

## JOINT OPINION

### Introduction

1 The Prime Minister suggested on the BBC1 "Frost Programme" on 26 January 2003 that, by reason of concern about asylum-seekers who pose a threat to the national security of the United Kingdom, the Government may consider withdrawing from the European Convention on Human Rights ("ECHR") and then re-ratify but with a reservation. This proposal was first floated by the Conservative Party in Autumn 2001, and was repeated by the Shadow Home Secretary, Mr Oliver Letwin, following the comments of the Prime Minister.

2 The objective would be to circumvent Article 3, which prohibits a State from returning a person to a place where he or she may face ill-treatment, irrespective of whether the person is a danger to the removing State : Chahal v United Kingdom (1996) 23 EHRR 413 (European Court of Human Rights).

3 The proposal recognises that Article 15 of the ECHR allows a State to derogate from some protected rights in times of national emergency, but cannot be used for this purpose since it expressly prohibits a derogation from Article 3.

4 We are asked to advise Liberty on whether such steps would

be consistent with international law.

5 In our opinion, it is strongly arguable that the ECHR does not permit a Contracting State to use the power of denunciation of the Convention (that is, withdrawal) as a device to secure a reservation which could not otherwise validly be made.

**The relevant provisions of the ECHR**

6 Article 3 of the ECHR states :

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

7 Article 58 of the Convention regulates "Denunciation" :

"1 A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2 Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

...".

8 Article 57 regulates "Reservations" :

"1 Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in

conformity with the provision. Reservations of a general character shall not be permitted under this article.

- 2 Any reservation made under this article shall contain a brief statement of the law concerned".

### **General matters relevant to interpretation of the ECHR**

- 9 Article 26 of the Vienna Convention on the Law of Treaties states that :

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

- 10 Article 31.1 of the Vienna Convention adds :

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose".

- 11 In Loizidou v Turkey (1995) 20 EHRR 99, 133, paragraph 72, the European Court of Human Rights stated that

"the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective".

### **Jurisdiction of the European Court**

- 12 The European Court of Human Rights has jurisdiction to consider whether, in a specific case, a reservation has been made in accordance with the ECHR. See Temeltasch v Switzerland (1983) 5 EHRR 417, 430-431 at paragraphs 59-67 (European Commission of Human Rights); and Belilos v Switzerland (1988) 10 EHRR 466, 483 at paragraph 50

(European Court of Human Rights).

13 If the United Kingdom were to denounce, re-ratify and seek to make a reservation as to Article 3 this could be challenged in the European Court. A claim would be made that the United Kingdom had breached Article 3. When the Government sought to defend itself by reference to the reservation, the Applicant would contend that the reservation is invalid and ineffective.

**The general validity of a denunciation for the purpose of re-signing with a reservation**

14 There is no authority which assists on whether a Contracting State could use Article 57 to denounce the ECHR for the purpose of re-joining with a reservation.

15 No other Contracting State has so acted, although Trinidad and Tobago (in 1998) took similar steps in relation to the International Covenant on Civil and Political Rights in an attempt (which failed for other reasons) to re-ratify with a reservation as to the first Optional Protocol (the jurisdiction of the Human Rights Committee, in relation to death penalty cases).

16 It is strongly arguable that it is not open to a State to use Articles 57 and 58 in the manner being considered by the United Kingdom :

- (1) In substance, the Government is seeking to derogate from Article 3 in a time of national emergency. Article 15 expressly prohibits such a step.
- (2) Alternatively, it is seeking to make a reservation which it chose not to make under Article 57 when signing the Convention and which it therefore cannot now make.
- (3) It is strongly arguable that it is an abuse of rights, or action which is not in good faith, for the Government to denounce the Convention for the sole purpose of re-joining with a reservation in the terms it would have adopted under Article 15 if permitted to do so, or in the terms which it would have adopted under Article 57 if parties to the Convention could make fresh reservations. If such a step were permissible, the restrictions on derogations in Article 15, and the restrictions in Article 57 on making reservations after signing, would have little effect : a State could always achieve its objective by denunciation, and immediate re-ratification with an appropriately worded reservation.

17 This argument relies on the observations of the European Court in Ireland v United Kingdom (1978) 2 EHRR 25 at paragraph 239 :

"unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a collective enforcement".

This recognises that the ECHR is designed to impose higher standards than other treaties. It would be incompatible with the objects and purposes of the ECHR if a Contracting State could circumvent its obligations by using the device under consideration.

### **The proper scope of a reservation**

18 There is a further point. It is arguable that Article 57 only applies to reservations which are temporary in the sense that they are designed to allow for time for the State to bring its laws into line with the requirements of the ECHR.

19 That was the argument advanced in the Concurring Opinion of Judge De Meyer in the European Court in Belilos v Switzerland (1988) 10 EHRR 466, 493-494 : the ECHR does not create, but recognises rights; Article 57 (then Article 64) allows a narrow exception for

"a purely temporary measure, 'at the time of' the signature or the ratification of the Convention, a brief space in which to bring into line any laws 'then in force in its territory ...'".

20 However, this would be a difficult argument to sustain. It must be acknowledged that a large number of reservations

(and interpretative declarations) to the ECHR have not been of this temporary nature. Nor have such permanent reservations attracted objections from other Contracting States. Of course, the validity of the reservation is for the Court to determine, but it would inevitably be affected by State practice.

### **Conclusion**

21 In our opinion, it is strongly arguable that the ECHR does not permit a Contracting State to use the power of denunciation of the Convention (that is, withdrawal) as a device to secure a reservation which could not otherwise validly be made, and therefore the proposal floated by the Prime Minister would be invalid and unlawful.

**DAVID PANNICK QC**

**SHAHEED FATIMA**

**BLACKSTONE CHAMBERS,**

**TEMPLE,**

**LONDON EC4Y 9BW**

**29 January 2003**

IN THE MATTER OF

DENUNCIATION OF THE EUROPEAN  
CONVENTION ON HUMAN RIGHTS

---

---

JOINT OPINION

---

---

Liberty

21 Tabard Street

London SE1 4LA

Tel : 020 7403 3888

Ref : John Wadham /

Shami Chakrabarti