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