

Race Discrimination Bill: Non-residents

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Scope of Presentation

- Convention for Elimination of All Forms of Racial Discrimination (CERD)
- CERD Committee, General Recommendation XXX
- RDB Clause 3
- RDB Clause 8; Immigration status
- RDB Clause 54, 55, 56
- Race Relations Act 1975 [Eng] (as amended in 2003)

CERD Committee Concluding Observations

- CERD Committee Concluding Observations dated 9 August 2001 (CERD/C/59/Misc.16/Rev.3)
 - Concern over continuous absence of legal provisions protecting persons from racial discrimination in which they may be subjected by private persons, groups or organizations.
 - Concern over situation of foreign domestic helpers in HKSAR mainly from Philippines, Indonesia and Thailand, and the existence of certain rules and practices such as the so-called ‘two week rule’ which may be discriminatory in effect.

CERD Art 1

- Article 1
 - (1) In this Convention, the term ‘racial discrimination’ shall mean any distinction etc based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the enjoyment etc on an equal footing of human rights etc.
 - (2) This Convention shall not apply to distinctions etc made by a State Party between citizens and non-citizens.
 - (3) Nothing in this Convention may be interpreted as affecting in any way the legal provisions of State Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

How CERD Committee understand them?

- General Recommendation XXX (Discrimination against non-citizens) (1 October 2004)
 - Recalls Durban Declaration which recognizes that xenophobia against non-nationals particularly migrants, refugees and asylum seekers constitutes one of main sources of contemporary racism.
 - Art 1(2) must be construed construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the UDHR, the ICESCR and the ICCPR.

How CERD Committee understand them?

- General Recommendation XXX (2004)
 - Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory.

What CERD Committee recommends?

- General Recommendation XXX (2004)
 - 7. Ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens;
 - 9. Ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin;
 - 13. Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents;

What CERD Committee recommends?

- General Recommendation XXX (2004)
 - 25. Ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies;
 - 28. Avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life;

What CERD Committee recommends?

- General Recommendation XXX (2004)
 - 33. Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects;
 - 34. Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault;
 - 35. Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, once an employment relationship has been initiated until it is terminated;

RDB Clause 3

- Clause 3: “Ordinance applies to an act done by or for the purposes of the Government that is of a kind similar to an act done by a private person”.
 - Exclusion of immigration decisions by its terms?
 - Claim that aggrieved persons may resort to HK Bill of Rights Ordinance (Cap 383) not apply because of s 11 exception that “as regards persons not having right to enter and remain in HK, the HKBORO does not affect any immigration legislation governing entry into, stay in and departure from HK, or the application of any such legislation”. Based upon reservation to ICCPR.

RDB Clause 55

- Clause 55: Nothing in Part 3, 4 or 5 affects, “as regards persons not having right to enter and remain in HK, any immigration legislation governing entry into, stay in and departure from HK, or the application of any such legislation”.
- Neither UK nor PRC entered reservation to CERD in respect of HK/HKSAR in general terms regarding immigration legislation
- General Recommendation XXX:
Recommendation No 9 regarding immigration policies, particularly possible discriminatory effect.

RDB Clause 55

- CERD obligations
 - Art 2(a): State Party undertake to engage in no act or practice of racial discrimination and to ensure all public authorities shall act in conformity with this obligation
 - Art 2(c): State Party take effective measures to review governmental, national and local policies, and to amend etc any laws and regulations which have effect of creating or perpetrating racial discrimination
 - Art 6: Assure to everyone within jurisdiction effective protection and remedies
- Internal constitutional considerations:
 - BL 41: Persons in HKSAR other than HK residents shall in accordance with law enjoy the rights and freedoms of HK residents prescribed in Chapter III.
 - BL 31: Freedom to travel and to enter or leave the HKSAR

RDB Clause 54

- Clause 54: Nothing in this Ordinance - (a) is to be construed as affecting in any way any law concerning nationality, citizenship, resident status or naturalization; or (b) renders unlawful any act done by any person in, or in connection with, the operation of any such law.
- CERD Art 1(3): Provided that such provisions do not discriminate against any particular nationality.
- General Recommendation XXX (2004): Ensure particular groups of non-citizens not discriminated against with regard to access to citizenship or naturalization.
- BL24(4): Having taken HK as place of permanent residence: Post-*Prem Singh* enquiries.

RDB Clause 56

- Acts done under statutory authority not affected by Part 3, 4 or 5: If it is necessary for the person to do act in order to comply with a requirement of an existing statutory provision (essentially what has been enacted before but includes subsequent re-enactments).
- CERD obligation Art 2(1)(c): Eliminate discriminatory laws
- BL 25: Equality of all HKSAR residents before the law.

RDB Clause 8

- Definition of ‘race’, ‘on the ground of race’: Largely following CERD Art 1(1)
- Definition of ‘racial group’: Largely following RRA s 3(1)
- Additions: Clause 8(2) and (3)(b)-(d): If done on ground of whether or not HKSAR permanent resident, whether or not having right of abode to HKSAR, whether or not subject to condition of stay, whether or not having permission to remain, length of residence in HK, or nationality, citizenship or resident status of person under relevant law of any country or place, not constitute act done on ground of race, colour, descent or national or ethnic origin of a person.

RDB Clause 8

- General Recommendation XXX (2004)
 - Construction of CERD Art 1(2) to avoid undermining basic prohibition of discrimination;
 - Differential treatment based on citizenship or immigrant status will constitute discrimination if criteria not applied pursuant to legitimate aim and not proportional to achievement of such aim.
 - Recommendation: Implementation of legislation not to have discriminatory effect against non-citizens. Art 6: Effective remedies.

RDB Clause 8

- General Recommendation XXX (2004) thus puts case that discrimination on ground of citizenship or immigration status may be discrimination prohibited under CERD and it may be too narrow to read only in terms of CERD Art 1(1).
- Little problem in drafting or grafting such an aspect into RDB. Cf pregnancy/ marital status in SDO and also Racial Discrimination Act 1975 (Cth) of Australia s 5 (additional operation of Act to discrimination by reason that person or relative or associate is or has been an immigrant)

Race Relations Act 1975 [Eng]

- Section 71: Governmental and public authorities having general statutory duty in carrying out of functions to have due regard to need (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups.
- But where the functions have to do with *immigration and nationality* be carried out having due regard to need (a) to eliminate unlawful racial discrimination; and (b) to promote good relations between persons of different racial groups.

Race Relations Act 1975 [Eng]

- Section 71C: EOC (UK) empowered to issue code of practice
- Sections 71D and 71E: EOC (UK) empowered to issue and enforce compliance notices in respect of government departments, armed forces, police, NHS, schools, and local government.

Race Relations Act 1975 [Eng]

- 2003 Amendments:
 - Greater protection against discrimination on grounds of race or ethnic or national origins and
 - Broaden extent of protection in relation to work wholly outside UK if employer has place of business in UK, work done for purpose of such business, and employee ordinarily resident in UK at time of application or at any time during course of employment.

What can we do?

- Bills Committee
- Bar's concern that if enacted legislation might even be inconsistent with or undermine CERD obligations in Arts 2(1)(a), (b), (c) and (d), 5 and 6.
- CERD Committee: Early warning and/or urgent measures procedures. Example: 2004 passage of New Zealand legislation on foreshore and seabed affecting Maori rights.
- Legal challenge?