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

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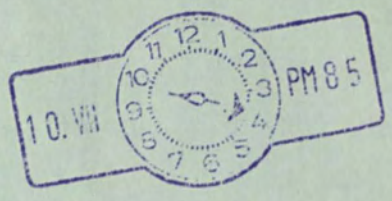

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