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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.

13 MAY 1985

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.*

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* 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

13 MAY 1985