



JUSTICE

**Inquiry into the Concluding Observations
of the UN Committee on Economic Social
and Cultural Rights
Joint Committee on Human Rights**

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Introduction

1. JUSTICE is an all-party, law reform and human rights organisation, whose purpose is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.
2. JUSTICE welcomes the Committee's inquiry into the concluding observations of the United Nations Committee on Economic Social Cultural Rights ('UNCESCR') in June 2002. JUSTICE coordinated the joint NGO Report to the UNCESCR in response the UK Government's Fourth Report to the International Covenant on Economic Social and Cultural Rights ('the Covenant'), which was submitted in April 2002. Prior to that, it published its joint study with Oxfam entitled *Beyond Civil Rights: developing economic social and cultural rights in the UK* in December 2001, which examined the political and legal framework for establishing economic social and cultural rights ('ESC rights') in UK law.¹
3. JUSTICE has also been involved in a project monitoring the state of Covenant rights in the Russian Federation in partnership with a Russian NGO,² and is currently preparing to cooperate with an Almaty-based NGO on a similar project in Kazakhstan.

Should the ICESCR form part of UK law?

Is there a case for incorporation of guarantees of economic social and cultural rights in UK law? Can the Covenant rights be adequately protected without incorporation?

4. JUSTICE reiterates its view that UK law should contain guarantees of ESC rights, including those contained in the Covenant.³
5. The basis for this view is JUSTICE's belief that the long-standing distinction between civil and political rights on the one hand, and ESC rights on the other, owes more to historical contingency than intellectual coherence.⁴ Nor does it seem plausible that

¹ S Ruxton and R Karim, *Beyond Civil Rights: developing economic social and cultural rights in the UK* (Oxfam: 2001).

² See Foundation for Civil Society, *Social and Economic Rights in Russia* (Moscow, 2002).

³ See para 1.5, 'Joint NGO Report to the UNCESCR', April 2002.

⁴ See e.g. H Shue, *Basic Rights* (Princeton, 1996: 2nd edition); A Sen, *Development as Freedom* (OUP: 2001).

ESC rights are somehow intrinsically less well-suited to adjudication by the courts than civil and political rights. It is useful, for instance, to consider the contrast between the right to respect for private and family life under Article 8 ECHR on the one hand, and the right to education under Article 13 ICESCR on the other. It is difficult to see how something as vague as the right to ‘respect for ... family life’ is, on its terms, inherently more justiciable than a provision requiring *inter alia* ‘the general availability and accessibility’ of secondary education.⁵

6. JUSTICE also notes that the UK is a wealthy country – by many accounts, the fourth largest economy in the world⁶ – and yet it faces what are described as ‘intractable social problems’ across a range of issues, including poverty, homelessness and long-term unemployment.⁷
7. JUSTICE considers that a rights-based approach is essential to combating these problems, and that ESC rights-standards provide the appropriate yardstick by which such exclusion can be measured and addressed.
8. As to the precise manner of implementing guarantees of ESC rights in UK law, JUSTICE recognizes that there are a variety of ways in which economic social and cultural rights may be protected,⁸ and that the best way may not necessarily be a specific, justiciable provision in each case. Rather, JUSTICE considers that the justiciability of any right – whether civil, political, or ESC – is a matter to be determined on a case-by-case basis.
9. As it stands, though, UK law lacks even the *concept* of ESC rights as human rights, still less any measure to provide overarching protection of Covenant rights in the

⁵ c.f. Article 2 of Protocol 1 to the ECHR.

⁶ See e.g. Office of National Statistics, “GDP Growth: UK economy increased by 0.2% in 2003 Q1”, 23 May 2003; US Department of Commerce, *2002 Financial Year Report on UK*.

⁷ c.f. Lord Richard describing the remit of the government’s social exclusion unit: “Social exclusion is a shorthand label for what can happen when individuals or areas suffer from a combination of linked problems such as unemployment, poor skills, low incomes, poor housing, high crime environments, bad health and family breakdown” (Hansard, HL, 9 December 1997, col WA20).

⁸ See e.g. Waldron ‘Liberal Rights: Two sides of the coin’ in *Liberal Rights* (Cambridge University Press, 1993) at 31: ‘As an abstract matter we can say, with the drafters of Article 25 of the UDHR, that everyone has ‘the right to a standard of living adequate for the health and well-being of himself and his family’. But that may not necessarily emerge as a specific legal or constitutional guarantee: a just society may not have a rule to that effect, or even any particular agency charged with administering this

same manner that the Human Rights Act protects Convention rights. It may be that not all Covenant rights are necessarily suitable for incorporation as justiciable provisions, but – for the reasons noted above – JUSTICE remains deeply sceptical of the claim that none of them are.⁹

10. If it is correct that (i) ESC rights have the same importance as civil and political rights; and (ii) the importance of Convention rights (*qua* civil and political rights) was the justification for their incorporation into UK law, then JUSTICE considers there to be a *prima facie* case for the incorporation of Covenant rights.
11. The case for incorporation is strengthened where we identify areas where the lack of guarantees has led to a lack of protection for ESC rights in UK law.¹⁰
12. On the same basis, JUSTICE would also encourage the UK to incorporate those ESC guarantees contained in *inter alia* the EU Charter of Fundamental Freedoms, the Revised European Social Charter, and the Convention on the Rights of the Child.
13. Similarly, JUSTICE would encourage the UK to sign and ratify Protocol 12 of the ECHR implementing a free-standing right to equality, to sign and ratify the optional protocol to the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') allowing right of individual petition for breach of the Convention, and to accept the right of individual petition under the Convention on the Elimination of Racial Discrimination ('CERD'), on the basis that these measures represent important mechanisms for the protection *inter alia* of ESC rights.

Can you provide evidence of areas where you believe the lack of such guarantees leads to lesser or unsatisfactory protection of economic social and cultural rights, such as to breach the UK's obligations under the Covenant?

standard. There may be a variety of provisions and arrangements ... all of which taken together may represent the best ... that can be done in an institutional framework to honour the underlying claim for the individuals in whose behalf it can be made".

⁹ C.f. the UNHCR referred to the UK government's position that 'the provisions of the Covenant, with minor exceptions, constitute principles and programmatic objectives rather than legal obligations that are justiciable, and that consequently they cannot be given direct legislative effect' (E/C.12/1Add.79. *Concluding Observations on the UK*, 05/06/2002, para 11).

¹⁰ See para 14 below.

14. In JUSTICE's view, the most compelling instance of the failure of UK law to provide sufficient protection for Covenant rights has been in relation to the provision (or rather non-provision) of asylum support.
15. Section 55 of the Nationality Immigration and Asylum Act 2002 provided that the Secretary of State may not provide asylum support to an asylum seeker where 'the Secretary of State is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom'.¹¹ Section 55(5) of the Act provided *inter alia* that this did not prevent the provision of asylum support 'to the extent necessary for the purpose of avoiding a breach of a person's Convention rights'.¹²
16. In *R v Secretary Of State For The Home Department ex parte Q and others*,¹³ the Court of Appeal considered the issue of whether the Secretary of State could refuse to support a destitute asylum seeker under section 55(1) without also subjecting them to inhuman treatment contrary to Article 3 ECHR.¹⁴ Specifically, the Court asked whether it was compatible with Article 3 "to provide no assistance to those who are destitute on the basis that Article 3 will not be engaged unless and until that destitution results in ill-health or some other similarly severe adverse consequence?"¹⁵ The Court concluded that it was not unlawful for the Secretary of State to decline support "unless and until it is clear that charitable support and the individual is incapable of fending for himself such that his condition verges on the degree of severity [of degrading treatment] described in *Pretty*".¹⁶
17. In JUSTICE's view, while the Court's analysis of Article 3 ECHR may be sound, the decision in *Q* demonstrates the very real failure of UK law to recognize ESC rights as independent and free-standing human rights. To be sure, the right to be free from inhuman and degrading treatment is an important right but it is clearly not the only right that was engaged by the destitute condition of the respondent asylum seekers. The refusal of the Secretary of State to provide support engaged Articles 9 (Right to

¹¹ Section 55(1)(b).

¹² Section 55(5)(a).

¹³ [2003] EWCA Civ 364.

¹⁴ Para 3.

¹⁵ Para 7.

¹⁶ Para 199(viii).

Social Security), 11 (Right to Adequate Standard of Living), and 12 (Right to Physical and Mental Health) ICESCR.¹⁷ It is not a satisfactory answer to say that Article 3 ECHR provided an adequate safeguard against ill-treatment in this case. If we are to take the provisions of the ICESCR seriously, then it must be clear that state-imposed destitution is *itself* a violation of ESC rights, rather than the more severe consequences of such destitution. Moreover, it is apparent from the judgment of Q that the jurisprudence of civil and political rights (in this case, Articles 3 and 8 ECHR) is liable to become distorted to accommodate ESC rights-values where legal recognition of ESC rights is lacking.¹⁸

Specific Issues

Discrimination in Employment, Housing and Education

18. As noted in the 2002 report, there is no free-standing right to equality in UK law. Discrimination on the basis of sex, race, and disability is addressed by way of specific legislative measures, which provide varying degrees of protection.¹⁹ Discrimination on the basis of age, religion and sexual orientation remains lawful.²⁰
19. JUSTICE supports the UNCESCR's call for the introduction of comprehensive single Equality Act as a means to ensure compliance with Article 2.2 of the Covenant, and as a means to consolidate and simplify the existing discrimination provisions.

¹⁷ The facts in Q also engaged Articles 6 (in that section 8 of the Asylum and Immigration Act 1996 prohibits asylum seekers from working without the special permission of the Secretary of State (Immigration (Restrictions on Employment) Order 1996); see para 56 of judgment) and Article 2.2 (in that the measures were targeted to aliens seeking asylum).

¹⁸ See e.g. para 64:
"In the context of this case Article 8 provides little. In the context of this case we think that Article 8 adds little. Certainly Article 8 without more does not entitle the applicant to a roof over his head – see *Marzari v Italy* [1999] 28 EHRR CD 175. On the facts of this case, we find it easier to envisage the risk of infringement of Article 3 rights than of Article 8 rights. In the light of our overall conclusions we do not consider there is any need to consider Article 8 at greater length."

¹⁹ See B Hepple, M Coussey and T Choudhury, *Equality: A new framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, (Hart, 2000) paras 2.4 – 2.7.

²⁰ The exception is Northern Ireland, where discrimination on the grounds of religious belief or political opinion is prohibited: see Part III, Northern Ireland Constitution Act 1973; Fair Employment (Northern Ireland) Act 1976; Fair Employment (Northern Ireland) Act 1989; and Fair Employment and Treatment (NI) Order 1998.

20. JUSTICE also welcomes the adoption of the Race and Employment Directives,²¹ which will make it unlawful to discriminate against people on grounds of racial or ethnic origin in employment, training, education, health, security, cultural benefits and goods and services; and – in relation to employment only – unlawful to discriminate on grounds of religion or belief. JUSTICE expresses its concern, however, that the Government has decided to implement these directives wholly by use of regulations, which will – in our view – give rise to a two-tier system of protection as follows.
21. The definition of race discrimination in the Race Directive covers discrimination on grounds of racial or ethnic origin, though it explicitly excludes discrimination on grounds of nationality (article 3(2)) and does not specifically mention the grounds of ‘colour’. The Race Relations Act 1976 defines race discrimination on ‘racial grounds’ as including the grounds of colour, race, nationality or ethnic or national origins (section 3(1)).
22. The consequence is that the new regulations apply to discrimination on grounds of racial or ethnic origin, but not to discrimination on grounds of nationality or colour. Hence the new definition of indirect discrimination, the new burden of proof, the new definition of genuine and determining occupational requirements will apply to cases of discrimination on grounds of racial or ethnic origin, but the old definitions will apply to discrimination on grounds of nationality or colour. In such cases it is not always clear whether the discrimination is on grounds of racial or ethnic origin or nationality, or both.
23. As a practical matter, this will create unnecessary difficulties for tribunals and courts and the general public. Some tribunals may have to consider each ground separately this will make the law excessively difficult to understand and apply. The broader consequence of the two-directive approach is that victims of race discrimination will receive a better level of protection than do victims of discrimination on grounds of their religion or belief, leaving the anomaly that Sikhs and Jews have far more extensive protection from discrimination than do Muslims and Hindus.
24. JUSTICE also reiterates its call for the UK to ratify Protocol 12 of the European Convention of Human Rights, which would implement a free-standing right to non-discrimination in respect of “the enjoyment of any right set forth by law”.

²¹ Council Directives 2000/43/EC (‘Race Directive’) and 2000/78/EC (‘Employment Directive’).

Poverty and Social Exclusion

25. The 2002 joint NGO report highlighted real problems of social exclusion and poverty in the UK, particularly among asylum seekers, certain ethnic minority groups, gypsies and travellers, and people with disabilities.²²

26. As noted above, JUSTICE considers that a principled statement of ESC rights coupled with a comprehensive single Equality Act would provide the ideal yardstick by which the government could monitor and combat social exclusion, particularly among vulnerable groups.

Homelessness

27. The 2002 Report noted that homelessness was a continuing problem: in 2000, a total of 172, 760 households were recognised as homeless by local authorities in England. This is estimated to represent about 410,000 people.²³ People from minority ethnic groups are most likely to be homeless. For example, in London between June and September 2000, 49% of households accepted as homeless by local authorities were from ethnic minorities. Of these 23% were from African and Caribbean households, although they comprise only 11% of households in London.²⁴

28. To this end, JUSTICE welcomes the coming into force of the main provisions of the Homelessness Act 2002 on 31 July 2002, which impose a general duty on local authorities to house those who are homeless or threatened with homelessness.²⁵ However, section 14(2) of the Act prevents local authorities from providing housing *inter alia* persons subject to immigration control. While this is consistent with the shift of responsibility for housing asylum seekers from local to central government as provided by section 115 of the Immigration Act 1999, JUSTICE has – as noted

²² See para 1.5

²³ Shelter, *Housing and Homelessness in England: the facts*, July 2001.

²⁴ *Ibid*

²⁵ Section 5, Homelessness Act 2002; The Homelessness Act 2002 (Commencement No. 1) (England) Order 2002 (SI 1799/2002).

above²⁶ – serious concerns as to the compatibility of asylum support (including housing) with ESC rights.

29. In JUSTICE's view, the Act's provision of a statutory duty to accommodate homeless persons is a useful illustration both of how an apparently abstract and programmatic ESC right can be given practical effect, and also how a more principled approach to incorporation of ESC rights would measurably enhance their protection. In the case of the Homelessness Act, there is no reference made to Article 11 ICESCR or similar ESC provisions in international instruments, not even in the Long Title.²⁷ Nor does it appear that the Covenant was referred to in the Bill's passage, save in the Joint Committee's own proceedings.²⁸ Recognition of the right to housing within the framework of the Homelessness Act, even as a matter of principle, would allow UK courts to have regard to the extensive international and comparative jurisprudence surrounding Covenant rights when interpreting the Act's provisions.

Housing Conditions

30. As noted in the 2002 NGO report, JUSTICE notes that poor quality housing is a continuing problem, particularly for certain minority groups, raising issues both of adequacy of housing conditions and of discrimination under Article 11 ICESCR. Members of certain ethnic minorities are much more likely to live in unfit properties than members of the majority white population. About one third of Pakistani and Bangladeshi households live in unfit properties compared to about 6% of white households.²⁹ Bangladeshi and Pakistani households are also more likely to be overcrowded than other households.³⁰

31. On the same basis, there are concerns as to the adequacy of accommodation which is being provided to many homeless households, including those supported by NASS under sections 95 and 98 of the Immigration and Asylum Act 1999. The number of households in all types of temporary housing, and in particular in Bed and Breakfast

²⁶ See para 14 above.

²⁷ It is "[a]n Act to make further provision about the functions of local housing authorities relating to homelessness and the allocation of housing accommodation; and for connected purposes".

²⁸ 1st report of the Joint Committee on Human Rights, Homelessness Bill.

²⁹ Cabinet Office, Performance and Innovation Unit Cabinet Office, Performance and Innovation Unit, Improving Labour Market Achievements for Ethnic Minorities in British Society, July 2001.

³⁰ *Ibid*

accommodation (B&Bs), has begun to rise sharply in recent years, due to a shortage of social housing, particularly in London and the South East. Conditions in B&Bs are often unsatisfactory, cramped and overcrowded. Figures released by the government in December 2001 show there are 77,940 households living in temporary accommodation - the highest number ever. Of these 12,290 are housed in B&Bs, an increase of 24 % on 2000.³¹ The government's recent pledge to end the use of B&B accommodation by 2004 is welcome.

32. A rights-based approach to the adequacy of housing would provide a useful illustration for the justiciability of ESC rights. While the courts are ill-placed (constitutionally and forensically) to adjudicate general policy decisions as to allocation of resources for housing, they are well-placed to determine factual questions such as whether particular accommodation is unfit for human habitation. Given their experience of balancing relevant considerations in other rights-based areas, such as the qualified ECHR rights under the Human Rights Act, it seems implausible that UK courts would not be competent to balance similar considerations in relation to a right to adequate housing.

The Reporting Process

What more could be done to increase awareness of the reporting process?

33. JUSTICE welcomes the standing NGO forum established by the Lord Chancellor's Department, and the establishment of a subcommittee to address the monitoring of international conventions. It welcomes the similar use of NGO fora by the Foreign and Commonwealth Office, most recently in relation to the UK's delegation to the UN Commission on Human Rights.

34. Outside the circle of participating NGOs, however, JUSTICE would on the basis of purely anecdotal evidence conclude that general awareness of the reporting process remains minimal. This is perhaps unsurprising, given the remote nature of the intergovernmental institutions involved, the abstruse character of much of the subject matter, and the formality of the reporting process itself. If there is a fault, then, with general awareness of the procedure, it lies as much with the relevant intergovernmental institutions as with the UK government.

³¹ Shelter, Press Release, 11 December 2001

35. While JUSTICE would commend the government's continuing efforts to increase awareness of the reporting process among NGOs, it would also encourage greater coordination between the various government departments responsible for monitoring particular Conventions. Generally speaking, NGOs dealing with a particular area (e.g. housing) are likely to have closer contact with the particular government department in their area than with the Lord Chancellor's Department (in its capacity for overseeing international human rights instruments). As such, greater coordination among government departments to encourage NGO participation is likely to yield greater awareness.

What steps could be taken to make the reporting process more useful or relevant to government or wider civil society?

36. The utility of the reporting process for NGOs is, by and large, a matter for NGOs and other civil society organizations. Increased *government* awareness of the reporting process would, on the other hand, benefit both government and civil society alike. In JUSTICE's view, the lack of an appreciable culture of rights in government means that governmental measures rarely address human rights issues until either late in the legislative process or, in some cases, when they are first challenged in the courts. An increased internal awareness of the reporting procedure may have the benefit of alerting policy- and decision-makers to the importance of having regard to international human rights standards, including Covenant rights and ESC rights generally.

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