

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's submissions to the Women and Equalities Committee's Ensuring strong equalities legislation after EU exit inquiry

November 2016

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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EXECUTIVE SUMMARY

The result of the referendum on the UK's membership of the European Union, and forthcoming withdrawal, carries obvious implications for the protection of rights and freedoms in this country, and in particular equality law.

Liberty is deeply concerned for the protection of equality in the UK after Brexit. Strong rights protections will be crucial to the UK's future after the referendum. We seek to underscore the paramountcy of securing hard-won victories for rights into UK law as part of any Brexit settlement.

Liberty urges the Women and Equalities Committee to:

- Recommend that the Government ensure all statutory instruments relevant to equality law and enacted under section 2 of the European Communities Act 1972, along with all EU-law equality obligations (including those set down by the case law of the Court of Justice of the European Union) either directly effective in UK law or implemented by any other means, are preserved through provisions of the 'Great Repeal Bill'.
- Recommend that the Government eschew previous pledges to repeal the Human Rights Act, highlighting its crucial importance in the fight against discrimination of all forms and the Convention's foundation in the fundamental principle of equal treatment.
- Recommend that the Government (i) make overwhelmingly clear its commitment to overcoming hate crime, (ii) take greater concerted action to monitor and curb the rise in hate crime and to ensure it is more effectively investigated and prosecuted, and (iii) give hate crime based on a person's nationality or immigration status equally serious attention and concern as other forms of hate crime, something that the Government's Hate Crime Action Plan manifestly failed to do.

Equality protections in UK law

2. The substance of much of EU law is enshrined in Acts of Parliament such as the Equality Acts of 2006 and 2010, and in secondary legislation made independently of the European Communities Act 1972 (ECA). The protections enshrined in these pieces of legislation would not be immediately compromised by this country's withdrawal from the EU; however, over the longer term, they will be vulnerable to repeal once the external pressure exerted by EU legal standards is removed. As Professor Catherine Barnard and Professor Aileen McColgan stated in evidence before the Women and Equalities Committee, three areas in which the Government has successfully eroded rights protections in recent years are precisely areas in which there was little or no EU-law holding them back – that is, employment tribunal fees, unfair dismissal, and trade union voting thresholds. Liberty is concerned that, after Brexit, a backstop against further rights-restricting legislation, especially in the field of equality law, will be lost.
3. Other equality protections derived from EU law have effect solely by way of sections 2(1) and 2(2) of the ECA. Directly-effective EU law will immediately cease to have effect once the ECA is repealed unless these protections are proactively preserved by domestic law. Similarly, secondary legislation made under section 2(2) of the Act which implements EU equality provision will be lost unless alternative provision is made.
4. Liberty believes that all EU law rights and equality protections which are either directly effective, or are contained in secondary legislation contingent on the ECA, must be preserved by way of the primary legislation required to repeal the 1972 Act. It has been suggested that will done through a forthcoming 'Great Repeal Bill'. Of this, Secretary of State for Exiting the European Union, David Davis, has stated, "EU law will be transposed into domestic law, wherever practical, on exit day. It will be for elected politicians here to make the changes to reflect the outcome of our negotiation and our exit."¹ Liberty urges that the Government commit to full implementation of all EU law rights and equality protections – whatever their EU-law source – through any forthcoming 'Great Repeal Bill'.
5. The implications of a failure by Government to preserve EU-derived equality protection implemented through secondary legislation would be particularly

¹ *The Guardian*, 'Theresa May to trigger article 50 by end of March 2017', 2 October 2016, available here: <https://www.theguardian.com/politics/2016/oct/01/theresa-may-to-propose-great-repeal-bill-to-unwind-eu-laws>.

concerning in Northern Ireland. Two crucial areas of Northern Ireland equality law are set out in Regulations which would fall in the absence of provision preserving this protection. The Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 provide the framework of protection against discrimination in employment on the grounds of sexual orientation. They provide that it is unlawful to discriminate on grounds of sexual orientation in employment and vocational training and prohibit direct discrimination, indirect discrimination, victimisation and harassment. Regulations 30 to 32 confer powers and duties on the Equality Commission for Northern Ireland in relation to the ground of sexual orientation, including the general duty of working towards the elimination of discrimination, promoting equality of opportunity between persons of differing sexual orientations etc. Regulations 33 to 41 provide for remedies for individuals, including compensation, by way of proceedings in industrial tribunals and in the county courts.

6. Further, the Employment Equality (Age) Regulations (Northern Ireland) 2006 make it unlawful to discriminate on grounds of age in employment and vocational training. They prohibit direct discrimination, indirect discrimination, victimisation, instructions to discriminate, and harassment. The regulations also provide for rights and duties for the Equality Commission for Northern Ireland and make provision for the enforcement of the regulations through the Industrial Tribunals and for remedies. Both these Regulations are vulnerable on repeal of the ECA, since that Act is its enabling legislation. Since equality law in Northern Ireland remains unconsolidated, with the Equality Act 2010 not applicable to it, it is crucial that these Regulations are retained after Brexit. Liberty urges the Committee to recommend that their protections are safeguarded as part of any future 'Great Repeal Bill'.

Jurisprudence of the Court of Justice for the European Union

7. The future status of the case law of the Court of Justice for the European Union (CJEU) is unclear. The CJEU has delivered significant victories in a variety of crucial areas of human rights protection, in particular when applying the EU Charter of Fundamental Rights. For example, decisions of the CJEU have been responsible for spurring amendments to the UK's equality law such as the inclusion of pregnancy status and transgender identity as protected characteristics – both of which have been incorporated into the Equality Act 2010.² It has also banned discrimination against individuals who associated with others with disabilities – protecting, for

² See *Webb v EMO* (C-32/93) [1994] ECR I-3567 and *P v S and Cornwall County Council* (C-13/94) [1996] ECR I-2143, respectively.

example, relatives of those with disabilities – and has helped employees fight discrimination in the workplace by making employers demonstrate, where there is prima facie evidence of unequal pay, that no discrimination took place.³ It has also held that equality requires protection from victimisation inflicted by employers or others as a result of bringing a complaint of discrimination.⁴ The CJEU has also found that caps on discrimination damages contained in (now superseded) UK equality legislation were unlawful, forcing the Government to remove the upper limit.⁵

8. Uncertainty remains about the status of judgments which have not been incorporated directly into UK legislation, nor is it clear what will be the approach of UK courts to the CJEU's judgments once we are no longer a member of the EU. Liberty urges the Committee to recommend that these rights protections are directly incorporated into primary legislation as part of any 'Great Repeal Bill'.
9. Also uncertain is the future status of the UK's own case law – where it has been enriched through the application of CJEU judgments and EU law, thereby aiding the development of the common law. For example, Liberty is currently representing John Walker, who has brought a claim challenging the discriminatory denial of pension death benefits for same-sex partners. Unlike the vast majority of private occupational pension schemes, the company for which he has worked for 23 years, Innospec, does not treat surviving same-sex spouses and civil partners the same as surviving spouses of other-sex marriages, that is, widows or widowers. As a result, his husband, unlike the spouses of heterosexual employees, will not receive any pension benefits were he to outlive John. Currently before the Supreme Court, his case in part relies on the EU Framework Directive on Equal Treatment in Employment as well as CJEU jurisprudence.

Legislative protection of EU law rights due to expire with Brexit

10. Liberty urges the Committee to recommend that existing EU-law rights protections be safeguarded via the suggested mechanism of a 'Great Repeal Bill.' The most appropriate way of scrutinising Government policy on this issue is via a single legislative vehicle with the express purpose of replacing EU-law rights and equality protection. As withdrawal from the EU is implemented, the important victories for

³ *Coleman v Attridge Law* (2008) C-303/06 and *Enderby v Frenchay Health Authority and Secretary of State for Health* (1992) C-127/92, respectively.

⁴ *Coote v Granada Hospitality* (C-185/97) [1998] IRLR 656.

⁵ *Marshall v Southampton and South West Hampshire AHA* (C-271/91) [1994] QB 126.

human rights from which the UK has benefited during its membership must be retained, and given pride of place within that settlement.

It has separately been suggested that EU law rights could be incorporated in the Government's threatened replacement of the Human Rights Act with a 'British Bill of Rights'. Liberty believes this approach is deeply flawed and misunderstands the nature of Government policy in this area. By its own admission, Government's proposed replacement of the HRA is intended to dilute fundamental rights protection – not retain or enhance it. Government has been clear on this: its 2014 strategy paper on the HRA it sets out myriad ways in which human rights could be curtailed, seeking, for example, to redraft the meaning of rights, diminish rights protections, and render legal challenge of rights violations more difficult.⁶

After the UK leaves the EU, its remaining human rights and equality protections will be more important than ever. The HRA and the ECHR which it implements, remain the most fundamental safeguard against discriminatory abuses of human rights in the UK. In advocating for the continued protection of equality and other human rights protection as we exit the EU, it would be nonsensical to support a project which is premised on the further repeal of primary legislation which protects equality. Parliament's EU Justice Sub-Committee has noted that, after extensive consideration, it was left "unsure why a British Bill of Rights was really necessary", with their "[d]oubts about the wisdom of introducing a British Bill of Rights [growing] with each evidence session we held".⁷ It would be anomalous to use an entirely separate, discredited Government suggestion to shore up important EU rights.

The European Convention on Human Rights and the Human Rights Act

11. Liberty remains extremely concerned that the current Government still is committed to repealing the HRA in these testing times for equality and non-discrimination. As Liberty has previously noted, this presents a grave risk to basic equality protection.⁸ Liberty urges the Committee to uphold the fundamental values of equal treatment

⁶ See 'Protecting Human Rights in the UK – The Conservative's Proposals for Changing Britain's Human Rights Laws', October 2014, available at - http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf .

⁷ European Union Committee, Report number 12 of Session 2015/16, The UK, the EU and a British Bill of Rights, p. 3.

⁸ See Liberty, 'Liberty's briefing on the Human Rights Act and the Government's proposal for its repeal', May 2016, available here: <https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%27s%20Briefing%20on%20the%20Government%27s%20proposal%20to%20repeal%20the%20HRA%20%282016%29.pdf>.

that the ECHR embodies and recommend that the Government eschew its plans to repeal the HRA.

12. The ECHR and the HRA have brought vital legal victories in the fight against discrimination in both the UK and elsewhere. They represent an essential tool to combat hate crime and discrimination after Brexit. Article 14 ensures that all individuals have their rights protected, regardless of prejudice, bigotry, or stereotype. As Lord Woolf said in our Court of Appeal:

“The principle of non-discrimination applying as it does, to all freestanding rights, is fundamental to the values that the Convention and the HRA 1998 are intended to protect.”⁹

13. In practice Article 14 has proved an essential bulwark to ensure that rights are respected regardless of race, religion, gender or other distinguishing characteristic.
14. To take only a few historic cases, in 1981 the European Court of Human Rights found Northern Ireland’s law criminalising homosexuality to be a breach of Article 8 of the ECHR, leading to Northern Ireland repealing that law a year later. The ramifications of that judgment went even wider. Other states with similar laws recognised the need for change. Cyprus, for example, decriminalised homosexuality in 1998 in response to another ruling that its laws breached Article 8.¹⁰ Further afield, the United States’ Supreme Court more recently relied on ECHR jurisprudence to strike down US state laws which criminalised homosexuality as unconstitutional.¹¹
15. The European Court of Human Rights has also ruled that the UK police’s ‘stop and search’ powers under section 44 of the Terrorism Act 2000, exercisable without any suspicion whatsoever, were discriminatory and unlawful, after a journalist and a peaceful protestor were wrongly stopped from attending a demonstration.¹² It was only after the Court made its finding that the Coalition Government repealed the provision allowing for such powers.
16. In 2013, Liberty intervened to support the case of Ms Nadia Eweida, an employee of British Airways, after her appeals were dismissed in the UK. Bringing her case to the European Court of Human Rights, it found that the refusal to permit her to wear her cross over her uniform, in her role meeting members of the public, breached both her

⁹ *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, paragraph 8.

¹⁰ *Modinos v. Cyprus*, Application No. 15070/89, judgment of 22 April 1993.

¹¹ *Lawrence v Texas* 539 US 558 (2003),

¹² *Gillan & Quinton v the United Kingdom* (App. No. 4158/05).

rights to religious freedom under Article 9 and her rights against discrimination under Article 14.¹³ Strasbourg set out even stronger protections of religious freedom by its finding that the State is under a positive duty to secure the rights under Article 9, requiring it, among other things, to make sure that religious freedom is respected by private employers.¹⁴

17. More specifically, Article 14 imposes several important obligations on states to ensure equality and combat discrimination. In the UK, Article 14 has been relied upon repeatedly to ensure that all receive equal treatment. For example, in a landmark case in 2004, the House of Lords used the HRA to make sure that provisions of the Rent Act 1977 did not discriminate against gay couples.¹⁵ Whilst heterosexual couples had the right to succeed to the statutory tenancy of their deceased partners, the law wrongly failed to give gay couples the same rights. Article 14 made sure that they had the same rights as everyone else.

18. In another case, Sarika Singh, a fourteen year old school pupil, was excluded from classes for wearing her kara, a plain bangle widely accepted as a central tenet of the Sikh race and religion. Using Article 9, the right to freedom of conscience, along with Article 14, the right against discrimination, the High Court held that Sarika had a right to wear her kara in school.¹⁶ She not only had a right to religious expression, but also a right to manifest her religion just as freely as those of any other faith.

19. In another case, an unmarried heterosexual couple from Northern Ireland had lived together for many years. One was the natural mother of the child whom they both sought to adopt. However, they were prevented from doing so, since adoption law in Northern Ireland prevented unmarried couples from applying to adopt children. The House of Lords found that this breached their rights to family life and their rights against discrimination under the Human Rights Act.¹⁷

20. Individuals have relied on Article 14 to challenge discriminatory denials of support for those in need as well. It has recently brought a historic victory to some of society's most vulnerable. The case included the grandparents of a child with very serious disabilities, with whom they lived, who required an additional bedroom in which to store their grandchild's equipment necessary for everyday life. It also included a

¹³ *Eweida and others v the United Kingdom* (App. Nos. 48420/10, 59842/10, 51671/10, and 36516/10).

¹⁴ See *Eweida*, paragraph 84.

¹⁵ *Ghaidan v Mendoza*.

¹⁶ *R (on the application of Watkins Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865 (Admin).

¹⁷ *Re P (A Child) (Adoption: Unmarried couples)* [2008] UKHL 38.

woman with severe disabilities who lived with her husband – who was also her carer – in their two-bedroom flat. Since they could not share the same bed, due to her disabilities, and that bedroom could not accommodate an additional place to sleep, he slept in a spare room.

21. The Supreme Court found that the Regulations governing the imposition of the bedroom tax – a reduction in housing benefit payment proportional to every room deemed to be 'spare' by the Department for Work and Pensions – unlawfully discriminated against them under Article 14.¹⁸ The Secretary of State had unlawfully refused to provide exceptions in the Regulations for these kinds of cases – since Article 14 requires that the Government must not impose arbitrary, blanket rules which disadvantage those who are different. Where individuals have different needs, arising out of their vulnerabilities or disabilities, the Human Rights Act requires the Government to make sure that individuals are treated appropriately and given the support they need.
22. Article 14 also provides the tools to challenge discrimination in future. Liberty has long opposed discriminatory and over-broad stop and search powers used by police, which statistics show are still used disproportionately against people who are black or of other ethnic minorities.¹⁹ The Human Rights Act remains the best hope for challenging the authorities where they fail to treat those of marginalised groups or minorities with the equal respect they deserve – for example, the Government's discriminatory and divisive policy to create an "hostile environment" for migrants and their families – matters of crucial importance after Brexit.
23. Indeed, the HRA remains a powerful tool for fighting discrimination in the UK. For example, it has been used to fight the Government's minimum income requirements for UK citizens and residents seeking to have their spouses join them in the UK. As a result of these changes, British citizens and British residents, including recognised refugees, who do not earn a gross annual income of £18,600 are prohibited from bringing their loved ones to live together as their spouses. The High Court found that these rules breached Article 14, and whilst this finding was overturned by the Court of Appeal, the judgment is currently on appeal before the Supreme Court.

¹⁸ [2016] UKSC 58.

¹⁹ See Liberty, 'Section 60 stop and search is discriminatory, destructive and doesn't work', 22 April 2015, available here: <https://www.liberty-human-rights.org.uk/news/blog/section-60-stop-and-search-discriminatory-destructive-and-doesnt-work>.

24. Overall, Article 14 has been crucial in gaining real reforms for historically marginalised and disadvantaged groups – and not just in the UK. Its power in protecting equality is easily demonstrated. As observed by a Joint Parliamentary Committee in 2013:

“In cases involving the UK just over a decade ago [namely, *Smith and Grady v United Kingdom*²⁰ and *Lustig-Prean and Beckett v United Kingdom*²¹] the Court held that dismissal from the armed forces on the sole basis of homosexuality was contrary to Article 8 of the Convention (which guarantees the right to private and family life) read together with Article 14 (which prohibits discrimination in the enjoyment of Convention rights). Yet at the time the UK Government, in its submissions before the Court, had argued that “admitting homosexuals to the armed forces at this time would have a significant and negative effect on the morale of armed forces’ personnel and, in turn, on the fighting power and the operational effectiveness of the armed forces”. Moreover, the House of Commons had itself voted against any change to the Government’s policy, by a majority of 188 votes to 120. But following the Court’s judgment, the Government acted quickly to end the ban on homosexuals in the military, and today it seems inconceivable that the Government or Parliament would seek to reinstate it. Indeed, [Secretary General of the Council of Europe, Thorbjørn Jagland] told us that “the rights of LGBT people,” and concern over infringement of these rights in some member states, was now one of the issues raised most frequently and forcefully by the UK Government within the Committee of Ministers.”²²

25. In fact, the Government has recently sought to amend the current Armed Forces Bill to remove “homosexual acts” from the list of residual grounds of dismissal from the military.

26. The same is true of other countries, such as Germany, which – soon after Strasbourg’s judgment in *Lustig-Prean* – voted to repeal the ban on gay men and women serving in the military. As academics have noted, “Between 1991 and 1998, not a single country abandoned its discriminatory policy or practices [to exclude

²⁰ (1999) 29 EHRR 493.

²¹ (2000) 29 ECHR 548.

²² Joint Committee, ‘Draft Voting Eligibility (Prisoners) Bill: Report’, Session 2013-14, 16 December 2013, accessible here: <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftvoting/103/103.pdf>.

those who are gay from their militaries]. During the decade following the *Lustig-Prean & Beckett* judgment, sixteen countries did so.”²³

27. There are myriad other examples of real rights-based reform:

“...when the Hungarian (2002) and the Portuguese Constitutional Courts (2005) declared unconstitutional the unequal age-of-consent laws in those countries, they relied heavily on the *Sutherland* decision finding that the UK’s age-of-consent statute contravened the European Convention [which was brought on the basis of Article 8, the right to private and family life, and Article 14, and led to the UK equalising the age of consent]. In 2007, the Irish Supreme Court overturned national laws that prohibited changing a birth certificate following sex reassignment, relying on the ECtHR’s decision in *Goodwin v. United Kingdom*.”²⁴

28. What is clear from these examples is that the compliance of the United Kingdom was at the forefront of these crucial legal changes. The fact that the UK complied with these historic decisions surely played a very significant role in ensuring Europe-wide reform in support of LGBT rights. The right against discrimination, under Article 14, was critical to these efforts.

29. The Convention’s anti-discrimination guarantees continue to be asserted by individuals in countries which have yet to fully implement them. For example, the European Court of Human Rights continues to uphold case after case in which individuals have been discriminated against on the basis of their sexual orientation in Eastern Europe, often receiving inhuman and degrading treatment contrary to Article 3, all because of their sexuality.²⁵

30. These examples demonstrate the crucial importance of Article 14 in the protection of equality. The UK’s commitment to these protections after Brexit will crucial not only to the fight against discrimination at home, but elsewhere as well.

The Human Rights Act and hate crime

31. The Human Rights Act recognises that states need to act to prohibit and deter the commission of hate crime. It requires that the Government does what it reasonably

²³ See Helfer, L., and Voeten, E., ‘International Court as Agents of Legal Change: Evidence from LGBT Rights in Europe’, in *International Organization* 68, Winter 2014, pp. 77-110, pp. 90 and 93.

²⁴ See Helfer and Voeten, p. 89. For footnotes, see original.

²⁵ See, for example, *Identoba and others v. Georgia* (App. No. 73253/12), *MC and CA v. Romania* (App. No. 12060/12), *Baczkowski and others v. Poland* (App. No. 1543/06), *Alekseyev v. Russia* (App. Nos. 4916/07, 25924/08, and 14599/09), and *Genderdoc-M v. Moldova* (App. No. 9106/06).

can to protect individuals from crime, but in particular crime motivated by hate for the victim on the basis of their group membership or other status. The HRA requires states to take positive measures to safeguard individuals from severe discrimination and hate crimes. For example, the European Court of Human Rights has found that the failure to safeguard those with disabilities from harassment and abuse can amount to a breach of Article 3, the right against inhuman and degrading treatment.²⁶

32. The Human Rights Act and the Convention have done a great deal to hold the authorities to account for other failures to protect individuals from racist violence. For example, in 2000, Zahid Mubarek was murdered by a racist whilst serving a short sentence in a Young Offender's Institution for theft. Just five hours before he was due to be released, he was beaten to death, having been placed in the cell with the murderer despite the evidence of his violent racism – in fact, the police were found to have missed 15 separate opportunities to save Mr Mubarek from his fate.²⁷ The House of Lords held that the Human Rights Act required the Government to hold an inquest which not only looked at the cause of his death, but the surrounding circumstances which led to it.²⁸ The inquest itself uncovered widespread racism in prisons, and identified almost 200 failings in the prison system, leading to better safeguards against racist attacks in custody.²⁹

33. In another example, father-of-two Christopher Alder, 37, and a black former British Army soldier, choked to death on the floor of Hull Police Station in a pool of his own blood, urine, and excrement while four officers watched, chatting and joking, in April 1998. None of the officers faced any criminal or disciplinary penalty in relation to the incident. Liberty acted for Mr Alder's sister, Janet Alder, who took a case to the European Court of Human Rights, since the Human Rights Act was not yet in force. Janet and her family argued that their brother suffered inhuman and degrading treatment, and that his death was never properly investigated. The Government fought the case until the final stages when it lodged its official apology with the Strasbourg court. It is believed to have been the first time the UK admitted violating Articles 2 and 3 of the European Convention on Human Rights in relation to a death in custody in the UK. The declaration also acknowledged that racism played a part, in breach of Article 14.

²⁶ See *Dordević v Croatia* (App. no. 41526/10).

²⁷ *The Guardian*, 'Mubarek "could have been saved 15 times"', 29 April 2005, available here: <https://www.theguardian.com/news/2005/apr/29/prisons.uknews?INTCMP=ILCNETTXT3487>.

²⁸ *R v. Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51.

²⁹ See 'Report of the Mubarek inquiry', 29 June 2006, available here:

<https://www.gov.uk/government/publications/report-of-the-zahid-mubarek-inquiry>.

34. The HRA has also been crucial in the fight to combat violence against women. Article 14 has been used, for example, to protect women from domestic violence by making sure police act appropriately when allegations are raised – where they would otherwise refuse to investigate violence against women. In one case, Nahide Opuz and her mother were repeatedly threatened and assaulted by Nahide’s husband.³⁰ Nahide was beaten, run down with a car, and stabbed, but on each occasion the authorities’ responses were inadequate – police, prosecutors, and courts were said to view such crimes as domestic matters in which they need not become involved. Even after he shot and killed her mother, Nahide’s husband received only 10 months’ imprisonment and a small fine. The Court held that the government had violated Articles 2 and 3, finding that the authorities had failed to protect Nahide and her mother, and should have done much more to properly investigate and punish her husband. But the Court also found that they had violated Article 14, since the authorities had deprived her and her mother of the equal protection of law, solely because they were women.

Government response to hate crime

35. One of the most pressing rights issues to emerge since the referendum vote, is the upsurge in hate crime. There have been multiple and shocking reports of xenophobic, racist, Islamophobic, homophobic, and other hate crimes. These crimes have ranged from vandalism and verbal abuse to serious physical violence and even alleged murder.

36. In fact, since the referendum, the National Police Chiefs’ Council (NPCC) reported a 57% rise in hate crime,³¹ with later figures demonstrating a lasting rise.³² A 41% rise in reported hate crimes has since been reported in official figures released by the Home Office in October.³³ Indeed, as Mark Hamilton, head of the NPCC stated:

“I believe the referendum debate has led to an increase in reporting of hate crime. It is very clear in the last couple of weeks that more people have been aware of experiencing such incidents than we have had before...Some

³⁰ *Opuz v. Turkey* (App. No. 33401/02).

³¹ National Police Chiefs’ Council, ‘Hate crime is unacceptable in any circumstances, say police’, 27 June 2016, available here: <http://news.npcc.police.uk/releases/hate-crime-is-unacceptable-in-any-circumstances-say-police>.

³² *The Independent*, ‘Brexit caused lasting rise in hate crime, new figures show’, 8 September 2016, available here: <http://www.independent.co.uk/news/uk/crime/brexit-hate-crime-racism-eu-referendum-poland-islam-more-in-common-a7231836.html>.

³³ *The Guardian*, ‘Hate crimes soared after EU referendum, Home Office figures confirm’, 13 October 2016, available here: <https://www.theguardian.com/politics/2016/oct/13/hate-crimes-eu-referendum-home-office-figures-confirm>.

people took that as a licence to behave in a racist or other discriminatory way. We cannot divorce the country's reaction to the referendum and the increase in hate crime reporting."³⁴

37. Moreover, the surge in hate has been directed far beyond EU nationals to all 'visible minorities'. Black equality organisations have reported incidents of abuse reminiscent of the 1970s.³⁵ In early September police in Bristol announced that they were investigating an apparently racially-motivated assault on a 10-year-old boy by two other children.³⁶ As Faith Matters founder, Fiyaz Mughal, has pointed out, "the Brexit vote seems to have given courage to some with deeply prejudicial and bigoted views that they can air them and target them at predominantly Muslim women and visibly different communities".³⁷ Tell Mama, an organisation working to fight Islamophobic hate crime, has received reports of Muslim women facing taunts of "we voted you out, why are you still here", and "today's the day we get rid of the likes of you."³⁸

38. The UN Committee on the Elimination of Racial Discrimination issued a report in August which noted its deep concern "that the referendum campaign was marked by divisive, anti-immigrant and xenophobic rhetoric, and that many politicians and prominent political figures not only failed to condemn it, but also created and entrenched prejudices, thereby emboldening individuals to carry out acts of intimidation and hate towards ethnic or ethno-religious minority communities and people who are visibly different."³⁹

39. Thus far, the Government has failed to properly respond to these concerning developments. In fact, it has appeared to abate them, with the profoundly disturbing suggestion from the Home Secretary to force companies to name their non-UK workers, in addition to her announcement to deepen and intensify efforts to create a

³⁴ *The Huffington Post*, 'EU Referendum To Blame For Hate Crime Rise, Senior Police Officer Says', 11 July 2016, available here: http://www.huffingtonpost.co.uk/entry/eu-referendum-to-blame-for-hate-crime-rise-senior-police-officer-says_uk_5783a656e4b07a99eadd0170.

³⁵ See The Monitoring Group event 'Brexit, Racism and Xenophobia' in Tottenham, attended by over 400 local people, July 2016.

³⁶ *The Guardian*, 'Police investigate alleged racist attack on 10-year-old in Bristol', 6 September 2016, available here: <https://www.theguardian.com/uk-news/2016/sep/06/boy-10-racially-assaulted-in-bristol>.

³⁷ *The Huffington Post*, 'Racist Attacks After Brexit Soar As Hate Crimes Reported To Police Increased By 57%', 28 June 2016, available here: http://www.huffingtonpost.co.uk/entry/post-brexit-racist-attacks-soar-hate-crimes-reported-to-police-increase-57_uk_57714594e4b08d2c5639adcb.

³⁸ See *The Huffington Post*, 28 June 2016.

³⁹ UN Committee on the Elimination of Racial Discrimination, 'Concluding observations on the twenty-first to twenty-third periodic reports of United Kingdom of Great Britain and Northern Ireland', 26 August 2016, available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD_C_GBR_CO_21-23_24985_E.pdf.

'hostile environment' for migrants by excluding them from basic services. The Department for Education has also continued with its odious new policy of requiring schools to ask parents to provide evidence of their child's nationality.

40. Liberty is deeply concerned by this divisive, discriminatory, and damaging rhetoric and policy making which is clearly emboldening those with prejudiced views to act in a hateful and violent manner towards minority groups. This rhetoric is currently a feature across the political spectrum, with MP Rachel Reeves around the same time speaking of "bubbling tensions in this country" that "could explode", with her constituency an alleged "tinderbox". Elected politicians' use of their public platform to issue such warnings and stoke tension in this manner is not a new phenomenon. However, society's response to it have changed; the sort of statements for which former MP Enoch Powell in 1968 was, in effect, nationally ostracized have sadly become part of mainstream political discourse.⁴⁰
41. As it implements Brexit, the Government must make overwhelmingly clear its commitment to overcoming hate crime. It should also take greater concerted action to monitor and curb the rise in hate crime and to ensure it is more effectively investigated and prosecuted. The Hate Crime Strategy published by the Home Office in August 2016, provides a useful overview of ongoing initiatives but does not set out a robust strategy for tackling the scourge of hate crime. Racial hate crime makes up 82% of all such crime and is estimated to be severely under-reported. The Home Office's own Hate Crime 'Action Plan', for example, highlighted the disturbing differences between figures on hate crime reported to the police and the hate crime that likely takes place.⁴¹ Statistics from the Crime Survey for England and Wales continue to be around four times higher than the numbers of such crimes reported to police, with similarly low rates of prosecution for hate crimes that are reported. Conviction and victim satisfaction rates are low and academics report poor police training and a patchy police response across the country.
42. Furthermore, the bases on which crime is categorised by the Strategy as motivated by hate are all too narrow. The Strategy does not, for example, explicitly include crimes motivated by a person's perceived nationality or immigration status. This must

⁴⁰ See Liberty, 'National Hate Crime Awareness Week 2016: We stand together to reject the politics of hate', 7 October 2016, available here: <https://www.liberty-human-rights.org.uk/news/blog/national-hate-crime-awareness-week-2016-we-stand-together-reject-politics-hate>.

⁴¹ Home Office, 'Action Against Hate: The UK Government's plan for tackling hate crime', July 2016, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/543679/Action_Against_Hate_-_UK_Government_s_Plan_to_Tackle_Hate_Crime_2016.pdf.

be reformed: hate crime categorisation should reflect the protected characteristics in the Equality Act 2010, and hate crime based on a person's nationality or immigration status should be given equal attention and concern.

Conclusion

43. After Brexit, it is imperative that hard-won victories in rights protection and discrimination are not threatened with repeal. Existing equality protection derived from EU law must be ensured in statute, this means any gaps in protection which arise as a result of the repeal of the ECA must be filled. The Government must make clear that hate crime and discrimination can never be tolerated, and do more to ensure that all forms of discrimination are equally and vigorously combated.
44. In addition to existing equality law, the UK has a crucial tool for the protection of equality and the fight against discrimination: the Human Rights Act and the European Convention it enshrines. These will be even more important after Brexit, holding the Government to account for discriminatory policies and making sure hate crime is defeated.

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