. In those cases where the Government were successful in the domestic courts, but the appellant still proceeded to the Strasbourg Court, the latter would have before them the considered judgement of a British court on the terms of the Convention. The Strasbourg court would thus be more likely to appreciate the differences inherent in the English legal and administrative systems and their impact upon human rights. Incorporation should therefore produce a smaller number of cases going to Strasbourg and a better result from those cases which did proceed. It would not, however, eliminate all Strasbourg cases nor would it necessarily reduce the total number of violations, since the domestic courts would themselves be ruling on occasion against the Government.

17. Incorporation presents major practical and constitutional problems, notably the fact that judgements would take immediate effect instead of allowing the

Government a reasonable amount of time to amend the law in such a way as to comply with the Convention. The other major problem with incorporation would be that it would usurp the political function in favour of the judicial. An incorporated Convention could not be totally binding on future Parliaments and indeed it is most unlikely that any Government would wish to ensure this. However Parliament would be at least morally bound in its enactment of future legislation to respect the terms of the Convention. If Parliament subsequently legislated in a way which contravened the Convention, the courts would be faced with a difficult constitutional problem, unless the form of incorporation made their role clear. Until that point they might well pursue a policy which was evolutionary in some respects, in the same way that the Strasbourg Court has done. Incorporation would not, therefore, halt the "evolution" of human rights legislation.

18. Incorporation could be restricted, either to specific Articles of the Convention (Option H) or to particular aspects of administration (eg the prison service) in all its respects (Option I). It is difficult to see precisely what effects such limited incorporation would have on administration or on the number of cases eventually going to Strasbourg. One advantage of restricted incorporation would be to enable an experiment to be conducted to observe the attitudes to the Convention of the domestic courts.

19. Home Secretary's variant of incorporation. Following his discussions with colleagues, the Home Secretary proposes (his minute of 10 July) legislation enabling an individual to take proceedings in the High Court (or the Court of Appeal in criminal cases) on the basis that he had been adversely affected by the measures of the Government or some other public authority and that those measures were incompatible with the European Convention on Human Rights. There would be a right of appeal to the House of Lords and ultimately to Strasbourg. When a decision against the Government was taken by a UK court, this would be in a declaratory form and the Government would be able to put the matter right at a time and manner of its own choosing. There are significant difficulties which need to be resolved before such a system could operate. Firstly, Strasbourg would have to regard the proposed procedure as offering a domestic remedy otherwise little would be gained. Secondly, the uncomfortable contrast which exists now, between a case based on UK law, where the Court's decision would take immediate effect, and one based on the Convention, where implementation would be delayed, would be highlighted.

20. Given the difficulties with each course it may be that none of these options should be pursued; the status quo being the best option available.

HANDLING

21. You will wish the Home Secretary to introduce the paper by officials, which sets out a wide variety of options, and his proposal for a limited form of incorporation. You might then suggest that the meeting should first discuss the possibility of withdrawals, then some form of filter and finally the question of incorporation, concentrating on the Home Secretary's proposal.

22. On withdrawal the Foreign and Commonwealth Secretary wil wish to speak against; it is unlikely that any Minister present will wish to speak in favour.

23. On filters, the idea of Strasbourg-proofing will secure general agreement, but the Attorney General and the Lord Advocate may wish to comment on pre-emptive settlements.

24. On incorporation, it would be useful first to run through in some detail the way in which the Home Secretary's variant would work. The Lord Chancellor, the Attorney General and the Lord Advocate will wish to comment on its feasibility.

25. The Lord Chancellor may then wish to speak on the question of incorporation in a more extensive way and the Home Secretary may wish to comment on the possibility of limited incorporation by reference to Articles of the Convention or areas of administrative action.

CONCLUSIONS

26. There is no absolute need to reach final conclusions at this meeting and the most likely conclusion is that more work should be done. However, it would be useful to narrow the range of options and, in particular, to establish whether those which might require action in January 1986 (ii below) are still runners. Decisions which could be taken are:

i. should withdrawal from the Convention be ruled out for the foreseeable future?

ii. Should the Government renew its acceptance of Articles 25 (Right of individual petition) and 46 (Acceptance of the compulsory jurisdiction of the Court) in January 1986?

iii. Should future legislation be Strasbourg-proofed?

iv. Should greater use be made of pre-emptive settlements?

v. Is there any support for total incorporation of the Convention of Human Rights in UK domestic law?

vi. Are there forms of limited incorporation which will provide the advantages sought by the Government without creating the difficulties foreseen in full incorporation? If so, is any of these variants (eg the Home Secretary's) preferred?

M. C J S BREARLEY
16 july 1985

Art 13.
Art 26. - enhanced domestic remedies
Just.

PRIME MINISTER 16 July 1985

THE EUROPEAN COURT OF HUMAN RIGHTS

There are two important points the brief from the Home Office does not emphasise sufficiently.

In Support of the Court

It was important for our industrial relations policy that the European Court had condemned the British Rail closed shop. If ever some of the more dotty socialist ideas, such as those on "positive discrimination" or "reverse discrimination" were made law, individuals could exercise their right, under the European Convention, to challenge them.

Against the Court

We signed the European Human Rights Convention in 1950 and we accepted the provisions of Article 25 which allowed the direct access by individuals in 1966. These small revokable surrenders of sovereignty were undertaken without Parliamentary debate. There is a growing and vociferous group on our side of the House that identifies this as a constitutional outrage. (Fred Silvester, leading letter in The Times, 5 June, John Wheeler and others).

What Action to Take?

A. Political Options

There will be a furore if we fail to renew our acceptance of Article 25 of the convention next January or to exercise our right to denounce the convention under Article 65 ~~(Appendix II)~~. It would be presented as an authoritarian Tory Government "smashing" the rights of the little man. However, prior to January 1986 we have a splendid double opportunity. If the business managers in the House were persuaded to allow Parliamentary time to debate this topic:

1. the Government could show it stands up for the individual against the State machine by endorsing the convention again;

2. you could quieten the constitutional rumblings over the lack of debate.

B. Incorporation

The Home Secretary suggests the Treaty could be put into force in English law as the Treaty of Rome was. This will lead to more litigation, judging by European experience. There may be calls for legal aid provision and judicial time is costly. Unless we pulled out of the Strasbourg Court as well, we would not avoid the international opprobrium.

Pulling out of the Court is not feasible, so we are likely to aggravate our problems by incorporation.

C. Concerning "court decisions", we could:

1. announce the Government's position that it regards Britain as "morally" bound by the European Convention because this Treaty has not been put into statutory form and that, therefore:

2. where necessary, Britain would allow Parliament time to debate the issues decided by the European Court of Human Rights; and

3. would not always follow their decisions, but would instead be bound by the decision of Parliament; and

4. when certain special cases arise, such as corporal punishment, we could qualify our adherence to the Convention to specifically exclude these cases.

D. The British Judge in the European Court

Sir Vincent Evans is the current British Judge and has been there for two years out of the nine year term that he is initially allowed. The Lord Chancellor suggests, in a letter of 3 June, that a good judicial appointment to this court from Britain might deal with the court's penchant for perversity. Home Office officials say the court is beginning to understand

British common law much better. The Lord Chancellor's solution is not an option in the next 7 years, unless Sir Vincent retires early.

Conclusion

We recommend you resist the call for "incorporation" as expensive and wrong, and suggest a Parliamentary debate in the autumn would help to defuse the political tension over the constitutional propriety.

HL Booth

HARTLEY BOOTH

PRIME MINISTER

MEETING OF MINISTERS: HUMAN RIGHTS

The purpose of the meeting is to look at the paper produced by officials on ways to reduce the impact of the findings of the European Court in Strasbourg in our law. The paper is at Flag A.

The first point you will want to get a view on is just how damaging in political terms the Strasbourg judgements are. An analysis of them is in paragraphs 3-26 of the officials' paper. Those which have been seriously damaging in substance - corporal punishment, telephone tapping, Irish State case - seem to have been relatively few. But there is the wider point that people just do not like being judged by some foreign court; and feel that we do not need the sort of protection for human rights that other countries with different traditions and different legal systems do. Do these considerations warrant the fairly major steps, likely to involve legislation, which would be needed to insulate or defend ourselves from Strasbourg judgements?

If it is agreed that the damage done by Strasbourg requires action, the second question is: how radical should that action be? The options are spelled out in paragraphs 28-100 of the report. They fall into various categories:

(i) Withdrawal from the ECHR or from some of its provisions (notably that of individual petition). It is clear from your colleagues' pre-meeting that they have no stomach for this;

(ii) A filter mechanism. This was your preferred solution but the experts say it will not work because it would require amendments to the Convention, ratified by all the states party to it. There is the possibility of a de facto filter in the form of steps to make new legislation Strasbourg-proof. But this would be only

a partial solution;

(iii) Pre-emptive settlements. The coward's way out: we give up and let Strasbourg tell us how to do things, without even arguing our case;

(iv) Incorporation. This requires major constitutional change. It would in practice allow the courts to find existing legislation and administrative practices unlawful.

If none of these solutions are acceptable then the third point to consider is whether to stick to the status quo; or to go for the option described in the Home Secretary's minute (Flag B). This would be legislation to enable an individual to take proceedings in a British court on the basis that:

(a) he had been adversely affected by measures taken by the Government or some public authority; and

(b) that these measures were incompatible with the European Convention on Human Rights.

This would enable UK courts to give a view before any issue went to Strasbourg. This is quite ingenious but would still not necessarily stop people going to Strasbourg.

A very long Cabinet Office brief has now arrived. I think you need only read the handling paragraphs (21-26). Also a note by the Policy Unit.

C.D.P.

16 July 1985

10 DOWNING STREET

Prime Minister (2)

The Solicitor General has minuted to exonerate the Law Officers from the charge that they argued that the Government was not obligated to pay any compensation.

I have checked the Attorney General's minute of 20 July 1984 and it is clear that he was not denying any obligation, only an obligation deriving from the Convention.

AT
15/7

Did we ever have made it clear that we accepted the need for some form of compensation. The statement in this paper seems less than clear - the impression seems to be made only by reference to Article 1 that Protocol no

(2)

PRIME MINISTER

HUMAN RIGHTS

There will be a meeting next week to consider ways of reducing the impact of findings of the European Court in Strasbourg on our law. One of the options to be considered is incorporation of the European Convention on Human Rights into UK law.

The Home Secretary has convened a pre-meeting of colleagues to try to clear some of the undergrowth. The results are in the attached minute. What he suggests is that we should legislate to enable an individual to take proceedings in a British court on the basis that:-

(a) he had been adversely affected by measures taken by the Government or some public authority; and

(b) that these measures were incompatible with the European Convention on Human Rights.

This would enable UK courts to give a view before any issue went to Strasbourg.

CDP

CDP

12 July, 1985.

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SWIH 9AT

12 July 1985

The Home Secretary thought that the Prime Minister and Cabinet colleagues would wish to have the enclosed copy of the Statement of Changes in Immigration Rules which is to be published at 2.30pm on Monday 15 July.

Copies of this letter go to the Private Secretaries of Cabinet Members, the Attorney General, the Chief Whip and Sir Robert Armstrong.

SUSAN REX
Assistant Private Secretary

HC 503 15.7.85 – destroyed

Tim Flescher Esq

NSAPM
AF 1573

MR TURNBULL 12 July 1985

THE NATIONALISATION CASE (AIRCRAFT & SHIPBUILDING INDUSTRIES) BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

I have studied the papers and the correspondence on this case. The Attorney General has had to defend a very difficult position. As he states through his draft of the letter to Alan Beith: "we have never resiled from the position that the compensation paid to some of the companies that were nationalised was insufficient to the point of being unfair".

At the same time, he argues that the "machinery established by the act for determining compensation was itself so clearly misconceived as a method of trying to reach a fair result" as to be within the 'margin of appreciation' or 'discretion' allowed under the convention for member states.

This is undoubtedly a hair splitting exercise. Not surprisingly, the Attorney appears inconsistent in his notes to the Prime Minister. However, as the Commission upheld the Attorney's submission (even though it was not unanimous) no action need be taken. I cannot find reliable indications on how the Court will decide the matter, but it may well prove to be hostile to the Government.

HARTLEY BOOTH

10 DOWNING STREET

ASP Yes. 11/7.

Can Mr. Dunn
deputise for SS/DES
at Hum Rights
Meeting 17/7/85?

Martin

Told DES
(Clare Jones 2095)

4

Prime Minister

HUMAN RIGHTS

Following my minute of 13 May, I and our other colleagues most directly concerned thought it would be useful to discuss some of the issues before the meeting which is due to be held under your Chairmanship. Some points arose which we thought it would be helpful to have on record for the discussion and the meeting was therefore postponed for a little while to enable this to be done.

First, I ought to record that there was very strong agreement at our discussion that the options - identified in the document prepared by officials - of withdrawal from the Convention or declining to renew acceptance of the right of individual petition or the jurisdiction of the Court - would be extremely damaging both domestically and internationally. There are a number of cases which cause real embarrassment and intense irritation but they are very few indeed over the years. On the other hand there would be very serious implications if we were to withdraw from the Convention or not to renew the right of individual petition or the mandatory jurisdiction of the Court.

Second, we also concluded that, if the general view is against interfering fundamentally with the status quo, it ought to be possible to develop administrative procedures for minimising the risks of adverse decisions at Strasbourg which could be avoided without unacceptable policy consequences. Thus, we think it should be a routine drill in putting forward any proposals

for legislation, subordinate legislation or major changes in policy to consider the ECHR implications. There is also a strong case for encouraging a greater readiness on our part to reach friendly settlements where it is clear that there is a likelihood of adverse findings and where such settlements would not carry with them even greater political costs. Finally, we ought to consider most carefully the implications of any future findings for analogous areas of our law and policy which might be at risk, with a view, wherever possible, to taking preventive action.

We also had a helpful discussion on the various proposals for incorporation of the Convention into United Kingdom law. Some concern was expressed by colleagues about the consequences of a form of incorporation resulting in judgments which had the immediate effect of rendering various measures unlawful without giving us any time to consider what we needed to do in order to comply, and which involved the inferior courts in decisions on the compatibility of our law and policy with the European Convention. I fully acknowledge the force of these reservations. On the other hand there would certainly be some real advantages in arrangements which, while avoiding these difficulties, enabled cases to be considered by the United Kingdom judiciary so that they were able themselves to interpret the Convention. This would not bind the Commission and the European Court, but it is likely to influence them considerably if they have to study a British judicial determination of a Convention issue.

I think we could bring this about by legislation which enabled an individual to take proceedings in the High Court - or the Court of Appeal in criminal cases - on the basis that he had been adversely affected by the measures of the Government or some other public authority (whether these measures took

the form of executive action or of subordinate or primary legislation) and (b) that those measures were incompatible with the European Convention on Human Rights. I envisage that there would be a right of appeal to the House of Lords against the decision of the High Court for either the individual complainant or the Government. The effect of a judgment against the Government should be much the same as that of a Strasbourg judgment ie the Government would be bound by its international obligations to put the matter right, but at a time and in the manner of its own choosing. This would avoid the instantaneously disruptive effect of an immediately effective judgment.

Although such a procedure would enable British courts to consider Convention issues there is a risk that such a procedure would not offer the further advantage of requiring complainants to go through our own courts before taking an issue to Strasbourg. This is because Strasbourg might well not regard it as offering a domestic remedy which would have to be exhausted before they could admit an individual petition as a sufficient compliance with our Convention obligations. This means that the procedure could be by-passed by a complainant.

As against this, many potential Strasbourg complainants are likely to feel it only prudent to use this procedure; and in those cases which did go on to Strasbourg (because the complainant was dissatisfied with the outcome) there would as I have indicated be the advantage of the Strasbourg organs having the UK Court's decision available to them. I think this could only be to our advantage and that the procedure would deter but not prevent those cases which go through the procedure and fail at the domestic level from going to Strasbourg at all; moreover, it provides a background against

which the Strasbourg organs might be more likely to reach decisions favourable to us on those cases which reach them through this procedure.

I appreciate that there is a wide range of practical considerations which would flow from this suggestion. I would not want to under-estimate the importance of these or the possible resource considerations - which I cannot yet assess but which could have implications for the judiciary in particular. Moreover, there remain, of course, the wider political and constitutional issues for and against incorporation in all its various forms which are canvassed in the discussion paper attached to my earlier minute. Those who resent the Strasbourg Court having power to intervene so intrusively in our affairs will have to consider carefully (if we retain the right of individual petition) whether we wish Strasbourg alone to do this, or whether we think a British input into the jurisprudence would provide a better chance of our own particular circumstances being taken into account. The balance is not an easy one, but I do think that the merits of incorporation are sufficient for it to be right to consider a way of doing it which avoids those of the disadvantages which are not inevitable. The procedure I have outlined would, in my view, avoid some of the disadvantages that have been put forward, and in my view it is a viable approach, if movement in this direction is desired.

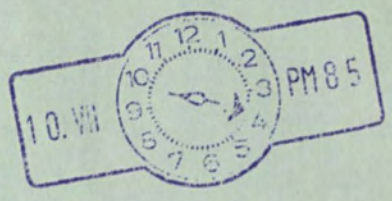
I hope that in your forthcoming meeting we will be able to assess collectively the importance and scale of the problems presented by adverse decisions at Strasbourg and go on to examine the relative attractions of the options identified in officials' discussion paper. I am very conscious that the subject is attracting increasing Parliamentary interest and I think it important that we establish a clear and defensible position on these issues.

Copies of this go to the recipients of my earlier minute and of my Private Secretary's letter to those of other colleagues with a possible interest.

L.B.

10 July 1985

EUR POL: Human Rights : NOV 1980



(19)

Yes CM

DP

OK - ? CR

10 DOWNING STREET

Mark / Caroline - PL check with CDP. Meets 17

"Human Rights" meetings (next one on 17/7)

DES phoned to register their Secretary of State's desire to be involved in future discussions

Can I tell them "OK" and confirm the time of the meeting for them (17.00 - 18.00)

CST 8/7. Carwyn

Lord Mis.

CR.

(PHONE CLAIRE JONES ON FED. 2095)

010

B/P
with HS's minute 8/7

cc HB

LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

H.STEEL,CMG OBE
LEGAL SECRETARY

T J Flesher Esq
Private Secretary to Prime Minister
The Prime Minister's Office
10 Downing Street
London SW1

3 July, 1985

Dear Tim,

1.The Solicitor General has told me that, when he saw the Prime Minister on another matter a few days ago, she expressed dismay to him that, when the Nationalisation Case (Aircraft and Shipbuilding Industries) was before the Human Rights Commission in Strasbourg, the United Kingdom had argued that it was legitimate to nationalise without paying any compensation at all and that the Commission had ruled against us on this. The Prime Minister said this should never have been argued and that in future the Law Officers should ensure that politically unattractive defences were not advanced, however sound they might be.

2. Although the applicants in this case have consistently, and especially in the press, represented the UK's argument before the Commission as being that it was legitimate to nationalise without paying any compensation at all, that is a misrepresentation: we have never advanced such an argument. What in fact happened is that the applicants rested their own case before the Commission on the argument that the reference in Article 1 of the First Protocol to the Convention to "the general principles of international law" imported, for their benefit, the relevant rules of international law (which, in summary, require prompt, adequate and effective compensation). We for our part, basing ourselves on legal principles, on the clear intention of the draftsmen of the Convention (as evidenced by the travaux preparatoires) and on decisions by the Commission in earlier cases, contended that the "general principles of international law" could not operate as between an applicant and his own State. Whatever obligations there were on a State to pay compensation to its own nationals, we argued, they did not flow from this

/particular

particular provision of the Convention. We of course never argued that it was legitimate or acceptable for a State to nationalise without paying compensation: on the contrary, we went out of our way to avoid expressing or endorsing any proposition of that kind.

3. In their Report, the Commission unequivocally and unanimously upheld our argument about the inapplicability of "the general principles of international law" to a case between a State and its own nationals. They did, however, conclude - though this was not an argument that had been put forward on behalf of the applicants - that an obligation to pay compensation where property is nationalised is "inherent in Article 1 in so far as the payment of compensation may be necessary to preserve the appropriate relationship of proportionality between the interference with the individual's rights and the 'public interest'". Against the background of that conclusion, they further concluded that the sovereign Governments and legislatures of Contracting Parties to the Convention had to be accorded a "margin of appreciation" as to the machinery which they adopted for determining compensation in accordance with that obligation and that the machinery chosen by the 1977 Act was within that legitimate margin of appreciation. When we came to frame the line of argument which we should pursue when the case went to the Court, we decided that our best course was, as it were, to fall in behind this interpretation of the Convention, since it would allow us both to accept that there was a duty under Article 1 of the First Protocol to pay compensation (but without conceding the argument which the applicants had relied on) and at the same time to defend the legitimacy, in terms of the Convention, of Ministers' previous refusal to pay additional compensation to the applicants. You will remember that Ministers had collectively decided even before the Strasbourg proceedings began (and had subsequently re-affirmed that decision) that such additional compensation should not be paid: see, for example, the minute of 2 July 1980 from the Secretary of State for Industry to the Prime Minister.

4. That is the position as regards the arguments which we actually put forward. I shall now try to summarise what was done as regards getting Ministerial authority for those arguments.

/5.

5. As you may know, this issue of whether the Convention imposes a duty to pay compensation to a State's own nationals (and, if so, on what basis) is also central to another case that was dealt with by the Commission at the same time as the Nationalisation Case and is now also due to go to the Court. This is the Duke of Westminster's Case, which concerns the Leasehold Reform Acts 1967 and 1974 (i.e. partly Labour Government legislation and partly Conservative Government legislation). The Duke of Westminster's Case was in fact the first to confront us and, when it did, the Attorney General was careful to ensure that the politically sensitive issues (which, even at that stage, we could see that it would raise) were fully understood by Ministers. See, for example, the minutes of the 'H' Committee meeting on 10 February 1981 (H(81)4th meeting). Once, however, the Nationalisation Case got under way, the two cases were treated as one, so far as the central issue of law was concerned. At all stages, the officials of all Departments concerned (i.e. DOE, DTI, FCO and the Law Officers' Department) were acutely aware of the political sensitivity of some of the arguments that might have to be deployed - not only on the general question of the obligation to pay compensation but also on the particular question of whether the compensation actually paid was "fair" or "adequate". We were fully alert to the need to ensure that our respective Ministers knew what the proposed line, or the alternative possible lines, might be and to obtain their authority for the line which we eventually adopted. We in the Law Officers' Department kept the Attorney General in the picture and I know that similar steps were taken in the other Departments. For example, we have on our files a copy of a very full submission which DTI officials made to their Secretary of State on 10 March 1982 to obtain his approval for the proposed contents of our written Observations in the Nationalisation Case. There was a further submission to DTI Ministers in April 1982 to obtain approval for the final version of those Observations. We ourselves sought and obtained the Attorney General's approval at that time. So far as the Duke of Westminster's Case was concerned, the written Observations had previously been carefully scrutinised and approved in draft not only by the Attorney General but also by the then Secretary of State (Mr. Heseltine) and there was correspondence between the two of them before the draft was finally settled.

6. After the written Observations had been submitted to the Commission and during the course of preparations for the oral hearing - which was to be a single hearing covering both cases - officials of all Departments again paid particular regard to the need to ensure Ministerial awareness of, and to obtain Ministerial authority for,

/the

the arguments that it was proposed to deploy. The Attorney General, for his part, took special care to obtain his colleagues' approval for the line which would be advanced by the Counsel whom he had chosen. For example, our files show that there was correspondence on this matter early in January 1983, relating to the Duke of Westminster's Case, between the Attorney General and Mr.Stanley (then Minister of Housing). This was also copied to the Secretary of State for Wales and Scotland. More important, on 20 January 1983 the Attorney General wrote to the Secretary of State for Trade and Industry, explaining clearly and in detail to him and to the other recipients of the letter the arguments which would, with their approval, be advanced at the oral hearing which was to take place shortly. That letter was copied to the Prime Minister, the Secretary of State for the Environment and the Minister of Housing, the Secretaries of State for Wales and Scotland, the Chancellor of the Exchequer, the Foreign and Commonwealth Secretary and Sir Robert Armstrong. As the letter itself says, the Attorney General had, before writing it, called in our leading Counsel (Mr. Donald Nicholls, now Mr. Justice Nicholls), and satisfied himself that he understood the need to put out arguments on the politically sensitive points exactly in the way that we wished.

7. For completeness, though this is not what the Prime Minister was primarily adverting to, I should say that exactly the same processes of consultation between Departments and of consultation of Ministers by Departmental officials were carried out in preparation for the proceedings before the Court, both at the stage of written pleadings and before the oral hearing. As an example, I draw your attention to the Attorney General's letter of 20 July 1984 to the Secretary of State for Trade and Industry. This was copied to the Prime Minister, the Secretary of State for the Environment, the Chancellor of the Exchequer, the Foreign and Commonwealth Secretary and Sir Robert Armstrong. (The Duke of Westminster's case was, by then, being treated separately and so the letter did not have to go to the other recipients of the letter of 20 January 1983.)

8. I hope that this will reassure you, and enable you to reassure the Prime Minister, that we did not run the particular argument which the applicants have (mischievously, I think), attributed to us and which had, understandably, dismayed her. I also hope that the Prime Minister will be reassured that the Attorney General has indeed been alert at all times to the need to avoid politically

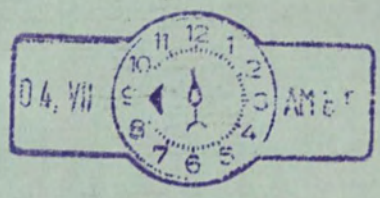
/unattractive

unattractive arguments and has been kept fully in the picture for that purpose. Finally, I hope that I have demonstrated that the other Ministers concerned have at all times been consulted about the line of argument that it was proposed to use and have given their approval for it.

9. I am copying this letter to John Ballard (DOE), John Mogg (DTI) and Len Appleyard (FCO).

Yours ever,

H STEEL


04. VII
AM

CONFIDENTIAL

SUBJECT
cc Master VC
CCPC

10 DOWNING STREET

2 July 1985

From the Private Secretary

Dear Hugh.

IMMIGRATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Prime Minister held a meeting this morning to consider the Government's response to the recent judgement of the European Court on Human Rights on the immigration rules covering the admission of husbands. The Lord President, Lord Chancellor, Home Secretary, Foreign and Commonwealth Secretary, Lord Privy Seal, Attorney General, Chief Whip and the Minister of State for Home Affairs took part.

The Home Secretary introduced the proposals in his minute of 20 June which would have the effect of allowing husbands to join women who have been allowed to settle in this country in line with the existing provisions of the rules which allowed wives to join men settled here, and of applying the tests which at present husbands must meet before being allowed to join British citizen women to the admission of wives and female fiancees joining men settled here. Although his proposals would lead to some increase in settlement amounting to about 2,000 a year, this figure had to be seen against the background of the Government's success in reducing immigration since 1979.

The Attorney General said that he was content with the Home Secretary's recommendations with the exception of the advice given on Section 1(5) of the 1971 Immigration Act. His view was that the Government should give an undertaking to repeal this but need not necessarily do so for a year or two.

In discussion it was pointed out that there was no absolute obligation on the Government to be guided by the judgement of the European Court on Human Rights. However it had complied with every decision of the Court hitherto and could not refuse to do so on this occasion while remaining consistent with its international obligations. It was further pointed out that the Court's judgement had upheld our immigration rules in most respects saying only that we should not discriminate in favour of women. It had not laid down how this discrimination should be corrected and in theory at least it would be open to the Government either to remove the right which wives at present had to join men who were settled here or restrict the right to bring in a spouse

6

CONFIDENTIAL

of British citizens. Against this it was pointed out that the Government had repeatedly accepted a commitment to admit wives of settled immigrants and could not easily go back on these undertakings.

Some concern was expressed lest allowing husbands to join women settled in this country should lead to additional claims for supplementary benefit and housing allowance. It was noted, however, that the Home Secretary's proposals provided for the maintenance and accommodation requirements at present applied to the admission of wives to be extended to cover husbands. While there were some arguments in favour of delaying the Government's response to the Court's judgement, it was probably preferable to take action sooner rather than later.

Summing up the discussion, the Prime Minister said that the proposals in the Home Secretary's minute of 20 June were accepted and the necessary changes to the immigration rules should be laid before Parliament in July.

I am sending copies of this letter to the Private Secretaries to members of H Committee, to the Private Secretaries to the Foreign and Commonwealth Secretary and the to Attorney General and to Richard Hatfield (Cabinet Office).

yours ever,

C.D. POWELL

Hugh Taylor, Esq.,
Home Office.

CONFIDENTIAL

Prime Minister
cbm.

MR POWELL

1 July 1985

IMMIGRATION MEETING: 2 JULY 1985

Herewith:

1. Policy Unit brief

2. Copy of the Abdulaziz Judgement

3. Copy of the relevant Immigration Rules (H/C paper 169 - 9 February 1983).

HARTLEY BOOTH

CONFIDENTIAL

PRIME MINISTER 1 July 1985

IMMIGRATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

We believe that the Case of Abdulaziz, Cabales and Balkandali decided in the Court of Human Rights in Strasbourg on 28 May 1985 might, with caution, be used as a test case of how the Government wishes to treat the decisions of this Court.

1. The Home Secretary's minute of 20 June 1985 states that "under our obligations to the European Convention, we are bound to comply". This is so in international law, but as yet this treaty has not been given the force of law in Britain, and so we have no 'absolute obligation' in British law to obey this decision.

2. Of course, we uphold the 'comity of nations', however the sovereignty of Parliament should not be 'overruled' unless Parliament so decides.

3. The sensible proposals of Leon to toughen some of the Immigration rules so as to remove 'discrimination' could be decided by free vote in the Commons.

We believe this to be a feasible option that should be considered, but if this course is taken, it might prove a hostage to fortune. If a radical Left Government was

overruled by the Court of Human Rights, we might not welcome a free vote precedent in the House of Commons.

On balance, we believe the time for a free vote on the power of the Court of Human Rights is in the Autumn, when the right of individuals to apply to the Court comes to be reconsidered.

HARTLEY BOOTH

E.R.

CONFIDENTIAL

PRIME MINISTER

Immigration and the European Convention on Human Rights

You disagreed strongly with the Home Secretary's recommendations on our response to the judgement recently given by the European Court of Human Rights on the immigration rules governing the admission of husbands.

There is to be a meeting to consider the issue tomorrow morning, to be attended by the Home Secretary, the Lord President, the Foreign and Commonwealth Secretary, the Lord Chancellor, the Attorney General and the Chief Whip.

The attached note summarises the Home Secretary's recommendations, pointing out in particular that his preferred course would lead to a direct increase in settlement of about 2000 a year.

Your view was, I think, that we should restrict the right to bring in a spouse, whether male or female, to British citizens. This would mean restricting a right which wives have at present, namely to join husbands settled here (but not necessarily British citizens); and the Home Secretary regards it as very damaging politically.

C.D.P.

N.B. Policy Unit advice also now attached

1 July 1985

[illegible]ll raise this at the European Council and I hope to discuss it with Vice-President Bush when he comes next week.

Mr. Kinnock: Is the Prime Minister aware that I and my right hon. and hon. Friends wish warmly to congratulate the police on the remarkable detective work and the success that they have achieved against the Provisional IRA? We believe that the whole nation has cause to be grateful. Can the Prime Minister give us an assurance that all necessary resources will be provided in order to ensure that the police can fully and quickly undertake the painstaking search that they now have to undertake of hotels and boarding houses in all the resorts mentiond by Commander Crawshaw?

The Prime Minister: I am grateful to the right hon. Gentleman. As he knows, my right hon. and learned Friend will be making a statement on this matter shortly. We all warmly congratulate the police on preventing a disaster which was calculated to maim and kill many innocent people. All possible resources will be devoted to the task of the necessary search.

Q2. **Mr. Greenway** asked the Prime Minister if she will list her official engagements for Tuesday 25 June.

The Prime Minister: I refer my hon. Friend to the reply that I gave some moments ago.

Mr. Greenway: Would my right hon. Friend not agree that in a bad week, when terrorists have terrified the world, it is high time that everyone united in congratulating the police upon their brilliant anti-terrorist operations? Is it not time that the GLC anti-police Bill was withdrawn and that the sour and obstructive attitude towards the police by many Members in the Labour party was brought to an end?

The Prime Minister: I agree with my hon. Friend and indeed I have already indicated that we warmly congratulate the police on their success. I agree with him about the GLC anti-police Bill.

Mr. Winnick: Can the Prime Minister give any explanation at all why the Tory candidate in the current by-election goes about as if he has never heard of her? What possible explanation can there be for that?

The Prime Minister: I am sure that we have a candidate who is concentrating on putting across positive, constructive policies—*[Interruption.]* Those policies are the policies of our party. The Labour party attempts to personalise politics because it has no constructive policies to put across.

Q2. **Mr. Dobson** asked the Prime Minister if she will list her official engagements for Tuesday 25 June.

The Prime Minister: I refer the hon. Gentleman to the reply that I gave some moments ago.

Mr. Dobson: Does the Prime Minister recall her speech to the Welsh Conservative party conference in Swansea in 1980 in which she said that Welsh people who wanted work would have to move to find it? Is that still her advice to the people who live in Brecon and Radnor? If it is, where does she suggest that they go? Surely she cannot be suggesting her constituency of Finchley, where 3,000 people are on the dole.

The Prime Minister: In that speech I said that movement was a part of finding a job—*[Interruption.]* That is also mentioned in the employment White Paper published many years ago.

Dr. Blackburn: Does my right hon. Friend agree that the greatest blessing that a Government can give to the sick, the unemployed, the disabled and those on fixed incomes is—[HON. MEMBERS: "To resign".]—lower inflation? Will my right hon. Friend confirm to the House and to the nation from the Dispatch Box that that remains the paramount policy of Her Majesty's Government?

The Prime Minister: It is our policy to reduce inflation. Although at the moment it is higher than we would wish, it is lower than any level achieved by the Labour Government.

Mr. Beith: Why is the Government's representative in the European Court of Human Rights at Strasbourg arguing so adamantly in favour of the power of a Labour Government to nationalise industries without adequate compensation? Does the Prime Minister really believe that the shares that she has sold to large numbers of the British public should be open to renationalisation at a knock-down price?

The Prime Minister: The European Commission on Human Rights has pronounced on the case and the matter has now gone before the Court. As the hon. Gentleman is aware, we accept the Court's decisions, whatever they may be.

Q2. **Mr. Douglas** asked the Prime Minister if she will list her official engagements for Tuesday 25 June.

The Prime Minister: I refer the hon. Gentleman to the reply that I gave some moments ago.

Mr. Douglas: May I make an appeal to the Prime Minister's scientific mind? The expectation of an event occurring which is one divided by 10 to the power of 53 is small. Is not that exactly the position of the Scottish miners because 413 men have been re-employed, but not one of the 203 men from Scotland has been re-employed? Are we therefore correct in assuming that human intervention is involved? Will the Prime Minister now instruct the National Coal Board to pay the same attention and give the same justice to Scottish miners as to miners in other areas so that some at least of the 203 men who have been dismissed will be re-employed?

The Prime Minister: I told the House what the Coal Board said when I replied last time. The hon. Gentleman is the first to know that the correct procedure for miners who were dismissed during the dispute is to appeal to an industrial tribunal. If that tribunal finds that any miner was unfairly dismissed it can order compensation and recommend reinstatement. That is the correct procedure.

Mr. David Atkinson: Will my right hon. Friend use the opportunity of the forthcoming European summit to strike a blow on behalf of millions of small businesses throughout the Community by trying to amend the sixth directive on value added tax to increase the threshold to above £50,000 a year so that small businesses can get on with the job of making a profit and creating new jobs rather than being weighed down by the enormous bureaucracy in the EEC?

The Prime Minister: I raised the subject of that directive at the previous meeting of the European Council.

PEC Brief

LINE TO TAKE

STRASBOURG AIRCRAFT AND SHIPBUILDING INDUSTRIES ACT 1977

Notes for Supplementaries

Q1. Is not the Government's unwillingness to provide further compensation a discouragement for future privatisation?

A1. The Government's position on not altering the terms of compensation was set out by Sir Keith Joseph in August 1980. I do not consider that our stance on this matter has impeded the privatisation programme.

Q2. Will the Government legislate to protect the right of British nationals to compensation?

A2. As I said in answer to a Parliamentary Question on 12 June 1984 such legislation in general terms is not appropriate, nor would it ensure in all circumstances that compensation would be adequate.

Q3. Has not the Government admitted that the compensation terms of 1977 were inadequate?

A3. My Rt Hon Friend, the then Secretary of State for industry in announcing the decision not to alter the compensation terms said that the Government shared the view of those who felt that the terms of compensation were unfair to some of the companies concerned. However the point at issue is whether the compensation is in breach of the European Convention of Human Rights, and the Commission have found that there has been no breach.

Q4. Does not the reference of the applications to the European Court of Human Rights demonstrate that there is a justified grievance?

A4. The Commission found that there had been no breach of the United Kingdom's obligations under the European Convention of Human Rights and the First Protocol to it. The reference to the Court provides an opportunity for an authoritative ruling on an important issue.

Q5. Is it not an encouragement to offer insufficient compensation in future instances that the Government has argued that the Convention conferred no right to compensation on UK nationals?

A5. The Government so argued because this appeared to be the established jurisprudence on the point. The Commission, however, held that the Convention and Protocol do confer upon nationals a right to compensation for expropriation; and the Government have accepted this finding.

Q6. What happens if the Court finds in favour of the applicants?

A6. As I said on 11 June we have signed the declaration and we must abide by its rules.

Background Note

1. The European Court of Human Rights is hearing on 24-26 June the case of the seven applicants who have claimed that the compensation paid under the Aircraft and Shipbuilding Industry Act 1977 was inadequate and was contrary to the European Convention of Human Rights. A list of the seven applicants is attached.

2. The applicants decided to take the case to the European Commission of Human Rights after Sir Keith Joseph's written answer of 7 August 1980 (attached) in which he announced that amending legislation to establish new compensation terms retrospectively would be unjust to the many people who sold shares on the basis of the previous terms.

3. The Government's case has been that the compensation provisions were not in breach of the United Kingdom's obligations under the European Convention of Human Rights. The view that there has been no breach of the rights of the applicants has been supported by the European Commission of Human Rights. The reference to the Court provides an opportunity for an authoritative ruling on an important issue.

4. The European Commission of Human Rights did not accept the Government's case that the Convention did not confer a right to compensation upon nationals of the State concerned. The Commission found that "while the rules of international law do not apply to nationals there is inherent in Article I (of the Protocol) a right to compensation for the taking of the property of anyone within the jurisdiction of a Contracting State, where and insofar the payment of compensation is necessary to preserve the appropriate relationship of proportionality between the interference with the individual's rights and the public interest".

5. The Government in its memorial to the Court has accepted the Commission's opinion on this point, and the Government's case is therefore concentrated on those arguments which were endorsed by the European Commission's Report.

ECHR: LITHGOW AND OTHERS v THE UNITED KINGDOM

List of Applicants

Applicant	Company nationalised
Sir William Lithgow	John G Kincaid
English Electric Ltd) Vickers Plc)	British Aircraft Corporation (Holdings)
Vosper Plc	(Vosper Thornycroft (UK) (Vosper Shiprepairers
Yarrow Plc	Yarrow Shipbuilders
Banstonian Company) Northern Shipbuilding and) Industrial Holdings Ltd)	Hall Russell and Company
Vickers Plc	Vickers Shipbuilding
Dowsett Securities Ltd) FFI (UK Finance Plc) Prudential Assurance Co)	Brooke Marine

With the exception of Sir William Lithgow, who was one of several shareholders in Kincaid, the applicants are the parent companies of subsidiaries which were nationalised in 1977. (There are two further applications, in respect of Scott Lithgow and Scott Lithgow Drydocks. These were made at a later date and have only recently been found admissible).

Hansard 7 August 1980, Cols 289/80

INDUSTRY

Shipbuilding and Ship Repairing

Mr. Buck asked the Secretary of State for Industry whether he intends to introduce legislation to enable the nationalised shipbuilding and ship repairing companies to be offered back to private enterprise; and if he will make a statement.

Sir Keith Joseph: The Government have been considering whether to introduce private sector capital into shipbuilding and ship repair. This review was begun when there were some signs of recovery in the market and there was still a reasonable expectation that British Shipbuilders would be able to keep within its financial limits this year without the need for substantial corrective action. As the Minister of State told the House last week, these hopes have not been realised and the industry faces a period of continuing uncertainty about its future shape and viability. We have accordingly decided to defer proceeding at this stage. I know that this decision will be a disappointment to many, including all those who think that private enterprise offers a better hope for jobs and prosperity in the industry than public ownership. We intend to introduce private capital into the industry as soon as appropriate.

We recognise that some previous owners and many members of this House and of the public believe that the terms of compensation imposed by the 1977 Act were grossly unfair to some of the companies and we share this view. We have explored every possibility to right the injustice done by the previous Government, but to our very great regret we have concluded that amending legislation to establish new compensation terms retrospectively would be unjust to the many people who sold shares on the basis of the previous terms.

We had to recognise, moreover, that had we wanted as an alternative to offer the companies back to the former owners legislation would have been required. This would inevitably create a long period of uncertainty for the industry during the passage of legislation, the preparation of the detailed offer to the former owners and the consideration of the terms. Moreover we cannot return to the former owners that which was taken from them because the assets and liabilities of the companies concerned have changed. In the case of the aircraft industry the changes are quite clearly irreversible. We have therefore come to the most reluctant conclusion that there is no satisfactory way to alter the 1977 compensation terms.

Mr. Morrison: I could not agree more with my hon. Friend. That is precisely why the adult training strategy has been adopted.

Mr. Sheerman: Will the Minister come clean and accept that the so-called re-jigging hides the fact that throughout the country short-term "cheapo" courses are being substituted for genuine year-long skills training in our skillcentres? Is it not a surprise that the two skillcentres that the Minister has saved are in Tory marginal seats? Is he aware that men and women in other areas will take that lesson hard, they having had their skill-training opportunities taken away from them?

Mr. Morrison: The decision as to which skillcentres to keep was made entirely by the chairman of the Manpower Services Commission. The hon. Gentleman will know that the leader of the CSU pleaded with the chairman of the MSC to retain the Southampton skillcentre. He will know also that it was the Labour-controlled council which guaranteed money for the Southampton centre. Those are the facts.

PRIME MINISTER

Engagements

Q1. **Mr. John Townend** asked the Prime Minister if she will list her official engagements for Tuesday 11 June.

The Prime Minister (Mrs. Margaret Thatcher): This morning I had meetings with ministerial colleagues and others. I was present at Victoria station to meet President de la Madrid of Mexico at the beginning of his state visit to this country. In addition to my duties in this House, I shall be having further meetings later today. This evening I shall be attending a state banquet given by Her Majesty the Queen in honour of President de la Madrid.

Mr. Townend: Is my right hon. Friend aware of the growing resentment in the country over the activities of the European Court of Human Rights? Is it right that a court dominated by foreign judges should dictate who enters Britain, should prevent naughty schoolchildren being caned and should discuss the future of Myra Hindley? Is it not time that these decisions were brought back to the House and the Government? Will my right hon. Friend give notice that we shall terminate our membership and recognition of this body?

The Prime Minister: I can understand why my hon. Friend feels deeply about some of the judgments that have been given. However, we have signed that declaration and we must abide by its rules. The court held, for example, that the immigration rules applying to the admission of husbands had the legitimate aim of protecting the domestic labour market. It is worth noting that Myra Hindley has tried previously to get her case before the European Court and has failed. It was ruled inadmissible.

Mr. Steel: Will the Prime Minister join me in deploring the concentration of television interviewers and Conservative Central Office on something called the TBW factor? Does she agree that it is merely a pathetic excuse for the failures of the Government's economic and social policies?

The Prime Minister: I note that the right hon. Gentleman cannot find a more effective and more important supplementary question than that.

Lord James Douglas-Hamilton: Does my right hon. Friend agree that the victory of Barry McGuigan was a great victory and one which symbolised the capacity of the different communities in Northern Ireland to live together when they have the will to do so?

The Prime Minister: I agree with my hon. Friend and I congratulate the winner most warmly. We are all delighted at the reception that he received in both parts of Ireland.

Q2. **Mr. Evans** asked the Prime Minister if she will list her official engagements for Tuesday 11 June.

The Prime Minister: I refer the hon. Gentleman to the reply that I gave some moments ago.

Mr. Evans: How many people will have to pay increased national insurance and pension charges if the state earnings-related pension scheme is abolished, which apparently the right hon. Lady is determined to do?

The Prime Minister: Any increases will be nothing like those that would have to have been paid had SERPS continued. There will be a certain number of increases because SERPS will continue until the end of the century for those who are entitled to it. As the hon. Gentleman knows, the money that is paid out in pensions this year has to be met by contributions, a factor that I wish he would remember more often.

Mr. Crouch: Is my right hon. Friend aware that if she decides to intervene in the current moves to find a peace settlement in the middle east, she will have the wholehearted support of the House, and no one will criticise her for visiting Cairo, Amman and other centres in that area, or suggest that she should take a holiday instead?

The Prime Minister: We cannot intervene directly, as my hon. Friend knows, but we keep closely in touch with these matters, both with the parties concerned and the United States. I have often been asked to visit Egypt and Jordan as Prime Minister, and by the time that the long recess comes, it will be about time that I accepted those kind invitations.

Mr. Kinnock: The right hon. Lady gave an evasive response to the question asked by my hon. Friend the Member for St. Helens, North (Mr. Evans). Is it not the plain truth and the plain fact that every worker, whether contracted in or contracted out of SERPS, will have to pay more as a consequence of any abolition of the scheme? Why does she not come out and admit that?

The Prime Minister: As long as SERPS carries on, yes, more contributions will have to be paid to meet the liability. The right hon. Gentleman must be well aware that the contributions paid so far towards SERPS are not being accumulated to pay out SERPS but are used to pay out existing basic pensions as well as increments on former graduated pensions that have built up. The situation will be far worse under the system that he proposes. If SERPS were fully in operation for the period in which it was arranged for it to be in operation it would cost £66½ billion, compared with the £15 billion now on the same price terms.

Mr. Kinnock: The Prime Minister wants us to forget that not only did she vote for the scheme but she endorsed it at the last general election. Setting that aside, how does

Briefing prepared for Questions 27/6

NATIONALISATION CASES IN STRASBURG

Line to Take

I do not resile from what we said when we were in Opposition and indeed after we took office, namely, that the compensation paid to some of the companies that were nationalised was insufficient to the point of being quite unfair. My RHF the Education Secretary explained why, nevertheless, we thought that it would be impracticable and possibly unfair to others if we decided now to pay additional compensation to the original owners. But that is not the question that is being argued at Strasburg. The question there is whether the machinery for determining compensation that was established by the 1977 Act was itself so clearly misconceived as a method of trying to reach a fair result, as to be outside the legitimate margin of appreciation, that the Convention leaves to sovereign Governments and Parliaments in these matters, with the result that the UK had violated its international legal obligations. We believe that it was not; the Commission has agreed with us; and we are contending that the Court should take the same view.

27 June 1985

FILE

H Cttee:

LPO	DHSS
LCO	DEmp
(HO)	CS
DES	DTrans
NIO	CWO
SO	Cpt G-Arms
WO	CO
LPS	CDL
	PGO
	MwP

RM (35)

10 DOWNING STREET

From the Private Secretary

24 June, 1985

IMMIGRATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Prime Minister has considered the Home Secretary's minute of 20 June about changes which need to be made to our Immigration Rules to respond to the recent judgement of the European Court of Human Rights on the rules governing the admission of husbands.

The Prime Minister disagrees with the Home Secretary's recommendations. We shall therefore need an early meeting. Mrs. Ryder will be in touch to arrange this.

I am copying this letter to the Private Secretaries to members of H Committee, to the Foreign and Commonwealth Secretary and to Richard Hatfield (Cabinet Office).

(C.D. Powell)

H. Taylor, Esq.,
Home Office.

(1)

PRIME MINISTER

IMMIGRATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The attached paper contains the Home Secretary's proposals for implementing the recent judgment of the European Court of Human Rights on the Immigration Rules.

You will recall that the judgment found that the fact that wives are admitted under more favourable conditions than husbands amounted to sex discrimination.

There are two possible ways to deal with this.

The first is to achieve equality by removing the right which wives at present have to join men who are settled here. This would reduce immigration. But the Home Secretary judges that it is too controversial politically and in breach of commitments given by this and earlier governments.

The second is to allow husbands to join women settled here in the same way that women are allowed to join men; but at the same time to impose on women the same tests and requirements for entry - e.g. the primary purpose test - as are imposed on men. The Home Secretary estimates that this will lead to an increase in settlement from all parts of the world of 2000 a year, of whom 600 will be from the Indian sub-continent. It is the course which he recommends.

Agree the Home Secretary's recommendation, subject to views of colleagues?
or
Hold a meeting to discuss it?

I disagree very strongly indeed

C.D.P.

(C. D. POWELL)
21 June 1985

cc PM
cc H.B

PRIME MINISTER

IMMIGRATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In my minute of 17 May I forewarned you and colleagues of the impending judgment of the European Court of Human Rights on the Immigration Rules governing the admission of husbands.

As you know, judgment was given on 28 May and, although in many very important respects it upheld our Immigration Rules, it held that sex discrimination existed in the difference between the Rules governing the admission of husbands and the admission of wives, and that this constituted a breach of the Convention.

The Court judgment, in so sensitive a matter as immigration, has, of course, excited much interest. We need to indicate quickly how we propose to respond to the judgment, with which, under our obligations to the European Convention, we are obliged to comply. I have therefore been considering urgently what changes we must make to the Immigration Rules. I attach a paper setting out my proposals.

The conclusions to which I have come are as follows:

We must allow husbands to join women who have been allowed to settle in this country, in line with the existing provisions of the Rules which allow wives to join men settled here;

the maintenance and accommodation requirements which apply to the admission of wives should be extended to cover husbands;

the requirements, and in particular the primary purpose test which at present husbands must meet before being allowed to

Join British citizen women in this country should be extended to the admission of wives joining men here;

the similar requirements to which male fiances are subject, including the requirement to obtain entry clearance before travelling, should be extended to the admission of female fiancees.

Meeting the requirements of the European Court that the Immigration Rules should not have provision for the admission of husbands which differs from those for the admission of wives makes controversy inevitable. But I judge that this package gives us the best balance we can achieve. I should draw attention to the most important considerations.

The Rules for the admission of husbands and wives could be made the same and sex equality achieved by removing the right which wives at present have to join men who are settled here. I believe, however, that the practical and political difficulties in the way of doing this are overwhelming. It would mean going back on the commitment given by this and previous Governments to allow wives to join men accepted for settlement here and it would mean refusing admission to the wives of men who had settled here from all parts of the world, including the old Commonwealth and America.

Although the judgment was not directly concerned with the primary purpose test, and the other requirements or tests such as that the parties should have met which we introduced to prevent men using marriage as a means to settle here, we cannot meet the Court's finding of sex discrimination unless we either abandon the tests, or apply them to women as well. It will be recalled that the primary purpose test requires men to satisfy the authorities that the primary purpose of their marriage is not to obtain admission to this country.

In my view it would be quite wrong to abandon the test for men. To do that would unacceptably damage our present system of control. They will, therefore, have to be extended to apply to the admission of women. This will be controversial, particularly as the practical difference this will make is not substantial. But the argument for doing so can be sustained, and it is essential to do so in order to be able to retain sufficient control on the admission of men.

There is, however, one significant limitation on our ability to apply the marriage tests to women. The statutory protection which the Immigration Act 1971 affords Commonwealth citizens settled here when the Act came into force means that the marriage tests cannot be applied to the wives of such citizens. The new Rules will therefore have to reflect this statutory entitlement. We cannot, however, afford to weaken the primary purpose test for men by exempting those who marry women settled before the coming into force of the Act; and to this extent the Rules will still be unequal in their effect. I believe, however, that this degree of sexual discrimination is defensible, and I have been advised by our lawyers that there is a reasonable defence against any further complaint under the European Convention on this point, on the basis that the 1971 Act is a transitional provision.

The primary purpose test and other requirements apply to the admission of fiances as well as to husbands. Extending the requirements to the admission of wives makes it necessary to extend them to the admission of fiancees as well. At present fiancees, unlike wives or husbands or fiances, do not have to obtain entry clearance before entering this country. Extending the marriage tests to their admission means that they will have to be subject to the entry clearance requirement.

The net result of these changes is likely to involve an increase in settlement of about 2,000 a year from all parts of the world. No more than about 600 of these will come from the Indian sub-continent. Any increase in immigration is, of course, unwelcome; but this should be seen in the context of the substantial fall in settlement since we came into office, to which I referred in my minute of 17 May.

As the paper notes, the proposed Rule changes will mean new work for an immigration control system which is already under strain. Queues in the Indian sub-continent and work at other posts abroad (both of which are managed under the Foreign and Commonwealth Secretary's responsibility), and work here will be affected. Bureaucratic delays at all points in the system are constantly criticised. Without changes in procedures and some increases in staff, we will not meet publicly

announced targets for service to applicants, the majority of whom in this country have valid claims. I cannot rule out the need to bid for new resources, but the objective will be to absorb the increased demand.

Subject to your views and those of our colleagues, I shall press ahead with the preparation of Immigration Rule changes to be made, subject to detailed agreement in H Committee, before Parliament rises for the summer.

I am sending copies of this minute to members of H Committee, to the Secretary of State for Foreign and Commonwealth Affairs, to the Attorney General and to Sir Robert Armstrong.

L.B.

20 June 1985

E.R.

EUROPEAN CONVENTION ON HUMAN RIGHTS: CHANGES IN IMMIGRATION RULES

I. JUDGMENT OF EUROPEAN COURT OF HUMAN RIGHTS

1. On 28 May the European Court of Human Rights delivered judgment in three test cases brought by the wives of three men refused permission to settle in this country under the 1980 Immigration Rules.

2. Under the Immigration Rules the admission of husbands is subject to a number of restrictions which do not apply to the admission of wives. The provision challenged in these cases was one limiting the admission of husbands to those of women who were citizens of the United Kingdom and Colonies born in this country or had one parent born here. This provision has now been replaced, under the 1983 Immigration Rules made when the British Nationality Act 1981 was brought into force, by a restriction that only husbands of British citizen women may settle here. But the principle, and therefore the relevance of the judgment, remains the same, namely that the admission of husbands is subject to more stringent requirements than the admission of wives. In particular, wives are admitted to join men who have been allowed to settle here even though the men do not have British citizenship.

3. The judgment endorses the aim of the Immigration Rules to curtail primary immigration in order to protect the labour market at a time of high unemployment. It found that there was no violation of the right to respect for family life (Article 8). The Court also found that there was no breach of the Convention on grounds of degrading treatment or discrimination on grounds of race or birth.

4. The Court did, however, find that the fact that wives are admitted under more favourable provisions than husbands amounted to sex discrimination in violation of Article 14 with Article 8. On the basis that sex equality is a major goal in the Member States of the Council of Europe, the Court held that while protecting the domestic labour market was a legitimate aim of the Immigration

Rules, the justification for permitting more favourable treatment for wives in this context was insufficient to avoid violation of Article 14.

5. The Court also found that the absence of effective remedy within the United Kingdom domestic law for the breach of the Convention amounted to a violation of Article 13.

II. ISSUES ARISING

6. It will be necessary to remove distinctions between the sexes from the Immigration Rules insofar as such differences affect rights guaranteed by the European Convention, in practice the right of respect for family life. (So far as the Article 13 violation is concerned removing the substantive breach should be sufficient remedy).

7. The specific provisions on which action will be necessary are:

(i) the citizenship difference in the rules applying to the admission of wives and husbands;

(ii) marriage tests which at present apply to the admission of husbands but not wives.

8. The citizenship requirement alone was the specific issue in the husbands cases. Only one of the marriage tests, namely the requirement that the couple must have met before a husband may be granted admission, was referred to by the Court. Its aim was endorsed (though with the comment that it was not at issue) in the context of the applicants' argument that the rules amounted to racial discrimination. This rule, together with the other tests,in particular the primary purpose test, have the same objective of protecting the domestic labour market. We may be confident that, in the light of this judgment, the European Court will not find them in breach of Article 8 as such. But equally the judgment gives no room for supposing that the Court would find the arguments for applying the tests to husbands but not wives (essentially the same as those advanced for the

difference in the citizenship requirement) sufficient justification to avert violation of Article 14 with Article 8 on grounds of sex discrimination.

9. There are other provisions in the Immigration Rules in which distinctions between the sexes are at risk as a result of the European Court judgment, for example the provisions which allow male students to bring in their wives but prevent female students from bringing in their husbands, and similar rules applying to men and women admitted for a limited period for employment; but these are not affected directly in the judgment in the husbands' cases. Whether there is "the right to respect for family life", needed to bring the rules within the ambit of the European Convention, is not a question to which the judgment yields an immediate answer. We shall have to consider the implications of the judgment for these rules. They may well be in breach of the Convention. But no violation has (yet) been found by the Court requiring immediate remedy.

III. CITIZENSHIP REQUIREMENT

10. So far as the matter directly at issue in the judgment is concerned, we have one of two options. We can extend the right to bring in a spouse to settled women as well as women who are British citizens, thus making the rules applying to the admission of husbands the same in this respect of those applying to wives; or we can restrict the right to bring in a spouse to British citizens, whether male or female, thus removing the right which wives now have to join settled men. Either approach would appear to meet the requirement of the judgment to remove differences of treatment between the sexes.

11. The restrictive approach would not be a breach of Article 8 as such, at least in the type of case considered by the Court where the women married after settlement. However, the practical difficulties in the way of removing the right of wives to join settled men appear overwhelming. Successive Governments have undertaken to allow wives to join men allowed to settle in this country; and the Immigration Act 1971 gives statutory protection to this principle in respect of wives of Commonwealth citizens

settled here when the Act came into force on 1 January 1973. The controversy which going back on this commitment would arouse would be very considerable and very damaging. And the removal of the right of settled men to bring in their wives would affect people from all parts of the world. It would not only affect those heads of household from the Indian sub-continent who have not become British citizens; it would also affect the considerable number of men from the Old Commonwealth and America and elsewhere who settle here without becoming British citizens. It would not be in our interests to prevent foreign businessmen and others with scarce skills of value to the country from bringing their wives here, a restriction which might well dissuade them from coming.

12. Accordingly it appears necessary to allow husbands to join women settled here. The initial impact of such a change on the numbers settling here is unlikely to be great - perhaps about 2,000 a year from all parts of the world. Within that total there might be some 600 from the Indian sub-continent, though in due course the numbers from Bangladesh, from where few husbands come at present, are likely to increase (though most of the women are British citizens).

IV. RESTRICTIONS ON THE ADMISSION OF HUSBANDS

13. Husbands joining women who are British citizens are already subject to tests designed to ensure that the marriage is not a means to gain admission. To minimise the impact of extending the right of admission to the husbands of settled women additional tests might be considered.

14. This might take the form of an employment prohibition, in order to protect the labour market; or means test, to protect public funds.

15. At first sight an employment prohibition would be an attractive way of respecting family unity while at the same time protecting the domestic labour market. But it would be very difficult to defend a provision which allowed a man to come here to join his wife but prevented him from supporting himself and his family.

Furthermore it would be very difficult to enforce an employment prohibition effectively and the attempt would involve a significant move to after-entry immigration checks which could cause considerable difficulties with the ethnic minority communities.

16. A means test which limited admission to husbands who could show that they had adequate means to support themselves would be one way of protecting public funds. It would be a natural corollary of a prohibition on employment, designed to ensure that a husband admitted without the right to work would not be dependent on public support. Without an employment restriction it would not, however, be appropriate to have a general means test since husbands admitted on the understanding that they would be allowed to work could not be expected to support themselves and their families out of means available to them before coming to this country.

17. The most promising form of test to apply to husbands admitted to join settled women is an extension of the tests in the present Immigration Rules designed to ensure that there is adequate maintenance of accommodation for dependants joining heads of households settled here. This is designed to ensure that dependants are only admitted if their sponsors can show that they can maintain and accommodate them without recourse to public funds. The application of such a test to husbands would be different to the extent that the husband could not be treated as a dependant for whom adequate provision for maintenance and accommodation must exist before immigration. But it would be appropriate to assess whether a couple could maintain and accommodate themselves on the admission of the husband before granting admission. The test would equally apply to the admission of wives.

V. MARRIAGE TESTS

18. Although the requirements which a husband must satisfy under the immigration rules before he is allowed to join a woman who is a British citizen were not directly at issue in the husbands' cases, the fact that they are applied to husbands but not wives makes them open to complaint of sex discrimination. It is clear in the light of the judgment that we have no answer acceptable to the Court

to such a complaint. We shall, therefore, either have to abandon the tests in order to bring the provisions for the admission of husbands into line with those for wives; or extend the tests to wives to bring them into line with husbands.

19. The requirements are:

(1) the "primary purpose" test that the marriage was not entered into primarily to obtain admission to the United Kingdom;

(2) the intention to live together permanently;

(3) the requirement to have met;

(4) a 12 month probationary period on admission, with settlement only being granted at the end of that period if the marriage continues to exist.

20. Abandoning the tests on the husbands is not a realistic option. The strengthening of the controls over primary immigration through marriage, in particular through the introduction of the primary purpose test, has been a fundamental Government commitment. In the face of much controversy the primary purpose test has been upheld in our Courts; and the European Court has endorsed the object of the Immigration Rules - explicitly so far as the requirement to have met is concerned. It is out of the question to remove the tests now merely in order to meet the European Convention requirements of sex equality. To do so would involve an increase in settlement of the order of 2,000 a year, mostly from the Indian sub-continent.

21. Extending the tests to the admission of wives would meet the requirement of sex equality. On the basis that the tests are designed to prevent marriage being used for immigration purposes, it should be possible to rebut any claims that the tests violate the right of respect for family life.

22. In terms of immigration policy as such there has never appeared to be a strong case for applying the tests to the admission of wives. In the context of the Indian sub-continent, where it is a man's choice to join his wife rather than a woman's to join her husband which requires explanation, the primary purpose test at least will be virtually meaningless. But attempts to use marriage for immigration purposes is not unknown in the case of women from other parts of the world, such as Ghana and the Philippines. Although it will be highly controversial it will be possible to offer a defence of substance for applying the test to women as the response forced on the Government by the European Court judgment.

23. The statutory guarantee to wives of Commonwealth citizens settled here when the Immigration Act 1971 came into force do, however, constitute a major difficulty. Section 1(5) of the 1971 Act preserves the entitlements under previous provisions of Commonwealth citizens settled here when the Act came into force (1 January 1973) and their wives and children. Under the previous legislation such wives had a statutory right of admission and we cannot, therefore, limit that right now by applying the marriage tests to them. Instead the existing saving in the Immigration Rules for such wives will have to be extended to exclude them from the primary purpose test. Though the beneficiaries of section 1(5) form a defined group it is a very big one. Perhaps as many as half the wives admitted for settlement from the Indian sub-continent are protected by the provision.

24. To achieve sex equality in the provisions applying marriage tests to both husbands and wives it would be necessary to exempt husbands joining Commonwealth citizen women settled here on 1 January 1973 from the requirements of the marriage tests (in particular primary purpose). That would mean that up to half the husbands coming from the Indian sub-continent might be exempt from the marriage tests. Perhaps as many as 1,000 additional men who do not now qualify might gain admission in a year. This is not in my view acceptable.

25. It has, however, to be acknowledged that the failure to achieve full sex equality in the husband and wife rules could give rise to further challenge under Article 14 with Article 8 of the European Convention. To resist that challenge successfully it is necessary to be able to show reasonable and objective justification for the distinction between the sexes. A reasonable case can be mounted. Section 1(5) was incorporated into the Immigration Act 1971 in order to protect the position of Commonwealth immigrants and their families under previous legislation. We could argue that it is a transitional provision to safeguard the position of immigrants who had achieved a close connection with the United Kingdom through their Commonwealth citizenship and settled status. Good arguments could be advanced, in relation to the Immigration and Nationality law in force prior to the 1971 Act and the pattern of immigration in the 1950s and 1960s, to justify the fact that section 1(5) is couched in terms of Commonwealth citizens and their wives and children. The sex discrimination in the provisions of the Commonwealth Immigrants Acts 1962 and 1968 was retained in the 1971 Act as a transitional provision as an act of good faith to those who enjoyed entitlement under the earlier legislation.

VI. FIANCE(E)S

26. Fiances are subject to essentially the same requirements as husbands. Although it does not appear strictly necessary to treat fiancees the same as fiances in order to comply with the European Court judgment (since family life has not been established and there is, therefore, no issue under Article 8), extending the marriage tests to the admission of wives without extending them to the admission of fiancees as well would be open to objection on two grounds.

27. Even if it is not necessary to extend the tests to fiancees in order to comply with the judgment, to retain so total a distinction between the sexes in a provision of the Immigration Rules to which the Court's judgment is closely, if indirectly, relevant would be very difficult to defend. To appear to be doing mo more than the very minimum necessary to meet the requirements of the judgment would only add to the difficulties of getting a favourable reception for the Government's response.

28. From the point of view of immigration policy extending the marriage tests to the admission of wives without corresponding tests over the admission of fiancees would risk the credibility of the policy since a woman who might fail the marriage tests on seeking entry as a wife would be able to evade the tests by gaining admission as a fiancee and once here and having marriage would be extremely difficult to remove.

29. The principal difficulty which extending marriage tests to fiancees raises is the need to require fiancees to obtain entry clearance before entering the country. This would add to the workload of entry clearance officers, particularly in the Indian sub-continent; but from an immigration point of view it would be unavoidable since it would be quite impossible to apply the marriage tests at the time a woman arrived at a port of entry to this country.

VII. EC DIMENSION

30. The immigration rules applying to the admission of nationals of European Community countries and their families are separate from those applying to other nationalities. They are more generous, in particular in not including marriage tests. No action is needed following the European Court judgment so far as these provisions are concerned. The fact that they are more generous than those applying to non-EC nationals (and to the spouses of British citizens) is inevitable. A challenge under the European Convention on the basis that the rules discriminate on grounds of national origin is unlikely to succeed in view of the fact that the EC rules fulfil our international treaty obligations. New rules for the admission of husbands and wives will in any case not alter the principle that the EC rules are more generous.

VIII. RESOURCES

31. The resource implications of these proposals for the immigration staff of the Home Office and Foreign and Commonwealth Office are not inconsiderable. There would be additional work arising from extra cases as a result of allowing husbands to join non-British

citizen settled wives and by extending marriage tests and entry clearance requirements to fiancees; and the work associated with both husbands and wives before and after entry would become more complicated. So far as the Home Office Immigration and Nationality Department is concerned, the increase might be of the order of 15% in the number of cases handled, the equivalent of perhaps 35 additional staff. So far as entry clearance work carried out by the Foreign and Commonwealth Office overseas is concerned, the increase outside the Indian sub-continent appears likely to be slight; but the implications for posts in the Indian sub-continent, where delays are already the subject of controversy, the increase could be considerable. There might be an annual addition of about 4,000 entry clearance applications, about 1,000 additional husband applications and 3,000 fiancee applications. This represents about a 20% increase in the main entry clearance categories, or the equivalent of at least five entry clearance officers.

IX. SUMMARY

32. This paper proposes that:

(1) husbands should be allowed to join settled women (paragraphs 10-12);

(2) the admission of spouses might be subject to a maintenance and accommodation test (paragraph 17);

(3) the existing marriage tests should be extended to wives (paragraphs 18-22);

(4) there should be a saving for wives joining husbands settled here on 1 January 1973 (paragraph 23), but not for husbands joining wives so settled (paragraphs 24 and 25);

(5) the marriage tests should be extended, with entry clearance requirements, to fiancees (paragraphs 26-29):

Lawyers Committee for Human Rights
NW 80

CCPC

DEPARTMENT OF TRADE AND INDUSTRY
1-19 VICTORIA STREET
LONDON SW1H 0ET
TELEPHONE DIRECT LINE 01-215 5422
SWITCHBOARD 01-215 7877

DW32
PS/ *Secretary of State for Trade and Industry*

20 June 1985

Mrs C J Heald
Home Office
Queen Anne's Gate
London
SW1H 9AT

N617
ODP
21/6

Dear Christine,

HUMAN RIGHTS

Thank you for your letter of 4 June bringing to our notice the Home Secretary's minute of 13 May about human rights.

2. In view of this Department's involvement in the case of Lithgow and others v the United Kingdom, and his remarks at the last Conservative Party Conference, my Secretary of State would wish to be represented at the planned meeting.

3. I am copying this letter to Charles Powell (No. 10).

Yours Sincerely,
A D Lansley

ANDREW D LANSLEY
Private Secretary

999-1

EUR POL: Human rights:
Nov 1980

11 Meeting Thurs 13 June @ 1200 Rec'd 7/6/85

Please help until nearer the time of the meeting when the arrangements can be finalised with COP 7/6

PRIME MINISTER

HUMAN RIGHTS

Although the present investigation began as an assessment of ways of reducing the impact of the European Convention of Human Rights on our law, policy and practice in the United Kingdom, both the Home Office paper and the comments on it of the Attorney General (his minute of 21 May) have rightly focussed on the fundamental questions of the extent to which our law, policy and practice are compatible with the Convention, and whether the differences are such as to make adherence (or complete adherence) to the Convention unacceptable to the United Kingdom.

As regards the question whether the basic provisions of the Convention are compatible with the United Kingdom's policies, I see no reason to doubt that the Convention, which reflects the standards of civilized western nations, is substantially compatible with our domestic law and is an effective reinforcement of basic values - such as the right to property and freedom of choice within the law - which should be observed by any democratic and constitutional government. Given the remarkable range of acceptance of the Convention, by governments of right and left, it would be unrealistic to think we could pick and choose among the provisions of the Convention. Moreover I do not believe that it seriously inhibits any legitimate policy objective of the present government : its effect is rather to require fairness and humanity in the administration of policy. If anything, it tends to be supportive of our policies - in areas such as the trade union closed shop, parental choice in education and compensation for nationalisation - and any difficulties which it creates in fields like immigration and prison discipline can usually be met by minor adjustments in law or practice.

To the objection that the development of the jurisprudence of the Convention is too evolutionary and uncertain, it must be said that there are similar cases already in our domestic law - for instance the law of compensation for war damage, obscenity and (in Scotland) shameless indecency - and more particularly in European Community law which has been part of our domestic law since 1973. Under the rule of law governments have to adjust to judicial decisions which may not suit their political or administrative convenience, and which it may not be politically practicable to reverse by legislation.

To the objection that the Convention usurps the political function in favour of the judicial, it must be said that to some extent this is a price worth paying for a measure of entrenchment of fundamental rights, while still maintaining the sovereignty of Parliament as a long-stop. Moreover as stated above the Convention is more about fairness and humanity than about political policies, and the views of the ECHR judges are not wholly divorced from political realities but will inevitably reflect to some extent the view of the Governments who appoint them. There is however little reason to fear that judges either here or in Strasbourg will use the Convention in order to usurp clearly political functions.

In these circumstances I have some sympathy with the arguments for incorporation of the Convention in our domestic law. Incorporation would align us with the large majority of the other signatories of the Convention, and I do not believe that the fact that the law in the UK is based more on judicial precedent than is continental law would make it substantially more difficult to cope with incorporation. The UK courts have already built up considerable experience of dealing with normative and evolutionary concepts in such fields as judicial review and Community law. Incorporation would probably reduce the number of successful cases against us at Strasbourg. Every case would have to go through the UK court system, complainers would be more likely to have obtained satisfaction from the domestic courts and in cases which did go to Strasbourg there would be an opinion by a U.K. court containing an analysis of the issues in the context of U.K. law and policy.

On the other hand, incorporation would mean that the vague and imprecise concepts in the Convention would have a much wider and more direct impact upon our domestic courts. This could give rise to considerable uncertainty about the state of the law, and although superior courts might be trusted to adopt a cautious approach, I am concerned at the scope for capricious decisions by inferior courts and tribunals, particularly those containing lay members. I am also concerned by the danger of unsound decisions on matters of criminal and police procedure particularly having regard to the absence of a right of appeal by the prosecution on interlocutory questions.

I do not believe that there is any workable half-way position between complete incorporation and the status quo. In particular, as regards the Lord Chancellor's proposal (his minute of 3 June) I do not believe that anything less than complete recognition, in the manner accomplished for Community law by section 2(1) and (4) of the European Communities Act 1972, would constitute compliance with the Convention (The status quo constitutes compliance on the basis of our contention that the existing law does comply with the Convention).

The choice between incorporation and the status quo is a difficult political decision. For the reasons stated above I would prefer to maintain the status quo. I believe that most of the Scottish Judges would agree with this. Incorporation would produce at times situations where policy or practice had to be changed suddenly as the result of unfavourable judicial decisions. The present arrangements give more time for the government to respond by adjusting the law so that the decision does minimum damage to domestic expectations - as with the "tawse" case (Campbell and Cosans).

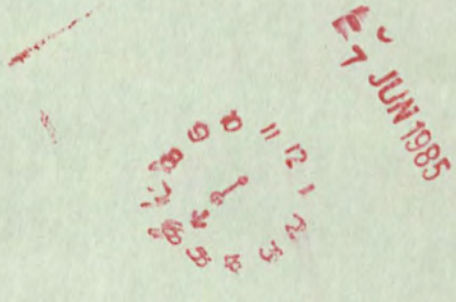
I do not believe that the present arrangements result in an unacceptable number of adverse decisions at Strasbourg. More deliberate attention to "Strasbourg - proofing" future legislation, together with greater readiness to settle cases or amend our rules where no substantial issue is at stake, could help to diminish the number of such adverse decisions.

I am copying this to the Lord Chancellor, the Attorney General, the Lord President of the Council, the Lord Privy Seal, the Home Secretary, the Foreign and Commonwealth Secretary, the Secretaries of State for Scotland and for Northern Ireland, the Chief Whip and the Secretary to the Cabinet.

I. Jack
Private Secretary.

(Approved by the Lord Advocate and signed in his absence).

Europ. Pol: Human Right 11/80



From: THE PRIVATE SECRETARY

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SWIH 9AT

4 June 1985

NBAM
CDP 5/6.

Dear Elizabeth,

HUMAN RIGHTS

Your Minister may like to be aware of a development which may have some interest for your Department.

Earlier this year the Prime Minister asked that an examination be made of ways of reducing the impact of the European Convention on Human Rights on our domestic law, and that the examination should include the option of incorporating the provisions of the Convention.

The Home Office has taken the lead, in consultation with the other Departments most directly interested in the policy issues, in preparing a paper setting out the various options and analysing the problem for the purpose of Ministerial discussion. This paper (which is essentially a discussion document prepared by officials rather than an agreed Ministerial document) has been sent by the Home Secretary to the Prime Minister and his other colleagues most directly concerned. I attach a copy of the Home Secretary's minute and the accompanying paper. (We would suggest that it is given only limited circulation within your Department). In due course the Prime Minister intends to hold a meeting of interested Ministers to discuss the paper.

The Home Secretary has asked me to ensure that this document is also brought to the attention of other Departments which may have had experience of specific cases arising under the ECHR and who might, therefore, wish to be aware of this forthcoming discussion. If your Minister should feel that your Departmental interests are sufficiently strong that they should be represented at the meeting you will no doubt get in touch with Charles Powell at No 10.

I am copying this letter and enclosure to Charles Powell (No 10) and to Elizabeth Motherhill at DHSS, Andrew Lansley at DTI, Chris Snell at DE, Denis Brennan at MoD and Colin Williams at the Welsh Office.

Yours sincerely,
Christine Heald.

MRS C J HEALD

Miss C E Hodkinson

FROM:
THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.

HOUSE OF LORDS,
SW1A 0PW

CDP (2)

Prime Minister
An ingenious idea from the Lord Chancellor. There is to be a Ministerial discussion next week. CDP 4/6

PRIME MINISTER

Human Rights

1. I hope you will not mind a modest contribution by myself to the current discussion on the European Convention on Human Rights, the Strasbourg Court, and the impact on ourselves. The Home Secretary's minute of 13th May, with officials' paper attached and the Attorney General's of 21st May refer.

2. I am a good deal less happy about the Strasbourg Court than either of the official paper or my colleagues' minutes would imply. The Court seems to me to suffer from two main defects. The first is that, despite the immense time consumed by its proceedings it basically has too little to do, and like most people with too little to do it seems to me to be constantly trying to enlarge its influence and occupying itself with trivialities. It was really designed after Hitler's war to safeguard basic human freedoms. Instead of that it insists on seeking to outlaw corporal punishment in schools and laws against homosexuality in Northern Ireland. It is not that I necessarily disagree with either decision. There are perfectly reputable arguments to be advanced. It is that I think that a free nation can be trusted to decide these questions for itself.

3. My second criticism of the Strasbourg Court is that its judicial personnel is not as good as those of the component countries. When the Judicial Committee of the Privy Council was in its heyday it could command the finest judicial brains in the

Commonwealth and particularly the United Kingdom. But, without casting any aspersions I ask myself the rhetorical question whether I would recommend for our representation there anyone I would seriously consider recommending to the Prime Minister for the Court of Appeal or above. It is otherwise with the Luxembourg Court where we have sent some of our best judicial timber.

4. There is a third disadvantage peculiar to ourselves. I readily concede that there is a growing understanding among lawyers on the continent of the sophistication of our own judicial system and the interplay of forces within our Cabinet system of Government. But nothing will convince me that our own judges do not understand these things better, even though successive Governments occasionally suffer the humiliation of defeat at the hands of our own judges in the novel procedures by way of judicial review. If a complainant had to exhaust his remedies here, including consideration of the Convention, before recourse to Strasbourg he would at least have to bring with him the judgments of some of our best judicial brains. I readily agree that this did not help us in the Sunday Times case, but, as has already been pointed out, the House of Lords had to decide the matter without benefit of the Phillimore Report.

5. I do not argue for total incorporation. To do so would be to interfere with the Sovereignty of Parliament. But I do suggest that there is an acceptable half way house. We could pass an Act of Parliament establishing for the Courts a rule of interpretation

that any Act passed by Parliament before the commencement date should be read, so far as possible in the light of the Convention obligations, and that any Act of Parliament passed after the commencement date should be read subject to the Convention unless an intention to derogate was clearly expressed in the body of the Act. If this were done complainants would have to go to our own courts first. If they succeeded we should at least not have been subjected to the ignominy of international censure. Many who failed would not take the matter further. If they did then invoke the Strasbourg jurisdiction, at least the Strasbourg Commission and the Strasbourg judges would have the English (or Scottish or Northern Irish) judgment in front of them.

I am copying this to the Lord President, the Lord Privy Seal, the Foreign Secretary, the Secretary of State for Scotland, the Secretary of State for Northern Ireland, the Attorney General, the Lord Advocate, the Chief Whip and to the Secretary to the Cabinet.

H: of Sr M.

3 June 1985

EUR. POL; human rights: Nov 80...

With the Compliments

of the

PRIVATE SECRETARY

of the

MINISTER OF STATE

Home Office
Queen Anne's Gate
LONDON
SW1H 9AT

Writers and artists

39. A passenger seeking entry as a writer or an artist must hold a current entry clearance granted to him for that purpose. He may be admitted for an initial period of up to 12 months subject to a condition restricting his freedom to take employment. For an applicant to obtain an entry clearance he will need to show that he does not intend to do work other than that related to his self-employment as a writer or artist and that he will be able to maintain and accommodate himself and any dependants from his own resources including the proceeds of that self-employment without recourse to public funds.

Dependants of persons admitted under paragraphs 27-39

40. The wife and the children under 18 of a person admitted to the United Kingdom to take or seek employment, or as a businessman, a self-employed person, a writer or artist or a person of independent means, should be given leave to enter for the period of his authorised stay if, apart from his having only limited leave to enter, the requirements of paragraphs 46-50 are fulfilled. Their freedom to take employment should not be restricted unless the head of the family is himself prohibited from taking employment, in which case the prohibition should extend to the wife and children. No other dependants are to be admitted before the person is settled here.

Fiancés

41. A man seeking to enter the United Kingdom for marriage to a woman settled here and who intends himself to settle thereafter should not be admitted unless he holds a current entry clearance granted to him for that purpose. An entry clearance will be refused unless the entry clearance officer is satisfied:

(*a*) that it is not the primary purpose of the intended marriage to obtain admission to the United Kingdom; and

(*b*) that there is an intention that the parties to the marriage should live together permanently as man and wife; and

(*c*) that the parties to the proposed marriage have met.

Where the entry clearance officer is satisfied that all the conditions at (*a*) to (*c*) above apply, an entry clearance will, subject to the maintenance and accommodation requirements of this paragraph, be issued provided that the woman is a British citizen. An entry clearance should not be issued unless the entry clearance officer is satisfied that adequate maintenance and accommodation will be available for the fiancé until the date of his marriage, without the need to have recourse to public funds.

42. A man holding an entry clearance issued under the preceding paragraph should, subject to paragraph 13, be admitted for 3 months and advised to apply to the Home Office once the marriage has taken place for an extension of stay. A prohibition on employment should be imposed.

43. A man seeking limited leave to enter the United Kingom for marriage to a woman settled here may be admitted only if the immigration officer is satisfied that the marriage will take place within a reasonable time; that the passenger and his wife will leave the United Kingdom shortly after the marriage; and that the requirements of paragraph 17 are met. Where the immigration officer is so satisfied, the passenger may be admitted for 3 months, with a prohibition on employment.

Fiancées

44. A woman seeking to enter to marry a man settled in the United Kingdom should be admitted if the immigration officer is satisfied that the marriage will take place within a reasonable time and that adequate maintenance and accommodation will be available, without the need to have recourse to public funds, both before and after the marriage. She may be admitted for a period of up to 3 months subject to a condition prohibiting the taking of employment and should be advised to apply to the Home Office for an extension of stay once the marriage has taken place.

PART IV: PASSENGERS COMING FOR SETTLEMENT

United Kingdom passport holders

45. Where the passenger is a British Overseas citizen and presents a special voucher issued to him by a British Government representative overseas (or an entry clearance in lieu), he is to be admitted for settlement, as are his dependants if they have obtained entry clearances for that purpose and satisfy the requirements of paragraph 46; but such a passenger who comes for settlement without a special voucher or entry clearance is to be refused leave to enter.

Dependants: general provisions

46. This paragraph and paragraphs 47-53 cover the admission for settlement of the dependants of a person who is present in the United Kingdom and settled here, or who is on the same occasion given indefinite leave to enter. In all such cases (except those mentioned in the last sentence of this paragraph) that person must be able and willing to maintain and accommodate his dependants without recourse to public funds in accommodation of his own or which he occupies himself and he should give an undertaking in writing to this effect if requested. This requirement does not apply to the admission of the wife, or a child under the age of 18, of a Commonwealth citizen who has the right of abode or was settled in the United Kingdom on the coming into force of the Act.

47. In addition, a passenger seeking admission as a dependant under this Part of the rules must hold a current entry clearance granted to him for that purpose.

Wives

48. The wife of a person who is settled in the United Kingdom or is on the same occasion being admitted for settlement is herself to be admitted for

(4)

EC PC

Prime Minister CAB.
We have set up a meeting on this for early June.
CDP 22/5.

PRIME MINISTER

mo.

Human Rights

1. With his minute of 13 May the Home Secretary circulated a paper prepared by his officials on the impact of the European Convention on Human Rights. This has opened my eyes to a number of misconceptions which I had shared. He suggested that we use this as a basis for dicussion. I am happy to do so but I think that it may assist the discussion if I make a few points in advance.

2. The first part of the paper seeks to identify the problems which the existing Strasbourg system is thought to create for us. This seems to me to take us to the heart of the matter, namely, whether the present system does indeed do serious harm to the United Kingdom and therefore needs to be replaced or substantially modified; or whether, despite the embarrassment from time to time caused by some decisions in Strasbourg, that system is in fact as good as any other that is in practice available to us - good, that is, in the sense of effectively protecting the rights that need protection without unduly impeding good government.

3. The Home Secretary rightly points out that, while there can be no certain way of measuring the impact of the Convention on the United Kingdom (either now or under any modified version of the system), the position of the United Kingdom, when examined statistically, seems better than some critics make it out to be. As a general point I would add that, while we suffer some embarrassment both by our being a "defendant" in Strasbourg and especially by our losing cases there, it is in the nature of the human rights process (whether in Strasbourg or in domestic courts) that Governments are the defendants, and it is also in the nature of that process that they sometimes lose cases. Indeed, there are some cases which Governments ought to lose - or if that is thought to be too heretical, which a Government of a different political persuasion from our own ought to lose!

/This

This no doubt means that there are some cases that a sensible Government ought not to fight to the bitter end, and that is a point which the Home Office paper very properly makes.

4. Looking at the assumptions identified in the paper as lying behind the concern at the impact of the Convention on the United Kingdom, it seems to me that many of them are of doubtful reliability. I have already mentioned the question of statistics, i.e. the popular belief that we are always in the dock and always losing. For example, though there have been cases in which the Strasbourg organs have clearly failed to appreciate the effectiveness of our constitutional arrangements as a safeguard for individual rights, it is only in the most exceptional case that it can be said that the difference between the Common Law and the United Kingdom legal system on the one hand and the law and legal systems of other States of the Council of Europe on the other hand has had a significant effect on the outcome in Strasbourg. Nor do I believe that we should be justified in building too much on the belief that we suffer unduly, or perhaps at all, from decisions that are manifestly wrong or perverse or are the result of an excessively "evolutionary" interpretation of the Convention. Certainly, there have been some decisions against us, as well as a few in our favour, which were arguably (not manifestly) wrong. I can also think of at least one decision (Campbell and Cosans - corporal punishment in schools) where it seemed to me that the Court quite unreasonably stretched the language of the Convention. But we should remember that, on the substance of that case, we were out of step with virtually the whole of Western Europe, and opinion in the United Kingdom itself was sharply divided. It is worth pointing out that in the Closed Shop case the Court's judgment was also based on what could be regarded as a stretching of the language of the Convention in a way which, as the travaux preparatoires clearly showed, was not what the draftsmen of the Convention had intended: but we did not make it a matter of reproach to the Court in that case. As for "evolutionary" interpretations, there is more than a grain of truth in that charge but I suspect that it is a charge that could be found applicable to any tribunal entrusted with the task of interpreting an instrument drafted in the broad terms appropriate to a Bill of Rights. If we are considering incorporating

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the Convention in our domestic law so that it falls to our domestic courts to interpret it, then (although I accept that our courts would provide the advantage that they would be more ready than the Strasbourg organs to regard "Ministerial responsibility" as an adequate substitute for strictly legal safeguards) I think that we should be unwise to be confident that their approach to its interpretation would be substantially different from that of the Strasbourg organs or that they would not be just as capable of adopting an "evolutionary" interpretation when they thought it necessary to protect the citizen against the authorities of the State. The way that judicial review has been developed by the judges in the last few years (for example, in the context of prisoners' rights) should give us no ground for complacency on that score.

5. This takes me to the last point that I would make in advance of our discussions. Incorporation in one form or another would have certain advantages: notably, the provision of a "universal" domestic remedy that would have to be exhausted before an individual application could be taken to Strasbourg and the probability that the Strasbourg organs would usually be reluctant to second-guess our courts on issues on which those courts had already given a judgement.

6. But I see formidable disadvantages to incorporation. First, of course, there is the enormous constitutional problem of somehow providing for an incorporated Convention to have an effect which would override subsequent legislation incompatible with it and to have some degree of entrenchment (which is not the same thing). Then there is the practical disadvantage that a judgment of our courts declaring that an administrative action or a piece of legislation is ultra vires has the effect of immediately invalidating it pro tanto, often with retrospective effect. A finding that such action or legislation was in conflict with the Convention as incorporated in our law would prima facie have to have the same effect; and I must say that I am not at all convinced by any of the suggestions in the Home Office paper for devices for evading this result. That result should be contrasted with the position under the Strasbourg system where conveniently we are left a very wide discretion

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and flexibility, both as to timing and as to method, for remedying a finding that the Convention has been violated. Then there is the third, and equally important, point that thrusting our courts into a role which requires them to determine the validity of legislation or administrative action would necessarily bring them into the political arena and, so to speak, "politicise" our judiciary to an extent which I personally would regard as highly undesirable.

This happens with Judicial Review

7. I have already made the point about the likely attitude of our own judges to the interpretation of a domestic Bill of Rights (whether taking the form of the incorporation of the Convention or any other form). I would only add that, if we envisage incorporation as being in addition to, rather than in replacement for, the acceptance of the binding authority of the Convention and its own enforcement machinery, incorporation seems to me to be likely, on balance, to increase rather than reduce the problems for Government which are inherent in any enforceable system of human rights. If, on the other hand, we contemplate incorporation being accompanied by a withdrawal from the Strasbourg system, we have to grapple with all the political disadvantages of such a step which the Home Office paper rightly draws attention to. I do not see how we could hope to justify withdrawal from the Strasbourg system without including at least as far-reaching provisions in our own law and establishing enforcement machinery at least as effective at the instance of individual citizens.

8. I am copying this minute to the Lord President, the Lord Chancellor, the Foreign and Commonwealth Secretary, the Home Secretary, the Secretary of State for Scotland, the Lord Privy Seal, the Secretary of State for Northern Ireland, the Lord Advocate, the Chief Whip and the Secretary to the Cabinet.

M.H.

21 May, 1985

Euro POL: Human Rights Nov 80.

10 DOWNING STREET

Human Rights:
European
Court.

LPS.
LC.
FCO
Sofss
~~[illegible]~~
NI
Att. Gen
Lord Advocate
Chief Whip
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1 hr.

CR
arranged for
Thursday 13 June
at 1700. 2815.

BF.

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10 DOWNING STREET

From the Private Secretary

20 May 1985

HUMAN RIGHTS

The Prime Minister has seen the Home Secretary's minute of 13 May on ways of reducing the impact of the findings of the European Court in Strasbourg on our law. She agrees that there should be an early Ministerial discussion of this which I shall arrange as soon as possible.

I am copying this letter to Janet Lewis-Jones (Lord President's Office), Richard Stoate (Lord Chancellor's Office), Len Appleyard (Foreign and Commonwealth Office), David Morris (Lord Privy Seal's Office), Jim Daniell (Northern Ireland Office), Henry Steel (Law Officers' Department), Iain Jack (Lord Advocate's Department), Murdo Maclean (Chief Whip's Office), Alan Whysall (Nicholas Scott's office, Northern Ireland Office) and Richard Hatfield (Cabinet Office).

(Charles Powell)

Hugh Taylor Esq
Home Office

(2)

Prime Minister.
You should be aware of this, but may prefer to await the views of colleagues before pronouncing.
CDP
17/5

Prime Minister

IMMIGRATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Court of Human Rights will shortly give its judgment in three, well publicised, test cases about our Immigration Rules governing the admission of husbands. The European Commission found against us, and it is quite likely that the Court will do the same. This would bring a controversial part of our immigration policy back into the centre of public and parliamentary interest and confront us with some difficult policy decisions. We cannot take those decisions until we have received and studied the terms of the judgment, but I should alert you and colleagues to the likely prospect.

This is in any case a convenient time to review the progress we have made on immigration. We came to office committed to firm immigration control. Settlement figures have dropped significantly since then. The total for 1984 was about 51,000 which is 19,000 below the figure for 1979. Within that total, the number of wives and children (making up about half those accepted for settlement) fell by nearly 7,000, the number of husbands by nearly 4,500 and the number becoming settled after four years in approved employment by about the same figure.

Just under half the 51,000 accepted for settlement last year came from the new Commonwealth and Pakistan while the only group for which the settlement figures are currently increasing is of those from the old

E.R.

Commonwealth: about 7,500 were accepted last year compared with 6,000 in 1983. I am sure that it is neither necessary, nor would it be acceptable to our supporters, to tighten those specific provisions of the Rules which particularly benefit citizens of the old Commonwealth countries.

The ECHR cases concerned husbands wishing to join their wives who are already settled in this country. The complaints turn on the question of whether the Rules we introduced preventing husbands from joining women who are not British citizens, but who have been allowed to settle here, amount to a breach of Article 8 with Article 14 of the Convention. It is argued that the couples' enjoyment of the right to respect for family life is subject to sex discrimination because there is no equivalent restriction on the right of settled men to be joined by their wives. We have vigorously contested the case on the basis that more restrictive rules for husbands than wives are necessary to protect the domestic labour market, but we are not optimistic that the Court will find that this argument provides a requisite justification for the discriminatory treatment in the Immigration Rules.

If we lose we must abide by the decision of the Court. Execution of the judgment of the Court is supervised, as you know, by the Committee of Ministers. We can expect to be allowed a reasonable time - certainly some months - before the Committee of Ministers will expect an indication of how we propose to give effect to the judgment. I would propose if you agree to resist demands for immediate policy changes by saying that the Government will need time to study the judgment carefully. The small print will be of considerable importance.

E.R.

Any adverse judgment is however likely to force us to contemplate significant amendment of the Immigration Rules. The changes we would probably have to make would be unpopular with some of our supporters, and they would be little mollified by the knowledge that we had been forced into them by the European Court. If we concluded that we had to relax the provisions that at present prevent husbands of women settled here from joining them the effect on the settlement figures would be relatively small initially when judged against the reductions we have seen since 1979. The annual increase might be of the order of 2,000-2,500 a year and only about 600 of these would come from the Indian sub-Continent. But we must expect that as Bangladeshi girls in this country reach marriageable age, husbands and fiance applications from Bangladesh will increase and it is impossible to forecast the effect of the change in the longer term. We must also accept that the relaxation would be greatly resented by some of our supporters.

Clearly we shall have to mitigate the effect of an adverse judgment so far as we can. My officials are working on proposals which would make the Rule changes as narrow as possible, and are in touch with the Foreign and Commonwealth Office about the possible effect of such changes on the number of people in the Indian sub-Continent waiting for their entry certificate applications to be considered, and on the numbers of staff required to deal with such applications. We will bring proposals forward as soon as we can. When doing so we shall also look at the remainder of the Rules to see what scope for further tightening up there may be, but given the restrictions imposed when the 1980 and 1983 Rules were prepared, and leaving aside the position of citizens of the old Commonwealth, it is unlikely that any further major changes can be contemplated.

You and other colleagues will recognise that the problems likely to be caused for us by the judgment in these cases is a particular example of the general question of the Government's stance in relation to the provisions of the European Convention which we are considering separately and to which my minute of 13 May referred.

I am sending copies of this minute to the members of H Committee, to the Secretary of State for Foreign and Commonwealth Affairs, to the Attorney General and to Sir Robert Armstrong.

L. B.

17 May 1985


17 M 1985

Prime Minister

HUMAN RIGHTS

At the meeting of 31 January, you asked me, in consultation with Geoffrey Howe and other Ministers, to look again at ways of reducing the impact of the findings of the European Court in Strasbourg on our law, including incorporation of the European Convention into United Kingdom law. It was agreed that my officials would take the lead in preparing a paper which would set out arguments for and against the various possibilities but without making recommendations.

You may think it would be appropriate for the paper, which I now attach, to be discussed at a meeting of interested Ministers which you would chair; and that the meeting should take place in the near future.

As you will see, the paper first considers whether - and if so to what extent - the impact of Strasbourg is and will be in the future harmful to the UK. There can be no certainty about the answer but the position statistically seems better than some critics make it out to be. The fact remains, however, that a relatively small number of cases have undoubtedly caused us embarrassment and have required changes in law and procedure which have been most unwelcome in substance, timing or both. (Some other judgments, of course, have been welcome.)

The question we have to face is whether any changes designed to avoid this would cause more political damage than sticking with the status quo and its accompanying irritants.

The paper accordingly considers way in which the impact might be reduced. This has not proved easy; there are many possible combinations of options and estimates of their impact are highly speculative. Nonetheless, the paper sets out the most obvious options or combinations of options varying from denunciation to total incorporation of ECHR. As I think you know, I have some personal sympathy for incorporation; but we have to recognise the extent of the change it would imply and that it would be unlikely to command a political consensus at this stage.

My officials have consulted those of other interested Departments in the preparation of the paper but it is essentially a discussion document prepared by officials rather than an agreed Ministerial paper. I recognise that views may differ and it is perhaps more helpful in the interests of an early discussion for any differences to be aired in discussion at this stage.

I am copying this to the Lord President, the Lord Chancellor, the Foreign and Commonwealth Secretary, the Secretary of State for Scotland, the Lord Privy Seal, the Secretary of State for Northern Ireland, the Attorney General, the Lord Advocate, the Chief Whip and the Secretary to the Cabinet.

L.B.

13 May 1985

EUR. POL: Human Rights: Nov 80.

HUMAN RIGHTS: PRIME MINISTER'S INITIATIVES

Summary

Paragraph

1. The purpose of the paper is to assess ways of reducing the impact of the European Court of Human Rights on our law, policies and practices.

Introduction: the assumptions behind concern at the impact of Strasbourg examined:

3-11 That there are too many findings of violation against the UK,

12-17 That too many of these findings are wrong, perverse or evolutionary,

18 That defending cases is costly,

19-22 That it is not fitting for UK law and practices to be judged by a foreign tribunal,

23-25 That the UK legal system is very different from that of other member states of the COE.

26-27 Conclusion: the case for taking steps to mitigate the impact of Strasbourg depends on a political judgement o the balance of damage done by cases where serious violations are likely to be found and embarrassment to the Government if it distances himself for Strasbourg.

Part I: Options to reduce impact, other than incorporation

28-34 A Withdrawal from the European Convention on Human Rights

35-38 B Non-renewal of acceptance of the right of individual petition (Article 25)

39-42 C Non-renewal of acceptance of the compulsory jurisdictio of the Court (Article 46)

43-45 D Non-renewal of either Article

46-51 E A filter operated by member states (as applications to the Ombudsman are filtered by MPs)

52-60 F Anticipation of the findings of the Commission and Cour by:

(i) making settlements and pre-empting opinions o the Commission or findings of the Court or Committee of Ministers;

(ii) "Strasbourg-proofing" domestic legislation and executive action

Part II: Options to reduce impact involving incorporation

Part III

1. This paper assesses ways of reducing the impact of the Europea Convention of Human Rights on our law, policies and procedures including the possibility of incorporation of the European Convention of Human Rights into UK law.

Introduction: the extent of the problem

2. Concern at the impact of the ECHR on UK law and practice is based on a number of assumptions:

(i) that there are too many findings against the UK;

(ii) that too many of these findings are wrong, perverse or at least based on an unduly free or "evolutionary" interpretation of the Convention;

(iii) defending ourselves at Strasbourg is costly;

(iv) it is not fitting for UK laws and executive acts to be judged by what is in essence a foreign tribunal.

(v) the UK common law system is not susceptible to judgements based on a system of conferred rights framed in general terms.

(i) Number of findings

3. It is said that there are too many findings against the UK and sometimes argued that the position is likely to get worse.

4. From 1966, when the UK accepted the right of individual application and recognised the jurisdiction of the Court, until 31 December 1984 there have been 11 findings of violation by the European Court of Human Rights against the UK, though in some of these cases the finding has been confined to a minor issue and the UK has been substantially vindicated on the main complaint.

5. Although it is only the Court which makes binding decisions on Member States, on cases not referred to the Court, the Committee of Ministers - which is more inclined to take account of political factors - decides whether to accept the view of the Commission that

there has been a violation: their decision and measures to implement it are also binding. The Committee of Ministers also decides, in cases not referred to the Court, whether there has been a violation. For the same period of time the figure for findings against the United Kingdom by the Committee is 7.

6. When considering the assumption that there are "too many findings" some comparison has to be made; an obvious yardstick is to compare the UK's record with other Council of Europe countries.

CASES DEALT WITH BY THE COUNCIL OF EUROPE COMMITTEE OF MINISTERS UP TO 31 DECEMBER 1984 (D)

Key
V = Violation
NV = No Violation
NFA = No Further Action
O = No Decision
P = Pending

	AUSTRIA	BELGIUM	DENMARK	FRG	GREECE	ITALY	NETHERLANDS	PORTUGAL	SWEDEN	SWITZERLAND	TURKEY	UK	TOTAL
V	1	-	-	-	1	-	-	-	1	1	-	7	11
NV	6	1	1	10	-	4	3	-	-	5	-	4	34
NFA	3	2	-	-	-	-	-	-	-	-	-	2	7
O	-	-	-	-	-	-	-	-	-	1	1	-	2
TOTAL	10	3	1	10	1	4	3	0	1	7	0	13	54
P	-	-	-	1	-	1	1	1	-	-	1	3	8
GRAND TOTAL	10	3	1	11	1	5	4	1	1	7	2	16	62

CASES DEALT WITH BY THE EUROPEAN COURT OF HUMAN RIGHTS UP TO 31 DECEMBER 1984 (B)

Key
V = Violation
NV = No Violation
OW = Terminated in Some Other Way
P = Pending

	AUSTRIA	BELGIUM	DENMARK	FRG	IRELAND	ITALY	NETHERLANDS	SWEDEN	SWITZERLAND	PORTUGAL	UK	TOTAL
V	4	9	-	5	1	6	5	2	2	1	11	46
NV	2	3	2	4	1	1	-	2	2	-	1	18
OW	-	2	-	-	-	-	-	1	-	-	-	3
TOTAL	6	14	2	9	2	7	5	5	4	1	12	67
P	3	-	-	4	-	2	4	-	-	-	6	19
GRAND TOTAL	9	14	2	13	2	9	9	5	4	1	18	86

7. The figures show that the UK has more findings of breach than any other Council of Europe country, and acounts for almost a third of the total number of violations. But in interpreting these statistics various factors have to be taken into account:

(a) The UK accepted the right of individual petition in 1966. But some countries accepted it later eg Italy 1973, Switzerland 1974, Portugal 1978, Spain 1980 and France 1982, and others - Cyprus, Greece, Malta and Turkey - have not accepted it at all.

(b) In the UK there is a highly developed civil rights movement, plus numerous active pressure groups eg Freedom Association, NCCL, STOPP, and JCWI, who fund applications and assist applicants in presenting their cases before the Commission.

(c) For reasons which are not clear, there are groups of applications brought against the UK which all deal with the same complaint, eg prisoners' correspondence cases. This appears to be a peculiarly British phenomenon.

(d) The per capita record of findings of violation against some States is greater than that of the UK eg Belgium, Netherlands, Austria and Switzerland (but these ratios have to be treated with caution as they are based on very small absolute numbers of violations and a per capita assessment has doubtful significance).

8. In addition the ECHR is not part of domestic law in the UK, which it is in most other Member States. It could be argued that this factor is likely to increase complaints against the UK in Strasbourg, and hence the potential for adverse findings, because in some areas there is no provision for a domestic remedy in the UK. Conversely the figures for findings of violations for those States where the Convention is part of domestic law should be increased by the number of such findings made by the domestic courts. (In the FRG this is believed to be a substantial number.) The findings of violation should also be compared with the total number of cases communicated for observations to the UK and the number of cases which have been declared inadmissible, settled and struck off.

9. There have been 823 cases communicated to the United Kingdom since 1966. 217 cases have been declared inadmissible after submission of observations eg Saha (disbarring procedure), Gay News (blasphemy) and Times Newspapers (contempt of Court), or after a hearing eg Pinder and Dyer (S10 Crown Proceedings Act) and Stewart (plastic bullets). 11 cases have been disposed of by way of friendly settlement after the case has been declared admissible and 361 have been struck off the Commission's list.

10. Although the statistics need to be treated with caution, the number of findings of violation against the UK is only a small proportion as against those cases in which no breach has been found.

11. It has been suggested that in the light of cases pending there will be disproportionately more findings of violation against the UK than against other Council of Europe countries. There is no evidence for this, and some indications to the contrary. The number of cases registered is declining: the figures over the past 5 years are 71 in 1980; 65 in 1981; 48 in 1982; 50 in 1983 and 45 in 1984. Insofar as there is a relation between the number of cases registered each year and potential findings of violation this decline is likely to show up in fewer adverse findings in future. In addition more use is now being made of friendly settlements. In the past 5 years there have been 7 cases settled whereas over the previous 14 years there had only been 4 settlements.

(ii) Too many, wrong, perverse or evolutionary findings

12. In considering this assumption it is important to bear in mind that the Convention is not drafted in the detailed way of UK legislation and is not open to interpretation as domestic courts interpret UK legislation. The Commission and Court do not, therefore, use that approach in interpreting the Convention. The ECHR is regarded as a living instrument and when interpreting its articles the Commission and Court construe them in the light of political, social and moral developments in Europe. If the Court finds that the UK standards are out of step with those in the rest of Europe, eg Dudgeon's case, the resulting need to change the law may be politically awkward, but it does not necessarily follow that the decision was incorrect in the sense that it was clearly perverse or

manifestly wrong on the basis of the interpretation of the Convention which the Strasbourg organs apply.

13. But there is not doubt that this approach has meant that the Strasbourg organs have, on occasion, reached decisions which would have been quite unforeseen at the time when the Convention was ratified and which are difficult to reconcile with its wording to those familiar with common law tradition and the approach to statutory interpretation adopted by the UK courts. Even so, the difficulties which adverse decisions have caused the UK in practice can be overestimated.

14. There have been judgements in cases like Campbell and Cosans (corporal punishment in schools), Malone (telephone tapping) and the Irish State Case which have created serious political difficulties. But the judgements could not be said to be perverse except in the Campbell case, which has also proved very difficult to implement.

15. Others, for example Golder (prisoners access to solicitor), and Silver (prisoners' correspondence) caused some difficulty at the time whereas the Campbell and Fell case (Board of Visitors) was almost completely pre-empted by changes in the prison regulations. As a result of the report of the Phillimore Committee new legislation was contemplated on the law of contempt before judgement in the Sunday Times Case. Of the remaining Court findings, some such as the Closed Shop, Handyside (Little Red School Book), and even Tyrer (birching in the Isle of Man) were welcomed by the Government. Some judgements assisted the introduction of desirable changes in legislation eg Dudgeon (homosexuality in Northern Ireland) and X (mental health).

16. As to the cases referred to the Committee of Ministers where violations have been found none of the findings can be criticised as being unjustified. The majority of them have turned on the facts of the case. All these findings have required changes in administrative practice. But the introduction of these changes did not involve any serious political embarrassment. Even the change in the Marriage Act, necessitated by Hamer and Draper (marriage of prisoners in prison), although expected to be controversial, did not prove to be so.

17. In many cases the Strasbourg organs have shown sensitivity. The Committee of Ministers were particularly helpful in deciding that no further action was required in the East African Asian case and thereby

not endorsing the Commission's opinion that a violation had been made, and the Commission have also been helpful in declaring not admissible Stewart (plastic bullets) and Elliott (sectarian killing in Northern Ireland), Kirkwood (American extradition) and the prison "cage" cases. In addition they handled the Maze case with sensitivity and even in McVeigh, O'Neill and Evans they were careful in their report not to criticise the PTA legislation.

(iii) Costs of Defending Ourselves

18. In view of the small number of cases - and the lack of evidence that they will increase - the burden of defending ourselves at Strasbourg does not seem to be a significant factor in the argument.

(iv) A Foreign Tribunal

19. There is a widespread and understandable view, expressed forcibly in Parliament, in some newspapers and by members of the public, that it is not fitting, and is even distasteful that United Kingdom law and practice should be judged by foreign tribunals. All the ECHR institutions contain a member of British nationality but the majority of each is, of course, foreign and all the institutions have their seat in Strasbourg. The assumption is that foreign members have no understanding of British ways and laws.

20. This objection, however understandable, strikes at the heart of the Convention system, which is designed to bind the Contracting States not only to observe and secure for all within their jurisdictions the rights and freedoms set out but also to subject themselves to independent international scrutiny of complaints that they have failed to live up to those undertakings. The objective of those who drafted the Treaty was to prevent the kind of wholesale denial of human rights which occurred in the totalitarian regimes of the 1930s, especially in Nazi Germany, where all institutions of the state, including the courts, were taken over and used by the same political force for its own ends. An independent and international enforcement system is essential to that aim. Stripped of its uniquely effective enforcement system the ECHR becomes no more than a repetition of the international undertakings contained in the Universal Declaration of Human Rights and the United Nations

Covenants. Having said that, the way in which the Convention has been applied in practice in some cases seems a far cry from the stated objective of the drafters of the Treaty. It is important that a system of internationally enforceable human rights should be applied in a pragmatic way, which has not always been the case with the Strasbourg organs, particularly the Convention.

21. The advantage of a system like the present one, is that individual citizens may appeal to tribunals made up of representatives from all the member countries, appointed by governments but independent of them.

22. Whilst, therefore, from that point of view, the 'foreignness' of these tribunals may be a positive advantage, it nevertheless presents problems, particularly perhaps for the UK as one of the only two common law countries. It should be noted however, that both Cyprus and Malta, which have both Commissioners and judges in Strasbourg, have a common law background and the present Liechtenstein judge is a Canadian.

(v) The UK Legal System

23. The UK legal system is very different from those of all the other Member States except Ireland (and, to some extent, Cyprus, and Malta because of their previous association with Britain). The Court and Commission are by now well aware of the common law system and accept eg that a principle established at common law is just as much 'provided by law' for the purposes of the Convention as a statute. Other peculiarly British legal institutions are not so well understood, for instance discovery (Harman) judicial review (AGOSI) and Anton Piller Orders (Chappell).

24. Under the UK legal system human rights are safeguarded in a different way from under most continental systems and under the Convention. UK law does not in general expressly enunciate and protect human rights as such; instead, the basic rights of each citizen are protected indirectly by the existence of ordinary rules of law (which may derive from the common law or specific statutory provision) that prohibit or restrict others from interfering with him or his property and that are enforceable in the court through ordinary

criminal or civil proceedings. In the Convention and probably in most continental systems those rights are conferred positively and in rather general terms subject to exceptions which the organs of the Convention construe narrowly. This makes it inherently difficult to compare the protection given under the UK system with that under other systems.

25. A third, and more serious difficulty is that UK administrative techniques are different. We tend to rely far more on administrative discretion, subject to the control of Ministers who are answerable to Parliament and far less upon control by detailed statutory provision and supervision by the courts. These techniques are far more difficult to justify under the Convention system even though they might in practice be at least as good in safeguarding human rights. The Convention organs are not against administrative discretion and accept that governments must have a 'margin of appreciation' - but they insist upon the discretion being ultimately subject to judicial control and review. To some extent, UK law, in the development by the courts of judicial review of specific statutory provisions (cf the new right of parents to challenge local authority decisions denying access to their children in care), is moving in the same direction. However, the wide scope of the rights guaranteed by the Convention and the conflict engendered by the approach adopted by the Strasbourg organs on the one hand and our unique legal and constitutional system on the other means that the UK is more at risk of adverse findings than many Member States whose administrative systems accord better with the Convention (eg in having a structure of administrative courts specifically set up to deal with claims against the executive).

Conclusion

26. In conclusion, whether there is a need to take steps to mitigate or wholly to stop the impact of Strasbourg on UK law, policies and procedures. seems to depend on a political judgement of the balance of the damage done by the relatively few cases where serious violations of the Convention are likely to be found, against the damage to our reputation in Europe and beyond, and embarassment at home if we are seen to be distancing ourselves from Strasbourg.

27. In reaching a conclusion, a balance will need to be struck between two sets of views. On the one hand there is a widespread perception that the Convention provides a reinforcement of certain basic values (the right to property, freedom of choice and the liberty of the individual vis à vis the State and other groups in society) which should be acceptable to any democratic and constitutional government of whatever party - but which, in the context of a constitution without the restraints of the Convention be more at risk from any future government of totalitarian tendencies. On the other hand, there is the view that the Convention will sometimes inhibit desirable action by governments; that its application in practice leaves a lot to be desired and that its extension to fields not envisaged by its authors could cause fresh difficulties.

PART I: OPTIONS OTHER THAN INCORPORATION

A. WITHDRAWAL FROM THE ECHR

28. Article 65 of the Convention provides that a high contracting party may denounce the Convention after the expiry of 5 years from the date on which it became a party to it and after 6 months notice.

Option

29. Denounce the Convention.

Advantages

30. It would remove any obligation to the United Kingdom to observe the provision of the Convention or to apply decisions of the Court. Individuals and other States would no longer have the right to bring applications against the United Kingdom.

Disadvantages

31. This is the most extreme option. It would have far-reaching effects on the UK's reputation domestically and internationally as a country committed to the protection of human rights. Denunciation would not be understood and would cause serious problems in our relations with close partners including the Germans.

32. It would cause severe difficulties for our position in the European Communities. The ECHR is part of the common principles of law observed by institutions and applied by the European Court of Justice. On 5 April 1977, the European Parliament, the Council and Commission adopted a joint Declaration (full text at Annex), stressing the prime importance they attached to the protection of human rights, as derived in particular from the ECHR and pledging continued respect for these rights. The preamble notes that "all the Member States are Contracting Parties to the ECHR."

33. It would of course undermine the UK's position within the Council of Europe itself. It would be widely seen as inconsistent with the position adopted by the UK in the CSCE and in bilateral contacts with Eastern European countries in which we have been pressing for better human rights performance. It would also make our posture in UN discussions of human rights questions less credible.

34. Domestically, the decision would certainly provoke widespread criticism.

B. RIGHT OF INDIVIDUAL PETITION

35. The UK's declaration of acceptance of the optional provision of Article 25,made in 1981, expires in January 1986. This Article provides for the right of any person, non-governmental organisation or group to petition the European Commission of Human Rights about any alleged violation of the ECHR by a High Contracting Party.

Option

36. It would be possible for the United Kingdom to refuse to renew its acceptance of the provisions of Article 25.

Advantages

37. Non-renewal of the provisions of Article 25 would result in a dramatic fall in cases being referred as only High Contracting Parties would then be in a position to challenge the United Kingdom.

Disadvantages

38. The right of individual petition is at the heart of the Convention, and non-renewal would be almost as damaging as denunciation of the Convention to the UK's standing as a country

committed to the protection of human rights. Out of 21 High Contracted Parties, only Cyprus, Greece, Malta and Turkey have not accepted Article 25. There is constant pressure by other Member States on them to do so.

C. COMPULSORY JURISDICTION OF THE COURT - ARTICLE 46

39. Hitherto the United Kingdom has accepted the optional provisions of Article 46 at the same time and for the same periods as those of Article 25; which means that our acceptance expires in January 1986 unless previously renewed. Article 46 provides for the compulsory jurisdiction of the Court of Human Rights in all matters concerning the interpretation and application of the Convention.

Option

40. It would be possible for the United Kingdom to refuse to renew its acceptance of the provisions of Article 46.

Advantages

41. The United Kingdom would still be able to decide that a case should be dealt with by the Court, if this were in our interests, but the Commission would no longer be able to refer UK cases to the Court.

Disadvantages

42. The damage to the UK's international standing would again be significant. It would be difficult to defend this action without casting doubt on the Court's competence and on our continuing intention to abide by the provisions of the Convention, or to explain why we were no longer prepared to accept binding international adjudication.

D. ARTICLES 25 AND 46

Option

43. It would be possible not to renew aceptance of either Article.

Advantages

44. The advantages set out above for not renewing either one or the other would apply cumulatively.

Disadvantages

45. The previous disadvantages would also apply, but whereas

continued acceptance of one or the other could be used to counter some of the critics who would allege an intention to ignore human rights commitments, withdrawal from both would leave us in an exposed if not indefensible position.

E. A FILTER MECHANISM

46. Any filter mechanism which restricted the right of individuals to petition the Commission would contravene the Convention, Article 25 of which requires States to "undertake not to hinder in any way the effective exercise" of that right.

Option

47. In theory it would be possible to draft a Protocol modifying the Convention so as to require applications by individuals to pass through a filter of the Member State before being submitted to the Commission, as in the case of applications to the Ombudsman which are filtered by Members of Parliament.

Advantages

48. Applications with no substance would not reach the Commission and hence there would be a reduction in the published figure for the number of applications from the United Kingdom.

Disadvantages

49. All Member States would need to agree to such an amending protocol. Given the attitudes of a number of them, we do not believe that it would be possible to secure the necessary support.

50. The Commission already acts as an effective filter; in 1984 75% of registered applications to the Commission were declared inadmissible without even being communicated to the Government concerned.

51. Whatever form of filter were envisaged, it would not catch the cases with serious policy implications, which constitute the real problem.

F. ANTICIPATE FINDINGS OF THE COMMISSION AND COURT

52. At present the United Kingdom effort to limit the adverse impact of Strasbourg decisions on domestic law and policy is predominantly reactive: ie we defend, usually to the hilt, applications brought against us. This has its successes, not only in cases wholly rejected by the Commission but also in limiting the number and scope of the issues on which violations are found. There has been relatively little successful use so far of positive prior action to avert adverse findings, whether by friendly settlement - though some significant and potentially damaging cases have been successfully settled eg Farrell (shooting in Northern Ireland) - or by 'Strasbourg proofing' draft legislation and proposed executive action.

Options

53. It would be possible:-

(i) to make greater use of pre-emptive settlements in cases where the Government defence under the Convention is weak and the consequences of an adverse finding damaging. This could be done at various stages: eg, when a complaint is raised domestically and there is a risk it will be referred to Strasbourg; after application has been made and before the Government has submitted observations; and after a hearing before the Commission and a decision that the case is inadmissible. The Convention requires the Commission to facilitate friendly settlement at this last stage and, to that end, the Commission usually gives a confidential indication to the parties of its preliminary view of the merits. It is theoretically possible, though rare, for cases referred to the Court to be settled (the UK has never done so). Settlement will usually entail payment of legal costs (domestic and Strasbourg) and, where appropriate, a change in law or practice. It may involve monetary compensation;

(ii) to pay more attention in domestic legislative process and in consideration of proposed executive action to 'Strasbourg-proof' the proposed legislation or other action and review existing legislation. Consideration could be given to institutionalising this in the same way that the Cabinet Office European Secretariat co-ordinates the 'Community proofing' of proposed legislation or other action.

Advantages

54. Every case settled at an earlier stage would reduce the numbers of cases referred to Strasbourg or of adverse findings by the Commission and Court.

55. It may be possible to avoid damaging legislative or policy change and achieve settlement simply by payment of sufficient cash (eg Farrell). The option of going down fighting, even in hopeless cases, where it is politically better to point to outside coercion for a change rather than a voluntary concession, would remain available.

56. The Commission positively encourages friendly settlement and is prepared to exert pressure on applicants to settle on reasonable terms.

57. 'Strasbourg-proofing' of proposed legislation and executive action in order to avoid potential breaches of the Convention accords with the fundamental obligation in Article 1 of the UK to 'secure to everyone within its jurisdiction the rights and freedoms defined in the Convention.'

Disadvantages

58. It is not always easy to recognise at the time of a complaint to an organ of the Government that it may involve infringement of a provision of the Convention - in the view of the European Court. And once the complaint has been rejected, it becomes more difficult subsequently to admit that it has substance.

59. Pre-emptive settlements always involve a calculation of the risk of an adverse finding, which could be wrong, particularly before the Commission has taken a preliminary view (such views are almost invariably confirmed). There is the risk of accepting unwelcome changes in the law or practice which in the event could have been avoided.

60. Assessment of likely attitudes of the Commission and the Court in the process of 'Strasbourg proofing' is also difficult though less so as the volume of decided cases grows.

PART II - OPTIONS INVOLVING INCORPORATION

Introduction

61. "Incorporation" of the Convention in its broadest sense would entail legislation providing in effect, that any UK legislation (existing or future) or any executive action or subordinate legislation authorised thereunder should comply with the terms of the Convention. Incorporation could take a number of forms. It would have to be decided whether the incorporating statute (which might be termed a "Bill of Rights") had subsidiary provisions and, if so, what guidance they should give on the relationship between the incorporating statute and executive action, the common law, subordinate legislation and existing Acts of Parliament. There is also room for variation as to which provisions of the Convention are to be incorporated, and as to whether their application would be restricted to specific areas of law and administration. But the essential effect would be to give the Convention's provisions the force of domestic law.

62. This would be a major departure for the United Kingdom as the unspecific terms of the Convention would open up large areas of administration, where policy had been determined by Government and then by Parliament during the passage of specific Bills, to a totally new interpretation - in terms of principle not detail - by the Courts. The general concepts of the Convention would make the application of our law uncertain and the effects on important areas of policy could be considerable. (One could argue for a very specific UK Bill of Rights which elaborated on all the provisions of the ECHR, but this would probably create more problems than it solved and there could be no guarantee that it would accord with later judgements of the European Court.)

63. Judgements that found existing legislation or administrative practices to be in violation of the incorporated provisions would have the effect of making them unlawful. When the European Court declares that there has been a violation of the Convention, the Committee of Ministers assumes the responsibility of seeing that the judgement is executed, though the Contracting State may well change its policy immediately and before amending legislation is introduced.

64. It is difficult to see how this problem might be overcome; and any solution seems likely to require a significant constitutional

change. One possibility might be for a judgement on the human rights provision to require Parliamentary endorsement before it could have the effect of challenging the vires of the existing law. This would allow a necessary time factor and, on the face of it, would preserve Parliamentary sovereignty. But, unless endorsement were an inevitable outcome, it would bring into question either the findings of the judiciary on interpretation of the law or challenge the human rights provisions as such. There would also be a danger of putting Parliament in conflict with both the domestic judiciary and our obligations under the Convention.

65. An alternative would be to try to devise a method for any judgement on the human rights provisions necessitating statutory change to have effect only after a certain period of time. The sole, but powerful, argument for this would be one of expediency but it would create a curious situation during the delay period and would result in inconsistent results according to whether the judgement of the court was based on the provisions of the Convention or on ordinary principles of judicial review. Often the same could involve, at the same time, issues under the ordinary law and under the provisions of the Convention.

66. A further option would be to incorporate but not activate the provisions for, say, five years during which time the Government could review existing policies and legislation. This would be only a partial solution because the Government would not necessarily be able to forecast decisions of the European Court; and subsequent decisions of the domestic courts could re-introduce the problem. It would also demonstrate an embarassing lack of confidence in the compatibility of our law with the obligations which we have assumed under the convention.

67. It would be necessary to consider whether the provisions of the Convention, if incorporated, could only be invoked against the Government or whether they could be invoked by one private individual against another individual or company. The latter approach would expand the scope of the Convention considerably (at present the Convention can only be invoked against Governments at Strasbourg)

and it might be necessary to consider in those circumstances a procedure - with considerable manpower and cost implications - for Government intervention. Article 8, guaranteeing the right to private life, readily brings to mind some of the new problems that could be encountered.

68. It is difficult to assess whether incorporation would reduce the number of cases concerning the United Kingdom before the European Court. There is little doubt that complainants would see the European Court as a court of appeal above the High Court or House of Lords. On the other hand, courts in the United Kingdom would presumably find in favour of some complainants after incorporation; whereas at the moment the domestic law may have no provision for a remedy. Then again, incorporation would give prominence to the ECHR and mean more litigation on human rights in domestic courts with unsuccessful actions being taken to Strasbourg as a matter of routine. But the Strasbourg organs would be less concerned then they are at present by what they see as the lack of constitutional guarantees in the UK.

69. It is possible that there could be a reduction in what appear at present to be embarrassing judgements by the European Court. If incorporation were to be effected, cases would only go to Strasbourg after domestic jurisdiction on the ECHR provisions had been exhausted; and this would mean that cases would be accompanied by considered judgements on whether or not there had ben breaches of the provisions in the ECHR. It is possible that the Commission and Court would be influenced by these and that as a result the United Kingdom would not suffer to the same degree as at present from erratic and uncertain outcomes. On the other hand there is a risk that the "perversity" might become a feature of domestic courts which might adopt the Strasbourg approach to avoid their decisions being overturned at Strasbourg. There have already been cases eg on the adjudication of Prison Rules, where the domestic courts have pre-empted Strasbourg; and, whereas the European Court is diffident about finding national legislation in breach of the Convention, domestic courts would not have the same hesitation.

G. INCORPORATION OF THE EUROPEAN CONVENTION IN TOTO

Option

70. Incorporate the provisions of the ECHR in toto into UK statute law.

Advantages

71. It would be seen domestically and internationally as a firm commitment by the Government to maintain and further the rights of individuals.

72. It would provide a domestic remedy in those areas in which it is absent at present.

73. It would be possible to amend incorporated rights; but this would mean a departure from the provisions of the Convention thus opening the door to a new comprehensive Bill of Rights and the UK would still remain subject to the provisions of the Convention.

74. There could be a reduction in the number of cases referred to the European Commission because a domestic remedy has become possible; and there could be a reduction in admissible cases against the United Kingdom because considered judgements from the United Kingdom would be taken into account in all cases.

Disadvantages

75. Incorporation would introduce general concepts into the law and definition would depend on the domestic courts rather than Parliament.

76. Judgements would no doubt arise in which provisions of existing law were found by United Kingdom courts not to be in accordance with the new provisions; and immediate legislation (and perhaps new policies) would be required unless some sort of delaying procedure could be devised.

77. Governments and Parliament could seldom be certain how future judgements of the courts would bear on their policies and legislation; and the sovereignty of Parliament cold no longer be relied upon.

There is likely to be a significant increase, at least initially, in domestic court cases arising out of the incorporated provisions, some of which would reach Strasbourg. This could mean that there might be no overall reduction of admissible cases.

H. INCORPORATION OF PART OF THE ECHR

78. It would be possible to incorporate some of the Articles of the ECHR into statute law leaving the remainder to be incorporated at a later date - or not at all. Thus, for example, Article 2 (right of life), Article 3 (torture or inhuman or degrading treatment), Article 4 (slavery or servitude) and Article 5 (liberty and security of person) could be incorporated with limited scope for significant challenges to domestic laws in domestic courts. But even here the risk should not be underestimated. We have just suffered an adverse finding by the Commission in respect of Article 5 concerning the recall of a life sentence prisoner and conditions in prisons do not lead us to be sanguine about conformity with Article 3. The underlying principle of this option would be that Articles could be incorporated at a pace which allows the Government of the day, and the courts, to assimilate the consequences.

Option

79. Incorporate the provisions of the ECHR in stages.

Advantages

80. Although the major constitutional difficulty of incorporation, the challenge to the sovereignty of Parliament, would not be removed, its impact could be significantly reduced. This would be the more so if steps were aken before incorporating any provision to ensure that existing laws and procedures were carefully examined, and amended where necessary, to ensure compliance with the human rights provisions to be incorporated.

81. The advantages of full incorporation would apply but to a lesser extent.

Disadvantages

82. In the short term, partial incorporation in this sense is unlikely to lead to a reduction of cases submitted to, or found admissible at, Strasbourg; and a reduction in the longer term is likely to arise from amendments to procedures and laws prior to incorporation.

83. It will be difficult to defend incorporation of only some provisions - domestically and internationally - whilst maintaining the traditional line that the United Kingdom supports and observes all the provisions.

I. INCORPORATION OF THE PROVISIONS OF THE ECHR INTO LIMITED AREAS OF ADMINISTRATION

84. Some major areas of administration, eg, prisons are dependent on subordinate legislation (the Prison Rules in this Case). One could amend such legislation with the inclusion of a Rule that required the observance of the provision of the ECHR in the application of any other Rule.

Option

85. The inclusion in subordinate regulatory legislation of a provision requiring observance of the ECHR.

Advantages

86. There would be no threat to the sovereignty of Parliament.

87. There would be likely to be a reduced number of applications to the European Commission because transgressions would be picked up early and, if not, domestic courts would have remedial action available.

88. Incorporation in this manner in stages would allow time for full incorporation of the provisions of the ECHR in due course without significant upheaval.

Disadvantages

89. It would be difficult for individual prison officers to interpret their responsibilities on human rights according to the general provisions of the ECHR.

90. To include such a provision would only be sensible if the Rules in question and detailed policy guidance had first been reviewed to ensure compliance with the ECHR in which case one of the previous incorporation options could be applied.

91. To make the necessary changes would require difficult policy decisions in important and sensitive areas of administration.

92. It would be difficult to defend, domestically and internationally, such limited action.

93. It would invite attention to that area of administration and could lead domestic courts to rule more unfavourably than the organs at Strasbourg

J. INCORPORATION COUPLED WITH NON-RENEWAL OF THE RIGHT OF INDIVIDUAL PETITION

94. Incorporation, or one of the variants proposed above, could be undertaken in conjunction with non-renewal of the right of individual petition.

Advantages

95. Non-renewal of the right of individual petition would drastically reduce the number of United Kingdom cases referred to Strasbourg and could be defended in part, if full incorporation is effected, as being no longer necessary.

96. The advantages of incorporation, mentioned earlier, would apply.

Disadvantages

97. The disadvantages of incorporation would also apply although there would be less risk of the European Court coming into direct conflict with decisions of domestic courts. Nevertheless domestic

courts would be faced with the decision whether to follow the line taken by the European Commission and Court or whether to act independently risking gradual divergence. If the UK remained a party to the Convention presumably they would follow the former course. It would be difficult to defend not renewing the right of individual petition because of incorporation bearing in mind that other Member States with incorporated rights have granted the right of individual petition.

PART III

K. MAINTAIN THE STATUS QUO

Option

98. This option involves renewing the right of individual applications (Article 25) and recognition of the compulsory jurisdiction of the Court (Article 46).

Advantages

99. This is what is expected of the UK internationally and domestically, and is consistent with our position as a country committed to upholding human rights.

100. The status quo combines (on the one hand) the advantages of ultimate acceptance of and compliance with the Convention, and (on the other hand) the advantages of distancing our domestic courts from the more political and evolutionary features of the Convention, thus enabling these to be applied by the Government, in its implementation of decisions on the Convention, in the manner most appropriate to the political and social framework within which those decisions must operate in the United Kingdom.

Disadvantages

101. We would have to recognise that there will continue to be awkward decisions of the Court from time to time, and parliamentary criticism thereof.

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts.*

---

* EDITORIAL NOTE:

On 5 April 1977 in Luxembourg the Presidents of the European Parliament, the Council and the Commission signed a Joint Declaration which was published in the *Official Journal of the European Communities*, No C 103, 27 April 1977, and which is given below for the reader's convenience.

JOINT DECLARATION
by the European Parliament, the Council and the Commission

THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE COMMISSION,

Whereas the Treaties establishing the European Communities are based on the principle of respect for the law;

Whereas, as the Court of Justice has recognised, that law comprises, over and above the rules embodied in the Treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the Member States is based;

Whereas, in particular, all the Member States are Contracting Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950,

HAVE ADOPTED THE FOLLOWING DECLARATION:

1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights.

Done at Luxembourg on the fifth day of April in the year one thousand nine hundred and seventy-seven.

For the European Parliament	*For the Council*	*For the Commission*
E. COLOMBO	D. OWEN	R. JENKINS

COUNCIL OF EUROPE (COE) MINISTERIAL MEETING ON HUMAN RIGHTS AT VIENNA : 19-20 MARCH

PRIME MINISTER'S QUESTIONS ON 21 MARCH

1. Was not the UK in the dock at Vienna over our bad human rights record - more cases affecting the UK go to Strasbourg than from any other member state of the COE?

No. Of all cases dealt with by the Court, the Committee of Ministers and Commission to 31 December 1984 the percentage of violations against the UK was lower than in a number of other countries. The UK's record was not the subject of the Conference.

2. Did not the UK block constructive proposals, for example the establishment of a full-time Human Rights Court or the appointment of a European Human Rights Commissioner, which would improve the COE's work in this field?

No. There was a significant degree of support for my Rt Hon and Learned Friend's view that consolidation of the Council of Europe's work is needed. My Hon Friend, Mr Timothy Renton, joined Ministers from 17 out of 21 member states in signing Protocol 8 to the European Convention on Human Rights which is designed to reduce delays at Strasbourg. This hardly amounts to isolation of the UK.

3. The UK's immigration practices inconsistent with the European Convention on Human Rights?

These were not discussed at Vienna. Cannot comment on specific cases currently being considered by the European Commission or Court.

4. Why did the Home Secretary not attend?

The Conference was devoted primarily to the machinery of the European Convention, to discussion of human rights in the world at large and human rights implications of developments in the biological sciences. Therefore it was appropriate for Mr Renton and Solicitor General to attend, supported by officials from the FCO, the Law Officers' Department, the Home Office and DHSS.

COUNCIL OF EUROPE (COE) MINISTERIAL MEETING ON HUMAN RIGHTS AT VIENNA : 19-20 MARCH

1. Ministers (Mr Renton and Sir Patrick Mayhew for the UK) of the 21 COE countries met in Vienna to evaluate and consolidate the work of COE in the field of human rights. The concluding Declaration on human rights in the world at large and Vienna telno 26 reporting the Conference are attached.

2. The UK objective of seeking broad support for consolidation rather than expansion of COE human rights work was achieved. Predictions, as in The Guardian on 18 March, that the UK would be the odd-man-out at Vienna and in the dock over our supposedly bad record on human rights, proved to be wrong.

3. Together with Ministers from 17 out of 21 member states, Mr Renton signed Protocol 8 to the European Convention on Human Rights, which is designed to reduce delays (currently considerable) at Strasbourg. This is consistent with the objective of consolidation.

4. Radical proposals for change, such as the establishment of a full-time Human Rights Court or the appointment of a European Commissioner for Human Rights made no real progress.

5. The concluding Declaration focussed on the need to improve observance of human rights in the CSCE and UN fora.

6. There was a useful debate at Vienna on the challenge to human rights posed by new developments in science and technology, particularly in the fields of biology, medicine and biochemistry. The UK tabled the "Warnock Report" on human fertilisation and embryology.

Parliamentary Unit

From : C A Munro, WED
Date : 21 March 1985
cc : PS
PS/Lady Young
PS/Mr Renton
Mr Jenkins
Mrs Glover, Legal Advisers
Mr Head, Home Office
Mr Gardiner, LOD
Miss Edwards, DHSS
News Dept

COUNCIL OF EUROPE (COE) MINISTERIAL MEETING ON HUMAN RIGHTS AT VIENNA : 19-20 MARCH

1. I submit Lines to Take and Background for Prime Minister's Questions on 21 March.

C A Munro
Western European Dept

Subject
ce Master
Ops.

PRIME MINISTER'S
PERSONAL MESSAGE
SERIAL No. T41A/85

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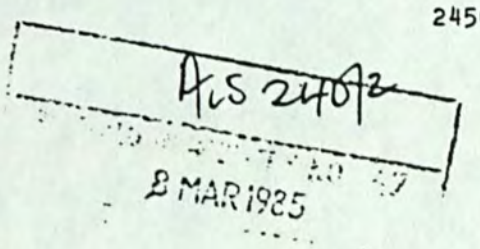

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TELEGRAM NUMBER 41 OF 6 MARCH
INFO MEXICO CITY, CARACAS, SAN JOSE, WASHINGTON, UKMIS NEW YORK, UKMIS GENEVA

YOUR TELNO 33: EL SALVADOR: HUMAN RIGHTS

1. MESSAGE FROM PRESIDENT DUARTE TO THE PRIME MINISTER FORESHADOWED IN YOUR TUR WAS DULY FORWARDED TO NO 10 BY THE SALVADOREAN EMBASSY ON 25 FEBRUARY (COPY BY BAG).

2. PLEASE NOW ARRANGE FOR THE FOLLOWING REPLY TO BE FORWARDED TO PRESIDENT DUARTE.

BEGINS: THANK YOU FOR THE MESSAGE PASSED TO ME BY YOUR CHARGE D'AFFAIRES IN LONDON IN A LETTER DATED 25 FEBRUARY, ABOUT THE CURRENT MEETING IN GENEVA OF THE UN COMMISSION ON HUMAN RIGHTS AND THE DRAFT RESOLUTION TABLED BY VENEZUELA AND COSTA RICA.

AS YOU KNOW, HER MAJESTY'S GOVERNMENT ADMIRE AND STRONGLY SUPPORT THE EFFORTS YOU AND YOUR GOVERNMENT ARE MAKING TO IMPROVE THE HUMAN RIGHTS SITUATION IN YOUR COUNTRY AND TO SEEK NATIONAL RECONCILIATION IN AN EFFORT TO BRING TO AN END THE ATMOSPHERE OF VIOLENCE IN EL SALVADOR. YOU MAY BE SURE THAT THE UNITED KINGDOM'S VOTE IN THE UN COMMISSION ON HUMAN RIGHTS WILL REFLECT THIS POSITION. ENDS.

3. COMMENT. AS IT STANDS WE CAN SUPPORT THE VENEZUELAN/COSTA RICAN DRAFT. WE UNDERSTAND THAT THE MEXICANS HAVE NOT TABLED A RIVAL DRAFT AND MAY NOW NOT DO SO FOR PROCEDURAL REASONS. BUT WE MUST EXPECT THEM TO MAKE EFFORTS TO AMEND THE VENEZUELAN/COSTA RICAN DRAFT AND OUR VOTING POSITION WILL DEPEND

ON THE TEXT WHICH FINALLY EMERGES.

HOWE

NNNN

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cc PC.

10 DOWNING STREET

From the Private Secretary

6 March 1985

EL SALVADOR

Thank you for your letter of 5 March enclosing a draft reply for the Prime Minister to President Duarte's message of 25 February.

The Prime Minister has approved the draft which may now be despatched.

BF
for final version

(Charles Powell)

Peter Ricketts, Esq.,
Foreign and Commonwealth Office.

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From: THE PRIVATE SECRETARY

NBPM

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SWIH 9AT

6 March 1985

Dear Richard,

HUMAN RIGHTS

Thank you for your letter of 27 February.

We shall, of course, be pleased to involve Chris Brearley in the preparation of the paper. We envisage that, in practice, most of the work will be done by correspondence and that it will be unnecessary to have more than one or two meetings of the group of officials concerned - if that; but we shall ensure that Chris Brearley is consulted from the outset.

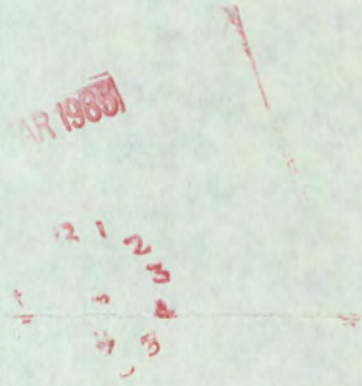
Copies of this letter go to Robin Butler, Janet Lewis-Jones, Richard Stoate, Len Appleyard, John Graham, David Morris, Jim Daniell, Henry Steel, Iain Jack, and Murdo MacLean.

Yours ever
Hugh Taylor

H H TAYLOR

R P Hatfield, Esq

Europ. Pol: Human Rights, Nov '80



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cc/pc (1)

Foreign and Commonwealth Office

London SW1A 2AH

Prime Minister
Agree attached reply to President Duarte?
CDP 5/3

5 March 1985

Dear Charles,

Yes my

El Salvador

In your letter of 26 February you asked for a draft reply to President Duarte's message contained in a letter to the Prime Minister dated 25 February from the Salvadorean Charge d'Affaires in London. I attach a draft in the form of a telegram to Tegucigalpa.

FLAG A

The 41st session of the UN Commission on Human Rights is meeting in Geneva until 15 March. El Salvador can again expect to be among the countries whose human rights performance comes in for criticism. However, she is unlikely to be so isolated as in previous years, although few may speak up in her favour. British policy is to give active support to President Duarte's Government, and to recognise the efforts he is making to improve the human rights situation in El Salvador.

The last UN General Assembly adopted a Mexican resolution highly critical of the human rights situation in El Salvador. The UK abstained and the US voted against it. At this year's session of the UN Commission on Human Rights, Venezuela and Costa Rica have tabled a much more balanced draft resolution for which President Duarte (with US encouragement) is now seeking our support, along with that of other friendly governments. As it stands we can support the Venezuelan/Costa Rican draft. But others, including the Mexicans, will doubtless seek to amend it and our eventual voting position will depend on the text which finally emerges.

Against this background it would be best to send President Duarte a brief reply reaffirming HMG's support for his efforts to improve the human rights situation in El Salvador but avoiding any specific commitment as to our voting intentions in the UN Commission on Human Rights.

President Duarte's message is a circular which has been addressed to a number of Heads of Government. We suggest that the Prime Minister's reply be telegraphed to our Ambassador in Honduras (who is also accredited to El Salvador) for delivery through normal diplomatic channels.

Yours ever,

Peter Ricketts

C D Powell Esq
10 Downing Street

(P F Ricketts)
Private Secretary

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OUT TELEGRAM

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CLASS	3	RESTRICTED
CAVEATS	4	
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	9	INFO MEXICO CITY, CARACAS, SAN JOSE, WASHINGTON, UKMIS NEW YORK,
	10	UKMIS GENEVA
	11	YOUR TELNO 33: EL SALVADOR: HUMAN RIGHTS
	12	1. Message from President Duarte to the Prime Minister
	13	foreshadowed in your TUR was duly forwarded to No 10 by the
	14	Salvadorean Embassy on 25 February (copy by bag).
	15	2. Please now arrange for the following reply to be forwarded
	16	to President Duarte.
	17	BEGINS: Thank you for the message passed to me by your Charge
	18	d'Affaires in London in a letter dated 25 February, about the
	19	current meeting in Geneva of the UN Commission on Human Rights
	20	and the draft Resolution tabled by Venezuela and Costa Rica.
	21	As you know, Her Majesty's Government admire and strongly
///	22	support the efforts you and your Government are making to improve
//	23	the human rights situation in your country and to seek national
/	24	reconciliation in an effort to bring to an end the atmosphere of
	25	violence in El Salvador. You may be sure that the United

NNNN ends telegram	BLANK	Catchword: Kingdom's
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Drafted by (Block capitals): P F RICKETTS		
Telephone number: 233-4641		
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OUT TELEGRAM (CONT)

		Classification and Caveats		Page
		RESTRICTED		2

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<<<<
Kingdom's vote in the UN Commission on Human Rights will reflect this position. ENDS.

3. Comment. As it stands we can support the Venezuelan/Costa Rican draft. We understand that the Mexicans have not tabled a rival draft and may now not do so for procedural reasons. But we must expect them to make efforts to amend the Venezuelan/Costa Rican draft and our voting position will depend on the text which finally emerges.

HOWE

NNNN

NNNN ends telegram	BLANK	Catchword

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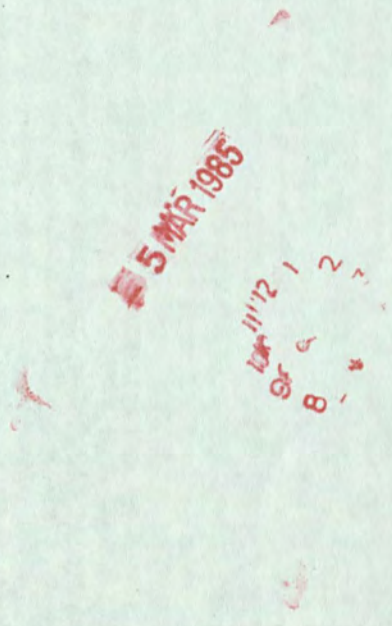
EUR. POL : Human Rights : Nov 80



CONFIDENTIAL

VC/48

10 DOWNING STREET

From the Private Secretary

4 March 1985

EUROPEAN COMMISSION ON HUMAN RIGHTS

Thank you for your letter of 26 February about ways of reducing the number of cases which go to the European Commission on Human Rights.

The Prime Minister has noted the difficulties of filtering applications.

I am copying this letter to Hugh Taylor (Home Office), Michael Carpenter (Lord Chancellor's Office) and Michael Saunders (Law Officers' Department).

(CHARLES POWELL)

C.R. Budd, Esq.,
Foreign and Commonwealth Office.

CONFIDENTIAL

CST

CONFIDENTIAL

NBPM

HOUSE OF LORDS,
SW1A 0PW

28 February 1985

My dear Margaret:

Human Rights

I have seen a copy of the letter of 15th February 1985 from the Private Secretary to the Home Secretary to your Private Secretary. I agree that this subject deserves a paper and discussion. It also seems appropriate that the Home Office should take the lead in preparing such a paper.

It should also be borne in mind that there is a bill in prospect on this issue, which will probably be introduced by Lord Broxbourne with the support of Lord Scarman. The bill is likely to provide for the incorporation of the European Convention on Human Rights into the law of the United Kingdom and when it is introduced, the Government will be expected to give some indication of its attitude towards this issue.

I am copying this letter to the Lord President of the Council, the Home Secretary, the Foreign Secretary, the Secretary of State for Northern Ireland, the Secretary of State for Scotland, the Lord Privy Seal, the Attorney General, the Lord Advocate, the Chief Whip in the Commons and to Sir Robert Armstrong.

yrs:

The Right Honourable
The Prime Minister
10 Downing Street
London S.W.1

Congratulations on the success of yr: Congress speech & for yr: nice letter.

EURO POL

Human Rights

4/86

CONFIDENTIAL

NBPM
CC AC

70 WHITEHALL, LONDON SW1A 2AS

01-233 8319

From the Secretary of the Cabinet and Head of the Home Civil Service

Sir Robert Armstrong GCB CVO

Ref. A085/623

27 February 1985

Dear Hugh,

VM FCO

Human Rights

Thank you for sending me a copy of your letter of 15 February to Robin Butler on this subject.

Sir Robert Armstrong is entirely content with the Home Secretary's proposals for the handling of this issue but he hopes that it will be possible for the Cabinet Office to be represented on the group of officials which will be preparing the paper for Ministerial consideration. If this is acceptable to you, our representative would be Mr Chris Brearley.

I am sending copies of this letter to Robin Butler, Janet Lewis-Jones, Richard Stoate, Len Appleyard, John Graham, David Morris, Jim Daniell, Henry Steel, Iain Jack, and Murdo MacLean.

Yours

(R P Hatfield)
Private Secretary

H H Taylor Esq

CONFIDENTIAL

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Human Rights

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Ref. A085/621

MR BUTLER

Human Rights

Thank you very much for your minute of 15 February.

2. I see no difficulty with the Home Office proposals for the handling of this issue. I shall, however, be ensuring that the Cabinet Office is represented on the official group.

RA

ROBERT ARMSTRONG

27 February 1985

CONFIDENTIAL

CONFIDENTIAL

10 DOWNING STREET

From the Principal Private Secretary 27 February 1985

HUMAN RIGHTS

Thank you for your letter of 15 February.

The Prime Minister is content with the approach which the Home Secretary has in mind for fulfilling the remit in my letter of 31 January.

I am copying this letter to Richard Hatfield (Cabinet Office).

Robb

Hugh Taylor Esq
Home Office

CONFIDENTIAL

CONFIDENTIAL

CC PC (2)

Prime Minister
The wider issue of reducing the impact of the findings of the European Courts on our law is being studied by officials, who will report in April. This deals with your suggestion of using an Ombudsman to filter cases going to the European Commission on Human Rights. There are problems with this, but the idea at X over seems sensible. CD? 27/2.

Foreign and Commonwealth Office

London SW1A 2AH

26 February, 1985

Dear Charles,

European Commission on Human Rights

You wrote to me on 22 January about the Prime Minister's interest in exploring ways of reducing the number of cases which go to the European Commission on Human Rights. Sir Geoffrey Howe shares the Prime Minister's interest in this question, which is relevant incidentally to the Council of Europe Human Rights Conference in Vienna on 19-20 March (Mr Renton will lead the delegation).

Home Office and FCO officials are looking into the possibilities of reducing the flow of applications. You will have seen from Hugh Taylor's letter of 15 February the Home Secretary's views on how best to take this exercise forward. This is an interim reply dealing with the Prime Minister's thought that there ought to be a way of filtering cases, for instance through an ombudsman system.

It will be difficult to find an effective means of filtering applications to Strasbourg which would be consistent with the Convention or acceptable to other member states. As things stand the UK, having accepted the right of individual petition, is bound not to hinder in any way the effective exercise of this right. An additional mechanism, such as an agreement by member states that each would use its national Ombudsman to filter cases on their way to the ECHR, would require an amending protocol to the Convention on Human Rights which all states party to that Convention would have to sign. Many would resist.

The Secretariat already discourages applicants who patently have no complaint under the Convention and the Commission itself summarily declares cases inadmissible without communicating them to governments. In 1984 75% of applications to Strasbourg were dealt with in this way.

If the Ombudsman were to operate a filter system there is not likely to be a decrease in the number of particularly sensitive cases which go to the Commission and eventually attract public attention. In Sir Geoffrey Howe's

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view, an Ombudsman would have to allow politically sensitive cases to proceed, given the UK's obligations under the Convention. Indeed, he would have to allow all cases admissible under the Convention to proceed. One theoretical possibility would be to involve the Committee of Ministers to prevent politically sensitive cases going through the processes of the Commission and Court. But the pressure in the Council of Europe is to extend the jurisdiction of the Commission and Court in relation to applications. The UK would not gain support for a proposal which sought to restrict the number of applications.

The recent discussions during the drafting of the 8th Protocol to the Convention, which is designed to improve the efficiency of the Commission and Court, indicate some of the difficulties. One of the new articles in this Protocol establishes a group of three members of the Commission who can summarily declare cases inadmissible. Previously this was done by the full Commission. This reform was introduced in order to reduce the workload of the full Commission, but there was opposition on the grounds that applicants would regard themselves as disadvantaged if their applications were not considered by the full Commission. It therefore seems clear that many states would be against a Protocol which reduced a potential applicant's opportunity to have his case considered by the Commission.

Vienna Conference

The Vienna Conference will be an opportunity to discuss our apprehensions with those who tend to think like we do, notably the Dutch, the Germans and the French. Sir Geoffrey Howe sees a danger in putting forward what many would see as a radical proposal to "filter" cases which go to the Commission. We would run the risk of saddling ourselves with an enquiry not only into our own ideas, which by and large are not popular, but also into the Swiss and Austrian proposals, such as the Austrian proposal for a Human Rights Commissioner with the opposite purpose to our own, which could well find favour with a majority. We wish to avoid this. Our aim of killing off unsatisfactory proposals such as this will be set back if we introduce a proposal which others would regard as unsatisfactory. This brings us back to the question of incorporation of the Convention as a way of reducing the number of applications to Strasbourg. This is perhaps best pursued in the context of the exercise referred to in paragraph 2 above (Hugh Taylor's letter of 15 February to Robin Butler).

I am copying this letter to Hugh Taylor (Home Office), Michael Carpenter (Lord Chancellor's Department), and Michael Saunders (Law Officers' Department).

Yours ever,
Colin Budd

C D Powell Esq
10 Downing Street

(C R Budd)
Private Secretary

Human Rights

NA 80

10 DOWNING STREET

From the Private Secretary

26 February, 1985

I am writing on behalf of the Prime Minister to thank you for conveying a message from President Duarte. I shall ensure that this is brought to the Prime Minister's attention as soon as possible.

(Charles Powell)

Senor Roberto Rivas Gardiner

10 DOWNING STREET

From the Private Secretary

26 February, 1985

I enclose a copy of a message to the Prime Minister from President Duarte of El Salvador.

I should be grateful for a draft reply.

(Charles Powell)

P Ricketts, Esq.,
Foreign and Commonwealth Office

SUBJECT
a Master
OPS

PRIME MINISTER'S
PERSONAL MESSAGE
SERIAL No. T36/85

EMBAJADA DE EL SALVADOR
9 WELBECK HOUSE,
62 WELBECK STREET,
LONDON W1M 7HB
TEL:01-486 8182/3

D-026

London, 25th February 1985

The Prime Minister
House of Commons
Palace of Westminster
London SW1

R26

Dear Prime Minister,

I have been instructed by H.E. President Napoleón Duarte to convey to Your Excellency the following message regarding the XLI Human Rights meeting being held in Geneva:

"I have the honour to address Your Excellency regarding the XLI Human Rights meeting being held in Geneva, and where the human rights situation in El Salvador is being discussed. On this matter I wish to convey to Your Excellency that even though El Salvador recognizes the value of the Human Rights Commission, it feels distraught for the partial and unjust treatment that the aforementioned Commission has alloted to my country. El Salvador is for the first time in its history enjoying the fruits of democracy and liberty.In obeisance to the Salvadorean will, I am bound to struggle for the establishment of democracy in my country on the grounds of social justice and the pursuit of the rights that every individual posseses by nature. From the beginning of my administration, my country has been guided towards the fulfillment of an open, just and pluralist society. Thus, we are heading towards the achievement of fundamental liberties and the begetting of human rights. It has been most unfortunate that our efforts have been overlooked by the last United Nations' General Assembly. As you are well aware, in the XXXIX General Assembly, Mexico and other countries, proposed a resolution that among other things lacked a firm knowledge of the Salvadorean reality and which was absolutely equivocal. On the other hand, Venezuela, Costa Rica, and other Central American countries were able to modify this resolution, but only to the extent of making it a less impartial one. In the present meeting of the Human Rights Commission where El Salvador is being discussed, I have been informed that Venezuela is working on a resolution project which acknowledges the human rights improvement in my country and which lets the facts talk for themselves. It is to this avail that in the name of the people, the government of El Salvador, and my own, I wish to express to the honourable government which Your Excellency presides, a most formal call grounded in the democratic values that should unite our countries and in the collective effort to achieve liberty and social justice, to support the aforementioned Venezuelan resolution project. I am totally confident that the definite support of Your Excellency's government in the present General Assembly would undoubtedly enhance the efforts achieved by my government regarding human rights provisions and further the process of democratization

so much alive in El Salvador. I rest assured, recognizing the democratic beliefs of Your Excellency, that you will respond positively to the sentiments fo my people and my government. Our present struggle, which converges with yours, is aimed at eliminating the roots of social discontent, thus reaching out for a better future which I want to offer and provide to the future generations of my nation.

José Napoleón Duarte
President of the Republic of El Salvador"

I avail myself of this opportunity to express to Your Excellency the assurances of my highest consideration.

Yours truly,

EMBAJADA DE EL SALVADOR
LONDRES

Roberto Rivas Gardiner
Chargé d'Affaires a.i.

CONFIDENTIAL

10 DOWNING STREET

From the Principal Private Secretary

SIR ROBERT ARMSTRONG

Human Rights

Your office have had a copy of the Home Secretary's letter of 15 February suggesting the way in which consideration of reducing the impact of the findings of the European Courts on our law, including incorporation of the European Convention into UK law, should be undertaken.

The proposals in that letter appear satisfactory to me, but I am sure the Prime Minister would be grateful for any observations which the Cabinet Office may have.

15 February 1985

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From: THE PRIVATE SECRETARY

CONFIDENTIAL

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SWIH 9AT

15 February 1985

Dear Robin,

HUMAN RIGHTS

Your letter of 31 January recorded the remit to the Home Secretary and the Foreign Secretary, in consultation with the Lord Chancellor and other Ministers concerned, to look again at ways of reducing the impact of the findings of the European Courts on our law, including incorporation of the European Convention into UK law possibly with derogations.

The Home Secretary has been considering how best to take this exercise forward. The issues are wide ranging and complex and it would be helpful, in his view, if Ministers were able to consider them on the basis of a succinct paper to be prepared by officials which would set out the various possibilities with arguments for and against, so that Ministers could then indicate what further work should be done. The paper would not make substantive recommendations. The Home Secretary suggests that his officials should take the lead in preparing such a paper in consultation with officials of those Departments which received your letter of 31 January. He would then propose that this paper form the basis for a collective discussion with Ministerial colleagues - leaving till later, perhaps when the Home Secretary has seen the paper, whether the Prime Minister wishes to chair the meeting herself.

On timing, the Home Secretary has in mind that this discussion might take place at the end of April or early in May. It would be helpful to know if the Prime Minister agrees with this approach.

Copies of this letter go to Janet Lewis Jones (Lord President's Office), Richard Stoate (Lord Chancellor's Office), Len Appleyard (Foreign and Commonwealth Office), John Graham (Scottish Office), David Morris (Lord Privy Seal's Office), Jim Daniell (Northern Ireland Office), Henry Steel (Law Officers' Department), Iain Jack (Lord Advocate's Office), Murdo Maclean (Chief Whip's Office) and Richard Hatfield (Cabinet Office).

Yours sincerely,
Hugh Taylor

H H TAYLOR

Robin Butler, Esq

CONFIDENTIAL

FILE

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10 DOWNING STREET

From the Private Secretary

7 February 1985

Council of Europe: Ministerial Conference on Human Rights

Thank you for your letter of 5 February about the forthcoming Council of Europe Ministerial Conference on Human Rights.

The Prime Minister has noted this.

I am copying this letter to Richard Hatfield (Cabinet Office) and Murdo Maclean (Government Whips' Office).

Charles Powell

Colin Budd, Esq.,
Foreign and Commonwealth Office.

CST

CONFIDENTIAL

Foreign and Commonwealth Office

London SW1A 2AH

5 February 1985

Dear Charles,

Council of Europe: Ministerial Conference on Human Rights

The Foreign Secretary has agreed that Mr Timothy Raison, Parliamentary Under Secretary of State at the Foreign and Commonwealth Office, should lead the UK delegation to the European Ministerial Conference on Human Rights to be held in Vienna on 19 and 20 March.

After some initial scepticism about this Conference the UK decided in May 1984 to agree to its being held, after an initially thin agenda had been much improved and it had become clear that the great majority wanted to see the Conference go ahead. The Conference will arouse interest in the media and will be closely watched by those interested in Human Rights. The UK delegation intend to table various papers at the Conference on one of its themes: "The Challenge to Human Rights Posed by the Development of Science and Technology". These will cover the protection of human beings in the context of the development of biology, medicine and chemistry. Among these documents will be the Warnock and Peel Reports.

Mr Renton will be accompanied by his Private Secretary and by a small UK delegation (one, or at most two, officials from Whitehall, plus Mr Christopher Lush, the UK Permanent Representative at the Council of Europe).

I am copying this letter to Richard Hatfield (Cabinet Office) and Murdo Maclean (Government Whips' Office).

Yours ever,

Colin Budd

(C R Budd)
Private Secretary

C D Powell Esq
10 Downing Street

CONFIDENTIAL

Copied to SECURITY: Interception: Pt 4.

CONFIDENTIAL

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VC

CC. M. Tod

CC T. Jack (Lord Adv.)

10 DOWNING STREET

From the Principal Private Secretary

31 January 1985

Dear Hugh,

INTERCEPTION OF COMMUNICATIONS BILL

The Prime Minister held a discussion today about the submission of 25 January from Sir Robert Armstrong on the shape of the Bill and about the minute of 29 January from the Home Secretary about Parliamentary handling. The Lord President, Lord Chancellor, Foreign Secretary, Home Secretary, Secretary of State for Scotland, Lord Privy Seal, Secretary of State for Northern Ireland, Chief Whip, Attorney General, Lord Advocate and Sir Robert Armstrong were present.

Shape of the Bill

The Home Secretary said that a number of alternatives to the original Bill had been considered, and the only viable alternative appeared to be a shorter Bill with some of the detail transferred into regulations. It was doubtful whether this would present much advantage, since the House would insist that a draft of the regulations should be published and Members would no doubt move amendments to incorporate the regulations into the Bill. This would create a debate on the contents of the regulations both during the passage of the Bill itself and when the regulations were laid before the House, and it would also arouse criticism that the content of the regulations had not been incorporated into the Bill itself.

In a short discussion, it was generally agreed that, while the full Bill was unattractive, the alternative approach would present even greater disadvantages.

Handling of the Bill

In a discussion of the Parliamentary handling of the Bill, the following points were agreed:

(i) the Committee stage of the Bill should be taken on the floor of the House.

(ii) It was noted that the Leader of the Opposition had not so far accepted the Prime Minister's suggestion that he

should receive from the Cabinet Secretary a briefing on security matters: this suggestion should be renewed and the Leader of the Opposition should be pressed to take it up. Briefing on the Bill should also be offered to Mr. Healey and Mr. Kaufmann on Privy Counsellor terms; and in view of his dual status as a Party leader and former Foreign Secretary, a similar briefing should be offered to Dr. Owen. The Cabinet Secretary should write to Mr. Edward Heath, Mr. James Callaghan, Mr. Roy Jenkins and Mr. Merlyn Rees offering to refresh their memories on the issues covered by the Bill: a similar offer should be made in due course to Lord Home and Lord Wilson when the Bill was about to come before the House of Lords.

(iii) The publication of the White Paper should take place as soon as possible, subject to keeping the interval between publication of the Bill, publication of the White Paper and Second Reading as short as possible.

European Convention on Human Rights

It was pointed out that the need for two Bills in the present session had arisen from cases brought before the European Court. This Court was not now operating in the ways intended by its founders and some of its judgements were eccentric: on the other hand HM Government was bound as a signatory of the Convention to adopt the findings of the Court into our domestic law. More cases went to the European Court from Britain than from any other country and one reason for this was that, because the European Convention was not incorporated into British law, complainants could not seek relief in the British courts. On the other hand, incorporation of the Convention into British law would raise very difficult issues in certain fields like immigration and prisons. But it was possible to consider incorporating the Convention with derogations, and it would be worth looking at this issue again.

Summing up the discussion, the Prime Minister said that it was agreed that the Home Secretary should now proceed with the Bill and the White Paper in the form attached to his minute of 16 January. He should discuss a timetable for the second reading with the Lord Privy Seal, with a view to publishing the White Paper and the Bill as soon as possible before the second reading. Briefings should be offered to Mr. Kinnock, Mr. Healey, Mr. Kaufman and Dr. Owen and these be carried out by officials. The Cabinet Secretary should write to Mr. Heath, Mr. Callaghan, Mr. Jenkins, Mr. Rees and in due course to Lord Home and Lord Wilson, offering to refresh their memories on the issues covered by the Bill. The Foreign Secretary and the Home Secretary, in consultation with the Lord Chancellor and other Ministers concerned, should look again at ways of reducing the impact of the findings of the European Courts on our law, including incorporation of the European Convention into UK law, possibly with derogations.

I am copying this letter to Janet Lewis-Jones (Lord President's Office), Richard Stoate (Lord Chancellor's

Office), Len Appleyard (Foreign and Commonwealth Office), John Graham (Scottish Office), David Morris (Lord Privy Seal's Office), Jim Daniell (Northern Ireland Office), Henry Steel (Law Officers' Department), Iain Jack (Lord Advocate's Office), Murdo Maclean (Chief Whip's Office) and Richard Hatfield (Cabinet Office).

Yours ever,

Robin Butler

Hugh Taylor, Esq.,
Home Office.

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10 DOWNING STREET

From the Private Secretary

22 January 1985

European Commission on Human Rights

When the Prime Minister met the Secretary-General of the Council of Europe recently she observed that too many cases went to the European Commission on Human Rights. She thought that there ought to be some way of filtering such cases for instance through an Ombudsman system. Senor Oreja expressed interest.

BF

The Prime Minister believes that the idea is worth pursuing and would like to see an assessment of the possibilities. There are, of course, a number of ways in which such cases are already filtered by the Secretariat and the Commission itself: and we shall not necessarily welcome any changes which lead to the speeding up of the hearing of cases by the Commission. I understand, however, that there is a general review in train of the efficiency of the Commission and the Prime Minister's suggestion might be pursued further in that context.

I am copying this letter to Henry Steel in the Law Officers' Department.

Charles Powell

Colin Budd, Esq.,
Foreign and Commonwealth Office.

CONFIDENTIAL

CCND

Y SWYDDFA GYMREIG
GWYDYR HOUSE
WHITEHALL LONDON SW1A 2ER
Tel: 01-233 3000 (Switsfwrdd)
01-233 7172 (Llinell Union)
Oddi wrth y Gweinidog Gwladol

CT/3566/84

WELSH OFFICE
GWYDYR HOUSE
WHITEHALL LONDON SW1A 2ER
Tel: 01-233 3000 (Switchboard)
01-233 7172 (Direct Line)
From The Minister of State

26 October 1984

DnB
26/10

Dear Keith,

CORPORAL PUNISHMENT IN SCHOOLS

Thank you for your letter of 24 October and the draft of the report you propose to make announcing legislation.

I am in complete agreement with your proposal and am copying this letter to the Prime Minister, Willie Whitelaw, Geoffrey Howe, George Younger, John Biffen, Norman Fowler and Douglas Hurd.

Yours ever,
John.

JOHN STRADLING THOMAS

The Rt Hon Sir Keith Joseph Bt MP
Secretary of State for Education & Science
Department of Education & Science
Elizabeth House
York Road
LONDON

Gurbd Nov. 80

Human rights

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DB.

DEPARTMENT OF EDUCATION AND SCIENCE

ELIZABETH HOUSE, YORK ROAD, LONDON SE1 7PH

TELEPHONE 01-928 9222

FROM THE SECRETARY OF STATE

CF
nbpm. But I have let DES have some comments of my own.
DNB
25/10

The Rt Hon Nicholas Edwards MP
Secretary of State for Wales
Gwydyr House
Whitehall
LONDON SW1A ZER

24 October 1984

Dear Nicholas.

CORPORAL PUNISHMENT IN SCHOOLS

In my letter of 14 August I mentioned my intention of making a further report to the House about corporal punishment legislation during the spill-over period. George Younger subsequently confirmed that he was content with this arrangement and that he intended to make a simultaneous announcement regarding the position in Scotland.

I now attach, together with a copy of my earlier statement, a draft of the further report which I propose to make, and I should be grateful for any comments which you or copy recipients might wish to offer. It was always my intention to make this report through a pursuant Answer and I would prefer to keep to this, subject to John Biffen's views. But this does mean that it would be desirable to give the Answer by the end of this week.

I am copying this letter to the Prime Minister, Willie Whitelaw, Geoffrey Howe, George Younger, John Biffen, Norman Fowler and Douglas Hurd.

Yours ever,

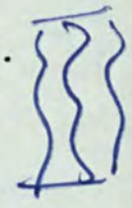
CORPORAL PUNISHMENT LEGISLATION

DRAFT PARLIAMENTARY QUESTION AND ANSWER

MR RICHARD RYDER (Mid Norfolk): To ask the Secretary of State for Education and Science, what plans he has in relation to corporal punishment in schools: and if he will make a statement.

SIR KEITH JOSEPH [Pursuant to his reply on 28 July 1983 (Col 545)]

My rt hon Friend the Secretary of State for Wales and I issued a consultative document on 28 July 1983 inviting comments on the practical issues involved in introducing arrangements which would allow parents to exempt their children from corporal punishment in schools. Over 100 organisations and individuals responded, and it is clear that there is concern about an exemptions system. We remain of the view, however, that decisions on the use of corporal punishment should be left to the schools themselves and informed by the views of parents.



After careful consideration of all the comments, we have concluded that the legislation envisaged in the consultative document should require schools to seek the views of parents of all children who might be subject to corporal punishment. The alternative of leaving the initiative to parents to make their wishes known to schools would involve too great a risk of mistakes and misunderstandings.

The legislation will apply to all maintained schools and to non-maintained special schools. It will also impose comparable obligations on independent schools in relation to local authority placements, to places in the Music and Ballet Scheme and to places provided under the Assisted Places Scheme.

We propose to introduce the necessary legislation in the next Session.

Poor quality text due to the nature of the material.

Image quality is best available.

Hansard 28/7/83 Vol 66 No 32
Col. 548

Corporal Punishment

Mr. Ryder asked the Secretary of State for Education and Science what plans he has in relation to corporal punishment in schools; and if he will make a statement.

Sir Keith Joseph: As a party to the European Convention on Human Rights since 1951 the Government are bound by the decisions of the European Court of Human Rights in any case under the convention to which they are a party. In the Campbell and Cosans case the court decided that where a parent holds a philosophical conviction against corporal punishment at school this must be respected by the state. My right hon. Friend the Secretary of State for Wales and I intend to give effect to the court's judgment in England and Wales proposing in due course legislation which will grant to parents who hold a conviction against corporal punishment the right to have their children exempted from corporal punishment in maintained schools. We believe that parents will exercise this right responsibly.

We are concerned to allow schools the maximum freedom, consistent with such a right of exemption, to employ for the maintenance of discipline such sanctions, including corporal punishment, as they judge to be appropriate. We also wish to maintain the tradition under which teachers act in loco parentis and concern themselves with the personal and social development of pupils; and to preserve the balance of responsibilities, in relation to school discipline, between LEAs, governors and head teachers.

There are several possible ways in which these objectives might be met. In order to develop a detailed scheme which can be embodied in legislation, my right hon. Friend and I will consult widely on the practical issues involved. We have today published a consultation document with a request for comments by 30 November 1983. Copies are available in the Vote Office. My right hon. Friend the Secretary of State for Northern Ireland will be issuing a similar document.

When these consultations have been completed we intend to make a further report to the House.

8.90

CONFIDENTIAL

CC (80)

NSPM

AT 2/8

Treasury Chambers, Parliament Street, SW1P 3AG
01-233 3000

30 July 1984

The Rt Hon Sir Michael Havers QC MP
Royal Court of Justice
LONDON
WC2A 2LL

Dear Michael

EUROPEAN CONVENTION ON HUMAN RIGHTS: SHIPBUILDING AND AIRCRAFT INDUSTRY CASES AND LEASEHOLD REFORM ACT CASE

I have seen a copy of your letter of 20 July and the Prime Minister's response.

As the proposal to adopt before the Court the Commission's argument on the question of obligation is calculated to achieve our main objective of not having to pay more compensation in these cases more easily than repeating the line we took at the Commission would do, I am, naturally, prepared to support it.

I am copying this letter to the Prime Minister, the Secretary of State for the Environment, the Secretary of State for Trade and Industry, the Foreign and Commonwealth Secretary and Sir Robert Armstrong.

Yours Nigel

NIGEL LAWSON

MW

CONFIDENTIAL

CC(84)

2 MARSHAM STREET
LONDON SW1P 3EB
01-212 3434

NMM
BT 3017

My ref: J/PSO/15750/84

Your ref:

30 JUL 84

Dear Michael,

EUROPEAN CONVENTION ON HUMAN RIGHTS:
SHIPBUILDING AND AIRCRAFT INDUSTRY CASES AND LEASEHOLD REFORM ACT CASE

Thank you for copying to me your letter of 20 July. As you know, the compensation issue was less central to the Leasehold Reform Act case than to the others. However, I agree with you that our approach needs to be consistent in both proceedings. I do not see that your proposed change of argument would seriously weaken the Government's case on the Leasehold Reform Act and I have no objection to it.

I am copying this letter to the Prime Minister, Geoffrey Howe, Nigel Lawson, Norman Tebbit and Sir Robert Armstrong.

Yours
Patrick

PATRICK JENKIN

The Rt Hon Sir Michael Havers QC MP

CONFIDENTIAL

EUROP. NOV 80

Human Rights

CONFIDENTIAL

P45 8H

10 DOWNING STREET

From the Private Secretary

30 July, 1984

Derogations from International Human Rights Instruments

The Prime Minister has considered the Northern Ireland Secretary's letter of 3 July to the Home Secretary on this subject, together with the comments by colleagues. She agrees that the notices of derogation from the UN Covenant on Civil and Political Rights and from the European Convention for the Protection of Human Rights and Fundamental Freedom should be withdrawn, despite the possible difficulties with Section 14(2) of the Northern Ireland (Emergency Provisions) Act 1978.

I am sending copies of this letter to the Private Secretaries to the Foreign Secretary, the Defence Secretary, the Secretary of State for Scotland, the Lord Chancellor, the Lord Advocate and the Attorney General and to Richard Hatfield (Cabinet Office).

C. D. POWELL

Graham Sandiford, Esq.,
Northern Ireland Office

CONFIDENTIAL

cc Home Office 1/8.

E.R.

CONFIDENTIAL

PRIME MINISTER

Derogations from International Human Rights Instruments

The Northern Ireland Secretary is proposing to withdraw or reduce our notices of derogation from the UN Covenant on Civil and Political Rights (CCPR) and from the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR). The derogations are made necessary by emergency legislation which we have in Northern Ireland.

A working group has concluded that the withdrawal of the notices of derogation would not put the UK at significantly greater risk of being found in breach of either of the Conventions, and would reduce the risk of criticism by the UN Human Rights Committee.

There is one particular problem in relation to soldiers' powers of arrest under Section 14(2) of the Northern Ireland (Emergency Provisions) Act. This power could be found to be in breach of the two Conventions if we withdraw our derogation. But the risk is regarded as small, and it is anyway the intention to legislate in due course to abolish the power. It is proposed therefore to withdraw the notices of derogation for this as well.

The Home Secretary, Defence Secretary, Lord Chancellor, Attorney General, Lord Advocate and Lady Young agree with Mr Prior's proposal.

Agree to withdrawal of derogations?

Yes

C.D.P.

27 July 1984

CONFIDENTIAL

NBPA CC(86)
AT 30/7

Foreign and Commonwealth Office

London SW1A 2AH

From The Minister of State

27 July 1984

Dear Michael,

Thank you for copying to Geoffrey Howe your letter of 20 July to Norman Tebitt. Geoffrey is overseas at present so I am replying on his behalf. I agree that we should adopt the change of line that you propose.

It is in my view likely that in any event the Court will adopt the interpretation placed upon Article 1 of the First Protocol by the Commission. It is close to the interpretation given already by the Court in its recent jurisprudence. That being so, we do not advance our case by continuing to maintain an argument which is, unfortunately, susceptible to misunderstanding and misrepresentation.

Like you, I do not believe that to change our posture in this way would involve an unacceptable compromise of any principle of interpretation of the Convention to which we have adhered, nor any unacceptable increase in the risk of losing these important cases.

I am copying this letter to the Prime Minister, the Secretary of State for Trade and Industry, the Secretary of State for the Environment, the Chancellor of the Exchequer and Sir Robert Armstrong.

Yours ever

Tony

Baroness Young

The Rt Hon Sir Michael Havers QC MP
Attorney-General
Law Officers' Department
Attorney-General's Chambers
Royal Courts of Justice
LONDON
WC2A 2LL

EUROPA NOV 80

Human Rights

CONFIDENTIAL

CC NO

Foreign and Commonwealth Office

London SW1A 2AH

From The Minister of State

26 July 1984

BF | PL await Home Secretary's reply.

Dear Tim,

DEROGATIONS FROM INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

You copied to Geoffrey Howe, who is now in Hong Kong, your letter of 3 July to Leon Brittan.

I agree with the conclusion of the inter-departmental Working Group and also with your comment that this demonstrates the extent to which we have been able to preserve civil and political freedoms in the face of a terrorist campaign designed in part to provoke just the reverse.

I agree that, in the light of this detailed review, we should now withdraw all of our notices of derogation under the two instruments. Our imminent report to the Human Rights Committee makes this particularly timely. The UN Human Rights Commission is also likely to give increasing attention to derogations and states of emergency. To retain our notices of derogation would provide those intent on exploiting and internationalising the problems of Northern Ireland with unnecessary ammunition for their cause. We have, thus far, been reasonably successful in heading off serious international criticism of the security measures necessary for Northern Ireland, although this has required intense diplomatic effort at times. Withdrawal of our derogations, as the paper points out, would not remove this danger but it would certainly make our task easier and would reflect more accurately the realities of the situation we now face.

/As.

The Rt Hon James Prior MP
Northern Ireland Office
Whitehall
LONDON
SW1A 2AZ

CONFIDENTIAL

As for Section 14(2) of the Northern Ireland (Emergency Provisions) Act 1978, there is a small risk of a successful case being brought against the United Kingdom at Strasbourg so long as Section 14(2) remains in being, but I believe that we should be prepared to live with this possibility for the sake of the substantial advantages of a clean withdrawal of the derogations.

I am copying this letter to the Prime Minister, Leon Brittan, Michael Heseltine, George Younger, Quintin Hailsham, Kenneth Cameron, Michael Havers and Sir Robert Armstrong.

Yours ever

Janet

Baroness Young

Gen Ass. Nov 80

Human Rights

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DEPARTMENT OF TRADE AND INDUSTRY
1-19 VICTORIA STREET
LONDON SW1H 0ET
TELEPHONE DIRECT LINE 01-215 5422
SWITCHBOARD 01-215 7877

Secretary of State for Trade and Industry

NRSPM

AT 27/7

26 July 1984

The Rt Hon Sir Michael Havers,
QC, MP
Attorney-General
Royal Courts of Justice
London WC2A 2LL

Dear Michael,

EUROPEAN CONVENTION ON HUMAN RIGHTS: SHIPBUILDING AND AIRCRAFT INDUSTRY CASES AND LEASEHOLD REFORM ACT CASE

Thank you for your letter of 20 July concerning the presentation of the legal arguments in the UK Government's defence before the European Court of Human Rights.

2 I agree with your suggestion that we should drop the argument previously used before the European Commission of Human Rights that the Convention itself did not impose any obligation to pay compensation. This is a delicate and complex argument to present and, bearing in mind that the proceedings before the Court will be in public whilst those before the Commission were in private, they could leave us open to misinterpretation of our motives. There would be also political advantages in ceasing to use this line of argument in the light of the recent criticism from some of our supporters to which you have referred.

3 Having said this, we cannot expect such a change of tactics to go unnoticed and it may itself give rise to some press comment at the time of the hearing. I suggest that we should present it as a decision to concentrate our case on those arguments which were endorsed by the European Commission's Report.

4 I am copying my letter to the Prime Minister, Nigel Lawson, Geoffrey Howe, Patrick Jenkin and to Sir Robert Armstrong.

Yours Norman

NORMAN TEBBIT

JH2AUV

EURO PA : Human Rights

Lord Advocate's Chambers
Fielden House
10 Great College Street
London SW1P 3SL

Telephone: Direct Line 01-212 Ext 0515
Switchboard 01-212 7676

NBPM 27/7

25 July 1984

Rt Hon James Prior MP
Secretary of State for Northern Ireland
Northern Ireland Office
London SW1A 2AZ

DEROGATIONS FROM INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Thank you for sending me a copy of your letter to the Home Secretary of 3 July.

I accept the reasons why you and the others whose responses I have seen think it right that these derogations should now be withdrawn. Doing so will, as has been observed, leave us at risk of challenge to the soldier's power of arrest without explanation under section 14(2) of the Emergency Provisions Act and, from the legal point of view, I would welcome anything which the responsible Ministers felt able to do to reduce the extent to which section 14(2) may be at variance with the UN Covernant and the European Convention.

I am copying this to the Prime Minister, Geoffrey Howe, Michael Heseltine, George Younger, Quintin Hailsham, Michael Havers and Sir Robert Armstrong.

CAMERON OF LOCHBROOM

Euro Pol Human Rights
NN 50

CONFIDENTIAL

HOME SECRETARY

QUEEN ANNE'S GATE LONDON SWIH 9AT

24 July 1984

Dear Jim,

DEROGATIONS FROM INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Thank you for your letter of 3 July giving your response to the recent report of the inter-departmental Working Group of officials. My initial reaction is, like yours, very sympathetic towards dispensing with these derogations. Whilst they are in existence not only does the United Kingdom stand in bad company as you mention, but it also casts doubt upon our traditional championship of human rights, bearing in mind that other countries - particularly those in the Communist bloc - do not bother to enter derogations.

I would only add that I hope if we are to drop these derogations we can do so in toto. The 'soldier's powers of arrest' is, of course, an issue primarily for you and Michael Heseltine; but were we to preserve a derogation to take account of it - and hence draw attention to it - we might well lose the advantage gained by dropping the other derogations. In this connection I very much agree with Michael Havers that we will need to look very carefully at the presentation of the decision to withdraw our notices.

I am copying this to the Prime Minister, Geoffrey Howe, Michael Heseltine, George Younger, Quintin Hailsham, Kenneth Cameron, Michael Havers and Sir Robert Armstrong.

Yours ever,

Leon

The Rt Hon James Prior, MP

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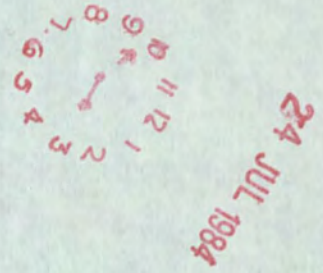
NOV 80



CONFIDENTIAL

bc. Mr. Owen SH

10 DOWNING STREET

From the Private Secretary

24 July 1984

Dear Henry,

European Convention on Human Rights: Shipbuilding and Aircraft Industry Cases and Leasehold Reform Act Case

The Prime Minister has seen the Attorney General's letter of 20 July to the Secretary of State for Trade and Industry. She agrees that the change in the basis of our defence would be better for the conduct of the case and would be more consistent with the Government's philosophy. She much prefers to base the case not on a denial of the Government's obligation to pay compensation but on acceptance of that obligation plus assertion that the compensation actually paid was adequate.

I am copying this letter to Callum McCarthy (Department of Trade and Industry), John Ballard (Department of the Environment), David Peretz (H M Treasury), Len Appleyard (Foreign and Commonwealth Office) and Richard Hatfield (Cabinet Office).

Yours sincerely

Andrew Turnbull

Andrew Turnbull

Henry Steel, Esq., CMG, OBE

CONFIDENTIAL

10 DOWNING STREET

Prime Minister (1)

The Attorney General wishes to change the basis of our defence in the European Court case on Shipbuilding and Aircraft Industry nationalisation. Instead of arguing that the Government has no obligation to pay compensation he would prefer to argue, as the Commission have done, that there is an obligation to compensate, but that the amount paid was within the range which could be considered reasonable. The AG believes that the disadvantage of changing our stance is outweighed by adopting a stance which is consistent with Government philosophy.

Agree? Mrs Thatcher AT

Yes mh. 23/7

CONFIDENTIAL

CC(70)

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

ATTORNEY GENERAL

01-405 7641 Extn 3201

20 July 1984

The Rt Hon Norman Tebbit MP
Secretary of State for Trade and Industry
1 Victoria Street
LONDON S W 1

Dear Secretary of State,

EUROPEAN CONVENTION ON HUMAN RIGHTS : SHIPBUILDING AND AIRCRAFT INDUSTRY CASES AND LEASEHOLD REFORM ACT CASE

As you know, the European Commission of Human Rights, having in effect found in our favour on the Nationalisation Cases, has referred its Report to the European Court of Human Rights. The Court has set 31 October as the time limit for the submission of our Memorial. The Leasehold Reform Act Case, in which the Commission has also found in our favour on substantially the same grounds, has now also been referred to the Court. The Court has not yet fixed a time for the submission of our Memorial in that case but it is very probable that the two sets of cases will in due course be taken together by the Court as they were by the Commission. In any event, we clearly have to run the same arguments in both proceedings. Although, therefore, the matters which I am putting to you and to other colleagues in this letter are discussed, for convenience of exposition, in terms of the Nationalisation Cases only, the decisions which we take on them will necessarily apply to the Leasehold Reform Act Case as well.

The principal issue in the proceedings before the Commission was whether the Convention imposed on us any obligation to pay compensation for the nationalisation of the Applicants' property and, if so, whether the compensation actually paid satisfied that obligation. The case

/against

CONFIDENTIAL

against us as put forward by the Applicants was that such an obligation derived from the reference in the relevant provision of the Convention to "the general principles of international law" and that the test of the sufficiency of the compensation was therefore the international law test of "prompt, adequate and effective". We denied that the general principles of international law did apply in cases of this kind and therefore that the Convention itself imposed any obligation on us to pay compensation, though we were careful at all times not to argue that it would ever be justifiable to nationalise property without compensation. In the event, the Commission, while upholding our arguments on the case advanced by the Applicants (i.e. on their contention that we were bound by an obligation deriving from the general principles of international law), held that the Convention did impose an obligation to pay compensation but that this had a different derivation. The Commission concluded that "... a right to compensation for the taking of property is inherent in Article 1 in so far as the payment of compensation may be necessary to preserve the appropriate relationship of proportionality between the interference with the individual's rights and the 'public interest'." When, however, the Commission turned to the question whether the compensation which had actually been paid in these cases was sufficient to satisfy this obligation, they again found in our favour. Their conclusion on this point was expressed as follows: "Having regard to the wide margin of appreciation left to States in this area, a violation of Article 1 could only be held to arise from absence or inadequacy of compensation if it were clearly established that there was a real and substantial disproportion between the burden imposed on the individual and what could reasonably be considered justifiable in the light of the public interest objectives

/being

being pursued by the national authorities".

It is against this background that we now have to decide, urgently, what line we are going to adopt on this particular issue in our case before the Court and therefore in our written Memorial. In ordinary circumstances, the natural course would be to repeat the arguments which we advanced before the Commission and therefore maintain that the Convention imposed no obligation upon us at all to pay compensation in these cases. Our hope would be either that the Court would find our arguments on that point more persuasive than the Commission did or that they would, so to speak, do no more than put us back to the same position as the Commission reached, i.e. they would reject our denial of any obligation at all deriving from the Convention but endorse the Commission's view of the nature and limited scope of that obligation and also endorse the Commission's assessment that we had in practice discharged it. If we did adopt this course, we should avoid the embarrassment of having to explain a change of posture on this major (and, as it turned out, very controversial) issue in the proceedings - a change that would probably be represented as having been induced solely by the criticism that was levelled at us by some of the Government's own supporters during the course of the proceedings before the Commission and when the Commission's Report was published.

Nevertheless, I myself would favour making such a change of posture. I would favour explicitly abandoning our denial of any obligation under the Convention to pay compensation and adopting as our own the interpretation of the Convention which the Commission itself enunciated. I see a number of advantages in this which seem to me to outweigh the embarrassment of explaining why we have now come

/to

to a different view of the law from the one we strongly argued for at the earlier stage of the case.

The first advantage is, so to speak, a matter of forensic tactics. If, whatever arguments we use, we can persuade the Court in the end to accept the same conclusion as the Commission, we shall have attained our major objective, i.e. an authoritative finding that we are not in breach of our international obligations and that we are not bound to pay any more compensation. My assessment is that this objective will be more easily achieved if we ourselves espouse the Commission's arguments, since I judge that the Court will regard them as producing a reasonable and attractive interpretation of the Convention and we shall therefore have a more sympathetic hearing on the other aspects of the case. There is also the consideration that we shall find ourselves arguing before the Court in harmony with the Commission's representatives rather than in opposition to them. It is the Applicants who will then be isolated.

The second advantage is that the change of posture will make the Government less vulnerable to the painful and politically damaging (although unfair) criticism from our own supporters which we have recently encountered. That criticism has been to the effect that it is surprising to find a Conservative Government and a Conservative Attorney General contending that it is legitimate, at least so far as the Convention is concerned, for a State to seize the property of its own nationals without paying compensation. So long as there are respectable arguments which I can put forward in good conscience for that purpose - and the arguments which we advanced before the Commission were perfectly respectable - I am prepared to defend whatever policy position my colleagues think it right to adopt,

/but

but I have to say that I personally would welcome not having to argue any longer that there is no obligation under the Convention to pay compensation for nationalised property in cases of this kind.

The third advantage is that the interpretation put forward by the Commission helps to steer the jurisprudence of the Convention on this particular issue in a direction which seems to me to be positively beneficial from the point of view of its further development and it does so in a way which does not unduly prejudice the canons of interpretation (e.g. reliance on the intentions of the original contracting parties and on the travaux preparatoires) which we favour in other cases. In more concrete terms, the Commission's interpretation of the relevant provision, though arguably not entirely in accord with the intention of the parties when it was adopted, does make better sense of it, or at least produces a more attractive result, than the interpretation originally intended.

Finally - and this is linked with both the second and third advantages - the Commission's interpretation, if it becomes the authoritative interpretation, will help to establish the Convention as an effective safeguard against any attempt by a future Socialist Government in this country to nationalise or re-nationalise property without paying any compensation at all. That is an objective to which we all attach importance (and so will our supporters outside Government) and I think that it can be achieved in this case, if the Court does endorse the Commission's findings, without our having to pay the price of the United Kingdom being once again found to have violated its Convention obligations or of the Government having to meet the financial demands of the Applicants with all the consequences that flow from that.

/I

ATTORNEY GENERAL

I therefore hope that you and the other recipients of this letter will agree that we should adopt the change of posture that I have suggested. I am very anxious that work on the Memorial should be pursued as fast as possible - indeed, this is essential if we are to meet the timetable set by the Court - and I should therefore like to give our Counsel their Instructions (I hope in the sense I have suggested) in time for them to start work in the very near future: if possible as soon as the present law term closes at the end of this month. In order that this time-table can be adhered to, I should be grateful for your very early concurrence.

I am copying this letter to the Prime Minister, the Secretary of State for the Environment, the Chancellor of the Exchequer, the Foreign and Commonwealth Secretary and Sir Robert Armstrong.

Yours sincerely,

Henry Stark

for

MICHAEL HAVERS

(Approved by the Attorney General and signed on his behalf)

CONFIDENTIAL

CCNO

PL amend
HS' reply

MINISTRY OF DEFENCE WHITEHALL LONDON SW1A 2HB

TELEPHONE 01-218 9000
DIRECT DIALLING 01-218 2111/3

MO 21/8/5

19th July 1984

Dear Jim

DEROGATIONS FROM INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Thank you for copying to me your letter of 3rd July about the inter-departmental Working Group report on the UK's derogation from the UN and European Human Rights Instruments.

I agree with the main conclusion of the Working Group's report, that we should drop our notices of derogation. There is obvious advantage in going as far as we can in withdrawing them. My particular difficulty is, of course, what we should do in respect of Section 14(2) of the Northern Ireland (Emergency Provisions) Act 1978.

I should sound a note of warning about the ease with which we could discontinue section 14(2) and issue new operational instructions for soldiers. A soldier in Northern Ireland must have a quick and simple way of effecting a legal arrest. He does not have the benefit of the training and expertise of police officers in satisfying the normal requirements for the law when making an arrest, and I am concerned that a new formula which required the soldier to operate in a manner more akin to a police officer could be both operationally and politically hazardous. In dealing with crowd disturbances or more serious incidents the uncertainty which a young inexperienced soldier might feel about the proper basis for making an arrest could lead to hesitation on his part which, in turn, could result in loss of control. I am also wary of the political and PR implications of an increased number of technically false

The Rt Hon James Prior MP

arrests and the criticism this could attract that the Army was abusing its powers.

For these reasons, I am not convinced that the time is right to amend soldiers' powers of arrest in Northern Ireland. To do so could have most unwelcome operational consequences. Nevertheless, the risk of us being found in breach of our obligations if we withdraw our derogations does not seem high enough to outweigh the clear advantages of making a clean sweep of them. I therefore agree with your proposal that we should withdraw the notices, leave Section 14(2) as it is, and live with the consequences. But we should do so in the knowledge that there is no easy fall-back position if a case against us succeeds.

I am sending copies of this letter to the Prime Minister, Geoffrey Howe, Leon Brittan, George Younger, Quintin Hailsham, Kenneth Cameron, Michael Havers and Sir Robert Armstrong.

Yours ever

Michael Heseltine

Euro Pol 11/80

Human rights

CONFIDENTIAL

HOUSE OF LORDS,
SW1A 0PW

16 July 1984

My dear Jim:

DEROGATIONS FROM INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Thank you for sending me a copy of your letter of 3rd July 1984 to Leon Brittan on this difficult subject which I think could prove embarrassing if it were to be considered by the European Court on Human Rights.

I have also seen and agree with Michael Havers' reply of 16th July 1984 in which he supports your proposed line but favours giving very careful attention both to presentation of the withdrawal of the derogations and to Sir George Baker's recommendations on section 14(2) of the Emergency Powers Act.

Yrs:

The Right Honourable
James Prior, M.P.,
The Secretary of State
for Northern Ireland.

CONFIDENTIAL

DISTRIBUTION LIST

The Prime Minister

The Secretary of State for Foreign and Commonwealth Affairs

The Secretary of State for the Home Department

The Secretary of State for Defence

The Secretary of State for Scotland

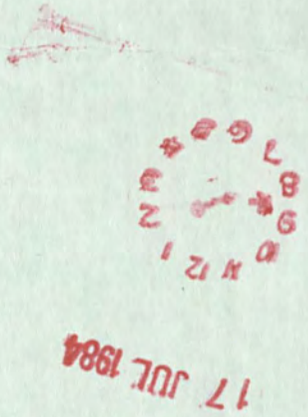
The Attorney General

The Lord Advocate

The Secretary to the Cabinet

Euro Pn Nov 80

Human Rights Convention



CONFIDENTIAL

cc NO

Mr Powell
Aspects of
Law

16 July, 1984

Dear Jim.

DEROGATIONS FROM INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Thank you for sending me a copy of your letter to the Home Secretary containing your response to the report prepared by an interdepartmental Working Group of officials on the issue of derogations from the UN Covenant on Civil and Political Rights (CCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

I have studied the Working Group's Report and am content with the conclusions. I am also in agreement with your recommendation that we should withdraw the notices of derogation and leave s.14(2) of the EPA as it is. There is however clearly a risk that we would be found to be in breach of Article 9(2) of the CCPR and Article 5(2) of the ECHR. I therefore very much support your recommendation that we should aim to reduce our exposure to the risk by expediting the consideration of Sir George Baker's recommendations on this point. It would also be highly desirable, in my view, to discontinue section 14(2) and/or introduce new operational instructions for soldiers which would make any breach of the Convention or Covenant unlikely.

I think we may need to look carefully at the presentation of the withdrawal of our notices of derogation. I have some doubts as to the wisdom of proclaiming publicly the comfort we derive from the Strasbourg jurisprudence on Article 5 in relation to the PTA. The cases under that Article failed on somewhat technical grounds. It might invite further challenges if we were to make too much of this jurisprudence (see paragraph 24 of the Working Group's Report).

/I am

CONFIDENTIAL

I am copying this letter to the Prime Minister, Geoffrey Howe, Leon Brittan, Michael Heseltine, George Younger, Quintin Hailsham, Kenneth Cameron and Sir Robert Armstrong.

Yours ever. Michael.

The Rt Hon James Prior MP
Secretary of State for Northern Ireland
Northern Ireland Office
Whitehall
London, SW1A 2AZ

EURO POL: Human Rights: Nov 84.

D5CON18

CONFIDENTIAL

2

DEPARTMENT OF EDUCATION AND SCIENCE

ELIZABETH HOUSE, YORK ROAD, LONDON SE1 7PH

TELEPHONE 01-928 9222

FROM THE SECRETARY OF STATE

5 July 1984

Dear George,

CORPORAL PUNISHMENT IN SCHOOLS

Thank you for your letter of 21 June about your intended announcement on corporal punishment in schools in Scotland.

As the effect of your announcement will be simply to parallel what is already public knowledge in relation to the rest of the United Kingdom, I see no reason why it should cause me any difficulty. I am inclined to delay, however, my own further announcement until we have made up our minds about the arrangements for the independent sector.

I am copying this letter to those who received copies of yours, and to Jim Prior.

Yours.

Keith.

The Rt Hon George Younger MP
Secretary of State for Scotland
Dover House
Whitehall
London SW1A 2AU

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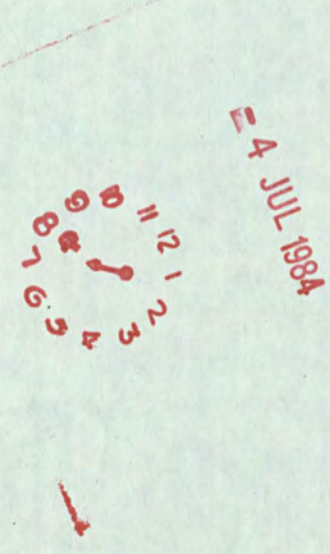
EURO POL: Human Rights
Nov 80



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CS/NO

NORTHERN IRELAND OFFICE
WHITEHALL
LONDON SW1A 2AZ

SECRETARY OF STATE
FOR
NORTHERN IRELAND

Awaiting views of Home Secretary, FCS & Lord Chancellor.
CDP

The Rt Hon Leon Brittan QC MP
Home Office
Queen Anne's Gate
London SW1

3 July 1984

Dear Leon

DEROGATIONS FROM INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

I am writing to you as the Cabinet Minister with lead responsibility for human rights issues generally to let you know of my response to the report prepared recently by an inter-departmental Working Group of officials on the issue of our notices of derogation from the UN Covenant on Civil and Political Rights (the CCPR) and from the European Convention for the Protection of Human Rights and Fundamental Freedom (the ECHR).

These notices of derogation refer to the emergency legislation made necessary by the situation in Northern Ireland - the Northern Ireland (Emergency Provisions) Act 1978 and the Prevention of Terrorism (Temporary Provisions) Act 1984. I am encouraged by the Working Group's conclusion that the withdrawal of the notices of derogation should not - save for one minor exception - put the United Kingdom at significantly greater risk of being found in breach of either the CCPR or the ECHR. The fact that a study of our emergency legislation can produce this conclusion is a tribute to the extent of the United Kingdom's concern to preserve human rights even in the face of a vicious and prolonged terrorist campaign.

I hope we can take advantage of the Group's conclusions to withdraw - or at least substantially reduce - our notices of derogation. This would reflect more fairly the United Kingdom's reputation in the field of human rights generally and improve the international perception of human rights in Northern Ireland in particular. As the report explains, the withdrawal of our notices of derogation would reduce the risk of criticism by the UN Human Rights Committee which will soon be considering our compliance with the CCPR on the basis of a report which needs to be submitted in August; it would also get us out of some bad company - Chile, Uruguay, Nicaragua and Peru.

In the first place we need to agree on the group's conclusions. I support them but I should be grateful to know that you and other recipients of this letter, and in particular Michael Havers, are content.

/...

CONFIDENTIAL

Secondly, we need to decide how to deal with the difficulty which the group has identified as arising from Section 14 (2) of the Northern Ireland (Emergency Provisions) Act 1978 which says that a member of HM Forces arresting a person for up to 4 hours under Section 14 (1) complies with any rule of law requiring him to state the ground of arrest if he states that he is effecting the arrest as a member of Her Majesty's Forces. As the report concludes, there is a risk that the exercise of this power in this way would give rise to a breach of Article 9 (2) of the CCPR and Article 5 (2) of the ECHR.

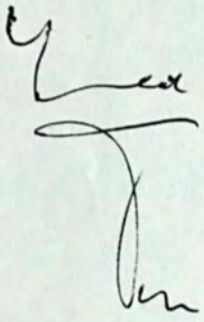
As you probably know, Sir George Baker, in his recent review of the Northern Ireland (Emergency Provisions) Act said that he doubted whether Section 14 (2) was really necessary (albeit in the context of changes to the arrest power itself in Section 14 (1)) and we must certainly bear in mind during our consideration of his report the additional benefits which would flow from a decision to repeal, discontinue or amend Section 14 (2). That consideration will require extensive consultations, and faced with the need to make a decision before August we are effectively offered two choices: to withdraw the notices of derogation, leave Section 14 (2) as it is and live with any consequences; or to enter revised notices of derogation limited solely to Articles 9 (2) of the CCPR and Article 5 (2) of the ECHR.

The latter option seems to me to be unattractive. It would draw attention to the power; greatly diminish the credit we could expect for withdrawing the vast majority of our notices of derogation; and would still require us to demonstrate that a state of emergency threatening the life of the nation existed in the UK and that our derogation met all the other criteria.

In the light of this I think we should accept whatever risks the first option carries. The arrest power is not arbitrary: the soldier concerned must have genuine 'suspicion' that 'an offence' has been or is about to be committed and this can be tested in court. And even so the arrest can only last a maximum of 4 hours so it is hardly draconian. If the worse came to the worse and a case was successfully brought against the UK in Strasbourg we would have to consider amending or dropping the power: but it is not a crucially significant part of the emergency powers and its repeal or amendment has already been suggested by Baker, so an adverse finding would not cause us too many difficulties. If we decide to take this course, however, I believe we should aim to reduce our exposure to the risk of being found in breach of the Covenant or Convention by expediting the consideration of Sir George Baker's recommendations on this point: even though the legislation which would be necessary to repeal Section 14 (2) or amend the Act could not be introduced for some considerable time we could discontinue Section 14 (2) at any time and/or agree on new operational instructions for soldiers which would make any breach of the Covenant or Convention unlikely.

I should be grateful to know if colleagues are content that we should drop our notices of derogation in respect of these two instruments, despite the difficulty with Section 14 (2) of the EPA. If colleagues think it helpful I would of course be happy to attend a meeting to discuss the issues further before a final decision is reached.

I am sending copies of this letter to the Prime Minister, Geoffrey Howe, Michael Heseltine, George Younger, Quintin Hailsham, James Mackay, Michael Havers and Sir Robert Armstrong.



SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

CONFIDENTIAL

The Rt Hon Sir Keith Joseph Bt MP
Secretary of State for Education and Science
Department of Education and Science
Elizabeth House
York Road
LONDON
SE1 7PH

21 June 1984

Dear Keith,

CORPORAL PUNISHMENT IN SCHOOLS

I understand that you intend to announce shortly your proposals for legislation to allow parents of pupils in maintained schools in England and Wales the option to exempt their children from corporal punishment but that you have still to decide on what action, if any, should be taker with regard to pupils in assisted places.

I too will have to announce similar intentions and ideally we should make the announcements simultaneously. However, I fear that waiting for decision on assisted places pupils, on which I think we must be agreed, is likely to pose difficulties for me. As you know I have, in pursuit of voluntary action by Scottish education authorities, suggested publicly on a number of occasions that I considered the end of the 1983/84 school session this month to be a reasonable target date for completion of the process of voluntary elimination. If I do not make an announcement before the end of June it seems to me to be very likely that I shall have to face Questions anyway about the position in Scotland. In doing so I do not think I could avoid making clear my intention to introduce legislation.

Naturally I would prefer to announce my intentions in the normal manner by reply to an Arranged Question and I propose to do so as soon as possible. This will doubtless mean leaving aside the question of the assisted places pupils but, in the circumstances, this is unavoidable. I do not in any event think that it is vital to say anything at this stage about the assisted places scheme. I am enclosing for your information the text of what I propose to say.

I hope you will feel able to make your announcement simultaneously and, if so, our officials can make the necessary arrangements. If on the oth hand you prefer to delay your announcement I hope you will accept that what I propose will not cause you any difficulty particularly since your intention to legislate was made clear in the consultation document you issued last year.

I am copying this letter to the Prime Minister, the Lord President of the Council, the Lord Chancellor and Nicholas Edwards.

Yours ever,

George.

ANNEX A

DRAFT ARRANGED QUESTION AND ANSWER

---------- to ask the Secretary of State for Scotland what is the position with regard to compliance in Scotland with the judgement of the European Court of Human Rights in the case Campbell and Cosans v. the United Kingdom concerning the use of corporal punishment in schools; and if he will make a statement.

SUGGESTED REPLY:

Compliance with the Court's judgement means that there must be respect in schools for the philosophical convictions of parents against the use of corporal punishment. It remains my view that this would be best secured by completion of the voluntary process of elimination of corporal punishment in education authority schools which has been the long standing general aim in Scotland. Most education authorities have taken positive steps to this end, though not all will meet the target date of the end of the 1983/84 school session which I suggested. I will continue to press those few authorities which have not yet taken steps to eliminate corporal punishment in their schools to do so.

Most education authorities have also taken measures to ensure that, until the process of elimination is completed, there will be respect in their schools for the philosophical convictions of parents against the use of corporal punishment. The Court's judgement is binding upon the Government and I have decided that it is now right for me to take steps to support those authorities which have already acted and to ensure through legislation ~~minimum~~ compliance throughout Scotland with the judgement.

It is therefore my intention to introduce ~~as soon as possible~~ when Parliamentary time permits a Bill to provide for parents of pupils in education authority schools to have the option to exempt their children from corporal punishment.

PRIVY COUNCIL OFFICE
WHITEHALL. LONDON SW1A 2AT

18 May 1984

Dear George

CORPORAL PUNISHMENT IN SCHOOLS

Thank you for your letter of 16 May in which you say that you would like next Session's legislation to cover Scotland as well as England and Wales.

Whilst none of us has any illusions about the controversy this Bill will arouse, I am glad that you agree that there is no defensible alternative to legislation on the lines proposed by Keith Joseph. Unless any colleagues register objections in the next day or two, you and Keith may take it that you have H Committee's agreement on the content of the legislation. In my capacity as Chairman of QL Committee, I am content that this should all be dealt with in one Bill. I hope that it will still be possible to meet the objective of introduction at the beginning of the Session and I should be grateful if you would ensure that instructions relating to the Scottish provisions are prepared as soon as possible.

I am sending copies of this letter to the Prime Minister, the members of H and QL Committees, to First Parliamentary Counsel, and to Sir Robert Armstrong.

Yours

Willie

The Rt Hon George Younger TD MP

DES

MR LIGGEY

MR GLUCKMAN

MR LOLLEY

MISS BROWN

MR ULRICH

CO

PS

MR BIRD
MR MALSEY
SCI
MR JAMESON
MR STUART
CI MR LORD
MR GAISH
MR MORGAN
MR PORTER
MR INGHAM
MR WALMSLEY

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17

PRIVY COUNCIL OFFICE
WHITEHALL. LONDON SW1A 2AT

30 April 1984

Dear Keith

CORPORAL PUNISHMENT

Thank you for your letter of 12 April about the form of next Session's legislation to meet the ECHR judgement on corporal punishment in schools. I have also seen the letters of 13 April from George Younger and 17 April from the Prime Minister's Private Secretary.

I see that George Younger has doubts abut the wisdom of legislating at all. I must say that I do not see how the Government can meet the undertaking to the ECHR without taking such action in respect of England and Wales, and I should have thought the issue we face now is not whether to legislate but what the precise effect of the legislation should be. It may well be that the position remains different in respect of Scotland, though if the voluntary movement towards abolition of corporal punishment (which memorandum H(83) 14 indicated was due to be completed by the end of the 1983/84 school session) has run into the ground I am not clear how Scotland is going to comply with the judgement without legislation. I gather that you have it in mind to discuss the issues with George Younger during the coming week, and it would be helpful if you could let the Committee know your conclusions. If George still considers that legislation should be avoided, or you both think it should take a different form from what you have so far advocated, I think you will have to bring the matter back to a meeting of H Committee.

I am sending copies of this letter to the Prime Minister, other members of H Committee, to the Attorney General and the Lord Advocate, and to Sir Robert Armstrong.

Yours

The Rt Hon Sir Keith Joseph Bt MP

RESTRICTED

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NORTHERN IRELAND OFFICE
WHITEHALL
LONDON SW1A 2AZ

SECRETARY OF STATE
FOR
NORTHERN IRELAND

The Rt Hon Sir Keith Joseph BT MP
Department of Education and Science
Elizabeth House
York Road
LONDON
SE1 7PH

30 April 1984

Dear Keith

CORPORAL PUNISHMENT

Thank you for copying to me your letter of 12 April to Willie Whitelaw.

As you probably know the legal position regarding corporal punishment is much the same in Northern Ireland as in England and Wales and we issued a consultative document, based on yours, to the various interests there. The reaction was similar to that in England and Wales; most of those who responded criticised the proposed exemptions scheme as unworkable. I also received a Report from the Northern Ireland Assembly supporting corporal punishment in schools and making a number of recommendations. A copy of that Report and a summary of the other comments received has been sent to your Department.

Since the position is similar here and since we would not wish a Northern Ireland case to cause embarrassment for the Government at the European Court of Human Rights, we will seek to introduce legislation for Northern Ireland on the same lines as you propose for England and Wales. A separate Northern Ireland Education Order will allow some account to be taken of local views and we do not have your problem of extending the legislation to certain pupils in independent schools. There are only a few independent schools here and the education and library boards do not normally place children in them. However some children from Northern Ireland are placed in independent special, music and ballet schools in England and Wales and it would probably be preferable for your Bill to extend the exemption arrangements to those children rather than for a Northern Ireland Education Order to seek conditions on schools in England and Wales.

/...

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Perhaps we could pursue this point when the detailed drafting is under way.

I am copying this to those who received copies of your letter.

DES

MR LIDDY

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MR MORGAN

MR PORTER

MR INGHAM

MR WALMSLEY

KL

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NORTHERN IRELAND OFFICE
WHITEHALL
LONDON SW1A 2AZ

SECRETARY OF STATE
FOR
NORTHERN IRELAND

The Rt Hon Sir Keith Joseph BT MP
Department of Education and Science
Elizabeth House
York Road
LONDON
SE1 7PH

30 April 1984

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/...

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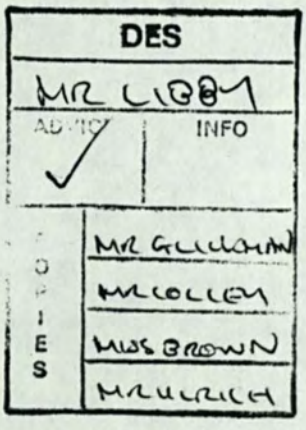
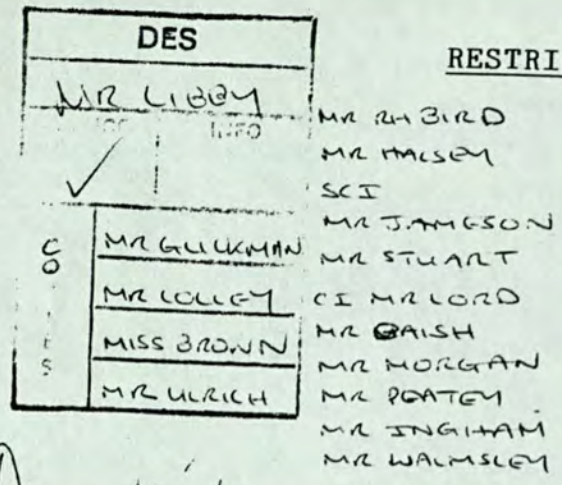


MR RICHARD
MR HALSEY
SCI
MR JAMESON
MR STUART
CI MR LORD
MR BALSTI
MR MORGAN
MR PORTER
MR INGHAM
MR WALMSLEY

KL



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PRIVY COUNCIL OFFICE
WHITEHALL. LONDON SW1A 2AT

30 April 1984

Dear Keith

CORPORAL PUNISHMENT

Thank you for your letter of 12 April about the form of next Session's legislation to meet the ECHR judgement on corporal punishment in schools. I have also seen the letters of 13 April from George Younger and 17 April from the Prime Minister's Private Secretary.

I see that George Younger has doubts abut the wisdom of legislating at all. I must say that I do not see how the Government can meet the undertaking to the ECHR without taking such action in respect of England and Wales, and I should have thought the issue we face now is not whether to legislate but what the precise effect of the legislation should be. It may well be that the position remains different in respect of Scotland, though if the voluntary movement towards abolition of corporal punishment (which memorandum H(83) 14 indicated was due to be completed by the end of the 1983/84 school session) has run into the ground I am not clear how Scotland is going to comply with the judgement without legislation. I gather that you have it in mind to discuss the issues with George Younger during the coming week, and it would be helpful if you could let the Committee know your conclusions. If George still considers that legislation should be avoided, or you both think it should take a different form from what you have so far advocated, I think you will have to bring the matter back to a meeting of H Committee.

I am sending copies of this letter to the Prime Minister, other members of H Committee, to the Attorney General and tne Lord Advocate, and to Sir Robert Armstrong.

Yours

The Rt Hon Sir Keith Joseph Bt MP

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NEW ST. ANDREWS HOUSE
EDINBURGH EH1 3SX

CONFIDENTIAL

The Rt Hon Viscount Whitelaw PC CH MC
Lord President of the Council
Privy Council Office
Whitehall
London
SW1A 2AT

16 May 1984

Dear Willie,

CORPORAL PUNISHMENT

In your letter of 30 April to Keith Joseph, which you copied to me, you asked to be informed of the outcome of my discussion with him about legislation on corporal punishment in schools. You also suggested that, if we now intended that legislation should take a different form from what we had so far advocated, the matter should be brought back to H Committee.

As you know it has, since 1968, been the general aim in Scotland that corporal punishment should be abolished in education authority schools and I have made it clear on a number of occasions, before and since the ECHR judgement, that I expected the process of voluntary abolition to be completed by the end of the current school session. It had been my intention to legislate to confirm this action and to extinguish the common law right of teachers in Scotland to administer moderate and reasonable corporal punishment. I had hoped to do so in a non-controversial atmosphere after abolition had been achieved throughout Scotland, but in March 1983 H Committee authorised me to announce my intention if it proved difficult to secure the co-operation of the education authorities.

In the event progress has been satisfactory in most authorities, though some will not meet my suggested deadline, but three - Borders, Grampian and Tayside - are proving difficult. Borders has rejected abolition, Grampian has said that abolition will be considered only if the Government allocate additional resources to meet what the authority sees as the cost of administering alternative sanctions in schools, and Tayside, whilst agreeing to abolition in primary schools, seems unlikely to extend this to secondary schools unless additional resources are allocated.

So far as minimum compliance with the ECHR judgement is concerned this has been secured in all authorities with the exception of Grampian where it is clear that nothing will be done unless the Government acts either to legislate or to provide additional resources on a scale which we cannot contemplate.

I am, therefore, reluctantly persuaded that, in order to demonstrate to the Committee of Ministers of the Council of Europe that positive steps are being taken to ensure compliance with the ECHR judgement, I must make an early announcement of my intention to legislate. It has, however, become increasingly clear to me that legislation to abolish corporal punishment would be very unpopular with many of our supporters in Scotland. I therefore propose to join in Keith Joseph's Bill so that parents in Scotland, as well as in England and Wales, would be able to exempt their children from corporal punishment in school. This can be presented as the unavoidable minimum to secure compliance with the ECHR judgement and as not incompatible with the continuation of the longstanding policy in Scotland, that of voluntary abolition. Indeed, as Keith recognises, the likelihood is that individual schools, if not the three remaining Regional Councils, will be encouraged by the difficulties of operating a system of exemptions to go further and opt for abolition.

Keith has agreed to the extension of the Bill to cover Scotland and if you and members of H Committee concur I shall proceed on this basis. My officials will go ahead with those in DES with the preparations for the legislation and an early announcement of intention.

I am sending a copy of this letter to the Prime Minister, colleagues on H Commmittee, the Attorney General and the Lord Advocate, and Sir Robert Armstrong.

Yours ever,

George

cc MRS TURP
MR COLLUM
MR JEFFERY
MR LUCAS
MR RUTHERFORD
MR HUTSEN
SCI
MR JAMESON
MR STUART
CI MR LORD
MR BAISH
MR MORGAN
MR PEATEY
MR INGHAM
MR WALMSLEY

DEPARTMENT OF EDUCATION AND SCIENCE

ELIZABETH HOUSE, YORK ROAD, LONDON SE1 7PH

TELEPHONE 01-928 9222

FROM THE SECRETARY OF STATE

12 April 1984

Dear Willie.

CORPORAL PUNISHMENT

As I mentioned to you recently, we have been studying reaction to the consultative document issued jointly last Summer by this Department and the Welsh Office Education Department on the use of corporal punishment in schools. The document, you will recall, expressed our intention to allow maintained schools in England and Wales to retain corporal punishment as a sanction but, in order to comply with a judgment of the European Court of Human Rights in 1982, undertook to give parents the right to exempt their children from such punishment.

The primary purpose of the document was to seek views on the practical implications of an exemptions scheme. As I anticipated, the scheme was criticised on the grounds that having two kinds of pupils in a school - those who can be given corporal punishment and those who cannot - will cause difficulties. Indeed, the criticism was so strong that I suspect that many schools will not give the scheme even a chance to get off the ground; they will sidestep the legislation by banning corporal punishment altogether.

On the basis of replies to the consultative document and of informal soundings, and bearing in mind that a number of local education authorities have already banned corporal punishment in schools throughout their areas, an informed guess would be that, even before the legislation took effect, the sanction would have been withdrawn except in a small minority of schools. So, for the sake of a comparatively small number of institutions (possibly five to ten per cent), we would be taking through the House a Bill which even some of our supporters will attack on the grounds of impracticality.

/My own

The Rt Hon Viscount Whitelaw PC CH MC
Lord President of the Council
68 Whitehall
London SW1A 1AT

My own views on this are unchanged. I believe that the public at large is not opposed to corporal punishment in schools and that, within the limits set by the European Court of Human Rights, we should give schools the right to choose whether they wish to use it or not. We shall be criticised for bringing in the scheme but it seems to me that we should be even more criticised if we actually banned the practice, removing all choice. I felt, however, that I should warn colleagues that we can expect the Bill to receive a stormy reception next Session, and at the end we could see corporal punishment disappear from all but a minority of maintained schools. I am more sanguine about being able to leave independent schools with a free choice on this issue, because for these schools our intention is to confine the impact of exemption arrangements to those children who are placed there by local education authorities or through the Assisted Places or similar Schemes.

I am copying this to the Prime Minister, members of H Committee, the Attorney General and Sir Robert Armstrong.

Yours ever,

Kenneth.

CC MR GLICKMAN
MR COLLEY
MISS BROWN
MR ULRICH
MR BIRD
MR HALSEY
SCI
MR COLEMAN
MR JAMESON
MR STUART
CI MR LORD
MR BAISH
MR INGHAM
MR WALMSLEY
MR SERTON

NORTHERN IRELAND OFFICE
GREAT GEORGE STREET,
LONDON SW1P 3AJ

SECRETARY OF STATE
FOR
NORTHERN IRELAND

The Rt Hon Sir Keith Joseph Bt MP
Secretary of State for Education and
Science
Elizabeth House
York Road
LONDON SE1 7PH

28 July 1983

CORPORAL PUNISHMENT IN SCHOOLS

Thank you for copying to me your letter of 18 July to Willie Whitelaw.

You say that you cannot see any real possibility of avoiding legislation for England and Wales. There seems to me to be little prospect of getting agreement to implement a non-statutory system of exemptions in Northern Ireland either, particularly in view of the proportionately large number of voluntary schools here. I therefore consider that legislation will be necessary for Northern Ireland and I support your view that the consultative paper should refer to the proposal to legislate.

I am copying this letter to recipients of yours.

DES
MR LIDDY
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MR INGHAM
MR WALMSLEY

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CONFIDENTIAL

NOTED ✓

PRIVY COUNCIL OFFICE
WHITEHALL. LONDON SW1A 2AT

26 July 1983

The Rt Hon Sir Keith Joseph Bt MP
Secretary of State for Education and Science

Dear Keith

CORPORAL PUNISHMENT IN SCHOOLS

Thank you for your letter of 18 July about the draft consultative document on corporal punishment. I am grateful to you for explaining why you think a commitment to legislate can no longer be avoided, and I feel sure the Committee understands your position.

I am less happy about the assisted places scheme. As you say, it is difficult to weigh the risk that some independent schools may wish to withdraw from the scheme rather than have exemption forced upon them. But I see from George Younger's letter to you of 21 July that he thinks the risk is considerable and that the effect on the scheme could be disastrous. I have now seen your further letter of 25 July to George Younger. I understand that he now accepts that you should include the wording of paragraph 10 of the consultative document which you proposed in your letter of 18 July. You may now take it that you now have H Committee's approval to publish the consultative document.

I am sending copies of this letter to the Prime Minister, to members of H Committee, to the Foreign Secretary, the Attorney General, the Lord Advocate and to Sir Robert Armstrong.

Yours ever,
Willie

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MR LIGGY	
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MR GRD
MR HALSEY

SCI
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MR BASH
MR PEATEY
MR INGHAM
MR WALMSLEY (OIR)

DEPARTMENT OF EDUCATION AND SCIENCE

ELIZABETH HOUSE, YORK ROAD, LONDON SE1 7PH

TELEPHONE 01-928 9222

FROM THE SECRETARY OF STATE

25 July 1983

Dear George,

Thank you for your letter of 21 July about the consultative document on corporal punishment.

We discussed briefly today the question of assisted places. I have, as agreed, looked at this again, but I am still of the view that the wording of paragraph 10 of the consultative document should be as proposed in my letter of 18 July. I am grateful to you for agreeing to my going ahead with publication on this basis.

Copies of this go to recipients of yours.

Yours,

Keith

DES	
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Rt Hon George Younger TD MP
Secretary of State for Scotland
Scottish Office
Dover House
Whitehall SW1A 2AU

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SCOTTISH OFFICE
WHITEHALL, LONDON SW1A 2AU

CONFIDENTIAL

The Rt Hon Sir Keith Joseph Bt MP
Secretary of State for Education and Science
Elizabeth House
York Road
LONDON
SE1 7PH

21 July 1983

Dear Keith,

Thank you for copying to me your letter of 18 July to the Lord President of the Council about your draft consultative document on corporal punishment.

I do agree with your interpretation of the Law Officers' revised Opinion and that there is a risk that a parent wishing to take advantage of the assisted places scheme and finding that schools in the scheme will not respect his philosophical conviction against corporal punishment, could successfully argue to the European Court of Human Rights that the United Kingdom was thereby failing to comply with the European Convention. I believe, however, that that risk is to be preferred to the alternative of taking action to ensure that, in relation to assisted places, parents must have the option to have their children exempted from corporal punishment.

I do not think that the risk of schools withdrawing from the assisted places scheme rather than accept conditions concerning their disciplinary methods should be underestimated. Moreoever it appears to me that the alternative wording you propose for paragraph 10 of your consultative document would be interpreted as a commitment on the part of the Government to take action in relation to corporal punishment of pupils in assisted places. If, following from the consultations, there is then a significant withdrawal of schools from the scheme it would, in my view, be very difficult for the Government to retract and the effect on the assisted places scheme could be disastrous.

I would very much prefer to take no action in relation to the assisted places scheme but clearly we must be in concert since, unlike the position in the public sector, it would be impossible to argue that different considerations allowed

for different solutions in Scotland and in England and Wales. If you can accept my position then no mention of the assisted places scheme need be made in the consultative document. If, however, you feel unable at this stage to go along with that I suggest you should say merely that the position with regard to the assisted places scheme is still under consideration. We should then discuss the matter again in 'H' Committee.

I am copying this letter to the recipients of yours.

Yours ever,

George.

DES

MR LIBBY

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MR WALMSLEY

DEPARTMENT OF EDUCATION AND SCIENCE

ELIZABETH HOUSE, YORK ROAD, LONDON SE1 7PH

TELEPHONE 01-928 9222

FROM THE SECRETARY OF STATE

18 JULY 1983

Dear Willie.

CORPORAL PUNISHMENT IN SCHOOLS

Thank you for your letter of 5 July about the draft consultative document on corporal punishment.

The issue raised by the Lord Chancellor - that the legislation should be drafted so as to keep to a minimum the burden on the Courts and the legal aid fund - is important and to my mind poses no problem of principle.

As to your reference to the H Committee's meeting at which there was some discussion about whether or not we should commit ourselves to legislation, I believe our common objective was to leave options open for as long as possible. In fact, as I explained in a subsequent letter, I was able to escape altogether writing to Strasbourg as had been envisaged, and in large measure this achieved our objective. But in my view we cannot any longer avoid a commitment to legislate.

In England, at least, legislation is inevitable. I cannot see any real possibility of agreement to a voluntary system of exemptions, and even if I did we would still need to provide a legal remedy for parents to cover those instances where, for one reason or another, the system broke down. I note that George Younger has in mind legislation at some stage to cap his voluntary scheme, and he is following the line of abolition. The retention of corporal punishment elsewhere in the UK makes any voluntary scheme that much more difficult. As the consultative document makes plain, there is a complexity about even a legislated solution; working outside a legal framework would lack credibility both here and in Strasbourg.

/What I

The Rt Hon Viscount Whitelaw CH MC
Lord President of the Council
68 Whitehall
London SW1A 2AT

What I have in mind all the time is the need to demonstrate to Strasbourg that we are serious in our intention to act following the judgment in the Campbell and Cosans case, which issued seventeen months ago. Unless we can soon convince Strasbourg of our good intentions, we shall increase the risks surrounding the other English cases of corporal punishment. My conclusion, therefore, is that in the consultative document we must commit ourselves to legislation.

Moving on to the Assisted Places Scheme, this has now, of course, been covered by the Law Officers' revised Opinion. That revision seems to me to say that if a child is prevented from taking up an Assisted Place because of a parental philosophical conviction against corporal punishment, then there may be a breach of the European Convention on Human Rights if the State cannot provide a suitable alternative. I am sure that our position would quickly be tested by a case brought before the Commission and subsequently the Court; and the risk of an adverse finding would be high, given the difficulty of demonstrating that a place in a maintained school was a sufficient alternative to an Assisted Place, and given the hostile atmosphere in which the case would be heard. We are the more vulnerable for having, rightly, presented the scheme as offering opportunities not available in the maintained sector.

If an adverse finding could be confined to the narrow issue of the Assisted Places Scheme, the risk might be worth taking. My fear, however, is that the Court might use the opportunity to pronounce on the wider matter of corporal punishment itself, and so bring pressure on us to abolish it altogether. I hope that our exemption arrangements generally will be sufficiently robust to reduce to a minimum the corporal punishment cases coming before the Commission (and the Court). For these reasons I believe that we cannot simply ignore the Assisted Places problem.

I accept that the extension of the exemption arrangements to Assisted Places carries with it a different kind of risk - that some independent schools may wish to withdraw from the Scheme rather than have exemption forced upon them. It is difficult to weigh the risk and I suggest that, at the same time as the consultative document issues, the Independent Schools Joint Council should be separately consulted on this issue.

Paragraph 10 of the main consultative document might then read as follows:

> "Independent schools will be largely unaffected by the proposed legislation: parents who send their children to schools outside the maintained system generally do so by exercising choice. However, legislation will impose exemption obligations in relation to (a) local authority placements in independent schools (including places in independent schools for children with special educational needs); (b) places in non-maintained special schools; and (c) places in the Music and Ballet Scheme. In relation to the Assisted Places Scheme, the Government will consult separately the interests directly concerned."

/The reference

The reference to the Assisted Places Scheme in the final paragraph of the document would be deleted.

As the revision implies, the Law Officers' advice on the Music and Ballet Scheme has led me to believe that, because the schools involved offer specific opportunities which are not available within the maintained system, they must be brought within the exemption arrangements. I have taken it that Michael Havers' letter does not affect LEA placements, and that they too must be within the arrangements.

Copies of this letter go to the recipients of yours. I should be grateful for comments as soon as possible. It is now important to publish the consultative document before the Recess.

Yours ever,

Kenneth.

DES	
MR LIBBY	
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MR PEATEY
MR INGHAM

CONFIDENTIAL

n/c
NOTED ✓

8317

PRIVY COUNCIL OFFICE
WHITEHALL. LONDON SW1A 2AT

5 July 1983

The Rt Hon Sir Keith Joseph MP
Secretary of State for Education and Science

Dear Keith

CORPORAL PUNISHMENT IN SCHOOLS

Thank you for your letter of 22 June, in which, as agreed at the meeting of H on 3 March, you ask for comments on a draft consultative document on corporal punishment in schools. I see from Jim Prior's letter of 30 June that he proposes to prepare a separate Northern Ireland version of it; no doubt he will ensure that colleagues' comments are taken into account when it is prepared.

When the Home and Social Affairs Committee on 3 March discussed corporal punishment in schools, it was said that there was no need at this stage to give any commitment to legislation, so I wonder if it is right that your draft should explicitly do so? George Younger, in his letter of 29 June, also points out that it was agreed that the document should not raise the problem of assisted places in independent schools, and I imagine you will in any case wish to reconsider those parts of the draft in the light of the revised opinion from the Law Officers.

No doubt you will in due course ensure that, in order to meet the Lord Chancellor's concern about the legal aid fund, the remedy for a breach of the exemption arrangements is the minimum necessary for us to comply with the judgment of the Court of Human Rights.

I am sending copies of this letter to the Prime Minister and the other recipients of your letter.

Yours ever

Bill

DES		
MR ULRICH		
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MR HALSEY

SECRETARY OF STATE
FOR
NORTHERN IRELAND

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16/7 NOTED

NORTHERN IRELAND OFFICE
GREAT GEORGE STREET,
LONDON SWIP 3AJ

The Rt Hon Keith Joseph Bart MP
Secretary of State for Education and
Science
Elizabeth House
York Road
LONDON SE1

30 June 1983

Dear Keith

CORPORAL PUNISHMENT IN SCHOOLS

Thank you for sending me the draft of the consultative document with a copy of your letter of 22 June to Willie Whitelaw.

As it stands, the draft would not be really appropriate to Northern Ireland because of certain differences in terminology and background. While these differences are not substantial, nevertheless, a considerable number of additions or amendments would be needed throughout the document, and I think in the circumstances that it would be preferable for us to prepare a separate paper for use in Northern Ireland. This paper will, however, otherwise be based largely on the text of your own paper and I assume you would have no objection to that.

I am copying this letter to the Prime Minister, the Lord President, the Foreign and Commonwealth Secretary, the Lord Chancellor, the Home Secretary, the Secretaries of State for Scotland, Wales and Health and Social Services, the Leader of the House of Commons, the Chief Secretary, the Attorney-General, the Lord Advocate and Sir Robert Armstrong.

Yours Jim

smh

20/7

NEW ST. ANDREWS HOUSE
ST. JAMES CENTRE
EDINBURGH EH1 3SX

The Rt Hon Sir Keith Joseph Bt. MP
Secretary of State for Education and Science
Elizabeth House
York Road
LONDON SE1 7PH

29 June 1983

Dear Keith,

Thank you for copying to me your letter of 22 June to the Lord President of the Council covering the draft of a consultative document on corporal punishment in schools which you propose to issue in England and Wales. I am in general content with this draft.

However, I note that, whilst H Committee agreed in March that your consultative document should not, pending further consideration of the point by the Law Officers, raise the special problem of Assisted Places at independent schools, the draft in fact refers to this at paragraph 21 and, in more detail, at paragraph 10. If you wish to issue the paper quickly, before the Law Officers give us their further views, these passages will have to be deleted from the paper. Alternatively you may prefer to await the Law Officers' advice and further discuss the matter in H Committee as necessary.

As I said in my earlier letter of 25 March I should be grateful for as much advance notice as possible of the date of issue of your consultative document so that I can make my statement simultaneously on the Scottish position.

I am copying this letter to the Prime Minister and other recipients of your letter.

Yours ever,

George

DES

MR ULRICH

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SCI

MR HALSEY
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ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn

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SCI

29 June, 1983

Dear Keith.

CORPORAL PUNISHMENT IN SCHOOLS

I refer to your letter of 22 June to the Lord President of the Council inviting comments on the draft consultative document.

It was agreed in March that the advice in relation to the Assisted Places Scheme in paragraph 9 of the Opinion which I gave jointly with the Lord Advocate (Annex A to H(83)13) should be considered further.

I and the Lord Advocate have now agreed that paragraph 9 of that Opinion should be replaced by the following:-

> "It is, however, advisable for the Government to ensure that where a school offers a place for a child under the assisted places scheme, should the parents' philosophical convictions not be respected if they accepted that offer, education could nevertheless be provided by the State which did meet those convictions and which took account of the considerations set out in the second paragraph of the advice given above under the heading "Provision of Separate Schools in which Corporal Punishment is not Practised'."

I have not seen details of the Music and Ballet Schemes, but the principle to be applied is that suitable provision must be made in the public sector, or at public expense, affording the parent concerned an option which meets their philosophical convictions.

/I

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ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn

I suggest that paragraphs 10 and 21 of the draft consultative document be considered further in the light of the above.

I am sending copies of this letter to the recipients of yours.

Yours ever,
Michael

The Rt Hon Sir Keith Joseph, Bt, MP
Secretary of State for Education and Science
Department of Education and Science
Elizabeth House
York Road
London SE1 7PH

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11

HOUSE OF LORDS,
SW1A 0PW

24 June 1983

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MR ULRICH		
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SCI

The Right Honourable
Sir Keith Joseph, Bart., MP.
Secretary of State for
Education and Science
Elizabeth House
York Road
London S.E.1

My dear Keith: Corporal Punishment in Schools

Thank you for copying to me your letter of 22nd June to Willie Whitelaw, with the attached draft consultation paper.

I am in general agreement with the line taken in the paper. We must certainly comply with the judgment of the European Court of Human Rights, and I see no reason why we should go so far as to abolish corporal punishment altogether. An exemption system therefore seems to be the obvious solution, and I would myself favour leaving the initiative to parents who object on principle to corporal punishment, despite the problems you mention in paragraph 14.

There is one point of direct concern to me. In paragraph 20 you commit the Government to the view that a breach of the exemption arrangements should be remedied by civil rather than criminal proceedings. This will of course place an additional burden on the courts, and on the legal aid fund. The extent of this burden will be directly proportional to the volume of litigation, and it is difficult if not impossible to assess what

/this may be.

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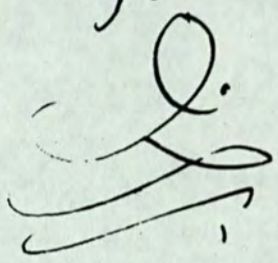
this may be. But I would ask you to ensure that the implementing legislation is so drafted that the civil remedy granted is the minimum necessaryfor us to comply with the judgment of the Court of Human Rights. I would not wish to see the courts encumbered by proceedings brought by parents who have suffered no real injury, but feel they have a good prospect of extracting damages from the Government in litigation which would most probably be funded by the Government.

I am copying this letter to the Prime Minister and other recipients of your letter of 22nd June.

Yrs:



F1SS61 CONFIDENTIAL

22 Jun

DRAFT ATTACHED

DES
MR ULLRICH
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MR HALSEY
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CI MR BOLTON
MR BAISH

DEPARTMENT OF EDUCATION AND SCIENCE

ELIZABETH HOUSE, YORK ROAD, LONDON SE1 7PH

TELEPHONE 01-928 9222

FROM THE SECRETARY OF STATE

22 June 1983

Dear Willie.

CORPORAL PUNISHMENT IN SCHOOLS

In March H Committee invited me to consult the Ministers concerned on the draft of the consultative document which I was invited to issue about the practical arrangements for giving parents a right to exempt their children from corporal punishment in schools. I now enclose this draft. As it stands, it covers both England and Wales and perhaps Nicholas Edwards could confirm that he is content that it should.

As the committee recognised, this document needs to be issued soon because the sooner it is clear that parents will be given a right of exemption the less the risk of untoward judgments in other cases involving corporal punishment now before the European Commission on Human Rights which would oblige us to abolish corporal punishment in schools altogether. I would, therefore, be grateful if colleagues could let me have any comments by 30 June.

The draft makes no commitment about the timing of the legislation which it foreshadows. As far as I am concerned, there would be no question of legislating in the 1983/84 session.

I am sending copies of this letter and the draft to the Prime Minister, the Foreign and Commonwealth Secretary, the Lord Chancellor, the Home Secretary, the Secretaries of State for Scotland, Wales, Northern Ireland, and for Social Services, the Leader of the House of Commons, the Chief Secretary, the Attorney General, the Lord Advocate and Sir Robert Armstrong.

Yours ever.

Keith.

The Rt Hon Viscount Whitelaw CH MC
Lord President of the Council
68 Whitehall
LONDON SW1A 2AT

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CONSULTATIVE DOCUMENT ON CORPORAL PUNISHMENT IN SCHOOLS

1. The United Kingdom, along with twenty-one other European States, is a party to the European Convention on Human Rights, having ratified it in 1951. States which have ratified the Convention undertake to abide by the decision of the European Court of Human Rights (which is established under the Convention) in any case to which they are parties. Last year, in the case of Campbell and Cosans v the United Kingdom, the Court considered the question of corporal punishment in schools. It concluded, despite arguments put on the Government's behalf, that where a parent holds a conviction against punishment of this kind, it amounts to a philosophical conviction which is protected by the Convention.

2. The Court's judgment is binding on the United Kingdom. It means that maintained schools should be required to respect a conviction of the kind mentioned above expressed by the parent of a pupil below the age of majority; and, in certain circumstances (see paragraph 10 below), there may be implications for certain schools which are not maintained. The law does not at present impose such a requirement. Common law in England and Wales regards the teacher of a pupil below age 18 as acting in loco parentis with the result that a teacher who administers moderate and reasonable corporal punishment has a defence against a criminal or civil action for assault. So the Government is obliged by the Court's judgment to change the law in England and Wales as it relates to corporal punishment in schools. This paper outlines the method chosen by the Government to give effect to the Court's judgment in England and Wales and invites comments on the detailed practical application of this method.

Discipline in schools

3. The Government (and the education service) set store by good discipline, which is necessary for the effective working of

schools and as part of the education of individual childre Sanctions, including corporal punishment, form an important aspect of discipline.

4. A distinguishing feature of the teaching profession in this country is the extent to which it concerns itself with the personal and social development of pupils. Schools seek to discharge a pastoral responsibility for every pupil. The Government acknowledge the value and importance of that responsibility and wish to preserve the conditions in which teachers can continue to exercise it.

5. The Government also wish to preserve the balance of responsibilities between local education authorities, school governors and heads. Responsibility for the conduct of a school (including matters of discipline) is determined by a school's articles of government. These generally assign ultimate responsibility for discipline within a school to the governors but also entail some sharing and overlapping of responsibilities involving also the local education authority and the head. Responsibility for day-to-day discipline is primarily assigned to the head. The Government are firmly of the view that, in matters of discipline, the head should have a central role with due discretion, within the law, to deal with problems as they arise.

The chosen method of implementing the Court's judgment

6. In the Government's view, the steps to give effect to the Court's judgment should take account of all the broad considerations outlined in paragraphs 3-5 above and should serve the well-established objectives of the British education system. In addition the method chosen to implement the Court's judgment should be practical. That is, it should be:

a. easy to operate by local education authorities and schools;

b. readily understood by staff, parents and pupils;

c. accessible to parents without undue difficulty.

7. One possible method would be to abolish corporal punishment. The Court was concerned with a parental conviction against corporal punishment and its abolition would automatically ensure that such a conviction was respected. But many parents (and indeed many teachers) in England and Wales favour the continuing availability of corporal punishment. The strength of conviction with which this parental opinion is held has been an important factor in the Government's consideration and they do not propose to abolish corporal punishment in schools in England and Wales.

8. The Government have also decided that the judgment should not be met by the introduction of a system under which all parents would have an unqualified right of access to a school not using corporal punishment. This would be expensive because of the need to provide additional schools so as to maintain existing patterns of choice between different types of school. It would be impractical, particularly in rural areas where choice is already limited by the sparsity of population; and it would be administratively cumbersome because it would complicate the existing procedures for the allocation of pupils to schools.

9. The Government therefore propose to introduce legislation which will oblige a maintained school to enable a parent to exempt a child from corporal punishment. "Corporal punishment" will be widely defined to include slaps and similar physical chastisement, whether formally or informally administered. The definition will cover any action by a member of staff which is intended as bodily punishment.

10. Independent schools will be largely unaffected by the proposed legislation: parents generally have a free choice whether to send their children to schools outside the maintained

system. However, that choice is limited in relation to the Assisted Places and Music and Ballet Schemes and local education authority placements (including placements of children with special educational needs in independent schools and non-maintained special schools). Consequently, the legislation will impose obligations on such schools in relation to assisted pupils and those allocated by a local education authority similar to those on maintained schools.

11. The decision whether to retain corporal punishment in a maintained school as a general disciplinary sanction should, in the Government's view, be a matter for the governors of the school in accordance with the articles of government. That decision will depend on many factors, including the extent to which the parents of pupils at the school exercise the right of exemption and the practical effectiveness of the school's use of disciplinary sanctions other than corporal punishment. Whatever the decision made, and whether it affects all or only some of the children in a school, the removal of corporal punishment as a sanction is likely to affect the maintenance of discipline. The Government believe that parents will recognise this before expressing a choice in favour of exemption, and look to those who do exercise their right to cooperate with the school in the use of alternative sanctions.

The practical application of the exemption system

12. It is necessary, for the purpose of the legislation conferring the right of exemption, to settle some important questions on how a system of exemptions would work in practice in those schools which decided to retain corporal punishment as a disciplinary sanction. The first question is how a parent should register a conviction, so that records can be set up and consulted when the possibility of the use of corporal punishment arises in a particular case.

13. There are three main possible approaches:

(i) to leave the initiative to parents who have a conviction against corporal punishment;

(ii) to leave the initiative to parents who do not object to the use of corporal punishment on their children;

(iii) to seek a formal response from all parents.

14. The first of these would place the onus on those with whom the Court's judgment is directly concerned. It would permit a relatively simple procedure with, in all likelihood, a minimum of record keeping. But from the teacher's point of view, it is open to the objection that the use of corporal punishment would be authorised by the absence rather than the presence of a record. Misunderstanding, clerical errors or the loss of the record could go unnoticed until corporal punishment had been used.

15. The second approach would overcome this difficulty. On the other hand, it would probably involve more records. Error or loss of the record could unnecessarily deprive the school of the use of corporal punishment where the school thought this appropriate. This approach would also mean operating a scheme for the benefit of those opposed to corporal punishment by imposing a positive responsibility on those who were content to leave discretion with the school.

16. The third approach would give the school the clearest picture of parents' views. The absence of a response from a parent could be readily identified (and followed up) by the school, minimising misunderstandings and the possibility of errors. This approach might be of particular benefit to schools during the transition to the new arrangements (see parargraph 19). But it would involve more paper work and again put to trouble parents who were content with the school's disciplinary arrangements.

17. With all three approaches, there is the question of t[redacted] point at which parental views should be expressed. The most appropriate opportunity would generally be the time of a child's first entry to a school.

18. It would be necessary to allow the parent at any time to register a conviction (or to signify that a previously registered conviction was no longer held). Registering a conviction would be a serious step and parents would be expected to avoid frequent and lightly made changes in this respect. There could be no question, however, of giving a school or local education authority the right to challenge a declared conviction against corporal punishment when it was stated or changed. Nevertheless, in practice, there would need to be some time-gap between the receipt of a parental declaration and the implementation of an exemption. Schools would need a reasonable, though not long, period to record the exemption and to notify all those staff concerned of the changed circumstances.

19. Other difficulties are likely to arise in deciding how an exemption will be claimed and registered when the proposed legislation comes into force. At that date, most pupils will have been on the school roll for some time. Depending on which of the approaches in paragraph 13 above is adopted, the school may need a period in which to cope with the administrative task of canvassing and registering parental convictions.

20. It will also be necessary to decide the precise responsibilities which would be put on (a) local education authorities (and, in the case of aided and special agreement schools, the governing bodies) to organise the introduction of an exemptions system, (b) the governors and head teachers of a school for the effective implementation of the system and (c) other staff, for giving effect to individual exemption claims. In the Government's view a breach of exemption arrangements by a teacher which resulted in the corporal punishment of a child whose parent

had properly claimed an exemption, should be subject to civil rather than criminal proceedings, as should a similar breach of arrangements in a school where corporal punishment had been abolished. (The existing remedies under both the criminal and civil law for the use of immoderate or unreasonable corporal punishment would still be available in all cases.)

21. Comments are invited on paragraphs 12-20 above in relation both to pupils in maintained schools and to pupils involved in the Assisted Places Scheme and Music and Ballet Schemes or local education authority placements, where different considerations, may apply. Responses should be made by 31 October 1983 to Department of Education and Science (Room 4/72), Elizabeth House, York Road, London SE1 7PH (tel 01-928 9222 Extension 2525); or, in the case of Wales: Welsh Office Education Department (Room .....) Cathays Park, Cardiff CF1 3NG (tel (0222) 825111 Extension .....).

S

CONFIDENTIAL

2 MARSHAM STREET
LONDON SW1P 3EB
01-212 3434
My ref: K/PSO/12029/83

Your ref:

1983 APR 25 08:12

20 April 1983

Mr Rix Mr Thomas

Dear Patrick

2014

Thank you for your letter of 5 April about the nationalisation and leasehold reform cases currently before the European Commission of Human Rights. I am most grateful for your assurances about the present position and about consultations with my Department.

I am sending copies as before.

312.4.83

for information: Mr Dickson
Mins
Sec
Mr Cooper
Mr Russell
Mr Treadgold
Mr Hudson

Yours ever

TOM KING

The Rt Hon Patrick Jenkin MP

CONFIDENTIAL

DEPARTMENT OF INDUSTRY
ASHDOWN HOUSE
123 VICTORIA STREET
LONDON SW1E 6RB

Telephone *Direct Line* 01-212 3301
Switchboard 01-212 7676

JU401
Secretary of State for Industry

5 April 1983

CONFIDENTIAL

The Rt Hon Tom King MP
Secretary of State
for the Environment
Department of the
Environment
2 Marsham Street
London SW1

copies to
PS/Mr Lamont
PS/Mr Butcher
PS/Secretary
Mr Treadgold SBP
Mr Dickson FRM
Mr Cummings (on file)

Dear Secretary of State

Thank you for your letter of 24 March 1983.

I am grateful to you for setting out your concern that any concessions in the nationalisation compensation cases now before the Commission could jeopardise the continued defence of the leasehold reform legislation.

There are, of course, important differences, as well as similarities, between the leasehold and nationalisation cases. Moreover, the extent to which concessions on the nationalisation cases might impinge on the leasehold cases will only become clearer when we receive the Commission's opinion on the merits.

As you say, we will not have a clear indication of the Commission's thinking until May at the earliest. Certainly I am not proposing any concessions at this stage. Should the situation change, I will ensure that your Department is consulted.

I am sending copies of this letter to the recipients of yours.

Yours sincerely

Stephen Nicholas

pp PATRICK JENKIN

(approved by the Secretary of State and signed in his absence)

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TO: Mr Fleming
(DRAFT REPLY IF APPROPRIATE)
PLEASE BY:
31/3/83

COPIES TO:
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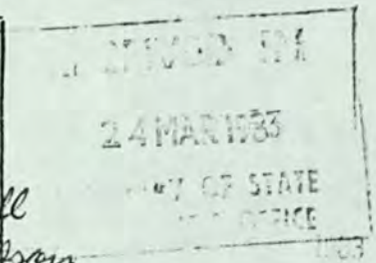
PS/JB
PS/Sec
Mr Russell
Mr Dickson



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2 MARSHAM STREET
LONDON SW1P 3EB
01-212 3434

My ref: K/ST/PSO/40299/83
Your ref:

24 March 1983

Dear Secretary of State

EUROPEAN COMMISSION OF HUMAN RIGHTS: NATIONALISATION AND LEASEHOLD REFORM CASES

I am aware that you are under some pressure from back bench colleagues to make concessions to the applicants in the 7 nationalisation cases before the Commission.

It now seems we will not have a clear indication before May at the earliest of which way the Commission may be inclining on the merits of those cases and of the leasehold reform case with which they have been linked. I nevertheless thought that I should record my concern that, if the question of a 'friendly settlement' with any of the nationalisation applicants became imminent, in May or subsequently, the wider implications of any concessions should be very carefully considered. I would wish my Department to be fully involved from the outset in any such consideration.

My immediate concern is, of course, that any concession in the nationalisation cases would make defence of the leasehold reform case - through to the Court if necessary - all the more difficult. It is of the greatest importance that we should win on all aspects of the leasehold reform case as the scope for a compromise in that case seems very small. The applicants are asking for additional compensation, from public funds, not merely for themselves but for all other landlords affected in the past by the leasehold reform legislation. That we estimate might cost in the order of £750 m. In addition the applicants are accordingly asking for the enfranchisement rights of the remaining leaseholders who qualify under the legislation to be taken away or curtailed. As a minimum, they are asking for the valuation provisions to be made less favourable to leaseholders. There may be hundreds of thousands of households involved. The political difficulty of meeting these demands, even in part, would be enormous - not least in Wales. Furthermore there would be direct repercussions on our current right to buy legislation in the Housing and Building Control Bill, under which the right to buy an enfranchisable lease is being granted to public sector tenants whose houses are on leasehold land.

You will appreciate, therefore, my anxiety that nothing should be done which might hamper or jeopardise continued defence of the leasehold reform legislation at Strasbourg. I do of course recognise the political difficulty of continuing to defend in Strasbourg nationalisation legislation which we strongly opposed when it was introduced by the last Labour Government. To an extent, however, we have a similar problem on leasehold reform, as we described the compensation basis as 'confiscatory' when the Leasehold Reform Act 1967 was before Parliament. However, I think we should be able to make clear to our supporters that the only issue at stake in Strasbourg is the strict legal one of whether the legislation

breaches the Convention, not whether we ourselves agree with the legislation.

I am sending copies of this letter to the Prime Minister, the Attorney General, the Secretaries of State for Foreign and Commonwealth Affairs, for Wales and for Scotland, the Chancellor of the Exchequer and Sir Robert Armstrong.

Yours sincerely

Helen Ghosh

TOM KING

(approved by the Secretary of State and signed in his absence).

Rt Hon Patrick Jenkin MP

CONFIDENTIAL

JH 684

DEPARTMENT OF INDUSTRY
ASHDOWN HOUSE
123 VICTORIA STREET
LONDON SW1E 6RB
TELEPHONE DIRECT LINE 01-212 3301
SWITCHBOARD 01-212 7676

Secretary of State for Industry

25 January 1983

Copies to:
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ALSO PS/MR LAMONT
PS/MR BUTCHER
PS/ SECRETARY
MR TREADGOLD
MR DICKSON FCO
MR LANE DOT
MR MALLINSON SEC
MR COULSON SEC
MR CUMMINS REA
(WITH PAPERS)

Rt Hon Sir Michael Havers QC MP
Attorney General
Royal Courts of Justice
Strand
WC2A 2LL

Dear Michael,

EUROPEAN CONVENTION ON HUMAN RIGHTS: NATIONALISATION COMPENSATION CASES

Thank you for your letter of 20 January about the conduct of the hearing next week.

2 Your advice is that we should fight these cases as hard as we can, and I do not disagree. I have been concerned about the way in which aspects of the arguments might rebound upon us, and I have considered the implications as the arguments have developed. I do not doubt that the lines set out in your letter - and particularly perhaps an argument that compensation was adequate within international law requirements if that has to be presented - will provide further ammunition for critics. Nevertheless, so long as we can preserve the distinction that we are arguing about the purely legal question of whether the legislation and what was done under it did or did not involve the UK in a violation of legal obligations under the Convention, we do seem to have some basis for defending the position. I accept that Mr Nicholls, particularly after your own discussion with him, should by now be fully aware of the difficulties and of the need to choose his words with care.

3 I am copying this letter to recipients of your letter, that is to the Prime Minister, the Secretary of State for Foreign and Commonwealth Affairs, the Chancellor of the Exchequer, the Secretaries of State for Scotland and Wales and Sir Robert Armstrong.

Yours ever

Patrick

CONFIDENTIAL

For information (advance in due course)
Mr Cumming
PS/Nk
PS/Nb
PS/Sec
Mr Treadgold
Mr Dickson
Mr Mallinson Sols
Mr Coulson
Mr Kane Insurance Dept

20 January, 1983

Dear Patrick.

EUROPEAN CONVENTION ON HUMAN RIGHTS: NATIONALISATION AND LEASEHOLD REFORM CASES

As you know, the European Commission of Human Rights will hold a hearing next week on certain aspects of the above proceedings. The cases in question are seven of the nine that have been brought against us by companies or individuals complaining about the Shipbuilding and Aircraft Industries Act 1977 (the other two applicants having not yet completed their written pleadings) and the group of applications brought by the Trustees of the Grosvenor Estates who arecomplaining about the Leasehold Reform Acts 1967 and 1974.

The initial question whether all these cases are admissible at all will be dealt with by the Commission on the basis of the written pleadings, as will also certain peripheral substantive issues such as whether the arbitration procedure established by the 1977 Act satisfied the "fair trial" provisions of Article 6 of the Convention. But the Commission has identified for oral hearing at this stage certain fundamental substantive issues which it regards as common to all these cases and on which it has therefore invited all the applicants to present a single, common argument and the Government to present a single exposition of its own position. In so far as particular cases present special features in relation to these common issues, there will be an opportunity for the applicants concerned and for the Government to deal with them separately at this hearing.

/Each

Each of the eight applicants whose cases are to be considered at the hearing will, we understand, be separately represented there but they have agreed that the common argument on their behalf will be presented by a single team led by Mr. Anthony Lester QC. We for our part are fielding a strong team of Counsel whom I have personally selected, led by Mr. Donald Nicholls QC. Officials from your Department as well as from the Department of the Environment and the Foreign and Commonwealth Office will be there in support.

Because of the importance of this litigation, and not least because of its political sensitivity, I took a close personal interest, as you know, in the drafting of our written pleadings and I have more recently kept closely in touch with the preparation of our oral submissions for next week's hearing. These preparations are almost complete - though the final stage of pulling the speech together must wait until our team assemble in Strasbourg over the weekend - and I have therefore taken the opportunity to have the benefit of a personal discussion with Mr. Nicholls, in particular about the handling of the politically sensitive matters. It is in the light of that that I am now writing to you and to other interested colleagues to report where we stand and, I hope, to reassure you that the points which are of special concern to all of us will be given full weight consistently with our need to fight this case successfully.

First, you will wish to know that it is still our intention to continue to maintain, as our first line of defence in all these cases, that the international law requirement of the payment of prompt, adequate and effective compensation for expropriated property, which in general is attracted by Article 1 of the First Protocol of the Convention, does not operate against a State for the benefit of its own nationals. If we succeed on that, the argument about the proper basis of compensation should not arise at all. But we cannot be confident that this initial line of defence will hold and we must

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therefore be prepared to defend our position on compensation on its own merits.

Secondly, we shall try, in making out our defence on compensation, to avoid justifying the compensation actually paid in particular cases under the 1977 Act (as regards nationalisation) and under either the 1967 Act or the 1974 Act (as regards leasehold reform) as intrinsically "fair" but shall put the emphasis instead on justifying the compensation systems established by the Acts as being ones which a Government could, within its "margin of appreciation", legitimately adopt. This is a distinction which is perhaps of greater importance in relation to the nationalisation cases than in relation to the leasehold reform case but it is not without its value in the latter context also.

I must, however, point out that we may in the end be driven - either by the way in which Mr. Lester puts his case or because we are directly confronted with the problem by members of the Commission - into grappling with the question whether or not it is our contention that the compensation actually received by the applicants met the relevant international law standard, ie was "prompt, adequate and effective". If that happens and if we are not seriously to undermine our chances of success, I see no alternative to our answering the question in this way. We shall say that if, as we have contended, the system in question was itself one which was legitimately selected, the Commission should not concern itself with the results which the system produced in particular cases unless these results were manifestly wrong; and we shall deny (though it will certainly be part of the applicants' submissions) that the results in the instant cases were manifestly wrong. It is in that sense, so we shall argue, that we do assert that the compensation actually paid satisfied the international law requirements of "prompt, adequate and effective". This will be a difficult argument to put across but Mr. Nicholls is well aware of the importance

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to us of maintaining the distinction between that assertion on the one hand and, on the other hand, the assertion that the compensation was fair or adequate in the sense that our colleagues intended when they criticised the measures in question during the passage of the legislation and subsequently. It would be quite wrong for me to try to tie Mr. Nicholls down in advance to any particular formulation - he must be absolutely free to play our hand as his judgment dictates according to the exigencies of the hearing - but I am fully confident that, if the need arises, he will pick his words very carefully so as to respect this important distinction and to spare us any avoidable political embarrassment.

This said, I think that we must expect the applicants to make some play, both through their Counsel during the proceedings and in other ways after the proceedings (despite the rule of confidentiality), with what they will represent as the discrepancy between our present legal case and our former political utterances. So far as the proceedings are concerned, I can assure you that Mr. Nicholls intends to adhere strictly to the line that what he says should in no way be construed as approval (or for that matter disapproval) by the present administration of the legislation in question or what was done under it: his concern and, he will contend, the concern of the Commission is merely the purely legal question of whether the legislation and what was done under it did or did not involve the United Kingdom in a violation of its legal obligations under the Convention.

Finally, I can confirm again that in justifying the measures in question as being "in the public interest" (which is another requirement of Article 1 of the Protocol), we shall be relying on two points, both of which should be helpful to us in the political context. The first is that what is "in the public interest" within the meaning of Article 1 is a matter on which Governments are entitled to a "margin

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of appreciation", so that our assertion that the measures in question did not exceed that margin of appreciation does not entail any expression of approval by us of what our Labour predecessors did. The second is that the phrase "in the public interest" is (like "adequate") a term which has a specialised meaning in international law, and in particular in the Protocol, so that our contention that the measures in question are not impugnable on that score in no way means that we endorse them as being desirable or in the national interest in ordinary parlance.

I am sure that we shall all watch the progress of these cases with keen interest and anxiety. Difficult as they are on both technical and political grounds, I believe that it is very important that we should fight them as hard as we can both because of the huge sums of public money that are directly involved in them and even more because of the potential consequences over a much wider field if we lost them.

I am copying this letter to the Prime Minister, the Secretary of State for the Environment and the Minister for Housing and Construction, the Secretaries of State for Wales and Scotland, the Chancellor of the Exchequer, the Secretary of State for Foreign and Commonwealth Affairs and Sir Robert Armstrong.

Yours ever. Michael.

The Rt Hon Patrick Jenkin MP
Secretary of State for Industry
Department of Industry
Ashdown House
123 Victoria Street
London, SW1

European Convention on Human Rights

(C(80) 66)

BACKGROUND

The optional clauses of the European Convention on Human Rights provide for the right of individual petition to the European Commission of Human Rights and the acceptance of the compulsory jurisdiction of the European Court of Human Rights. All EC members except France, and 14 of the 20 States Parties to the Convention, accept the right of individual petition; 17, including all EC members, accept the compulsory jurisdiction of the Court. The United Kingdom initially accepted these clauses in 1966 for three years and subsequently for periods of two, three and five years. The present acceptance expires on 14th January 1981, and the Home Secretary and the Foreign and Commonwealth Secretary propose a further five-year renewal.

2. The Secretaries of State say that the dynamic and evolutionary interpretation placed on the Convention by the Commission and the Court has caused increasing concern. It has interfered further with the exercise of Parliamentary sovereignty than could have been foreseen and has limited the freedom of action of both the legislature and the judiciary. Particular areas of difficulty or embarrassment arising from earlier cases and cases under consideration or in prospect are listed in the Annex to C(80) 66. They include the interception of communications, immigration and (potentially) nationality, police procedures, penal law and treatment, corporal punishment in State schools, and (potentially) military discipline.

3. The Secretaries of State say that the decision not to renew could only be defended on the general grounds of protecting Parliamentary sovereignty. The United Kingdom would be attacked for avoiding its obligations under the Convention. Failure to renew would be difficult to reconcile with the Manifesto commitment to discuss a possible Bill of Rights, and would be represented in

Northern Ireland as an implicit admission that arrangements there breached the Convention. There would be adverse comparisons with the Republic's indefinite acceptance of the right of individual petition. Internationally, we should lose our tactical advantage in our relations with the Communist bloc and other countries infringing human rights. A decision not to renew, particularly during the review of the Helsinki Final Act, would be criticised by our allies. It would make it harder to defend non-ratification of corresponding provisions in the United Nations Covenant on Civil and Political Rights.

4. The Secretaries of State note that renewal could be for less than five years, but that this would merely raise doubts about United Kingdom support for human rights, and would probably make it necessary to look at the question again during the runup to the next General Election. The third possibility, of indefinite renewal, would provide conclusive evidence of support for the protection of human rights and would be seen by some as a safeguard for the future. But it is uncertain whether we could withdraw from the commitment, if there were to be unacceptable adverse judgments at Strasbourg, even if the declaration itself referred to that possibility. It would in any case be politically difficult to withdraw from an indefinite commitment. Tactically, it might be salutary for the Strasbourg organs not to be able to count on United Kingdom acceptance into the indefinite future.

5. The Secretaries of State propose that the decision should be announced in answer to an arranged Parliamentary Question.

HANDLING

6. You will wish to ask the Home Secretary and the Foreign and Commonwealth Secretary to introduce their memorandum. You will then want the comments of the Lord Chancellor and the Attorney General on the legal aspects, the Lord Chancellor on the implications for a possible United Kingdom Bill of Rights, the Secretary of State for Northern Ireland on the implications for the Province, and the Secretary of State for Defence on the position in respect of military discipline. You may want the views of the business managers and the Paymaster General on the feeling in Parliament and the country.

7. The Cabinet might first review the political arguments, domestic and international, against withdrawal from the optional clauses. These seem to be compelling. They might then go on to consider the period of renewal. The

unpredictability of the Strasbourg organs and the considerations in paragraph 4 above are strong arguments against indefinite renewal. The proposal by the Secretaries of State for five-year renewal, which would take the next decision on renewal beyond the next Election, has force.

8. Cabinet might endorse the proposal of the Secretaries of State that the decision should be announced in answer to an arranged Question. This would fall to the Home Secretary. You may want the views of the business managers on the relative advantages of an Oral as opposed to a Written Answer.

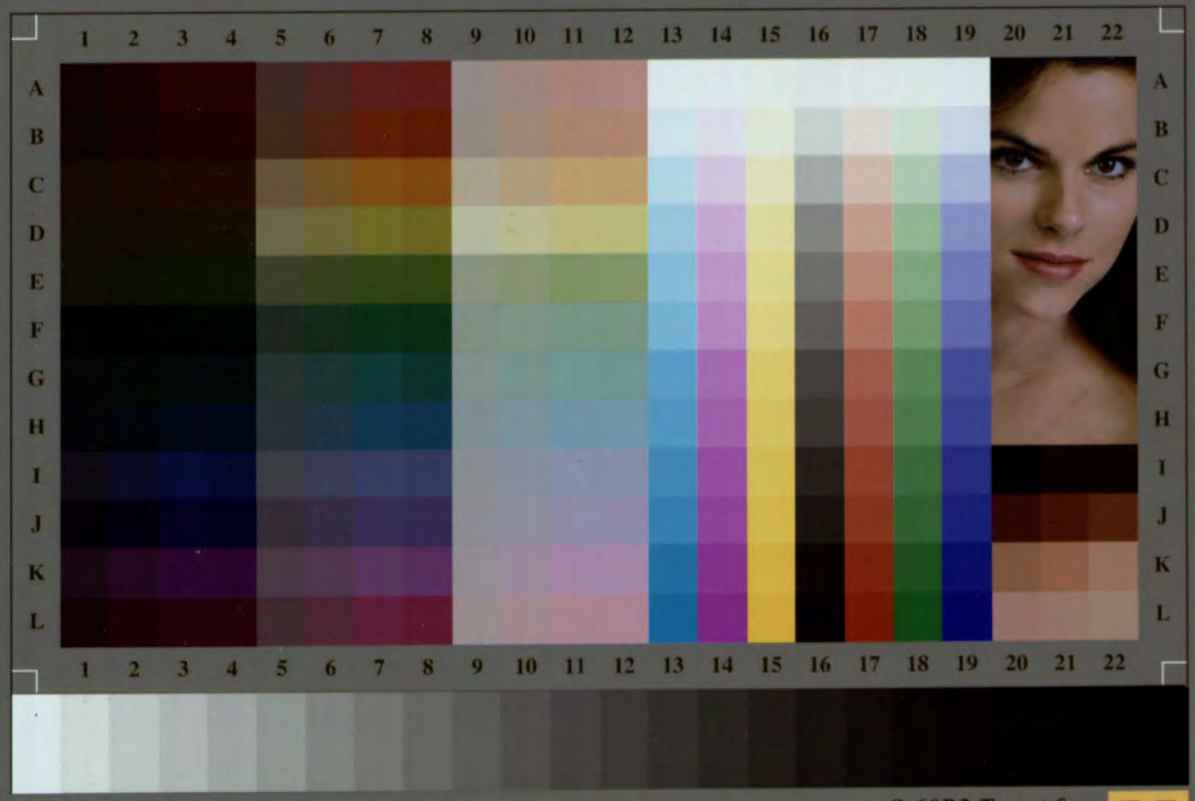
CONCLUSIONS

9. Subject to points made in discussion, Cabinet might endorse the proposal that the United Kingdom's acceptance of the optional clauses should be renewed for a further five-year period from January 1981, and that the decision should be announced in reply to an arranged Parliamentary Question.

ROBERT ARMSTRONG

ROBERT ARMSTRONG

12th November, 1980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