

Northern Ireland Affairs Committee

Oral evidence: The ECHR and Northern Ireland, HC 720.

Tuesday 14 May 2024

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Members present: Sir Robert Buckland (Chair); Stephen Farry; Claire Hanna; Carla Lockhart; Jim Shannon; Kelly Tolhurst.

Questions 1 - 35

Witnesses

I: Dr Colin Caughey, Director of Policy, Northern Ireland Human Rights Commission; Alyson Kilpatrick, Chief Commissioner, Northern Ireland Human Rights Commission; Professor Christopher McCrudden, Professor of Human Rights and Equality Law, Queen's University Belfast; Stephanie Needleman, Legal Director, JUSTICE.

Examination of witnesses

Witnesses: Dr Colin Caughey, Alyson Kilpatrick, Professor Christopher McCrudden and Stephanie Needleman.

Q1 Chair: This is a meeting of the Northern Ireland Affairs Select Committee. I am delighted today that we are turning our attention to a one-off session examining the potential implications for Northern Ireland should the United Kingdom withdraw from the European Convention on Human Rights. I am very pleased to be joined by an expert panel.

We have Stephanie Needleman, who is legal director of JUSTICE. I am grateful to you, Stephanie. I should declare an interest that I am a council member of that organisation. Then we have Professor Christopher McCrudden, who is professor of human rights and equality law at Queen's University Belfast. Then we have Alyson Kilpatrick, who is chief commissioner of the Northern Ireland Human Rights Commission. Then, finally, we have Dr Colin Caughey, who is director of policy at the Northern Ireland Human Rights Commission. Welcome one and all.

I wanted to open the batting, as it were, with a general question about how the European convention is applied in practice, and a discussion about the concerns that we hear about it, offering an opinion as to whether, frankly, those concerns are actually valid.

Professor McCrudden: Thank you for the invitation to attend. It is a real pleasure to be here. Maybe one way of starting is to think about what popular opinion says about the convention. There was polling done in September 2023. The question was put by the Savanta poll organisation—so, a reputable polling organisation—as to whether the UK should stay part of the ECHR or withdraw from it. In Northern Ireland terms, 68% of respondents said “stay”; 18% of respondents said “don't know”; 14% of respondents said “withdraw”. People around the table here know better how to interpret polling than I do; nevertheless, it is an indicator of quite an interesting lack of evidence as to there being popular opinion in Northern Ireland urging withdrawal. That is the first point.

In terms of the arguments that have sometimes been put about concerns, I suppose that there are three or four, perhaps. One is that the courts have gone rogue and interpreted the convention beyond what is appropriate. To be honest, my colleagues at Queen's and I have done quite a lot of work on this and we see no evidence that the courts have gone rogue.

The second is that in some way it is inappropriate for a foreign court, as it is sometimes called, to adjudicate these issues and that that is in some way doing down parliamentary sovereignty. Of course, there are two obvious points to that. One is that it is an exercise of parliamentary sovereignty to accept the convention and to incorporate it in the Human Rights Act. More importantly, if we are, as the Prime Minister often says, anxious to remain part of the international rules order, international rules need to be interpreted. They need to be applied and enforced, particularly



in circumstances where there is either controversy or lack of trust. The question then is how you would envisage an international organisation that did not have a mechanism for enforcement and interpretation. Those are two common approaches.

The third is that, in Northern Ireland terms, there is sometimes criticism the other way: that the European convention does not go far enough. That therefore leads into questions about economic and social rights. That leads us into the question of the Bill of Rights, but perhaps that will come up later on. If there are other concerns that you want to put, Chair, I would be happy to address them.

Q2 **Chair:** That is a very good opener.

Alyson Kilpatrick: I will come on to practice, because that is a really good working example of why the convention has been a very good thing. To add to what Professor McCrudden has said in relation to the concerns, they are often summed up by saying that it is a foreign court with foreign decisions imposed on us, particularly in relation to interim measures recently—those we have talked about a lot—and that it is overreaching. Professor McCrudden has touched on that as well.

In terms of a foreign court, it is not a foreign court. We are on the court. We nominate our judge to the court, and always have, and we vote for the other judges as well. It is very far from being a foreign court. It is deciding on things that we, as a sovereign nation, have put before it democratically. It appreciates subsidiarity and the margin of appreciation. That is built into everything the European court does.

Interim measures are a perfectly common measure that most courts have to prevent irreparable harm. They are used not commonly at all. I think only one last year was used against the UK. It is a perfectly ordinary way of a court protecting its business and protecting a person in the meantime, while the decision is being made. It really is exceptional circumstances: for example, somebody may die if deported. That is often the sort of situation they are talking about.

In terms of overreach, I understand and have more sympathy for that concern because I can see where it comes from. I can see that people are saying, "We never thought about climate change". For example, in one of the cases that they are concerned about, they never thought about that back in the 1950s. No, they did not, but they came up with a framework of principles that could adapt to changing times and circumstances, and has to have done, the same way our common law has adapted and changed to changing times. New challenges arise and the convention is sufficiently broad that it can adapt to that. They are not creating new rights. They are simply using the framework in new circumstances. It is the same rights, but new circumstances.

Talking about practice, Northern Ireland is a really good example of it working in practice. It is applied in everything, sometimes not even with



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people knowing it. The duty in public authorities to act compatibly has gone through the civil service and all public bodies, such as policing, criminal justice, medicine, social care and caring for older people. They have had 25 years of this now. They have been trained very well. It is second nature and works really well. It gives people a remedy. It makes them feel important and it makes people who are normally in a minority group, people who maybe do not have anywhere else to turn, feel important. That is very much also part of our common law, but the common law has not traditionally provided remedies for those minority groups or the vulnerable.

If I could take something that I have a particular experience of, which is policing, I had the great privilege of being a human rights adviser to the Northern Ireland Policing Board from about 2009. I have seen, through my time now, six chief constables. They were at the forefront of the Human Rights Act and its application to the most contentious situations and the most difficult circumstances, in those areas where most people would say, "Come on now, you can't be asking them to concern themselves about this. They have more important things. It is dangerous," et cetera. The police took to it, after a little bit of initial scepticism and fear. They took to it in a remarkable way.

Every single one of those chief constables, particularly now the most recent, has endorsed the human rights approach to policing, not just as a nice thing or as an aspiration, but why operationally it works. They have all said to me, "It makes decision making easier. It is much easier to send out a newly trained constable or my chief superintendent and know they are equipped to handle whatever may be thrown at them, because it is a decision-making model". I have seen them when nobody else can see them. I have been in operational rooms and settings, observing. It is the most natural thing in the world.

I spoke to one recently retired. I said, "What would happen if you did not have the Human Rights Act anymore, or if you did not have the convention to set your standards?" He said, "I don't know what we would do, because for some of us it's all we know. We've been here for 25 years and it's all we know". As I say, it works beautifully for everything from recruitment right through to stop and search or what you do with a mentally ill person on the edge of a bridge. It helps with all those decisions.

Housing is another one I have quite a lot of direct experience with. The Human Rights Act incorporating the convention immediately allowed local courts, such as magistrates courts and county courts, to look at fairness, reasonableness and the circumstance of the person in front of them to make sure that the decision they were making was fair and proportionate. That is all it did. It did not constrain anything. It did not stop them making decisions according to the law. That made a huge difference. There are a lot of people who would have been evicted perhaps but could have remained in their property with just a little bit of



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help. Courts were allowed to, as a result of the Human Rights Act, suspend and give them opportunities. This is coming up again now in relation to no-fault evictions.

This is a debate in which progress is made and then it stalls because of sometimes myths, rumours and gossip about what it causes in a practical sense. In my experience, it has only been positive.

Q3 Chair: It is right to say, is it not, that a lot of commentators here tend to look at it from the perspective of England and Wales, which is a separate jurisdiction with a whole panoply of different rules and laws, such as the Police and Criminal Evidence Act of 1984, for example, which is 40 years old this year. Northern Ireland is a separate jurisdiction with its own legal history, which means that the context is entirely different.

Alyson Kilpatrick: It is. It is similar, but it is very different in a very material way. We have had a Police and Criminal Evidence (Northern Ireland) Order, pre Human Rights Act. We have had various criminal justice rules and procedures, et cetera. What made a difference was requiring every single public body to match the same standards. In terms of policing, it worked so well because the police had a statutory duty to comply with the Human Rights Act. It was part of the code of ethics as well, so it was made immediately operational and practical.

The reason human rights were so integral to the peace agreement and to Northern Ireland being able to move on, in my view, was that it was something that the Government of the day could not affect. There were these standards set and agreed across 47 nations then. It was something that nobody could take away from them. That was really important at the time, because there was distrust—although there are more than two communities in Northern Ireland—between the two main communities. They said, “We’re going to leave it to other people who have agreed these standards, and you’re all going to benefit from it”. The minute somebody in a minority group does not benefit from them, we know that everybody is going to be at risk. That was why the European convention, the Human Rights Act and the Belfast/Good Friday agreement made such a difference.

Q4 Chair: I think that we will come back to that in the discussion, as to the particular context and why it was so important in 1998.

Dr Caughey: Where there have been concerns in relation to overreach, the Council of Europe and the European Court of Human Rights have been very responsive to these concerns, emphasising its subsidiary role. The court emphasised that judicial intervention cannot replace or provide any substitute for the action that must be taken by the legislative and executive branches of Government.

Q5 Chair: The subsidiarity point is of course part of the reforms that were obtained. We will come back to that question of reform in a moment.



Stephanie Needleman: I am not sure that there is that much to add, but perhaps I will pick up on a couple of points that have already been made. One key criticism is around this idea of the convention being a living instrument. As others have said, we want treaties to be read in a way that reflects changes in society. The living instrument doctrine has led to the recognition of rights that we would see as absolutely incontrovertible these days, such as the fact that children born out of wedlock should not be treated differently to children born to married partners and that the definition of family includes same-sex couples.

It also, as Alyson said, enables the court to consider the human rights implications of technologies, sciences and things that perhaps did not exist at the time that the convention was drafted. It has been able to consider the changes that have been effected by the rise of the internet, mass surveillance, the interception of communication and things such as surrogacy, which were clearly not in the mind when the convention was first drafted.

I also wanted to pick up on the international reputation point. Leaving the convention would have a serious detrimental impact on the UK's international reputation. We would be in the company of Russia and Belarus as the only states in Europe not party to the convention and part of the Council of Europe. It would hugely weaken the UK's voice and influence abroad if we were no longer part of the European rules-based order.

I wanted to add that business and investors as well rely on a stable human rights framework and the certainty that comes around that. As I am sure we will go on to discuss, withdrawing from the ECHR will create a significant amount of uncertainty in Northern Ireland, but also around how it impacts Westminster legislation and Government as they apply in Northern Ireland.

Q6 Chair: That leads on neatly to the next question I wanted to ask you, which is whether reform from within is possible. In fact, there are examples where it already has been done, most recently on the interim orders and rule 39. Is that a pipe dream? For those who do not like the regime and criticise it, is withdrawal the only viable option? Increasingly, that is the language we are hearing in the debate.

I can remember the prisoner voting argument 10 years ago. Nobody was talking about withdrawal. They were talking about how we accommodate that judgment. A lot of us, me included, thought it was not a very good judgment. It was not, but it was negotiated in the Committee of Ministers of the Council of Europe in a way that everybody was satisfied with, albeit that it took a long time. It was interesting then that withdrawal was not a serious option, whereas now it seems to be on the table in a way that it was not a few years ago. Professor McCrudden, do you think reform is possible or is the logic, to adopt Jonathan Sumption's view, withdrawal?



Professor McCrudden: There are maybe two points to make on this. The first is that past experience shows that reform has taken place, whether or not that is in terms of actual amendment of the convention itself. There has been mention of subsidiarity. Subsidiarity was an example of exactly when the convention was amended. Of course, there is the opportunity for new protocols to amend and that has been a fairly frequent occasion. Past experience says that there is, obviously, the opportunity to amend. In that respect, the 10 years or so of negotiations that the UK Government led in the past on reforms to the convention were not wholly successful, but they certainly were not unsuccessful. That is the first point. Another example of that is, as you mentioned, Chair, in the context of the application of the convention by the Committee of Ministers. There is opportunity there for negotiation.

The second point I would make is this. Of course there is an opportunity for negotiation and reform but in part it depends on what the attitude is going into the negotiation. Sometimes there has been the suggestion that we have to go into negotiation, but basically it is in order to show that the convention cannot be amended and cannot work. That seems to me to be a suggestion to negotiate in bad faith. Past experience indicates also that there is a degree of favourable response and serious engagement when the member state has concerns and wants to negotiate them, but not if they are done in bad faith.

In other words, if the negotiations for reform are essentially conducted in order to show how awful the convention is and as a prelude to, and indeed an occasion for, withdrawal, that is not going to go down well. It is likely to be seen as operating in bad faith. We have been in this position before, prior to the Brexit situation, where there was an attempt at negotiation that did not work and then that led to withdrawal. There is a danger here that you get into a position where withdrawal, as it were, is the only option because you are making impossibilist demands or negotiating in bad faith.

Alyson Kilpatrick: You have already alluded to the fact that reform has taken place, and very recently, such as the Brighton declaration and the Copenhagen declaration. All these things changed as a result largely of the UK making representations. There is protocol 15, which has taken up a lot of the concern and has expressly referenced subsidiarity and margin of appreciation, et cetera. Reform of rule 39, as you say, has taken on concerns, as has changing the time limit. The prisoner voting case you talk about, the Hirst case, is a really good example as well of when the court can actually be very reasonable and can compromise. It reached a compromise and accepted—I think it was on temporary licence, wasn't it?

Q7 **Chair:** That is right. Postal votes were available to certain limited classes of prisoner.

Alyson Kilpatrick: It reached a compromise. It was sensible, so it worked in that case. How I would categorise some of it, and I hope I am not being too unfair, is that the suggestion of leaving tends to come



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immediately after a decision is made that is uncomfortable or even could be wrong, but our own courts make decisions that could be wrong. They are overturned. I am sure that our own Supreme Court has made decisions with which not everybody is happy, but you do not leave these structures.

If you leave these structures, where do you go? Where does the individual citizen go? It is all very well saying that the UK courts are great, and they are. I practised in them for years. I have huge respect for them, but the right of individual petition to Strasbourg remains really important, not just symbolically but practically as well. We have gained a lot, a lot of things that most of the people who complain about the convention would not dispute, by going to Strasbourg, not in our own common-law jurisdiction. It is often the people who need the most help, like victims of crime.

I hear lots of things. I still hear them, despite all the defences we put up. For some reason, we are not addressing concerns sufficiently, but I feel sometimes that people are not listening to the defence and there are just knee-jerk reactions to things. I would ask, "What do you have instead?" Do you go into the company of Russia and Belarus, and what do you say to your citizens?

Q8 Chair: We can come on and discuss what a domestic Bill of Rights might look like. Dr Caughey, do you have any further observations on reform versus withdrawal?

Dr Caughey: I would just highlight the effectiveness of the UK Government in their engagement with the Council of Europe and the other international human rights mechanisms throughout the world that the UK contributes to very successfully. The UK's reputation as a country that upholds and supports international human rights processes, whether that be the UN Human Rights Council or the different UN treaty bodies that the UK has a reputation of providing membership towards, is very important. That has led to the UK's reputation as a nation that stands for human rights and has assisted it in supporting the Council of Europe and other institutions to develop, to grow and to ensure that they are protecting the rights of all.

Stephanie Needleman: As the others have said, there is the opportunity for reform. To pick up on the rule 39 changes that we have recently seen, they explicitly addressed a number of the concerns that the Government had in relation to their use when it came to Rwanda. Specifically, the Governments to which they are addressed are now able to ask the court to reconsider the rule 39 ruling if they consider the measures are no longer necessary or where they possess information that was not in front of the judge when the rule 39 measure was used.

I also want to flag that another method by which we can influence the Strasbourg court is through judicial dialogue. There has been a long history of judicial dialogue between the domestic courts and Strasbourg.



We have seen, in a number of cases, Strasbourg essentially changing its view after domestic courts have set out the domestic position in the UK.

The convention sets a floor for rights protections across Europe and ultimately it is a question of whether those who want to leave the ECHR want the UK to be part of that or not. If they do not, the reforms that we are talking about are not going to have much impact. For people somewhere in the middle, there are obvious ways in which we can reform from within if it is felt that that is necessary.

Q9 Chair: There are good examples of that dialogue having produced results. There was the whole life order murder sentencing case, where the UK was able to demonstrate that whole life orders were perfectly compatible with the convention, as well as reverse burdens of proof in things such as confiscation of proceeds of crime. All these have been found to be compatible. Even though they are pretty draconian and strong criminal justice measures, they have all been found to be compatible with the convention.

Stephanie Needleman: Yes, as well as court martial procedures and political advertising.

Chair: Yes, exactly. For the record, in 2023 we saw the UK in breach of the convention on one occasion. In 2022, we were in breach on two occasions. Russia, in its last year of membership, was in breach, I think, on 324 occasions.

Q10 Jim Shannon: Ladies and gentlemen, it is a real pleasure to see you. Thanks for coming. If you do not mind, I will give a special welcome to Dr Caughey. We have known each other for a long time. He comes from outside Ballyhalbert originally—and farmers as well, so good stock there.

I have three questions. I will pose the three questions and let whoever wishes respond to them. The first one is a follow-on from the Chair's. It is about the Government's intention to withdraw from the ECHR. Can the Sewel convention act as a barrier to that happening? Specifically, what would be the issues in relation to the convention rights for the devolution settlement for Northern Ireland? Lastly in relation to that one, the ECHR requires amendments to the devolution Acts, which could mean the Northern Ireland Act. That is a question to follow on from the Chair.

The second question I have is one that concerns me greatly. It is to do with freedom of religious belief. I chair the APPG for International Freedom of Religion or Belief. I speak up for those with Christian faith, those with other faiths and those with no faith. We have a tradition, as all four of you will know, in Northern Ireland of open-air preaching. I can remember that my mum and dad did it when we were wee boys in Ballywalter and the Ards Peninsula. It was all across the whole of Northern Ireland. There is some concern that that may be legislated against. I would have concerns were that freedom to preach the gospel in some way to be inhibited.



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My third question, to put them all on record if I can, is in relation to the legacy issues. We have all fought consistently on that issue of the legacy issues. I think of the people we have met. You, Mr Chairman, met some of them last week. We spoke about the Kingsmill massacre in an Adjournment debate Thursday week ago in the House. Families seek justice. I think of Raymond McCord from north Belfast, who seeks justice for his 20-year-old son who was brutally beaten to death because he had the courage to stand up against the UVF, terrorists and scum that they are.

I am also very aware that some of my constituents have never had justice. For instance, I think of the Ballydugan Four, who were murdered by the IRA. Only one person was ever made accountable, on a small charge, but those who were intimately involved in their murders have never, ever been made accountable. It comes to legacy issues for all of us on both sides of the community, for my family personally, for my friendships with the four UDR men and for my cousin Kenneth, who was murdered on 10 December 1971. The three people who killed him fled across the border to sanctuary. The Kingsmill massacre guys, the three IRA men who killed them, fled across the border. The Garda Síochána did not divulge all of the evidence that it had. Those are the issues and the questions on the ECHR: withdrawal that Government want to do, the issue of freedom of religious belief and, thirdly, legacy issues. I will leave those questions to whoever would wish to come back on them, if that is helpful.

Chair: There are three distinct parts, but I am happy for each witness to answer them in the round.

Professor McCrudden: It is a pleasure to see Mr Shannon. I had the pleasure of showing some guests around his beautiful constituency over the weekend, so it is a pleasure to see you. On Sewel, I suppose the first issue is why Sewel might arise. The question there is, if the UK were to withdraw from the convention, whether that would require an amendment of the Northern Ireland Act. At the moment, the Northern Ireland Act, in several sections, as you well know, provides for limits on both the Assembly and the Executive, which cannot act contrary to the ECHR.

If the UK were to withdraw, one would assume that it would have to amend the Northern Ireland Act. That would extend the jurisdiction of the Northern Ireland Executive and Northern Ireland Assembly. Therefore, that gets you into issues of the expansion of the devolved settlement. Therefore, it is legislating in the area of the devolved settlement, which then triggers Sewel. The first point is that Sewel could arise.

The second part of that, however, is that, in arising, the issue is whether the UK Government or Parliament would pay any attention to it, even if the Northern Ireland Assembly did not pass a Sewel acceptance recommendation. In the recent past clearly Sewel has been overridden in certain contexts. The issue then arises as to whether Sewel is



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enforceable. It is clear from the Supreme Court judgment in the first Miller case that the Sewel convention is not enforceable in law. All in all, my view is that Sewel could be engaged, but that it is likely to prove a very weak reed in preventing withdrawal.

- Q11 **Chair:** You are right, because in terms of the Scotland Act it was a declaratory clause, was it not? It was a declaratory section that was referred to in Miller, so it has no practical effect. It is a bit of declaratory legislation.

Professor McCrudden: Yes, in the courts. You will know this better than I. Even when it was legislated in the Welsh legislation, it was still not regarded as justiciable. My first response with regard to Sewel is that it would be a weak reed.

With regard more generally to your question, Mr Shannon, on the effect on the devolution settlement, it clearly would be of very considerable importance. Leave aside the question of the Good Friday agreement, which perhaps we will come to. In terms of the Northern Ireland Act at the moment, there are of course the provisions that we have just mentioned with regard to the ECHR. The Northern Ireland Act would have to be amended if the UK was to withdraw. It would be a very strange situation for Northern Ireland institutions to be required to comply with the ECHR under the Northern Ireland Act while the rest of the UK was not a member of the ECHR. I cannot really envisage that.

- Q12 **Chair:** It is right, is it not, that human rights issues are not devolved to Northern Ireland? They are still within the purview of the UK Government, are they not? There is that.

Professor McCrudden: Yes and no. In terms of the implementation of some human rights standards, for example those that arose from the EU, the institutions have responsibilities there. The point is well made that the Northern Ireland Assembly cannot legislate beyond devolved matters with regard to human rights. In that sense, the Scottish decision in the Supreme Court would apply, which was interpreted as not allowing the Scottish Parliament to legislate in non-devolved areas. It would have a significant effect in terms of the current devolution settlement, and that is before we get to the issue of the Good Friday agreement.

Alyson Kilpatrick: Christopher McCrudden is the expert, so I am not going to add anything in relation to that, if that is okay. I cannot possibly add anything of help.

I would like to take, just briefly, the other two, if I may. They are two really good examples because both are protected under the ECHR through the Human Rights Act in a way that the common law simply would not protect them at all. If I take legacy first, the rights to be warned of a risk, to an effective investigation, to information, to participation in the investigation and to have perpetrators prosecuted all come from the European convention, not from any domestic law.



Similarly, with religious belief, that is found in the convention and that is what would protect people wanting to express their faith on the streets. The commission has always taken the view that you do not ban religious expression in public, which would be contrary to the ECHR, but you are entitled to balance the rights of everybody in the vicinity. There are certain things you do not have a right to do—I know this debate comes up in relation to the use of megaphones, banners, et cetera. All of that is very nuanced. It is not easy. There is no one answer for that. If you think about it in terms of safe access zones around health clinics, it is often reported as being a ban on prayer. It is not. It is a ban on activity within a zone, but you can certainly pray outside of the zone. It is attempting to reach a balance between those accessing the clinic and those who want to protest against the clinic being there, or even offer prayer to people attending the clinic.

It is always about balance. You cannot really give a single answer to that. If you look at the jurisprudence of the ECHR, applied by our domestic courts, you will find the balance in there. That is what protects both. It will protect those who want to express their faith in public. I know that, for a lot of people, sharing it with other people is very much part of their faith. That would be protected, within limits.

Jim Shannon: What about silent prayer?

Alyson Kilpatrick: It depends on the context. I do not think that anybody would say that you have to be silent if you are outside the City Hall, for example. I do not think that anyone has suggested that. If they did, we would probably object to that on behalf of the people who wanted to express their faith outside the City Hall. It is how you express the faith, what you say in the course of expressing the faith, and the context.

I could come up with a lot of examples. It might be unhelpful, but it is about context as well. I have not yet met anybody, I have to say, who wants to share their faith with others who goes out to offend, frighten or intimidate anybody, but there have been situations where that has happened. That needs to be controlled, but it does not mean shutting people up and stopping them from expressing their faith.

Professor McCrudden: Before Alyson goes on to the question of legacy, may I just add a footnote to the question, which is a very important one? The first point is that sometimes, particularly in Northern Ireland, rights are seen as weaponised by one side rather than another. It is important to address that issue head-on. Your question touches on that to some degree, in asking, "Are religious believers protected in the same way that non-religious believers are protected?" I will mention two points that are relevant.

One is that I had the honour of representing Ashers in the Ashers case. The effect of Ashers was to strongly uphold rights to freedom of religion and freedom of expression, using the European Convention on Human Rights in part. It is important to put that on the record because it was an



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extremely controversial and important case where freedom of religion was upheld.

The second point that is relevant here—and I am sure we will talk about the Good Friday agreement later on—is that, as you will know, one of the provisions specifically mentioned in the list of rights protected by the Good Friday agreement is freedom of religious belief. We now have the situation that article 2 of the protocol upholds those rights. We have the position therefore, following the Windsor framework amendment and agreement, that the Windsor framework will specifically be used to uphold freedom of religious belief under the Good Friday agreement. It is worth putting that on the record because sometimes those who oppose aspects of the Windsor framework might not be aware of the extent to which freedom of religious belief is specifically protected by virtue of the Windsor framework, in addition to the European Convention on Human Rights.

Alyson Kilpatrick: I will speak very briefly on legacy because I have touched on this already, but the commission was probably very early doors a critic of the Act's compatibility with the European convention for all the reasons you say, as well as the impact on people in Northern Ireland and victims across Northern Ireland. We have intervened in a challenge to the Act, which is now to be heard in the Court of Appeal in June, so we have put those arguments to the Court of Appeal.

The advice we gave to Government was ignored at an early stage and throughout, so the only recourse we had in the end was to participate in legal proceedings, which is what we are doing. I think that the view of people in Northern Ireland has not changed, and it mirrors very much what you have said for the reasons you have said. Colin has been quite active in preparing our submissions on legacy.

Dr Caughey: I will just highlight that the withdrawal from the European Convention on Human Rights would have significant negative impacts on the UK human rights framework and the devolution settlement for Northern Ireland. The European Convention on Human Rights is a fundamental building block of the UK's unwritten constitution.

In the context of Northern Ireland, I do not think that we can overstate the significance of section 6 of the Human Rights Act, which makes it unlawful for a public authority to act in a way that is incompatible with a person's rights under the ECHR. This provides reassurance for all within Northern Ireland and for all within the UK that, when you are interacting with a public authority and with public officials, those officials are bound to respect your human rights and to exercise the powers that they hold over people in a way that respects the human rights of those individuals.

That applies to those councils you refer to that are enacting bylaws. It applies to those who are looking at legacy cases. It applies across the board. The importance of that in the Northern Ireland context, where we need to build up trust in our public officials and public institutions, really



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cannot be overstated. It underscores, as Chris highlighted, the support that there is for the European Convention on Human Rights in Northern Ireland and the valuable role that human rights plays in supporting peace and a sustained society in Northern Ireland.

Professor McCrudden: May I add a footnote to that as well? I should say that I am currently representing the Equality Commission for Northern Ireland and therefore I need to declare an interest at this point, in terms of the Dillon case, the legacy case, so I will not touch on that. More generally, there is Mr Shannon's point about those who left Northern Ireland having committed murders and went to the Republic. You will know better than I that one of the major controversies was extradition and the difficulties in the early days of extraditing people from the Irish Republic into Northern Ireland.

One reason why that became a lot easier was because of the European arrest warrant and equivalent arrangements. If the UK were to withdraw from the European Convention on Human Rights, those extradition arrangements would be a lot more difficult, because you would be extraditing from an ECHR and EU country into a country that was neither EU nor ECHR. Extradition in those circumstances is extremely problematic.

Stephanie Needleman: To add a couple of points, Professor McCrudden mentioned that the Northern Ireland Act would need changing if the UK were to withdraw from the ECHR. That is how you get to the point about the Sewel convention. Taking a step back, there is also a question about whether withdrawal itself from the European convention could be done by the exercise of royal prerogative or, in and of itself, would need some legislation in order to be able to do that post Miller I, because of its impact on the Human Rights Act, I should clarify. There are some obvious differences between the Human Rights Act and the European Communities Act, but there is definitely a live question as to whether legislation would be needed to withdraw from the ECHR at all, before you even get to the point of amending the Northern Ireland Act.

In relation to the amendment of the Northern Ireland Act, I guess you could have a situation in which you do not amend the Northern Ireland Act and retain the references to the ECHR in there. As Professor McCrudden said, it would be a very odd situation to have a devolution settlement based on a treaty to which the UK is not party. In addition, it would lead to a bifurcation of rights protection between Northern Ireland and the rest of the UK. Definitely for devolved matters, it would mean different standards. There is also a complication about what would happen for reserved or accepted matters and their application within the jurisdiction of Northern Ireland. Would the Home Office have to act in one way in England in relation to asylum and another way in Northern Ireland in relation to the same matters? I do not think that that is clear at all.



The other thing I wanted to flag about withdrawal from the ECHR and Sewel convention, or other procedures, is that there is a review procedure in the Good Friday agreement, a validation, implementation, and review section, paragraph 7 of which provides that “if difficulties arise which require remedial action across the range of institutions, or otherwise require amendment of the British-Irish Agreement or relevant legislation, the process of review will fall to the two Governments in consultation with the parties in the Assembly”. Withdrawal from the ECHR is very likely, almost certain, to trigger that review procedure, which actually puts in place greater obligations than the Sewel convention, as it requires consultation between the Irish and UK Governments, as well as the Northern Ireland Assembly parties.

Q13 Chair: That is a very important point because I do not think that that is fully understood. You make a comparison with withdrawal from the EU. There is an article 50 process there. You might know more than I, but I cannot think off the top of my head whether the convention has a withdrawal—

Stephanie Needleman: There is, yes. Article 58 allows for parties to give six months’ notice to withdraw. Crucially, 58(2) states that the contracting party that withdraws will still be under the same obligations with respect to acts that were done prior to the withdrawal date. In terms of thinking about legacy in Northern Ireland, the UK will still be obliged to comply with the ECHR in respect of acts that were done in Northern Ireland prior to its withdrawal.

Professor McCrudden: This is currently occurring with regard to Russia. The Russian cases are still continuing even though Russia has withdrawn, because the events took place prior to the denunciation.

Q14 Chair: That is right. If you think withdrawal is some sort of solution to the Rwanda policy, think again.

Professor McCrudden: Yes, or to legacy.

Chair: Exactly, it is prospective only, not retrospective, and that is not understood.

Q15 Claire Hanna: This is very useful. We are used to hearing about this in hot takes, little snippets from decisions and people going, “Isn’t that mad?”, so it has been very educational to hear these things stepped through by people who spend their life thinking them through. That is much appreciated. I want to ask, and it is a broad question, about the consequences of leaving the ECHR for the Good Friday agreement and peace in Northern Ireland. I will start with you, Alyson, if that is okay, because you have touched on it. What would be the impact? Specifically, could you comment on how it might affect confidence in public bodies? You have referred already to the police.

Alyson Kilpatrick: The ECHR is the foundation of the Belfast/Good Friday agreement. It is the thing that was supposed to guarantee future



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peace, civil liberties and protection of rights for everybody, so everybody could participate in and be part of this new society. I am old enough that I was there. I remember it and it very much was that.

I mentioned—I do not want to overstate this—that there was a feeling that this was something upon which other people had agreed. All these other civilised nations had agreed these standards and they could, ultimately, be determined outside of the country, so outside of the area where we had the conflict. That was really important.

Technically, it is written into the Northern Ireland Act. It is written into the way in which the Assembly can legislate. It has been rehearsed again in the Windsor framework. It is protected there for very good reasons. Even recently, when concerns were raised about the ECHR, et cetera, everyone recognised why this was so foundational and fundamental to peace in Northern Ireland and the promises made in the Good Friday agreement.

Breach of any promise has consequences, but particularly when it is a promise that is made to secure peace and that people buy into. As I say, there has been 25 years of it. I do not know how it would be explained. I do not know what the problem is with being part of the convention. I do not know what harm the Human Rights Act has done. I can think of lots of things it has done to help citizens of Northern Ireland from all backgrounds, from minority groups and majority groups. Government agreed to full incorporation of ECHR into Northern Ireland law, so they would have to admit that they were breaching that fundamental commitment. I do not know what they do about that, but it is an obvious breach. It also would be, in my view, a breach of the Windsor framework, which is predicated on ECHR rights.

Colin touched on public authorities, and I have seen this. When the Human Rights Act was coming in, I did a lot of work advising different public authorities on how to be ready for it. It really made a huge difference in relationships between the people they served and the public authorities themselves as a whole different way of thinking. It also said to people, “You have a way of holding them to account. You can go into your local court and hold them to account for things that otherwise seem intangible”, so it is hugely important.

Public authorities benefited also. Police and housing officers all benefited. They have all got comfort from it. It protects the police in the course of duty. It protects housing officers. It protects everybody. I have never been persuaded that there is anything in there that is doing us any harm. It is doing us, and has done us, an awful lot of good. I do not know how you would make up the gaps and clear up the mess, frankly, if we left.

Claire Hanna: Christopher, do you have anything to add to that?

Professor McCrudden: Yes, just one point. I agree with everything that Alyson has said but I will perhaps add an additional wrinkle on the issue.



It is also important not just that it was an international agreement but that it is a set of standards that applies to the UK as a whole. The ECHR applies through the Human Rights Act and the devolution settlements in pretty much the same way in Wales, Scotland, England and Northern Ireland. That is important. It is important that it is a UK standard, particularly from the point of view of arguments that have been made in the past about Northern Ireland being regarded as too separate. This is one area where these rights are regarded as UK wide.

We will come on to the question about whether there is anything that stops the UK withdrawing from the ECHR with regard to Northern Ireland. I would want to make the general point that, certainly, I would regard it as a failure of statesmanship for that to be the situation—that it is only Northern Ireland that is protected by the ECHR—not least because it then essentially divides Northern Ireland in rights terms from the rest of the UK. From the point of view of the Union, it is quite important that the same standards apply. If they have to apply in Northern Ireland, therefore the only way of protecting that, from, if I may say, a unionist point of view, is for the whole of the UK to remain within the ECHR.

Alyson Kilpatrick: Central to the Belfast/Good Friday agreement was this idea of rights across the island of Ireland and there being parity across the island of Ireland. We would be left then with Ireland still being part of the Council of Europe and signatories to the convention, and Northern Ireland not.

Q16 **Claire Hanna:** Yes, I think that colleagues are going to pick up on that later. Can I ask a slightly separate question, to which there might not be a definitive answer? Maybe there is. I appreciate that the ruling yesterday will be appealed and these opinions will be tested. A lot of the analysis or the takes on it were that it is the fault of the Windsor framework that the Illegal Migration Act is not applying to Northern Ireland. Is it not reliant on the ECHR, and so that is why? Even if Brexit and all that followed had not happened, it still would not have been applicable because of the ECHR, the GFA and our specific protections, or am I reading that wrong?

Professor McCrudden: This is a complicated question.

Claire Hanna: I could not even get the question out, let alone the answer.

Professor McCrudden: No, the question is quite straightforward. The answer is what is complicated. There were two findings, essentially, in the judgment yesterday. One finding was that particular provisions of the Illegal Migration Act were contrary to the Windsor framework article 2, incorporated into UK law through section 7A of the 2018 Act. That was one finding.

That finding was essentially based on EU law and, in particular, a series of directives—the procedures directive, the qualifications directive—that apply to asylum seekers. The predominant element in the Windsor



framework decision was EU law rather than ECHR. It was separate to that decision with regard to the Human Rights Act and the ECHR, which held a very similar set of provisions to be contrary to the Human Rights Act. The major difference here is one of remedy and the reason why, as it were, you cannot regard the Windsor framework point as simply duplicating the ECHR. The remedy that applies with regard to the Windsor framework point is disapplication of the Act, so it is essentially an EU remedy and a Factortame remedy. That meant that the order that will be forthcoming from the court disapplies the Act.

As you will know better than I, the remedy that applies under the Human Rights Act, if primary legislation is contested, is a declaration of incompatibility. That does nothing to the status of the Act or with regard to the particular individuals who are seeking a remedy. With regard to two different elements, it is important to distinguish the two elements of the finding.

Q17 Claire Hanna: If we had not had the framework and all of the outworking of Brexit, the people subject to the Bill would have had recourse under the Human Rights Act, the Good Friday agreement and the non-diminution, but there would not have been such a clear outcome and ruling. Is that what you are telling me?

Alyson Kilpatrick: The law would have continued to apply, but they may have had a remedy.

Professor McCrudden: The EU law would have continued to apply.

Alyson Kilpatrick: A declaration of incompatibility does not force anybody to do anything. Government would knowingly be acting in breach of the European convention, if you just look at that part of it. ECHR and EU law are so meshed together that it is hard sometimes to extract them from each other. They are part and parcel of the same thing. Certainly, we take the view that all the ECHR rights are protected by Windsor framework article 2. The two things really sit together.

As Chris says, it is very much the remedy. It is an effective remedy when you use the Windsor framework. It is a much less effective remedy when it is a declaration of incompatibility. That recognises just how important it is to Northern Ireland that these rights are not diminished and that that was knowingly given. Government implemented that restriction on themselves that it could be disapplied.

Q18 Chair: It also illustrates the difference between the effect of EU law and the role of the court-led Strasbourg law in England, Wales, Scotland and Northern Ireland. They have an entirely different effect. Very often the two are misunderstood, sometimes deliberately, it seems to me.

Alyson Kilpatrick: It is recognising expressly parliamentary sovereignty. It can be declared incompatible, but Parliament is allowed to continue.

Q19 Chair: Exactly, and the margin of appreciation and all these things are



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just not understood when it comes to talking about the applicability of case law from Strasbourg in the domestic law of England, Wales, Scotland and Northern Ireland.

Stephanie Needleman: I wanted to come back to one point around the Good Friday agreement and the obligation for complete incorporation into Northern Ireland law of the European convention. I wanted to address head-on an argument that has been put forward, predominantly by Professor Ekins and John Larkin KC, that that obligation is discharged fully by the enactment of section 6 and 24 of the Northern Ireland Act.

I will just put on the record that I do not think that that is correct. As we have already previously discussed, section 6 and 24 are limited to what the Assembly does and what Northern Ireland Ministers and Departments do, and therefore does not cover all of the possible breaches of the convention within the jurisdiction of Northern Ireland. There are public bodies that are not Departments, for example hospitals; there are, as we have discussed, reserved and accepted matters occurring within the jurisdiction of Northern Ireland; and there is potentially some limited horizontal effect of ECHR rights as well.

In addition, complete incorporation of the convention also requires the right of individual petition to Strasbourg under article 34. That has jurisdiction over all matters concerning the interpretation of the convention. Individuals can only bring cases against contracting parties. If the UK is no longer a party to the convention, there is no way for individuals within Northern Ireland to bring matters before the Strasbourg court. Therefore, it does not make sense to say that that obligation under the Good Friday Agreement is satisfied purely by the Northern Ireland Act provisions.

Alyson Kilpatrick: We all agree.

Q20 **Stephen Farry:** Good morning to all of our witnesses. I was going to ask you whether it was possible for the institutions of the Good Friday agreement to continue if the UK decoupled from the convention, but I think you have more or less covered that in multiple ways. Could I turn very specifically to the issues around confidence in public institutions and how important the human rights framework is for those? There may well be many in this regard, but I want to focus perhaps on two in particular.

First is the policing and the criminal justice system. As you all know, we had the Patten reform and the criminal justice reform in the late 1990s and early 2000s. I want to ask each of you to talk about how absolutely intrinsic the human rights foundation is for policing and criminal justice in Northern Ireland. In doing so, could you outline how Northern Ireland is qualitatively different from other jurisdictions in that regard?

Alyson Kilpatrick: I spent nine years witnessing the difference it made to policing and criminal justice in Northern Ireland and how the PSNI's reputation, confidence and legitimacy increased and increased and



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increased, despite some, shall we say, bumps in the road when things did not go exactly to plan.

Stephen Farry: That is still happening.

Alyson Kilpatrick: The PSNI had set out this framework and it was doing its best to comply with that. It was also admitting, most of the time, when it made mistakes. People supported, had confidence in and generally trusted the PSNI.

Anytime that they put up an argument against human rights, you could see confidence in the PSNI itself directly going down. Police officers would tell me that that played out on the streets as well. It is not just something that the senior team discusses in a classroom. They saw it in maintaining public order on the streets. As soon as there was an infringement of human rights and the public started talking about it, they had much more difficulty keeping the peace on the streets.

Every single chief constable has said something to the effect of, "Human rights have made our job easier". Having this very structured approach to human rights has made it easier. Hugh Orde famously went back to GB and said that GB needed to look at the model of policing in Northern Ireland, specifically the human rights approach, because it had turned protests that were policed by armed response units, took place over three days and led to burning cars, into ones where two police officers in shirtsleeves walked down the road and the thing went off peacefully. He said it was entirely because of the human rights approach. That is a very direct example of it.

As I say, I saw close at hand the difference it made. Police officers do need to keep being reminded of how it protects them too. That is sometimes where we fail. It covers things like what equipment they are sent out in the streets with, rest periods and all of that. It covers their rights too.

Interestingly, I did a trip to Ukraine in June as part of a capacity-building assessment. I went all around the country. They are desperately trying to build their human rights network, particularly in terms of policing, even during a time of war. They wanted to learn from us how we did it because they could see the real operational value of it. I cannot stress that highly enough. It is not just a nice thing to talk about or something that you hope for when there is lots of money and time. Operationally, it makes the job easier. I am not sure I covered all your questions.

Stephen Farry: I will pass the baton along the table.

Professor McCrudden: I would like to raise one small incident and make a general point. On the small incident, I am not sure whether members of the Committee have seen "Blue Lights".

Stephen Farry: Yes, I went through it last week.



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Professor McCrudden: Yes, exactly. For those of you who have not seen “Blue Lights”, it is basically a fictionalised account of PSNI.

Claire Hanna: It is also a master’s in Northern Ireland that you can take in six hours.

Stephen Farry: It is mild compared to reality, some people say.

Professor McCrudden: Those of you who have seen the first episode of the first series may remember that there is an incident being called in and the person on the other side of the communication says, “Is it an article 2 issue?”, with no explanation. It was assumed that every single person knew what an article 2 issue was.

I was subsequently talking to some of the PSNI officers during the festivities at Queen’s, and they were uniformly enthused by “Blue Lights”, because it was such an accurate reflection. In this context, it is a good example of the embeddedness of the Human Rights Act in everyday policing. That is the small point.

Q21 **Chair:** The supplementary would be, “Is that article 2 of ECHR or article 2 Windsor framework?”

Claire Hanna: We might need a third series.

Chair: Yes, we are moving on.

Professor McCrudden: As Ms Hanna says, that is the next series. It is article 2 of the ECHR. The more serious point is that—Alyson has said this as well—the ECHR has a constitutional role in Northern Ireland in a way that I am not sure it does in the rest of the United Kingdom. It is embedded in the understanding that, in order to create a society and a community of trust, and in order for distrust to be overcome, you need common rules.

Everyone in this room knows that the degree of distrust in the institutions in Northern Ireland from both communities was at an extraordinarily high level. We have to address that. One of the ways of addressing it is to have these kinds of institutions that are common to the communities, where both communities benefit. Getting rid of those is exactly the wrong way to go.

Q22 **Stephen Farry:** Before we bring in Stephanie, can I come back to the point you made earlier on around extradition? I will not offend you by saying that you are probably a slightly older member of the panel. That is my vintage as well. I remember back in the 1980s. Anecdotally, it seemed almost impossible at times to extradite terror suspects from south into the north.

Notwithstanding the wider UK-EU relationship around extradition and criminal justice co-operation, would there be a genuine threat to banishing terrorism on the island if Northern Ireland ended up out of the



convention?

Professor McCrudden: The answer must be yes, not least because, under EU law, not just the Republic of Ireland but all EU states are increasingly operationalising the European arrest warrant and equivalent under the general guidance of ECHR rules.

Alyson's point that it is very difficult now to tell the difference between the intersections of the ECHR and EU law applies in this context. The extradition to non-ECHR states clearly engages a different level of difficulty compared to extradition to an ECHR state.

Q23 **Stephen Farry:** At one end of the spectrum we are talking about dealing with terrorism, which is of vital importance for life. The other end of the spectrum in terms of life issues would be things like family law, which presumably would also be impacted by this.

Professor McCrudden: Indeed, yes.

Alyson Kilpatrick: Before Stephanie says something, can I just add in relation to practical experience as well? I know this Committee has heard from Jon Boutcher, who headed up Operation Kenova. Everyone talks about the Operation Kenova investigations. The first thing he did was sit down and get advice on a human rights-based approach to those investigations. He has said—I know he has said it to this Committee—that a human rights-based approach to those investigations enabled him to recover evidence that nobody had previously and enabled him to engage with victims who did not trust the police and had not spoken to a police officer in years. I saw that up close as well. It was real. It was a real human rights approach. It was not just window dressing.

In the course of his interim report, he also said that, if a human rights-based approach had been taken at the time, a lot of those murders probably would not have happened and that a failure to comply with human rights led to more deaths than needed to happen. I would just add that as well.

Stephanie Needleman: To be honest, I do not have anything to add.

Alyson Kilpatrick: We spoke for too long.

Stephanie Needleman: Given Alyson's experience, she has covered everything.

Dr Caughey: I would just highlight the growth and appreciation of the role of the European Court of Human Rights in developing positive obligations on the police and public authorities to prevent human rights abuses. This is particularly important in the area of addressing violence against women. People may recall that the UK recently ratified the Istanbul convention on violence against women.



One point that is not appreciated as much is that the Council of Europe, in addition to the European Convention on Human Rights, has a whole panoply of other conventions to protect rights in a number of areas. If we were no longer to have ratified the ECHR, we would leave the Council of Europe and therefore we would no longer be members of that full panoply of conventions.

Q24 Carla Lockhart: I have a few questions. First, to what extent do the statutory functions of the Northern Ireland Human Rights Commission depend on the UK's membership of the ECHR? How would the commission interpret and define human rights if the convention rights were no longer really incorporated into domestic law? I am happy for whoever feels they can to take that.

Stephanie Needleman: I will leave that one to Alyson.

Alyson Kilpatrick: I might pass this one to Colin as well. He has all the stats on this. In brief, it would not remove our function, but it would make our job very difficult. We are set up to monitor compliance with ECHR and the Human Rights Act.

It says "human rights" in the Northern Ireland Act. It does not say "ECHR", but it goes on to say that that is at least ECHR. It was contemplated in the Belfast/Good Friday agreement that we would have at least ECHR plus. That was why they talked about a Bill of Rights for Northern Ireland.

I do not know what we would be working with. We would not really have the tools to continue to do our job properly. We would maybe be drawing on unincorporated treaties rather than ECHR and the Human Rights Act, with which we are all familiar. Public bodies are familiar with those. Everyone knows how they work, and they have worked pretty well, despite some remaining concerns that people may have.

It would make our job very difficult. We would not be abolished immediately as a result, but I do not know what we would be measuring against. Do you want to add to that, Colin?

Dr Caughey: The commission is one of the UK's A-status national human rights institutions. As part of our characteristics, we have a broad mandate to protect and promote human rights in our jurisdiction. If the UK were no longer party to the main regional human rights instrument, the European Convention on Human Rights, it is difficult to see how we would still be considered to be a national human rights institution in those circumstances.

We would inevitably draw a lot more on the international human rights framework set up at UN level. You would have the UN Committee on the Rights of Persons with Disabilities, the UN Human Rights Committee and the various other treaty bodies that have not been incorporated into UK law but have a body of jurisprudence that we can draw on.



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I would say their jurisprudence tends to go a lot further than the European Court of Human Rights. European Court of Human Rights jurisprudence looks incredibly measured in comparison with either comparative regional courts or with some of the international treaty bodies.

Q25 Carla Lockhart: My belief is that there should not be any human rights border within the UK and that any reform should be done on a UK-wide basis, whether that is the Human Rights Act or the ECHR. Would that be your take on that? Is it important that it is done on a UK-wide basis so it does not leave Northern Ireland out on a limb?

Alyson Kilpatrick: If anything, we have the best deal because the Northern Ireland Human Rights Commission was set up first. It was the first human rights commission. We have more powers than some of our counterparts. We have at least as much as the UK, but we also have a little bit more. We are not disadvantaged according to any other parts of the UK.

If your question is whether there is a distinction simply because there are three human rights commissions for the UK, I would say no. Scotland, England and Wales, and Northern Ireland all have their own issues. They all have their own laws as well. You need a human rights commission in place that understands the circumstances of its own place. Otherwise, we would then be subsumed by a human rights commission that only really has experience of England and Wales.

I know Stephanie has looked at issues like the human rights institutions, but Professor McCrudden might have something as well.

Professor McCrudden: I made it clear earlier on that it is highly desirable for the UK as a whole to have these standards. You posed the question in an interesting way. My reaction would be that I would like there to be a UK standard, provided that the UK standard is the ECHR, but I would not go for a UK standard that meant the ECHR did not apply in Northern Ireland.

Carla Lockhart: That is helpful. Stephanie, did you want to say anything?

Stephanie Needleman: No, I agree with what Chris has said.

Q26 Carla Lockhart: In relation to the protocol and the Windsor framework, what assessment have you made of the extent to which the protocol and the Windsor framework, in terms of both annexe 2 and article 2, impact the rights of citizens in Northern Ireland compared to their counterparts in GB? I am thinking particularly in areas like trade, input into law making and democratic deficit, et cetera.

Professor McCrudden: It is a very broad question. Perhaps I will restrict myself initially to the question of the impact on human rights and equality. Basically, article 2 prevents the diminution of rights that are



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protected in the Good Friday agreement where they have been underpinned in the past by EU law. That is the objective.

This is a standard or requirement that does not apply in the rest of the United Kingdom. From that point of view, to the extent that the protections that were previously enjoyed under EU law have been done away with in the rest of the United Kingdom, Northern Ireland is in a different position. That is clear. It is clear from the judgment yesterday, if ever there were any doubt about it.

We do not know what, if anything, the Court of Appeal or the Supreme Court may do with those judgments, but, as we said, at the moment it is clear that Northern Ireland has human rights protections under article 2 that do not apply elsewhere.

Several questions arise from that. First, why do we have those protections? I do not mean politically but legally. The reason is section 7A of the 2018 Act, which was the withdrawal Act. This was an exercise of UK parliamentary sovereignty, which essentially required these protections to be put in place in Northern Ireland.

The simplistic argument that it is in some way limiting parliamentary sovereignty clearly is not correct. It does have the following really important implication. To the extent that article 2 of the Windsor framework protects ECHR rights indirectly, that would mean it has very considerable implications for arguments about the UK withdrawing from the ECHR in much the same way as the argument played out yesterday with regard to the Illegal Migration Act.

What are the implications of that? One of the questions that is hovering here is whether Parliament could withdraw from the ECHR, assuming that Parliament has to give approval. The answer is that, to the extent that the Windsor framework restricts that, the only way of doing it is to repeal section 7A of the withdrawal Act. That is like lighting the blue touchpaper and retiring with regard to relations between the UK and the EU.

In other words, there is a direct implication for relations with the EU from withdrawal from the ECHR. In order to do that, you would have to essentially destroy one of the main mechanisms by which the rights and guarantees, in trade as well as in human rights, are guaranteed under the Windsor framework. To the extent that you want to preserve good relations with the EU, this is clearly not the way to go.

Dr Caughey: In response to your former question on human rights protections throughout the UK, the Belfast/Good Friday agreement did contain proposals for a Bill of Rights for Northern Ireland that our commission was statutorily mandated to provide advice upon, which we did. Our mandate was to look at rights supplementary to what is provided in the European Convention on Human Rights.



Leading on from Chris's point, the European Convention on Human Rights and the protection of the European court should be the foundation stone upon which we build additional protections. The Bill of Rights for Northern Ireland has not progressed, but those additional rights protections that Northern Ireland has been provided with are a reflection of the importance of rights to peace in Northern Ireland and confidence in our public institutions.

Professor McCrudden: I failed to answer the part of your question—my apologies—that related to trade. One of the links between the human rights issues we are talking about today and the trade question arises because of the trade and co-operation agreement. You will know that part 3 of the trade and co-operation agreement, which basically sets the standards for criminal justice co-operation between the EU and Britain and the UK, essentially requires the UK to be a member of the ECHR.

The trade and co-operation agreement, therefore, at least part 3 of it, would be under very severe strain if the UK withdrew from the ECHR because of the ECHR's implications for the trade and co-operation agreement.

Q27 **Carla Lockhart:** I have one very final question—Stephanie touched on it earlier—around the small minority of cases in which the Supreme Court has departed from European Court of Human Rights case law. Is that an indication that there needs to be greater dialogue between domestic courts and Strasbourg? Is greater dialogue needed?

Stephanie Needleman: I am not sure. There already is good judicial dialogue between the two. As discussed earlier, there are lots of instances of the UK courts speaking first and then Strasbourg following what the UK courts have said. As Sir Robert Buckland, the Chair, pointed out earlier, we have an incredibly low number of judgments against the UK in Strasbourg.

In 2022, the UK received 0.002% of the total ECHR judgments that found a violation of the convention. That indicates that there is already a really good dialogue between the two courts and a good appreciation of what the convention means for the UK by domestic courts within the UK.

Alyson Kilpatrick: If I could make just one additional point, you have reminded me of something that I wanted to say. The UK's record in front of the Strasbourg court has improved considerably since the ECHR was incorporated by the Human Rights Act. It has won more and more and more cases every year since the Human Rights Act was incorporated. In that sense, it has protected Government from being taken to Strasbourg.

Q28 **Kelly Tolhurst:** Thank you, everyone. I have really enjoyed your evidence so far. We touched on it very briefly, but to what extent could a Northern Ireland Bill of Rights provide for rights that reflect the particular circumstances of Northern Ireland, if the ECHR could no longer be incorporated into UK law? Alyson, do you have any comments?



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Alyson Kilpatrick: It could simply duplicate the ECHR and then add bits on to reflect the circumstances of Northern Ireland, but you would lose all of that international standing. You would lose access to the court in Strasbourg. The Bill of Rights in Northern Ireland is something that should be additional to rather than instead of.

Colin was there when we gave advice in relation to the Bill of Rights so he might be able to tell you what their thinking was at the time.

Dr Caughey: Our advice on the Bill of Rights was always intended to be supplementary to the European Convention on Human Rights. We would have to completely refresh our advice.

The main concern for us would be the loss of the jurisprudence that the European Court of Human Rights has developed over 70 years of hearing cases and delivering judgments, and how that has meant that rights are protected and applied to new and emerging issues, such as increased data usage in criminal justice, the moves towards positive obligations and the other positive developments there have been in that jurisprudence. It is difficult to envisage how large a Bill of Rights would be, if you were trying to capture all those protections and the application of those rights.

Whilst we would not be envisaging a great additional range of rights to be protected, the European court in its jurisprudence has looked at how those rights are protected in specific circumstances and what rights protection means in practice. It would be very hard to start with a blank page and try to develop a new instrument. It would effectively be doing away with 70 years of legal history and reasoned judgments. It would be very tough. It would be a hard week in the office to make a start on developing that.

Stephanie Needleman: The Good Friday agreement expressly envisages that the starting point is the ECHR. It refers to the Bill of Rights as being supplemental to the ECHR and says "taken together with the ECHR". It seems illogical to withdraw from the ECHR and then try to have a Northern Ireland Bill of Rights.

This also goes back to Chris's point about having UK-wide rights protection. If you did have a Bill that was the ECHR without the UK being a party to the ECHR, plus something additional to reflect the specific circumstances of Northern Ireland, you would lose the UK-wide rights protection that you currently have.

Professor McCrudden: As a footnote to that, were the Bill of Rights to be passed through the Assembly, it would be restricted, because of the Scottish decision in the Supreme Court, to legislating only in devolved areas. In many respects, the ECHR has been as much used to protect rights with regard to activities of the UK Government and Parliament. That is the first point.



Secondly, if I could perhaps add a little political point here, though not a party political point, the negotiations over the Northern Ireland Bill of Rights have been at a snail's pace. They have been up and down and up and down. The most recent was basically after 2020 in the New Decade, New Approach context. What happened then was essentially that all of the parties at one point agreed in principle perhaps to go ahead with a Bill of Rights, very much in principle. The DUP then subsequently withdrew its in-principle agreement, in my understanding, which left five parties essentially proceeding to report an in-principle agreement. All of that took place in the context of it being supplemental to the ECHR.

The political point is simply this. It would mean starting all of that from scratch. Any degree of progress, minimal though it has been, towards reaching agreement on a supplemental Bill of Rights now goes up in smoke, to put it technically. That would mean a significant retreat from the existing politics of the situation, difficult though that is. The question would then be whether all the parties would agree to the ECHR even in the devolved areas. That also would be up in the air.

Q29 Claire Hanna: We have touched on this, but what impact would withdrawal from the ECHR have on cross-border collaboration and the protection of human rights on an island-wide basis, including the work of the joint committee? Alyson, I will come to you first on that.

Alyson Kilpatrick: We have been working quite closely with the Irish Human Rights and Equality Commission to ensure there is no divergence of rights on the island of Ireland. At the minute we have something to work with on that because we are both subject to the ECHR. We have our respective Human Rights Acts incorporating that directly.

Chris has made this point already—maybe we want to explore Chris's point a little bit further—but, in terms of how we would work as commissions, we would not. We would suddenly be torn apart. The Belfast/Good Friday agreement was predicated on the fact that the rights would be equal across the island. At the time, it was the Irish Government who were lagging behind. They agreed to increase rights protections in Ireland. It is probably fair to say that they have now jumped ahead in terms of rights standards.

Chris, do you want to expand on your technical point earlier?

Professor McCrudden: To take the technical point, there is agreement between the UK and the Republic of Ireland under the Good Friday agreement. Therefore, to that extent the Good Friday agreement is underpinned by the ECHR, that will destabilise and unbalance parts of that agreement. There is that issue. That relates to Alyson's point about co-operation at the human rights level.

However, there is also a broader point. It bears repeating that the Republic of Ireland is an EU state. As an EU state, it has obligations under EU law, which are pretty significantly underpinned by the ECHR



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requirements. In the context of the recent debate over migration, for example, there was a decision of the High Court in Dublin basically saying that there were problems under Irish law in returning people from the Republic to the UK. That was done under EU law.

As Alyson has made clear, EU law is underpinned by ECHR law. That mechanism becomes a lot more complicated. The reason why the Irish High Court found as it did was that there had to be protections in Irish law if you were going to send people into countries that did not have adequate human rights protections. To be quite direct and up to date on these questions, that dispute is a classic instance, in microcosm, of the problems that would multiply, were the UK to withdraw from the ECHR.

Alyson Kilpatrick: A very significant impact will be felt—this was one thing that I neglected to address—in terms of cross-border investigations. At the minute we have two countries that are both subject to ECHR. What that means in terms of investigations is that both have article 2 investigatory duties to help each other. It assists UK police, PSNI, to get information from the Garda and vice versa. There is an obligation on both to ensure that article 2 is complied with on the island of Ireland, especially where you have cross-border movement in relation to murders. That would be lost entirely.

Data sharing across the border is going to be affected considerably if we can no longer say that we comply with ECHR, including in relation to data protection and data adequacy agreements. It is going to have a significant impact on policing's operational ability.

Professor McCrudden: It brings us back to the point about the trade and co-operation agreement. I am not sure everyone fully understands—I am sure this Committee does and certainly the Justice Committee that reported to the Secretary of State is fully aware of it—that part 3 the trade and co-operation agreement is not a technical co-operation agreement with regard only to trade. It covers such areas as access to and sharing of intelligence, fingerprinting access, DNA, criminal records, extradition and mutual legal assistance.

All of that is covered by the trade and co-operation agreement. Part 3 being dependent on ECHR membership, if the UK withdraws from the ECHR, all of that is threatened.

Q30 **Chair:** Can I go back to the question about article 2 of the Windsor framework? We have seen it in action only yesterday. You have this rather interesting distinction between the application of EU law disapplying domestic legislation and the ECHR application merely making a declaration of incompatibility. Does that indicate some uncomfortable hierarchy here?

Professor McCrudden: It is certainly a hierarchy. I am not sure how uncomfortable it is.



Alyson Kilpatrick: It is simply the wording of the Act. It says expressly “disapplication”. It was thought through. It was very deliberately chosen, knowing that with ECHR it is a declaration of incompatibility. Everyone understands what that means. “Disapplication” was chosen very specifically, and it was chosen because it was the only means of ensuring that article 2 of the Windsor framework and the rights therein would be protected in practice.

It is not that unusual in Northern Ireland because the Legislative Assembly cannot legislate contrary to it. That is disapplied; there is no force.

Professor McCrudden: There is a really important constitutional point here. The court recognised yesterday, as it has in previous cases, that section 7A—I keep on coming back to it—is the equivalent of section 2 of the European Communities Act 1972. If we carry through the logic of that, it has constitutional status. Therefore, when we are enforcing essentially EU law, all the EU remedies come into play, just as they would under section 2 of the European Communities Act, hence my reference to Factortame.

The reason I said rather flippantly—my apologies—that I am not sure it is an uncomfortable hierarchy is that we are talking chalk and cheese. The chalk is the ECHR with its own remedies. The UK Parliament has decided on a declaration of incompatibility in that context. Equally, the UK Parliament has decided under section 7A that it is European Union remedies, and the court has recognised that.

If I may say, it is a false equivalence. It is understandable, given that they are both talking about rights and overlapping rights. From that point of view it may look awkward, but the logic is impeccable.

Q31 **Chair:** Yes. It begs the next question about—there has been some discussion of this—whether article 2 of Windsor effectively prevents withdrawal from the ECHR. What do you make of that argument?

Professor McCrudden: That is the \$64,000 question. I am sure Alyson and Stephanie will have views on this, but I would put it in this way.

The Good Friday agreement requires ECHR and paragraph 2 of the relevant section of the agreement specifically refers—Alyson has referred to it previously—to remedies having to be provided domestically for the ECHR. To the extent that the Good Friday agreement is underpinned by the ECHR, the logic of the decisions up to now has been that there would be considerable difficulty in withdrawing because of the Windsor framework, provided you keep section 7A.

Parliamentary sovereignty is clear. Parliament can repeal section 7A. If it does that, it has political and legal implications with regard to all the other relations with the EU. Legally, in terms of domestic law, Parliament can repeal section 7A. As long as it does not do that and as long as the



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courts keep on the trajectory that they are currently taking, it will create considerable difficulties in withdrawal.

Q32 Chair: As we come to the end of this fascinating session, the wider question is about the general impact that ECHR withdrawal would have on post-Brexit EU-UK relations and the particular implications for Northern Ireland. I know in my mind what the answer might be, but I would like to hear from the panel its assessment of the impact of such a withdrawal on those future relations.

Alyson Kilpatrick: I am going to be very general, if I may, and let others be more technical, if they wish. It would be such an obvious breach of promise, which was translated into an international treaty, and it would be a reneging on commitments made to the people of Northern Ireland and to the sacrifices that they made for the Belfast/Good Friday agreement. A lot of people gave up an awful lot, and they were rewarded, if I can put it that way, by this promise that they would always be protected by these standards that were greater and not subject to political will or change of Government.

It would be very difficult to explain to them, then, why that no longer is the case and why that has to be got rid of, especially since so recently, when Northern Ireland, contrary to its expressed will, was taken out of the EU, it was told that it would be protected and continue to be protected, and that ECHR and membership of the Council of Europe would be part of that protection. We all know how dangerous it is to breach promises. To do it without reason, justification or any real rationale would be very troubling. It would permit people to say, "What on earth was all that about?"

As a human rights commission, we are A-status. That is more than just a badge of honour. That gives us speaking rights in Europe and on the global stage. I would no longer be allowed to do that. I would not have any speaking rights. Northern Ireland would not be represented on the global stage.

I am just back from one meeting. I know that the threat to leave the Council of Europe and remove itself from the convention is talked about across Europe and across the world. It is not doing the UK any favours. Sometimes even more people than I see at home are asking me exactly the question you asked: "What impact does that have on the Good Friday agreement? We will not be happy". A lot of people have been watching what happened. In my view, it has to be protected.

Practically, what are the police going to do if you suddenly tell them that they no longer have to comply with all the things they have learned, trained and put into operation?

Stephanie Needleman: We have heard from Chris about the deeper technical details. The ECHR underpins much of the post-Brexit arrangements with the EU. Withdrawing from it risks disapplying parts of



them and opening up renegotiations with the EU after having had them for years already. The people of Northern Ireland felt a little bit like a political football during the Brexit negotiations. To put them back in that position after many years of those already long negotiations would seem incredibly detrimental.

As Alyson has already very well expressed, the ECHR is fundamental to the peace process and the Good Friday agreement. It is not an add-on to that. It is woven into the Good Friday agreement, the peace process and the political institutions in Northern Ireland.

Professor McCrudden: My response is that, as an academic, I like to see argument. I have yet to see any sustained credible argument that addresses the issues that have been discussed today by those who are advocating withdrawal.

You mentioned him specifically earlier on, so I will mention him also, if I may. Lord Sumption's argument, powerful though it may be in other respects—we can discuss that—does not address in any way the difficulties that would be occasioned with regard to the EU or Northern Ireland. Those are completely ignored. That seems perhaps surprising but also regrettable.

My general point is that we can identify pretty easily all the detrimental effects in withdrawal for the people of Northern Ireland. I have yet to identify any argument in favour of withdrawal from the point of view of Northern Ireland.

Q33 **Chair:** I have long been on the record as being somebody who is very much of the fundamental human rights camp. I do not believe in socioeconomic rights. I am mistrustful of a court or institution that seeks, through mission creep, to create those rights without the express will of the member states. In other words, they have to be prescribed in a revised convention.

Would you agree with me that that is a very different set of arguments from ones about withdrawal? Surely, the arguments that people like me can have are ones that we can have within the council and the convention, rather than ones that necessitate walking out the door.

Professor McCrudden: The question of socioeconomic rights is a difficult one and gives rise to considerable debates. In practice, most of the socioeconomic rights that are now on the agenda are being dealt with or considered under EU law.

Q34 **Chair:** That is right. The Charter of Fundamental Rights is a very different creature from the convention. It is a much more wide-ranging and prescriptive set of rights that gives people like me the collywobblers.

Professor McCrudden: I will not comment on your collywobblers. The reason I am hesitating in fully agreeing with you, Chair, is that we come back, I am afraid, to article 2 of the Windsor framework.



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In that context, the Good Friday agreement refers to civil rights. Two judgments now, the Dillon case in the High Court and yesterday's decision in the IMA case, specifically refer to the role of the Charter of Fundamental Rights as one of the underpinnings of civil rights in the Good Friday agreement. Both judges referred specifically to an interpretation of civil rights as including socioeconomic rights.

We can discuss that, but I want to put on the record that the socioeconomic rights aspect of it may well be coming through with regard to the application of the charter, which remains in force in many respects in Northern Ireland. A good example of that is the recent decision from the European Court of Justice in the CG case, which was a case originally from Northern Ireland prior to Brexit, where a minimum standard of living was required under article 1 of the charter, which protects human dignity. To the extent that human dignity requires an aspect and element of socioeconomic rights, I am sure we can agree that that is an important dimension.

Q35 Chair: It is, though it is much better to transfer it into the form of statutory duties on public bodies rather than rights. That is my personal view. The point that we can make is that that issue is not a problem of the European convention. It is an issue raised by the charter, which is an EU charter. Colin, did you want to come in?

Dr Caughey: Just returning to your original question on the impact of withdrawal for Northern Ireland, the EU has issued two data adequacy decisions, one under GDPR and one in relation to the law enforcement directives. This allows data to flow freely from the European Union's members, such as Ireland, to the UK. The PSNI has highlighted the fundamental importance of that to its effective operations in tackling cross-border crime.

The data adequacy decision specifically references the fact that the UK is subject to the jurisdiction of the European Court of Human Rights and has ratified the ECHR. If we were no longer to have ratified the ECHR and no longer in the jurisdiction of the European court, that would no longer be the case. I would imagine that that adequacy decision would be reviewed immediately. I know the House of Lords European Affairs Committee is currently considering data adequacy and its implications for the UK-EU relationship.

Chair: Thank you to all panellists for a very stimulating session. We are extremely grateful. An Urgent Question has been granted on yesterday's case, so I am sure that colleagues might want to take part in that. I will now bring proceedings to an end.