

The Rt Hon Dominic Raab MP
Deputy Prime Minister, Lord Chancellor and Secretary of State for Justice

By email to: HRReform@justice.gov.uk

7 March 2022

Dear Sir

Response to consultation on Human Rights Act reform – Please do not follow Putin on ‘rights’

I write on behalf of Clean Air in London (CAL) in response to the consultation, “Human Rights Act Reform: A Modern Bill of Rights”, which closes on 8 March 2022.

CAL campaigns to achieve, urgently and sustainably, full compliance with World Health Organisation (WHO) guidelines for air quality throughout London and elsewhere. As part of its campaigning CAL has promoted the human right to breathe clean healthy air and the recognition of that right.

Establishing the European Convention on Human Rights

The UK has a laudable history on human rights having initiated and taken an active lead in the drafting of the European Convention on Human Rights which was ratified and entered into force on 3 September 1953.

Right to clean, healthy and sustainable environment

The UK has built upon this achievement many times to further human and environmental rights including through the Stockholm Declaration (1972), the Rio Declaration (1992) and the Aarhus Convention (1998).

While the right to a clean, healthy and sustainable environment is not explicitly enshrined in the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) has recognised that the state of the environment can be essential to the right to life and the right to private and family life (Articles 2 and 8 of the Convention). As set out below, the UK recognises this right at an international level.

As mentioned above, UK is already party to the Aarhus Convention, the Preamble of which, recognises “that every person has the right to live in an environment adequate to his or her health and well-being” and a duty to protect and improve the environment for the benefit of present and future generations.¹

On Wednesday 29 September 2021, the Parliamentary Assembly of the Council of Europe passed a resolution calling for the drafting of an additional protocol to the ECHR to protect more effectively “the right to a safe, clean, healthy and sustainable environment”.²

¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), preamble.

² Parliamentary Assembly of the Council of Europe Resolution 2396 (2021)
<https://pace.coe.int/pdf/658d3f594762736ba3c0f378798b2c9529cf4be34aa45a8c38616ecd18fa80c0/resolution%202396.pdf>

On Friday 8 October 2021, the United Kingdom voted in favour of a United Nations Human Rights Council resolution recognising that access to a clean, healthy and sustainable environment is a universal right.³ In total, 43 States voted in favour, 0 voted against and 4 abstained: Russia, India, China and Japan.

Further, the Paris Climate Agreement which the UK is also party to, includes in its preamble that States “should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights”. This obligation is reaffirmed in the Glasgow Climate Pact adopted at COP26 on Saturday 13 November 2021.

CAL therefore believes that the UK should explicitly recognise the human right to a clean, healthy and sustainable environment in domestic law and at the UN General Assembly. By doing so, the UK would build further on its historic achievements on human and environmental rights.

Proposed repeal of the HRA

CAL does not believe that the Human Rights Act (“HRA”) should be repealed as suggested by the consultation. CAL notes that the Independent Human Rights Act Review (IHRAR), to which CAL provided evidence, issued its report in December 2021. The HRA consultation appears to largely ignore the recommendations of the IHRAR, including the IHRAR’s explicit rejection of proposals to repeal specific aspects of the HRA.

The drafters of the proposals seem to have forgotten the UK’s history and vital contribution, internationally, to the protection of human rights post World War 2. If it is to continue with a leading role the UK cannot weaken human rights protection at home. This is a particularly important consideration at a time when the protection of human rights at home and abroad, is threatened by actions of lawless states, the pandemic and the effects of climate change.

The HRA consultation and its proposals mark an attempt to row back on the system of human rights protection in the UK, including by limiting judicial interpretation, expanding the circumstances in which public bodies can act incompatibly with human rights, limiting human rights protection for categories of people who are already marginalised, limiting the positive obligations on public authorities to protect human rights and proposing measures that would create a divergent approach between the UK and the European Court of Human Rights (ECtHR).

As such, CAL does not support these reforms. Specific concerns are addressed in this letter together with positive proposals for reform to codify the right to a clean, healthy and sustainable environment.

Limiting judicial interpretation and creating a divergence in rights protection

Several of the consultation’s proposals are aimed at limiting judicial interpretation and/or allowing a divergence between the UK and ECtHR case law.

For example, the replacement options for s.2 of the HRA would explicitly divorce the meaning of specific rights from that given in international treaties, including the European Convention on Human Rights (ECHR) (option 1). Alternatively, it would require the UK courts to adopt a rigid approach based on the text of the right allowing little scope for interpretation and adaptation as times change

³ HRC 48/13 (2021) A/HRC/48/L.23/Rev.1

(option 2). The ECtHR has recognised that the Convention is a “living instrument” anchored to the reality of the Member States in which it applies.⁴ This has allowed the Convention to remain modern and dynamic, responding to the reality of present day. One clear example of this is the application of the Convention (in particular, Articles 2 and 8) to issues relating to the environment.⁵

Another draft clause in the consultation would permit Parliament to legislate contrary to decisions of the ECtHR. It is notable that this proposal mirrors a law passed by Russia in December 2015.⁶

CAL does not support these reforms, in particular because they would row back on incremental but positive developments seen in the areas of environmental protection and human rights.

Permission stage in human rights cases

The consultation also proposes introducing a permission stage in human rights claims and requiring that individuals must have suffered a “significant disadvantage” to bring a claim. It is suggested that this will help the courts focus on “genuine” human rights matters.

The idea that a “significant disadvantage” is required before a human rights abuse can be considered “genuine” is deeply problematic and flawed. This is particularly the case in environmental cases where the consequences of one source of pollution for any one individual may be difficult to prove but the consequences for the environment or populations as whole could be extremely serious. For example, air pollution is known statistically to shorten the lives of many thousands of people in the UK every year but only one person, Ella Roberta Adoo-Kissi Debrah, has had it mentioned on their death certificate (as no-one, to CAL’s knowledge, has had alcoholism, obesity or smoking mentioned on theirs).

The inclusion of an exception for cases where there are issues of “overriding public importance” is insufficient as a safeguard, not least because the consultation itself requires that these should be “exceptional cases”.

CAL believes that it is inappropriate to have a permission stage in human rights claims and that it would act as an unwarranted barrier on access to justice.

Conclusion

In conclusion, CAL urges the Government *inter alia* to: keep the Human Rights Act; actively support a UN General Assembly resolution recognising that access to a clean, healthy and sustainable environment is a universal (human) right; and enshrine this human right precisely and explicitly in UK law. Please do not follow Putin on universal, human or environmental rights.

⁴ The European Convention on Human Rights: A Living Instrument, August 2021, https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf

⁵ See, for example, *Lopez Ostra v. Spain*, judgment of 9 December 1994, *Guerra and Others v. Italy*, judgment of 19 February 1998, *Önerildiz v. Turkey* [GC], judgment of 30 November 2004, *Moreno Gómez v. Spain*, judgment of 16 November 2004, *Budayeva and Others v. Russia*, judgment of 29 September 2008, *Tătar v. Romania*, judgment of 27 January 2009, *Deés v. Hungary*, judgment of 9 November 2010, *Dubetska and Others v. Ukraine*, judgment of 10 February 2011, *Kolyadenko and Others v. Russia*, judgment of 28 February 2012, *Vilnes and Others v. Norway*, judgment of 5 December 2013, *Brincat and Others v. Malta*, judgment of 24 July 2014, *Jugheli and Others v. Georgia*, judgment of 13 July 2017, *Cordella and Others v. Italy*, judgment of 24 June 2019.

⁶ BBC News, Russia passes law to overrule European human rights court, 4 December 2015, <https://www.bbc.co.uk/news/world-europe-35007059>.



I would welcome the opportunity to discuss this submission with you.

Yours faithfully,

Simon Birkett
Founder and Director

Cc

Dr David Boyd, UN Special Rapporteur on human rights and the environment
Dr John Knox, Former UN Special Rapporteur on human rights and the environment
Sir Robert Neill MP, Chair, Justice Committee
Shadow Justice Ministers
Geraint Davies MP, Chair of the All Party Parliamentary Group on Air Pollution
Dr Maria Neira, World Health Organisation