



Pat Finucane Centre

Evidence to the Independent Human Rights Act Review

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About the Pat Finucane Centre

The Pat Finucane Centre (PFC) provides advocacy support to families and individuals bereaved and injured as a result of the conflict on the island of Ireland. We are funded by the Department of Foreign Affairs, the Victims and Survivors Service and the European Regional Development Fund- PEACE IV and are a registered charity. The PFC is a non-party political, anti-sectarian human rights group advocating a non-violent resolution of the conflict on the island of Ireland. We believe that all participants to the conflict have violated human rights

The PFC asserts that the failure by the British state to uphold Article 7 of the Universal Declaration of Human Rights, “all are equal before the law and are entitled without any discrimination to equal protection of the law”, is the single most important explanation for the initiation and perpetuation of violent conflict.

We provide an advocacy, advice and support service to families, bereaved/injured as a result of the conflict, who wish to engage with statutory agencies including the (now-defunct) Historical Enquiries Team (HET), the Coroners’ Service (CSNI) the Office of the Police Ombudsman of Northern Ireland (OPONI), the Police Service of Northern Ireland (PSNI) and An Garda Síochána in the Republic of Ireland through Justice for the Forgotten (JFF) a project of the PFC.

The aim of our work is to assist families in establishing the facts surrounding the death/s of their loved one/s or physical/psychological injuries sustained. We are also engaged, on both sides of the border, in working with individual families in a story-telling project known as the Recovery of Living Memory Archive (RoLMA).

We currently provide this service to approximately 230 families across Ireland through four offices in Derry, Armagh, Belfast and Dublin (in partnership with Justice for the Forgotten). Many of these cases engage Article 2 (and sometimes Article 3) European Court of Human Rights (“ECtHR”) issues. The Centre currently employs nine people at offices in Derry, Armagh, Belfast and Dublin (the latter through JFF).

A summary of key issues:

1. The short consultation period of seven weeks is insufficient given the seriousness of the human rights concerns under consideration, compounded by the endemic climate of undermining and messaging from the current Conservative government, evidenced in the general tone of the context section of the terms of reference of this review.
2. There has been constant threat to the rule of law in Northern Ireland, specifically in relation to legacy issues which is where our work sits. The current British government has reneged on enforcing the Stormont House Agreement (SHA); has threatened a roll back on protections with regards to right to life, torture and inhuman and degrading treatment in the *Overseas Operations (Service Personnel and Veterans) Bill*; as well as seemingly providing a carte blanche 'licence to kill' bill, via the Covert Human Intelligence Sources (Criminal Conduct) Bill, where state agents and M15 are being given legal permission to commit serious criminal offences without fear of prosecution.
3. There is an ongoing lack of recognition of the 'particular circumstances' of Northern Ireland in relation to the centrality of human rights and the continued threats to the Human Rights Act by the Conservative government. Or just blatant disregard.
4. There is a legally binding International Treaty between the Irish and British Governments, lodged with the UN that needs to be respected.¹ Any roll-back on the Human Rights Act 1998 and human rights protections would threaten the very foundations of the Belfast/Good Friday peace agreement, not to mention breaching legally binding guarantees provided in this International Treaty and corresponding implementation agreements.

Context and Comments:

5. It is disingenuous to say that in the Questionnaire section that "the review is not considering the UK's membership of the Convention, and the Review proceeds on the footing that the UK will remain a signatory to the Convention, and is not considering the substantive rights set out the Convention."

This is not the tone accorded to outlining 'the importance of the review' which states that in the past 20 years UK courts have been 'increasingly presented with questions of 'policy as well as law'.² This claim lacks any evidentiary fact.

The push for a so-called "British Bill of Rights" and the *scrapping* of the Human Rights Act has been on the Conservative Party agenda for a long time, with their manifesto statement of 2015 stating it would "*introduce a British Bill of Rights which will restore common sense to the application of human*

¹ UK Treaty Series no. 50 Cm 4705.

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953347/human-rights-review-tor.pdf

rights in the UK'.³ This further fuels the fire of an implied reach into courts of human rights policy that simply does not exist.

6. This review is being brought forward at a time when there are ongoing open attacks on the legal profession by the most senior Government representatives, including the Prime Minister and Home Secretary,⁴ creating a climate of hostility. In Northern Ireland we are only too aware of the potentially lethal outcome of such legitimization of targeting of lawyers by the State. We remember how a public statement by a senior politician in the House of Commons paved the way for the murder of human rights lawyer, Pat Finucane⁵. This toxic climate of hostility also surrounded the heinous killing of human rights lawyer Rosemary Nelson.⁶ More recently we have had to write to the Speaker of the House of Commons after politicians repeatedly prejudged the outcome of a trial in Northern Ireland of a soldier charged with involvement in the killing of a man with learning disabilities. The Speaker in reply indicated that some MP's had indeed broken the *sub judice* rule.⁷
7. This climate of establishment *myth-making* is also reinforced by false media claims of 'vexatious' prosecutions or a 'witch-hunt' against ex-British Soldiers⁸ where the families with whom the PFC works are pursuing legitimate legal routes to find out what happened their loved ones during the conflict. These deaths, taking place in disputed circumstances, failed to prompt a contemporaneous effective investigation as defined by the ECHR. Most importantly these attacks undermine the constitutional principles of the rule of law and separation of powers, necessary in any democratic society. In fact it is evident that often those who intervene in parliamentary debates around the issues connected with the prosecution of ex-British Soldiers are themselves former British soldiers, and there is a direct conflict of interest.⁹
8. In May 2018 the Northern Ireland Office issued a consultation document ¹⁰*Addressing the Legacy of Northern Ireland's Past* based on the proposals of the Stormont House Agreement (SHA, 2014), to

³ David Cameron, "Balancing freedom and security – A modern British Bill of Rights", *Speech to the Centre for Policy Studies*, (26 June 2006), available at <http://www.theguardian.com/politics/2006/jun/26/conservatives.constitution>; Conservative Party, *The Conservative Manifesto 2010*, available at [https://www.conservatives.com/~media/files/activist%20centre/press%20and%20policy/manifestos/manifesto to2010](https://www.conservatives.com/~media/files/activist%20centre/press%20and%20policy/manifestos/manifesto%20to2010) [79]; Conservative Party, *The Conservative Party Manifesto* (14 April 2015); Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals For Changing Britain's Human Rights Laws* (October 2014), available at https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf;

⁴ <https://www.theguardian.com/law/2020/oct/06/legal-profession-hits-back-at-boris-johnson-over-lefty-lawyers-speech>

⁵ <https://www.belfasttelegraph.co.uk/news/northern-ireland/files-reveal-taoiseachs-concern-at-claim-lawyers-unduly-sympathetic-to-ira-38817620.html>

⁶ <https://www.patfinucanecentre.org/collusion/inquiry-killing-human-rights-defender-and-lawyer-rosemary-nelson-finds-serious-omissions>

⁷ E-mail on file with PFC, copy can be provided on request.

⁸ Questions and Answers on the claims that there is a Witch Hunt against Ex-British Soldiers by Pat Finucane Centre <https://www.patfinucanecentre.org/q-there-witch-hunt-against-ex-british-soldiers>

⁹ <https://www.belfasttelegraph.co.uk/news/northern-ireland/tory-mp-proposes-legislation-to-stop-prosecution-of-troubles-era-soldiers-36271751.html>

¹⁰ <https://www.gov.uk/government/consultations/addressing-the-legacy-of-northern-irelands-past>

which PFC submitted a substantive response.¹¹ The UK Government *claimed* it was trying to find the best way to meet the needs of victims and survivors and to help people address the impact of the conflict in the areas of information, justice and acknowledgement to help Northern Ireland transition to long-term peace and stability. This consultation document proposed a number of overarching measures recommended in the SHA for dealing with the past including a Historical Investigations Unit (HIU); Independent Commission of Information Retrieval (ICIR); Oral History Archive (OHA); and an Implementation and Reconciliation Group (IRG).

9. The families with whom we work engaged in good faith with the SHA consultation, despite their initial reservations on London's commitment to implement the proposals. Their contributions were made at huge personal, emotional and psychological costs in the hope that their concerns would finally be treated with respect and that this was a genuine attempt by the UK government to answer their very painful questions. The NIO received over 17,000 responses from individuals and groups.¹² The PFC welcomed this consultation but also responded cautiously raising a number of concerns.
10. In the British Government's Queen's Speech in December 2019 and, again, in the 9th January 2020 document '*New Decade New Approach*'¹³ deal, (which restored the NI power-sharing Executive) governmental commitments were made to putting in place legislation to enact the SHA. This included an agreement that, by April 2020, a process would begin involving the north of Ireland political parties and the Irish government, to obtain a 'broad consensus' on any legislative changes required. This was a significant step forward for those families who have been waiting decades for answers. With this in mind the PFC, in common with other human rights NGOs, both domestic and international, became extremely concerned when on March 18th 2020, with no public or private consultation, the British Government set out its thinking on progressing legacy issues in the north of Ireland in the form of a Written Ministerial Statement (WMS).¹⁴
11. The provisions within this WMS contradict all recent previous commitments made by the British Government, not only in terms of the rights and protections provided for in the Human Rights Act (and many other international human rights treaties and the Belfast/Good Friday Agreement) but

¹¹ PFC submission to the NIO Consultation on *Addressing the Legacy of Northern Ireland's*

Past at <http://www.patfinucanecentre.org/truth-recovery/pfcs-response-consultation-deal-legacy-past>

¹² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836991/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses_2_.pdf

¹³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf

¹⁴ <https://www.gov.uk/government/news/addressing-northern-ireland-legacy-issues> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2020-03-18/HLWS163/>

also the UK government's assurances, made to victims and survivors and the general public, on their commitment to the full implementation of the Stormont House Agreement (SHA). Families that had engaged with the SHA process see this as an absolute breach of trust and cooperation, and all confidence in this government's genuine desire to address the legacy issues has collapsed. Families also consider the most recent 18 January 2021 statement on legacy (where the UK government commits to conducting "a transparent and meaningful consultation with victims' groups"¹⁵) as completely insincere, bearing in mind their dismissal of their SHA in-depth consultation responses. Furthermore, it is untrue to say, as the UK government does in this statement, that there have been repeated investigations into British Army killings. In a majority of cases there was a cursory review at most.

12. Compounding all of this is the continued measures by the present government to undermine the rule of law. PFC is deeply concerned that the *Overseas Operations (Service Personnel and Veterans) Bill*¹⁶, currently at Committee Stage in the House of Commons, will be extended to include immunity for British soldier's actions in Northern Ireland. This Bill seeks to prevent prosecutions for past war crimes, including torture and killing by the UK military. Families we work with have been victims of state-sanctioned¹⁷ torture and inhuman and degrading treatment and are still awaiting justice.

The PFC raised issues of torture and ill treatment with the UN Committee against Torture and Inhuman and Degrading Treatment (CAT) in May 2019¹⁸. Due to the seriousness of the evidence presented, the CAT had requested the UK government respond to specific questions within one year, as opposed to the normal four years. The CAT had asked the UK to

"ensure that effective and independent investigations are conducted into outstanding allegations of torture, ill-treatment and conflict related killings...and undertake initiatives, including expanding the mandate of the HIU¹⁹ to include allegations of torture and ill-treatment and provide redress"; as well as 'refraining from enacting amnesties or statutes of limitations for torture or ill-treatment, which the Committee has found to be inconsistent with States Parties' obligations'.²⁰

¹⁵ <https://publications.parliament.uk/pa/cm5801/cmselect/cmniaf/1153/115302>.

¹⁶ <https://bills.parliament.uk/bills/2727>

¹⁷ <https://www.channel4.com/news/waterboarding-claims-in-northern-ireland>

¹⁸ <https://www.patfinucanecentre.org/index.php/human-rights/pfc-submission-un-committee-against-torture>

¹⁹ The HIU is the Historical Investigations Unit, which was one of the agreed institutions to be set up under the outstanding Stormont House Agreement (SHA).

²⁰ Article 41 (a) – (f) in Committee against Torture, Sixty-sixth session 23 April – 17 May 2019, Consideration of Reports Submitted by States Parties under Article 19 of the Convention Concluding observations of the Committee against Torture (Extracts for follow-up of CAT/C/GBR/CO/6) at

In response to this, on 21 August 2020 the UK government said that it “condemns unreservedly the use of torture or inhuman treatment”...and “does not use or condone torture for any purpose, including to obtain information.”²¹

Yet here we are. Six months on from their response to the UN, the UK government is trying to stand over and justify a bill that will do the exact opposite. This *Overseas Operations Bill* will radically diminish the incorporation of the European Convention on Human Rights (ECHR) in Northern Ireland, weakening the protections against torture, inhuman and degrading treatment and the right to life. It would also directly conflict the Belfast/Good Friday Agreement via the *Rights Safeguards and Equality of Opportunity* provisions regarding incorporation of the ECHR in Northern Ireland, thus breaching an existing international treaty between two sovereign states.²²

13. In the same vein, the PFC would also like to draw your attention to the “Covert Human Intelligence Sources (Criminal Conduct) Bill” (or “CHIS” Bill). This bill was rushed through the House of Commons in ten days (5-15 October 2020) in response to the “Third Direction”²³ litigation initiated by ourselves in the PFC alongside the Committee on the Administration of Justice (CAJ), Reprieve and Privacy International.

The Bill would negate the ECHR compatibility of present MI5 Guidelines and would allow police, security agencies and other bodies to authorise crimes by informants, making such authorised criminal offences “lawful for all purposes”. Such crimes are to be put beyond the reach of the rule of law with no limits as to which crimes can be authorised. The UK government has rejected amendments, tabled by cross-party MPs, to set limits preventing authorisation of offences such as torture, sexual violence, kidnap, false imprisonment and murder.

The Bill will unravel key non-recurrence peace process reforms, in particular, reforms intended to ensure the independence of prosecutorial decisions in NI, and the related giving of reasons for decisions not to prosecute in cases involving the security forces, or suspected security force collusion through informants in paramilitary groups. The CHIS Bill would preclude a prosecutorial decision being taken at all for crimes by informants that have been authorised by their so-called police “handlers”, as the crime in question will no longer constitute a criminal offence that can be

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fFUI%2fGBR%2f35026&Lang=en

²¹ Paras.44 & 46 in Information received from the United Kingdom of Great Britain and Northern Ireland on follow-up to the concluding observations on its sixth periodic report 28 August 2020, UN Doc. CAT/C/GBR/FCO/6

²² The Belfast/Good Friday Agreement is annexed to a Treaty between the Irish and British governments (“The British-Irish Agreement”) under the terms of which they agree to implement the Belfast/GFA. UK Treaty Series no. 50 Cm 4705.

²³ <https://www.patfinucanecentre.org/taxonomy/term/324>

prosecuted. The CHIS Bill also expressly provides for authorisation for criminal offences to be committed outside of the UK, including in the jurisdiction of Ireland.

The UK government has, to date, evaded answering questions as to whether the legitimate authorities in other countries will be informed when UK agencies authorise criminal offences being committed within their jurisdictions. The PFC is gravely concerned at this disturbing breach of international human rights norms and the provisions of the ECHR.

‘Particular Circumstances’²⁴ of Northern Ireland

14. The centrality of the Human Rights Act (1998) for Northern Ireland cannot be overstated. The Northern Ireland the Belfast/Good Friday Agreement, an international peace treaty,²⁵ has human rights at its heart. This treaty committed the UK to incorporating the European Convention on Human Rights (ECHR) in Northern Ireland, which was given domestic effect both by the Human Rights Act and the relevant provisions in the devolution statute (Northern Ireland Act, 1998). The Irish Government, the other signatory to the Belfast/Good Friday Agreement, recognising the protection of human rights as a key principle underpinning the GFA, has stated that, *“as a guarantor of the Good Friday Agreement, the Irish Government takes very seriously our responsibility to safeguard the Agreement... The fundamental role of human rights in guaranteeing peace and stability in Northern Ireland must be fully respected.”*²⁶
15. Incorporation of the ECHR by the UK government was provided for in the Belfast/Good Friday Agreement, and given legislative effect by the Human Rights Act 1998. The Irish government, under equivalency recognition for human rights protections on the whole Island of Ireland, also passed the European Convention on Human Rights Act 2003²⁷, giving the ECHR domestic realisation in the Republic of Ireland. Any amendment in relation to the Human Rights Act, therefore, requires a negotiated agreement between the UK and Irish governments and the Northern Ireland Assembly parties.

²⁴ Most recent discussion on the Particular Circumstances of Northern Ireland outlined in a 2020 paper from the Northern Ireland Assembly see <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2020/ad-hoc-committee-on-bill-of-rights/4820.pdf>

²⁵ Treaty Series No. 50 (2000) Cm4705; the Agreement consisted of the British-Irish Agreement between the two sovereign states and the Multi-Party Agreement between participant political parties. The British-Irish Agreement (Article 2) affirms the solemn commitment of the UK government to support and implement corresponding sections of the Multi-Party Agreement.

²⁶ BBC, “Human Rights Act: Irish government ‘will protect 1998 Agreement’”, *BBC News* (14 May 2015), available at <http://www.bbc.co.uk/news/uk-northern-ireland-32734062>

²⁷ <http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html>

16. At present stronger human rights provisions taking into consideration the particular circumstances of Northern Ireland are being considered. The Belfast/Good Friday Agreement provided for a separate Bill of Rights for Northern Ireland, supplementing the rights of the incorporated ECHR through the Human Rights Act.²⁸ In the *'New Decade, New Approach'* document, which re-established the Northern Ireland institutions in 2020, a Bill of Rights Ad Hoc Committee of Members of the Legislative Assembly was set up.²⁹ The remit of this Committee is to examine the case for a Bill of Rights for Northern Ireland that builds on the protections in the ECHR. The ECHR and the HRA are seen as the floor not the ceiling for human rights provision and protections in Northern Ireland. Any backsliding through changes to the HRA which do not meet the human rights commitments in the Belfast/Good Friday Agreement have legal implications far bigger than those envisaged by the current Conservative government.

Brexit


17. Our final submission is in relation to Brexit and human right protections for all citizens in Northern Ireland. Article 2 of the Northern Ireland Protocol to the Withdrawal Agreement provides for “no diminution of rights, safeguards and equality of opportunity” in Northern Ireland due to Brexit.³⁰ We are aware, however, from the detailed work of other NGO's (with a broader reach than the focused legacy work that the PFC undertakes) that there are areas of concern particularly around citizenship curtailing rights protections. A recent research paper, funded by the Northern Ireland Human Rights Commission and Irish Human Rights and Equality Commission, outlines (amongst other things) a grey area for Irish citizens from the Republic of Ireland (RoI), living in Northern Ireland.³¹ This research notes that Irish citizens from the RoI might have less protection than those who apply for settled status. It would be strange for some Irish citizens to have to apply for settled status on the island of Ireland, while other Irish citizens born in Northern Ireland are not required to do this, nor indeed should they be. Citizenship is key in any post-conflict, transitional society where there are contested shared spaces.

²⁸ The Belfast (Good Friday) Agreement states : The new Northern Ireland Human Rights Commission will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the *particular circumstances* of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland.

²⁹ <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/>

³⁰ <https://www.gov.uk/government/publications/protocol-on-irelandnorthern-ireland-article-2>

³¹ Continuing EU Citizenship “Rights, Opportunities and Benefits” in Northern Ireland after Brexit

Sylvia de Mars, Colin Murray, Aoife O'Donoghue & Ben Warwick MARCH 2020, Northern Ireland Human Rights Commission 

Theme One

The first theme deals with the relationship between domestic courts and the European Court of Human Rights (ECtHR). As noted in the ToR, under the HRA, domestic courts and tribunals are not bound by case law of the ECtHR, but are required by section 2 HRA to “take into account” that case law (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right.

You asked for any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.

You also asked specifically for views on the detailed questions from the Terms of Reference set out below, which we have answered underneath each section.

Terms of Reference Q&A

**a) How has the duty to “take into account” ECtHR jurisprudence been applied in practice?
Is there a need for any amendment of section 2?**

In short there is no need for any amendment to section 2 of the Human Rights Act as it works well. The requirement to ‘*take into account*’ the jurisprudence of the ECtHR normally results in courts applying principles that are clearly established in the Strasbourg Courts. European case law has established that the Convention is a *living instrument* which must be interpreted in the light of changing, present day conditions. In interpreting questions about human rights the courts must ‘*take into account*’ any decisions made by the European Court of Human Rights but only to the extent that the Court considers them to be relevant. This does not bind the UK courts – rather it requires the courts to take into account relevant judgments, much like they do under common law rules of statutory interpretation.

A key criticism in this regard is that the Human Rights Act undermines the role of the UK courts, and that the requirement to take into account rulings from the European Court means that problematic jurisprudence is often applied to UK law. Yet the obligation under section 2(1) of the HRA is not one that imposes burdensome restrictions or obligations on UK domestic courts. The UK Supreme Court has always taken a careful approach to decisions of the European Court.

In the past the conservative government put forward a case for repealing the HRA and replacing it with a ‘British Bill of Rights’ (para.5 above) based on the text of the Convention. There is little doubt however that the Supreme Court would still use the jurisprudence of the ECtHR as an key interpretative tool, and yet remain, as it currently does, able to depart from Strasbourg jurisprudence where appropriate in particular cases. A full comprehensive detailed report on the potential effects repealing the Human Rights Act from

Doughty Street Chambers specific to Northern Ireland is an in-depth analysis of this question and the questions which follow and are views that the PFC supports.³²

b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that Jurisprudence? Is any change required?

We do not think any change is required with regards to the approach to the margin of appreciation permitted to States. The PFC feels that there is an appropriate balance and flexibility applied.

Examples of this are the cases of *re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] AC 173, regarding abortion law in Northern Ireland; *Dudgeon v UK* (1982) 4 EHRR 149, which led to the Homosexuality (NI) Order 1982 regarding decriminalisation of homosexuality in Northern Ireland and more recently the case of *Re Denise Brewster's Application for Judicial Review*, regarding the payment of pension to an unmarried partner.³³

c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

In general it is considered that the 'judicial dialogue' model between domestic courts and the ECtHR works satisfactorily and that the relationship between UK and Strasbourg judges is one open to constructive judicial dialogue and mutual respect. Where there are issues of concern regarding implementation of Strasbourg judgments the UK government can explain these to the Council of Europe's Committee of Ministers who are responsible for overseeing the implementation of Judgements. In general this is seen as an effective mechanism.

However, notable exceptions to the general recognition of compliance are in relation to the UK government's failure to comply with ECtHR cases on regarding Article 2 of the ECHR regarding Northern Ireland.

The 2001 *McKerr* group of cases relating to security forces killings and the case of murdered Human Rights Lawyer Pat Finucane in Northern Ireland remain under supervision of the Committee of Ministers.³⁴ The

³² <https://www.patfinucanecentre.org/sites/default/files/2017-02/HRA%20North%20of%20Ireland%20-%20Report%20with%20covers%20%28Optimised%20for%20screen%29.pdf>

³³ [2017] UKSC 8, [2017] NI 326

³⁴ *Jordan v the United Kingdom*, judgment final on 4 August 2001; *Kelly and Ors v the United Kingdom*, judgment final on 4 August 2001; *McKerr v the United Kingdom*, judgment final on 4 August 2001; *Shanaghan v the United Kingdom*, judgment final on 4 August 2001; *McShane v the United Kingdom*, judgment final on 28 August 2002; *Finucane v the United Kingdom*, judgment final on 1 October 2003; *Hemsworth v UK*, judgment final on 16 October 2013; *McCaughey & Others v UK*, judgment final on 16 October 2013

Committee has most recently expressed ‘deep concern’ that judicial remedies of inquests, investigations set out in the original McKerr group ECtHR case judgments remain unimplemented, and the UK’s failure to provide detailed information requested by them.³⁵ It also expressed deep concern that a decision had still not been made by the UK government on how to react to the Supreme Court judgement regarding a public inquiry into the murder of Pat Finucane, and underlined the urgency of reaching a decision with further delay. These cases will be examined again by the Committee of Ministers in March 2021.³⁶

Theme Two

The second theme considers the impact of the HRA on the relationship between the judiciary, the executive and the legislature.

The ToR note that the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review will consider the way the HRA balances those roles, including whether the current approach risks “over-judicialising” public administration and draws domestic courts unduly into questions of policy.

You asked for general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. In particular you sought views on any strengths and weakness of the current approach and any recommendations for change. You specifically asked for view on the below questions in your ToR.

Terms of Reference Questions and Answers

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been **interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it**? If yes, should section 3 be amended (or repealed)?

ii. If **section 3 should be amended or repealed**, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

iii. Should **declarations of incompatibility** (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

³⁵ https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a0668f#globalcontainer

³⁶ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a097b6. The response of the UK Government, which will be considered by the Committee in March, can also be accessed here: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a13307.

We are unaware of any instances where compatibility with Convention rights (required by Section 3) has been *interpreted in a manner inconsistent* with the intention of the UK Parliament, nor where this has occurred with regards to any decisions by courts or tribunals in Northern Ireland. In any instances where this has occurred after enactment of the Human Rights Act, legislation would have had to go through Parliament in accordance with compliance with section 3.

To *amend or repeal section 3* would go against the core and fundamental aim of the HRA to allow all law to be interpreted, as far as possible, in a way that is compatible with our basic human rights protections. There is no evidence of a problem that requires to be changed, amended, repealed or fixed. Any change we feel under the current climate would be a regression of domestic human rights protections.

Regarding *declarations of incompatibility* provided for in section 4 of the HRA, we are only aware of three cases that have been issued in Northern Ireland.³⁷ We do not see any need to change the current process as it would only delay relief for the claimant and require a parliamentary process for amending the offending legislation. The number of incompatibility decisions could possibly increase, thus further increasing legal uncertainty in key areas of law. Is there a need to fix something that is not broken?

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

The PFC believes that domestic courts should have the power to quash or decide on conditions for derogation in respect of Article 15(1) of the ECHR. This was decided in the first Belmarsh case³⁸ because the Anti-terrorism, Crime and Security Act 2001 expressly allowed such orders to be challenged before the Special Immigration Appeals Commission, and appeal from there on. We are concerned however that in future legislation a derogation may not contain requisite provisions. For example the new *Overseas Operations (Service Personnel and Veterans) Bill* that we mentioned earlier, requires the government to 'keep under consideration' whether to derogate from ECHR in cases of overseas operations via a new section 14A into the HRA. It does not however make any explicit provision for any such derogations to be challengeable in domestic courts nor how quashing orders would be issued where deemed appropriate.

c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

The PFC is not aware of any issues in this regard. We note that courts, importantly, have the ability to quash legislation which is incompatible with human rights, affording basic human rights protections to all citizens. No change is required.

³⁷ *Re McR's Application* [2002] NIQB 58. [2003] NI1; *The NIHRC Application* [2015] NIQB 96 and 102; *In the matter of an application by Siobhan McLaughlin for Judicial Review* [2018] UKSC 48, [2019] NI 66; Court of Appeal decision at [2016] NICA 53; the High Court decision of Treacy J at [2016] NIQB 11.

³⁸ *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

The PFC is very concerned with this matter. The actions of the UK state in general are not restricted to actions on the territory of the UK or other jurisdictions that it legally controls. This matter was dealt with in *Al-Skeini v UK* and *Al-Jedda v UK* and should remain as such.³⁹ Our concern lies in the fact that the UK government, through the Overseas Operations (Service Personnel and Veterans) Bill is seeking to avoid application of the ECHR to military operations, despite the Parliamentary Joint Committee on Human rights finding these provisions to be in breach of the UK's international human rights obligations⁴⁰.

We are also very concerned about the extraterritorial reach of the Covert Human Intelligence Source (Criminal Conduct) Bill, which allows those acting for a number of public agencies to committing crimes, including murder (already noted earlier in his document). There is conflicting information on whether the actions of agents under this legislation engage ECHR compliance, with the Home Office ECHR Memorandum stating that there will be no responsibility under the Convention for certain conduct.⁴¹ Yet in its final consideration stage, on 24th February 2021, the Solicitor General stated that all authorisations must comply with the Human Rights Act. It also requires a declaration by parliament rather than expressly provided for in the bill, leaving legal uncertainty around the scope of the HRA herein.

e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

The PFC acknowledges the role of parliamentary scrutiny of remedial orders undertaken by the Joint Committee on Human Rights and sees this as an effective approach. We are not in a position to offer any further legal considerations on this point.

³⁹ (2011) 53 EHRR 15 and (2011) 53 EHRR 23 respectively.

⁴⁰ ⁴⁰ <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/120321/operations-service-personnel-and-veterans-bill-is-unjustifiable-ineffective-and-will-prevent-justice-from-being-done-say-joint-committee-on-human-rights/>

⁴¹ [https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20\(CC\)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf](https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20(CC)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf)