



Overseas Territories UN Treaty Reservations/Declarations

A Shadow Report by the Cayman Islands Human Rights Commission

25 January 2017

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International Covenant on Civil and Political Rights (ICCPR)

Reservation

The Government of the United Kingdom reserve the right not to apply or not to apply in full the guarantee of free legal assistance in sub-paragraph (d) of paragraph 3 of article 14 in so far as the shortage of legal practitioners renders the application of this guarantee impossible in the British Virgin Islands, the Cayman Islands, the Falkland Islands, the Gilbert Islands, the Pitcairn Islands Group, St. Helena and Dependencies and Tuvalu.

ICCPR Article 14(3)(d)

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”.

Analysis

The Legal Aid Law (2015 Revision)¹, implemented on 24 October 2016, and the Bill of Rights, Freedoms and Responsibilities² (“**the Bill of Rights**”) in the Cayman Islands Constitution Order, 2009 (“**the Constitution**”), implemented on 6 November 2012, appear to cover all of the points of concern in ICCPR Article 14(3)(d). Article 14(3) only refers to persons facing criminal charges. The following sections of the Legal Aid Law appear between them to satisfy each of the ICCPR requirements:

1. To be tried in one’s presence: s.7 of the Constitution;
2. To defend oneself in person or through legal assistance of one’s own choosing: ss.14 and 22 of the Legal Aid Law;
3. To be informed of one’s right to have legal assistance: s.14(3) of the Legal Aid Law; and
4. To have one’s legal assistance assigned, where the interests of justice require, without payment if one does not have sufficient means to pay for it: ss.14 and 17 of the Legal Aid Law.

S.4(6)(b) of the Legal Aid Law also requires that all persons detained in the Islands be informed of their right to legal aid, and be provided with it at no cost if they do not have the means to pay for it.

¹ Appendix A

² Appendix B

Conclusion

The Commission is of the opinion that the reservations relating to the Cayman Islands for ICCPR Article 14(3)(d) may be removed.

International Covenant on Economic, Social and Cultural Rights (“ICESCR”)

Reservation

The Government of the United Kingdom while recognising the right of everyone to social security in accordance with article 9 reserve the right to postpone implementation of the right in the Cayman Islands and the Falkland Islands because of shortage of resources in these territories.

ICESCR Article 9

“The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

Analysis

‘Social security’ is defined by the Committee on Economic, Social and Cultural Rights’ General Comment no. 19 as comprising 9 separate components³. The response to this section has been divided according to each of these components.

1. Health Care. Ss.5 & 7 of the Health Insurance Law (2013 Revision), and s.4 of the Health Insurance Regulations (2013 Revision) require all persons (with specific exceptions) to have health insurance. Caymanians with HIV/AIDS are afforded free support under the Cayman Islands Government Policy on AIDS⁴. There is no provision for support of foreign nationals with endemic diseases who are unable to afford, or otherwise not covered by, insurance schemes.
2. Sickness. S.5(5) of the Health Insurance Law and s.4A of the Health Insurance Regulations make provisions for health insurance coverage for all, including ‘uninsurable persons’. (Disability coverage is explained below.)
3. Old Age. S.26 of the National Pensions Law (2012 Revision), s.4A of the Health Insurance Regulations and the Poor Persons Relief Law (1997 Revision) make provisions for support of older persons. However, indigent coverage on the basis of age under the Poor Persons Relief Law is only available for Caymanians.
4. Unemployment. The Poor Persons Relief Law and the Needs Assessment Unit (“NAU”) Poor Relief Criteria provide coverage for Caymanians who demonstrate objective need, including on

³ See ‘Part II A – Elements of the right to social security’ of the CESCR’s General Comment no. 19 for the components comprising social security:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQdrCvvLm0yy7YCiVA9YY61Z8YHJWla0gOfZ9fbBAjHL%2fLI5gllsqSBbczFKYIRCH3h0ggclCkMPkxITz7NI9wE.>

⁴ The Ministry of Health notes that this policy is in the process of being updated, though the Commission has not had sight of the draft updated version.

the basis of unemployment. However, there are no exclusive unemployment benefits in domestic law for persons who do not meet NAU Poor Relief Criteria. S.68 of the Labour Law (2011 Revision) provides for prosecution where health and safety offences have occurred in the work place. S.33 of the Penal Code (2013 Revision) states that *“Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence or by any other similar offences committed by him which are taken into consideration by the court in determining sentence. Any such compensation may be in addition to or in substitution for any other punishment”*. In addition, s.41 of the Immigration Law (2015 Revision) outlines the categories of persons who may be gainfully employed in the islands. A foreign national not qualified for gainful employment (and not falling within any other category of lawful immigration status) is not permitted to remain on island.

5. Employment Injury. Ss.58-68 of the Labour Law require protection of workers in their place of employment, and provide for prosecution of health and safety offences, but do not guarantee compensation where offences have occurred. Reference is again made to s.33 of the Penal Code as a means by which an individual may possibly receive compensation. The Poor Persons Relief Law provides coverage for Caymanians including on the basis of objective need resulting from disability; however, foreign nationals are not eligible for any automatic social security due to employment injury.
6. Family and Child Support. S.5(11) of the Health Insurance Law requires health insurance for dependants of employees as primary coverage. Caymanians who qualify under the NAU Poor Relief Criteria may obtain coverage for their dependants for items such as food, clothing, housing, water and sanitation (foreign nationals are not eligible).
7. Maternity. S.19 of the Labour Law provides for minimum maternity leave coverage of 12 weeks (NB: the draft Labour Bill 2015 provides for 14 weeks, meeting the Covenant minimum). S.5(12) of the Health Insurance Law requires post-natal coverage under health insurance schemes.
8. Disability. The Poor Persons Relief Law provides disability coverage where need-based criteria are met but for Caymanians only. No disability coverage is provided for foreign nationals, except as identified above in the Employment Injury section.
9. Survivors and Orphans. Ss.36 and 39 of the National Pensions Law provide for the award of benefits to survivors and orphans. The Poor Persons Relief Law provides assistance for funeral costs of Caymanians only. In informal discussions with a local funeral home, it was indicated that where persons are not able to cover the costs of a funeral or repatriation of the remains of

a foreign national the employer will usually cover these costs, although there is no requirement in law for them to do so. As a matter of last resort the Needs Assessment Unit will also provide assistance to foreign nationals in these cases, or the Ministry of Home Affairs/Department of Immigration may do where persons have not been lawfully employed on island.

Overall, a range of different laws and policies provide coverage for Caymanians in nearly all cases, except where persons are experiencing unemployment for an extended period of time and do not meet NAU Poor Relief Criteria (see Unemployment section above). Foreign nationals who are not eligible for gainful employment are not permitted to remain on Island according to the Immigration Law, and so very few provisions are made for such cases.

Conclusion

It is unclear whether the current state of affairs as outlined above is sufficient to satisfy the requirements outlined in the Covenant and General Comment. **NB:** see Declarations and Reservations to ICESCR⁵ for a reservation by Kuwait, and responding declarations from Finland, Germany, Norway and Sweden for further consideration of these issues.

⁵ Full text of the declarations and reservations to ICESCR can be found at:
https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en.

Convention on the Rights of the Child (“CRC”)

Reservation

The United Kingdom, in respect of Hong Kong and the Cayman Islands, will seek to apply the Convention to the fullest extent to children seeking asylum in those territories except in so far as conditions and resources make full implementation impracticable.

CRC Article 22

“1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.”

Analysis

Cayman is party to the Convention Relating to the Status of Refugees (“**CRSR**”), which guides the overall management of asylum seekers and refugees and recommends that all refugees be treated equally. Whilst reservations are maintained, they do not appear to have effect in this context⁶.

Furthermore, nothing could be found in domestic law to prevent the equal treatment of child refugees/asylum seekers. Relevant sections of domestic law/policy include:

- S.84(2)(a) of the Immigration Law: *“A person is eligible to apply for asylum if...he is at least eighteen years of age or is an unaccompanied minor”;*

⁶ See <http://treaties.fco.gov.uk/docs/pdf/1954/TS0039.pdf> or https://treaties.un.org/pages/ViewDetailsII.aspx?src=IND&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en#EndDec

- S.84(4) of the Immigration Law: *“A person whose application [for asylum] has been successful shall be granted leave to remain indefinitely in the Islands and the right to work for any employer in any occupation”*; and
- The Department of Immigration Asylum Policy and Procedure document states that *“In the case of an applicant being successful in obtaining Asylum in the Cayman Islands, their spouse and children (under the age of 18) may enjoy the same privileges that the applicant will obtain from Government.”*

Whilst unable to review a written policy to this effect, the Commission is aware that in practice asylum seekers who are minors are assigned accommodation separate from the Immigration Detention Centre (where adults are housed) while their applications are being considered. In the case of unaccompanied minors, appropriate adults have been assigned from within the community who act as *de facto* foster parents; in the case of minors travelling with a parent they are housed together in suitable hotel facilities.

Conclusion

The Commission is of the opinion that the reservations relating to the Cayman Islands for CRC regarding children who are asylum seekers (see Article 22) may be removed.

Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)

Reservation

The Cayman Islands reserves the right to continue to apply such immigration legislation governing entry into, stay in, and departure from, the Cayman Islands as it may deem necessary from time to time and, accordingly, its acceptance of Article 15(4) and of the other provisions of the Convention is subject to the provisions of any such legislation as regards persons not at the time having the right under the laws of the Cayman Islands to enter and remain in the Cayman Islands.

CEDAW Article 15(4)

“4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.”

Analysis

It is noted that the wording of this reservation/declaration is identical to that for the United Kingdom, which was withdrawn in recent years.

Nothing could be found in domestic law to prevent the equal treatment of women with regard to freedom of movement and the right to choose residence and domicile. Relevant sections of domestic law/policy include:

- S.30 of the Immigration Law, which deals with the application for and grant of permanent residence to persons legally and ordinarily resident in the Islands for at least eight years.
- S.3 of the Gender Equality Law: *“For the purposes of this Law, a person discriminates against another person on grounds specified in subsection (2) if the first-mentioned person makes, on any of the grounds specified in subsection (2), any distinction, exclusion or preference the intent or effect of which is to nullify or impair equality of opportunity or treatment in any employment or occupation.*

(2) The grounds referred to in subsection (1) are –

(a) sex, marital status or pregnancy; or

(b) any characteristic based on gender which appertains generally or is generally imputed to persons of a particular sex or marital status or pregnant state.

(3) Any act, practice or policy that directly or indirectly results in discrimination against a person on any ground specified in subsection (2), is an act of discrimination regardless of whether the person responsible for the act, practice or policy intended to discriminate.”

- S.16 of the Bill of Rights: *“(1) Subject to subsections (3), (4), (5) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.*

(2) In this section, “discriminatory” means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.”

- Other relevant laws can be found in the Caymanian Bar Association Student Members’ review of CEDAW from 2011 (p.14)⁷.

Whilst there was no legislation or policy found which conflicts with this Article outright, it is relevant to note the Commission’s letter to the Department of Immigration dated 25 May 2016 regarding the rights of dependant spouses divorcing Permanent Residence/Residency and Employment Rights Certificate holders. The letter identifies a pattern of disadvantage being caused to dependant spouses (usually women) who seek to maintain their immigration status after divorce from their PR-holding spouse. The issue typically arises as a result of female spouses being unable to satisfy the income component of a points-based immigration evaluation system after divorce. The Commission recommended that the Chief Immigration Officer utilise the discretion afforded to him in these cases, under s.30(18) of the Immigration Law, not to revoke their right to reside in the Islands.

Conclusion

The rights under Article 15(4) of persons *lawfully* in the Islands do not appear to be affected by Cayman’s legal framework. It may be prudent to obtain additional clarification in relation to the indirect consequences of legislation relating to divorced spouses of PR-holders.

⁷ The full text of the review can be found at:

http://www.humanrightscommission.ky/upimages/publicationdoc/CBAStudentsResearchonCEDAWsImpactonLegislation_1471366092_1471366092.pdf.

OVERALL CONCLUSION

Upon review, the Cayman Islands' reservations to the treaties appear, in the main part, to be related to a claimed shortage of resources. It is the opinion of the Human Rights Commission that, given the stage of Cayman's economic development, allocation of insufficient resources is not an adequate reason for the restrictions placed on these important and fundamental rights.

The reservations to ICCPR and ICESCR were both made in 1976, and the reservation to CRC was made in 1994. Reconsideration should be given by Government to its priorities when allocating resources to ensure that it maintains its commitment to upholding the rights of those within the jurisdiction of the Cayman Islands. Given the age of these reservations such reconsideration should be regarded as a priority.

Appendix A – Legal Aid Law, 2015 Relevant Sections

Scope of legal aid

4. (6) Subject to sections 5, 17 and 19, legal aid may be granted to individual natural persons of the following categories –

- (b) persons who are questioned or detained at a police station, correctional institution and other similar place;

Opportunity for legal advice in criminal proceedings

14. (1) Where an unrepresented accused person appears before a summary court charged with a Class A criminal offence, the magistrate shall, before requiring the accused person to plead to the charge or remanding him or otherwise dealing with him according to law -

- (a) inform him that he has the right to obtain legal advice from a duty counsel; and
- (b) afford him, if he so requests, an opportunity to obtain such advice before he pleads to the charge or, where the charge is one in respect of which he has an election whether to be tried summarily, before he so elects or before any evidence is called.

(2) Where -

- (a) an unrepresented accused person appears before a summary court charged with a Class B criminal offence; and
- (b) it appears to the magistrate that the interests of justice require that the accused person should have legal advice made available to him, the magistrate shall, before requiring the accused person to plead to the charge or remanding him or otherwise dealing with him according to law -
- (c) inform him that such advice can be made available to him by a duty counsel; and
- (d) afford him, if he so requests, an opportunity as is described in subsection (1)(b).

(3) As soon as a decision has been made to detain a person at a police station, correctional institution or other similar place, the person in charge of the police station, correctional institution or other similar place, shall inform the person detained that he has a right to obtain advice and representation for the purpose of any interview from a duty counsel or a listed attorney-at-law.

(4) A person who does not have sufficient means to pay for a legal representative in order to exercise his right under subsection (3), shall be informed by the person in charge of the place at which he is detained that he is entitled to legal representation at public expense.

(5) In this section “unrepresented” means not represented by an attorney-at-law.

Grants of certificates generally

17. (1) Subject to section 4, a legal aid certificate may be granted to an applicant by the Director if his disposable income is the prescribed amount or less.

(2) An applicant who -

(a) is charged before a court with any Class A criminal offence; or

(b) is a party to a criminal appeal before a court in connection with any such charge and satisfies the Director that there are reasonable grounds of appeal, shall, if he qualifies for the grant of a certificate under subsection (1), be entitled as of right to have a certificate granted to him by the Director.

(3) An applicant eligible for legal aid under section 4, other than one entitled as of right under subsection (2) to the grant of a certificate, may, if he qualifies under subsection (1), be granted a certificate by the Director in his discretion and in the exercise of that discretion the Director shall, among other things, consider whether it is in the interests of justice to grant legal aid.

(4) In considering whether it is in the interests of justice to grant legal aid under subsection (3) the Director shall consider the following -

(a) whether, if any matter arising in the proceedings is decided against the person, the person would be likely to lose his liberty or livelihood or to suffer serious damage to his reputation;

(b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law;

(c) whether the person may be unable to understand the proceedings or to state his own case;

(d) whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the person; and

(e) whether it is in the interests of another person that the person be represented.

(5) The Director may, in any case of urgency in any criminal proceedings, grant a certificate to an applicant for a temporary period not exceeding twenty-eight days at a time pending the exercise by the Director of his powers under section 16 and the consideration of the grant to the applicant of a certificate under either subsection (2) or subsection (3).

Choice of attorney-at-law, etc.

22. (1) Subject to subsections (2) to (4), whenever a certificate is granted by the Director he shall assign to the assisted person a listed attorney-at-law who is chosen by the assisted person.

- (2) Subsection (1) does not apply where the attorney-at-law chosen by the assisted person -
- (a) refuses to be bound by the prescribed legal aid fees; or
 - (b) in accordance with section 13(1) for any other reason, refuses the assignment.
- (3) Where -
- (a) an assisted person, for whatever reason, does not exercise his right to choose an attorney-at-law under subsection (1); or
 - (b) pursuant to subsection (2), subsection (1) does not apply, the Director shall assign to the assisted person a listed attorney-at-law or, in the case of a civil matter only, a listed attorney-at-law or a legal aid counsel.
- (4) For the purpose of subsection (3), the Director shall have regard to the principles that -
- (a) the assignment of an attorney-at-law should be appropriate to the nature of the proceedings for which the certificate is granted; and
 - (b) so far as is practicable, the volume of legal aid work should be evenly distributed among listed attorneys-at-law on the roster.
- (5) The Cabinet, after consultation with the Chief Justice, may make regulations to carry out the purposes of this section.

Appendix B – Bill of Rights Freedoms and Responsibilities s.7 – Right to Fair Trial

7.—(1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.

(2) Everyone charged with a criminal offence has the following minimum rights—

- (a) to be presumed innocent until proved guilty according to law;
- (b) to be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him or her;
- (c) to have adequate time and the facilities for the preparation of his or her defence;
- (d) to defend himself or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance and the interests of justice so require, through a legal representative at public expense provided through an established public legal aid scheme as prescribed by law;
- (e) to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- (f) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court; and, except with his or her own consent, the trial shall not take place in his or her absence, unless he or she so behaves in the court as to render the continuance of the proceedings in his or her presence impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence, or unless, having had reasonable notice of the hearing and of the nature of the offence charged, he or she is voluntarily absent from the proceedings.

(3) When a person is tried for any criminal offence, the accused person or any person authorised by him or her shall, if he or she so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

(4) No person who shows that he or she has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, save on the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(5) No person shall be tried for a criminal offence if he or she shows that he or she has been lawfully pardoned for that offence.

(6) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

(7) Every person who has been convicted by a court of a criminal offence shall have the right to appeal to a superior court against his or her conviction or his or her sentence or both as may be prescribed by law; but—

(a) nothing in any law shall be held to contravene this subsection—

(i) to the extent that it precludes an appeal by a person against his or her conviction of an offence if he or she pleaded guilty to that offence at his or her trial; or

(ii) to the extent that it makes reasonable provision with respect to the grounds on which any such appeal may be made or with respect to the practice and procedure to be observed in relation to the making, hearing and disposal of any such appeal; and

(b) this subsection shall not apply in relation to the conviction of a person by a superior court, or in relation to his or her sentence on such conviction, if he or she was convicted by that court on an appeal against his or her acquittal by a lower court.

(8) When a person has, by a final decision of a court, been convicted of a criminal offence and, subsequently, on the ground that a newly-disclosed fact shows that there has been a miscarriage of justice his or her conviction has been quashed or he or she has been pardoned, he or she shall be compensated out of public funds for any punishment that he or she has suffered as a result of the conviction unless it is proved that the non-disclosure in time of that fact was wholly or partly his or her fault.

(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.

(10) Nothing in subsection (1) or (9) shall prevent the court from excluding from the proceedings persons other than the parties to them and their legal representatives to such extent as the court—

(a) may be empowered by law to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of minors or the protection of commercial confidence or of the private lives of persons concerned in the proceedings; or

(b) may be empowered or required by law to do in the interests of defence, public safety, or public order.

(11) Nothing in any law or done under its authority shall be held to contravene—

(a) subsection (2)(a), to the extent that the law in question imposes on any person charged with a criminal offence the burden of proving particular facts;

(b) subsection (2)(e), to the extent that the law in question imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds;

(c) subsection (4), to the extent that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force, save that any court so trying such a member and convicting him or her shall in sentencing him or her to any punishment take into account any punishment imposed on him or her under that disciplinary law.

(12) In this section, “legal representative” means a person entitled to practise in the Cayman Islands as an attorney-at-law.