

Petition

Pre-conditions to negotiations concerning any trade agreements with the United Kingdom

Compliance of the United Kingdom with the European Convention on Human Rights

I, Billie Bryan, Caymanian and British citizen, founder of the grassroots organisation Colours Cayman, write to you on behalf of Colours Cayman and the LGBTQ people of the Cayman Islands who support Colours Cayman to petition to the European Parliament to make each of CONDITION 1 and CONDITION 2 below a pre-condition to negotiations concerning any trade agreements with the European Union upon UK's exit from the European Union.

“It isn't the EU we should leave but the ECHR and the jurisdiction of its court”

Prime Minister Theresa May, in a public speech in 2016, while she was Home Office Secretary.¹

Petition

A petition to the European Parliament requesting that the following pre-conditions are imposed on the United Kingdom for the entry into negotiations over any trade agreements upon its exit from the European Union and for any trade agreement agreed thereof to remain valid and enforceable:

CONDITION 1

the Government of the United Kingdom must rectify non-compliance with the ECHR, either by it or any of its territories to which the ECHR has been extended;ⁱⁱ and

CONDITION 2

the Government of the United Kingdom must remain party to the ECHR and must covenant on-going compliance with the ECHR and acceptance of the jurisdiction of its court.

The background for these two conditions is provided below.

Background

1. Background to CONDITION 1

- 1.1. On 15 January 2015, Robert Wintemute, professor of human rights at King's College London, explained that the laws of the Cayman Islands were in breach of the ECHR (some laws were fourteen years behind those ones of the UK) in the following areas:
 - 1.1.1. Public authorities may not discriminate against LGBTI individuals in employment.ⁱⁱⁱ
 - 1.1.2. Public authorities may not discriminate against LGBTI individuals in other areas.^{iv}
 - 1.1.3. Same-sex couples must be given a legal framework to register their relationships and acquire most or all of the rights of married different-sex couples.^v
- 1.2. On 27 July 2015, the Cayman Islands Human Rights Commission wrote to the Cayman Islands Government stating that the Cayman Islands needed to change its laws regarding LGBTI individuals before the courts declare those laws incompatible with the ECHR and the Cayman Islands Constitution.^{vi}
- 1.3. On 21 October 2015, the Premier of the Cayman Islands, Alden McLaughlin stated in his reply to the Commission that it was not on the agenda of his government to bring about any legislative reform that may benefit LGBTI individuals.^{vii}
- 1.4. On 11 September 2016, the Premier ratified this position at a public rally of evangelical churches.^{viii} In addition, the leader of the opposition, Mr. McKeeva Bush, at the same public rally, emphasised that he would not support any legislative changes that are inconsistent with the teachings of the church. This signalled a public agreement of all political parties in the Cayman Islands to prevent any change in the law that would address discrimination of LGBTI individuals in the Cayman Islands.
- 1.5. On 20 September 2016, Colours Cayman, in a last attempt to redress the status quo of discrimination, filed a petition with the UK government.^{ix} In this petition, Colours Cayman asked the UK government to step in and to issue an Order in Council in order to redress the on-going discrimination. This is legally possible because the UK government is still today the supreme legislative authority of its Overseas Territories by effect of the UK and its territories' constitutional arrangements, which in a nutshell are:
 - 1.5.1. The UK and the territories form a single unit in that the Crown is their common sovereign.

- 1.5.2. As a matter of constitutional law, the Crown no longer speaks by itself but it does so through the UK Parliament in matter of legislation and through its UK ministers in matters of royal prerogatives.
 - 1.5.3. The constitutional arrangements that link the UK government with its different territories vary, but they share in common different scopes of devolution of powers to the colonial governments from the UK government. Regardless of the scope of devolution of power conferred to their local governments, the UK government has kept residual powers.
 - 1.5.4. The UK government may exercise these residual powers at any time and, even, against the wishes of the colonies,^x either directly by the UK government in the exercise of Royal Prerogatives via Order in Council (as requested by Colours Cayman) or by Acts of Parliament.
 - 1.5.5. The scope of these residual powers varies, but the UK Parliament, being sovereign, may enact any legislation it pleases; it must be noted that the inhabitants of the Overseas Territories are not represented before the UK Parliament, so it is rather unlikely that the UK Parliament would ever act against the wishes of the UK government. In any event, the UK government does not require Acts of Parliament to effect changes by using Royal Prerogatives (i.e. Orders in Council).
- 1.6. The Minister for Overseas Territories has not yet replied to the Petition of Colours Cayman, although in correspondence held between the Foreign & Commonwealth Office and Stonewall (to which Colours Cayman was made privy), the Foreign & Commonwealth Office confirmed that *'the UK Government has no plans'* to act upon the petition.^{xi}
- 1.7. The unwillingness of the UK government to redress the violations of international obligations in relation to LGBTI rights by its colonial possessions is troubling in circumstances where the UK government has the constitutional power to do so. Moreover, there appears to be no direct consequences for the Overseas Territories' governments in breaching their international legal obligations under the ECHR, simply because they are not signatory states to the Convention, but the UK is.
- 1.8. Furthermore, this attitude of the UK Government stands in stark contrast with the remaining seven colonial dependant territories of the other three nations (i.e. USA, France and the Nethelands) in the Caribbean region where, for instance in relation to same sex unions:
- 1.8.1. Marriage is open to same sex couples in four^{xii} of these seven territories;^{xiii}

1.8.2. Marriage validity extended to the remaining three territories,^{xiv} which are part of the Kingdom of the Netherlands.

1.9. In brief, it is concluded that it is a dereliction of duties and a breach of the ECHR by the UK government to do nothing, in circumstances in which:

1.9.1. its Overseas Territories in the Caribbean are in breach of their international obligations in relation to LGBTI rights and unwilling (have said so publically) to effect any change in order to comply with their obligation under international law;

1.9.2. it is the UK, rather than their colonies, ultimately responsible towards the international community for these breaches; and

1.9.3. it is within the constitutional powers of the UK to redress these breaches of international obligations.

2. Background to **CONDITION 2**

2.1. The current Prime Minister of the UK, Theresa May, made the following case in a public speech in 2016 while she was Home Office Secretary: *'it isn't the EU we should leave but the ECHR and the jurisdiction of its court'*^{xv}.

2.2. Theresa May's dislike for European human rights had even taken her to the extreme during the Conservative Party Conference in 2011 of stating, wrongly, that an 'illegal immigrant ... cannot be deported because ... he had a pet cat.'^{xvi} It has never been clarified whether she said so negligently, i.e. out of ignorance, or intentionally, i.e. out of mendacity, but disturbingly during the conference she stated while she was saying this untruthful statement that 'she was not making this up'.

2.3. Theresa May changed her mind with regard to denouncing the ECHR upon announcing her bid to become Prime Minister in 2017. At that time, she stated that pulling out of the ECHR was something she was not going to pursue because of the lack of parliamentary support.

2.4. Rather disturbingly, Theresa May has changed her mind in many other key matters. Theresa May had been a remain campaigner and warned of the consequences of leaving the EU to bankers at Goldman Sachs in a private meeting on 26 May 2016^{xvii}, **yet** as Prime Minister she has chosen to disregard those consequences and has taken the country forward with Brexit by triggering Article 50.

2.5. The Prime Minister had also promised that there would be no early general election in the UK, **yet** a week ago she changed her mind on that too; it now being politically convenient for her party in Government to hold a general election.

2.6. Theresa May has been described in the British Parliament by the opposition as a person that cannot be trusted; in the words used by Yvette Cooper, Labour MP, referring to the numerous occasions on which the Prime Minister has breached her own promises: *'we cannot believe a single word [the Prime Minister] says'*.^{xviii}

2.7. This lack of trust in the Prime Minister, coupled with her public dislike of the ECHR and its court, is like the sword of Damocles hanging over our basic rights, which could fall at any time and destroy forever any hope that we have of achieving equality in the Cayman Islands and, indeed, other British Overseas Territories in the Caribbean.

Conclusion

3. The rights and guarantees contained in the ECHR have been made a flagship of the EU. They have been incorporated into the Charter of Fundamental Rights and the EU has made signing and complying with the ECHR a pre-requisite for any country wishing to become an EU member. It is submitted that upon the UK leaving the EU, it would be in the interests of the remaining Member States, and consistent with the EU's human rights policy, to secure continuity by the outgoing Member State of its obligations under the ECHR.
4. Our fear is that it is only a matter of time before political convenience will lead the Prime Minister to revisit her position and intentions with regard to the ECHR as explained in section 2. If this were to materialise, the consequences for LGBTI rights in the British Overseas Territories in the Caribbean could be catastrophic. Without the ECHR, the rights of LGBTI people in the Caribbean British Overseas Territories will be left in limbo: geographically we are in the American continent, yet we do not benefit from the American human rights system because politically we are part of the UK. Moreover, if the UK is allowed to leave the ECHR, we shall not benefit any longer from the European human rights system either. In fact, we shall be left solely at the mercy of the UK government as ultimate ruler of its colonies. Given that the UK government has chosen to do nothing in regards to acknowledged breaches of the ECHR, notwithstanding that it is ultimately responsible for such breaches and has the power to act to redress them, as explained in section 1, this looming uncertainty is of great concern to us.
5. Therefore, in conclusion and as per the Petition on p.2 above, Colours Cayman beseeches the European Union to make each of **CONDITION 1** and **CONDITION 2** a pre-condition to negotiations concerning any trade agreements with the European Union upon UK's exit from the European Union.

References

- ⁱ See ‘UK must leave European Convention on Human Rights, says Theresa May’ The Guardian (25 April 2016) available online at <<https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>> (accessed 26 April 2017).
- ⁱⁱ e.g. Declaration of extension contained in a letter from the Permanent Representative of the United Kingdom, dated 21 February 2006, registered at the Secretariat General on 23 February 2006: *On instructions from Her Majesty's Principal Secretary of State for Foreign Affairs, I now have the honour to inform you that the Government of the United Kingdom hereby accepts, on a permanent basis, the competence of the Court regarding the Cayman Islands*. Treaty Series No. 20 (2006) First Supplementary List of Ratifications, Accessions, Withdrawals, etc., for 2006 [In continuation of Treaty Series No. 43 (2005), Cm 6776] p 19, available online at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272338/6911.pdf> (Accessed 26 April 2017).
- ⁱⁱⁱ *Smith & Grady v. UK* (ECtHR, 27 September 1999) (ban on LGB members of armed forces was in breach of the European Convention).
- ^{iv} See e.g. *Mouta v. Portugal* (ECtHR, 21 December 1999) (custody of LGB parent's genetic child); *E.B. v. France* (ECtHR, 22 January 2008) (adoption as an unmarried LGB individual), *Alekseyev v. Russia* (ECtHR, 21 October 2010) (LGB pride parade in Moscow); *Taddeucci and McCall v. Italy* (ECtHR, 30 June 2016) (residence permit for immigration purposes on family grounds).
- ^v *Oliari and Others v. Italy* (ECtHR, 21 July 2015).
- ^{vi} See CIHRC's Press Statement (27 July 2015), available online at <http://www.humanrightscommission.ky/upimages/commonfiles/HRCsStatementontheEuropeanCourtofHumanRightsRulinginFavourofSame-SexUnions_1473194548.pdf> (accessed 26 April 2017).
- ^{vii} See Premier Alden McLaughlin's response to the Commission (21 October 2015), available online at <<https://caymannewsservice.com/wp-content/uploads/2015/11/Letter-to-the-HRC-from-premier-Recognition-of-Same-Sex-Unions-21-Oct-2015.pdf>> (accessed 26 April 2017).
- ^{viii} ‘Alden Warns Against hatred and Bigotry’ Cayman News Service (12 Sep 2016), available online at <<https://caymannewsservice.com/2016/09/alden-warns-against-hatred-and-bigotry/>> (accessed 26 April 2017).
- ^{ix} ‘LGBT Activist Calls on UK to End Discrimination’ Cayman News Service (21 Sep 2016) available online at <<https://caymannewsservice.com/2016/09/lbgt-activist-calls-on-uk-to-end-discrimination/>> (accessed 26 April 2017). A copy of Colours Cayman's Petition to the UK government is available online at <<https://beethedesigner.app.box.com/s/aqarcn1bq1vdpun1jjde8r7imph3kh63>> (accessed 28 April 2017).
- ^x e.g. *Caribbean Territories (Criminal Law) Order [in Council] 2000* (decriminalising homosexual acts in private notwithstanding any statutory or common law provision in the Overseas Territories in force to the contrary). This was adopted by the UK government against the wishes of five of its Caribbean Overseas Territories in order to comply with European Convention on Human Rights.
- ^{xi} E-mail from one Caroline, of Foreign & Commonwealth Office, to Alysha Khambay, International Officer of Stonewall, Re: FCO Strategy for the Cayman Islands, forwarded to me on 19 December 2016. (Copy on file)
- ^{xii} These are Puerto Rico and US Virgin Islands (US) and Saint Barthélemy and Saint Martin (France - collectivité d'outre-mer).

^{xiii} In addition to this four dependant territories, same-sex marriages is also allowed in the five European territories of the Netherlands and France in the Caribbean region – these are Bonaire, St Eustatius and Saba (Netherlands - municipalities) and Guadeloupe and Martinique (France - département d’outre-mer) – where the laws of these two European countries apply.

^{xiv} These are Aruba, Curaçao and Sint Maarten (Netherlands – Landen / Koninkrijk der Nederlanden).

^{xv} See ‘UK must leave European Convention on Human Rights, says Theresa May’ The Guardian (25 April 2016) available online at <<https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>> (accessed 26 April 2017).

^{xvi} See ‘Conservative Party Conference 2011: Human Rights Act 'has to go' says Home Secretary Theresa May’ The Telegraph (4 October 2011), available online at <<http://www.telegraph.co.uk/news/politics/conservative/8806196/Conservative-Party-Conference-2011-Human-Rights-Act-has-to-go-says-Home-Secretary-Theresa-May.html>> (accessed 26 April 2017).

^{xvii} ‘Theresa May's private Brexit warning speech to Goldman Sachs’ (26 May 2016), audio available online at <<https://www.theguardian.com/politics/video/2016/oct/25/theresa-may-private-brex-it-warning-speech-to-goldman-sachs-audio>> (accessed 26 April 2017).

^{xviii} See ‘Yvette Cooper accuses Theresa May of not being honest and claims voters “can't believe a word she says”’ The Independent (20 April 2017), available online at <<http://www.independent.co.uk/news/uk/politics/yvette-cooper-theresa-may-general-election-pmq-not-honest-uk-voters-cant-believe-word-labour-tories-a7690961.html>> (accessed 26 April 2017).