

Robert Buckland talks about an examination of the machinery of the Act while leaving the substantive rights of the Convention intact which sounds rather benign, yet, it leaves one slightly uneasy as to what lurks below the waterline in the government's mind.

I want to focus on the resonance the outcome of the review may have for Northern Ireland and in particular the Belfast (Good Friday) Agreement.

Human rights and equality were central to the 1998 Agreement with a section devoted to the issue reflecting its importance as part of securing a durable peace process.

Under the Agreement, the UK government committed to 'complete incorporation into NI law, the ECHR with direct access to the courts and remedies for the Convention including the powers for the courts to overrule Assembly legislation on grounds of inconsistency'. So my first point is that the 1998 Agreement encompasses the machinery as well as the substantive rights of the Convention. Moreover, the Irish government agreed to 'bring forward measures to strengthen and underpin constitutional protections of human rights including considering the incorporation of the ECHR into domestic law'. The Irish government subsequently incorporated the Convention into its own domestic law. The measures were to ensure 'at least an equivalent level of protection as will pertain in Northern Ireland'

Now, we know from our negotiations around the Ireland/Ni Protocol as part of the EU withdrawal negotiations that the UK government consider the equivalence provision to be a one way street applying South/North rather than a reciprocal commitment.

The 1998 Agreement also gave the Human Rights Commission a role 'to advise on the scope for defining in Westminster legislation, rights supplementary to those in the ECHR to reflect the particular circumstances of NI drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity of both communities and parity of esteem- which taken together with the ECHR would constitute a Bill of Rights'. Among the issues to be specifically considered was protection from discrimination in both the public and private sector.

My second point is that the Agreement envisaged a 'Convention plus' approach. We still do not have a Bill of Rights which remains a Westminster responsibility though currently a NI Assembly ad hoc committee is looking at the issue. The ad hoc committee is an outworking of the 'New Decade, New Approach' agreement reached to restore devolved institutions in NI in January 2020.

The centrality of abiding by Convention commitments, domestic human rights legislation and international obligations is written into the Northern Ireland Act as Lord Bingham noted in the Robinson case (2002) UKHL 32 "The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution' (para 11). It is also to be found in Police and Justice Acts which heralded reforms following the 1998 Agreement.

The importance of the Agreement and its human rights and equality commitments were re-emphasized in the arrangements for the UK leaving the EU. The UK government's commitment to 'no diminution of rights under the rights, safeguards and equality of opportunities section of the 1998 Agreement' first appeared in the December 2017 agreed statement between the UK government and EU 27. That commitment is enshrined in Article 2 of the Ireland/Ni protocol and led to the creation of a dedicated mechanism comprising the NI Human Rights Commission, the Equality Commission (NI) and the joint committee of the two human rights commissions on the island of Ireland. The protocol contains provisions to guarantee that the UK government will keep pace with any future EU law developments on specific EU Directives covering equal treatment in employment, self-employment, access to goods and services social security alongside freedom from discrimination based on racial and ethnic origin. This sat alongside the non-regression commitment where the

scope of the human rights and equality provisions fall within the scope of the relevant section of the 1998 Agreement. The dynamic realignment reflects in part a concern around leaving human rights and equality issues solely to the NI Executive and NI Assembly.

The UK government issued an explainer document in August 2020 and it stated 'The Protocol commitment means that the UK government must ensure that the protections currently in place in Northern Ireland for the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Agreement are not diminished as a result of the UK leaving the EU..... we do not envisage any circumstances whatsoever in which any UK government or Parliament would contemplate any regression in the rights set out in that chapter, but, the commitment, nonetheless provided a legally binding safeguard. It means that, in the extremely unlikely event that such a diminution occurs, the UK government will be legally obliged to ensure that the holders of the relevant rights are able to bring challenges before the domestic courts and should their challenges be upheld, that appropriate remedies are available'. Further, the Explainer document outlines that 'by virtue of being included in the UK-EU Withdrawal Agreement, the no diminution commitment is binding on the UK government and Parliament as well as the NI Executive and Assembly as a matter of international law and to ensure the 'no diminution' commitment is maintained the NI Act 1998 will be amended to ensure the NI Executive and Assembly must comply with the Article 2 commitment'.

Now on the surface, does this review cross over any of this, in that we will still have remedies and access to the courts et al following the review. Nonetheless, any significant dilution of human rights protections will impact on the delicate ecology of the Agreement. I am also reminded of the mantra of Strasbourg court judgments that 'rights must be real and effective not theoretical and illusory' I don't think I can make a tenable argument that the Human Rights Act can never be amended due to the 1998 Agreement, but, I do think there is a need to benchmark any proposals in the review alongside the Agreement and the 'no diminution commitment' Others will deal with the machinery questions though the Commission's submission argues that the current arrangements work well and do not need amending.

To finish in practical terms. First, I have only ever heard two Chief Constables praise the value and virtues of the Act for policing, namely George Hamilton and Hugh Orde both former chief constables of the PSNI. I know the current Chief Constable is also comfortable with policing under the Act. The Commission has done training work on Convention rights and the Act and its use in public order settings for Gold and Silver PSNI Commanders and it is clear that the human rights framework for dealing with such situations is appreciated. I will not labour the point as Nuala O'Loan has been in the crucible of the policing and human rights debate so you have access to her expertise.

Secondly, the reality of politics in NI often means the HR Act assumes particular importance, one example will do. The blanket retention of biometric material under PACE for unconvicted individuals was held to be unlawful in the Strasbourg court by *S and Marper v UK*. As a result, the rest of the UK reformed its legislation. In NI equivalent reform to England and Wales was presented and accepted by the NI Assembly as part of the Criminal Justice Act 2013, but never commenced due to disagreement within the NI Executive. It took a further legal challenge in the case of *Gaughran v UK* where a man fined £50 and banned from driving for a year for a drink driving offence challenged the indefinite retention of biometric material, long after the conviction was spent. The case went to the Supreme Court who held the arrangements were proportionate as it covered a convicted rather than an unconvicted individual. Subsequently, the case proceeded to Strasbourg who held otherwise. There are now proposals to amend the law a decade after the rest of the UK. In fairness, based on a separate legal challenge from the Commission, the PSNI had agreed to adopt a policy in line with the uncommenced provisions in the Criminal Justice (NI) Act 2013 though senior officers acknowledged

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the situation was (to put it mildly) sub optimal. So my point is that the HR Act and the ability to enforce it effectively is an important practical as well as constitutional safeguard for NI. There is a febrile political atmosphere in NI at present which may or may not pass – so please be mindful of the backdrop of the 1998 Agreement when reaching your conclusions and recommendations.

I hope this is helpful and good luck with your work.