



Northern Ireland Scrutiny Committee

Corrected oral evidence: Article 2 of the protocol/Windsor Framework

Wednesday 24 June 2026

10.45 am

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Members present: Lord Carlile of Berriew (The Chair); Lord Dodds of Duncairn; Lord Elliott of Ballinamallard; Baroness Foster of Aghadrumsee; Baroness Goudie; Lord Hain; Baroness Ludford; Baroness O'Loan; Baroness Ritchie of Downpatrick; Baroness Sanderson of Welton; Lord Thomas of Gresford.

Evidence Session No. 3

Heard in Public

Questions 29 - 43

Witnesses

Professor Christopher McCrudden CBE, Barrister, Blackstone Chambers and Emeritus Professor of Human Rights and Equality Law, Queen's University Belfast; Samuel Willis, Barrister, 11KBW.

Examination of witnesses

Professor Christopher McCrudden and Samuel Willis.

Q29 **The Chair:** Good morning and welcome to this public meeting of the Northern Ireland Scrutiny Committee. We are today holding the third public evidence session of our inquiry into Article 2 of the protocol/Windsor Framework, which is the so-called diminution of rights provision.

We are joined today by Professor Christopher McCrudden CBE. He is emeritus professor of equality and human rights law at Queen's University Belfast and a member of Blackstone Chambers, a very distinguished chambers in London. We expect to be joined shortly by Samuel Willis, who is a very distinguished but junior barrister at 11 King's Bench Walk—11KBW—barristers' chambers, another very distinguished set of chambers. They will both be very welcome; you already are, Professor McCrudden. We very much look forward to their evidence.

Professor, we would like you to introduce yourself briefly the first time you speak and declare any relevant interests in relation to the inquiry. Today's meeting is being broadcast, and a verbatim transcript will be taken for subsequent publication; it will be sent to you to check for accuracy. I refer to the register of members' interests as published on the committee's website.

I am going to start now, Professor McCrudden. I do not know quite what has happened to your colleague whom we expect to be with us, but we will introduce him when he turns up. I am going to start the session by asking the first question. What are the origins of the rights, safeguards and equality of opportunity—the so-called RSEO—paragraph 1 provisions on human rights in the Belfast/Good Friday agreement, please?

Professor Christopher McCrudden: Thank you, Lord Chair, and thank you for the invitation to appear before you. Before turning to that question, if I may, I declare an interest, which is that I represented the Equality Commission for Northern Ireland in the Dillon case that we will be getting on to. I am now also representing the commission in litigation concerning the implications of the For Women Scotland case, which is relevant to the inquiry. Finally, I am not quite sure whether it is a conflict of interest, but I should probably say that I am also a member of a committee called the expert network that advises the European Commission on equality matters.

Turning then to the question, I am afraid, like many of the answers that we are likely to give today, it is a complex and somewhat surprising story. The clerk to the committee has circulated an article that I did a few years ago on the origins of the paragraph that you are mentioning. The story that emerges, in essence, is that paragraph 1 starts in a considerably earlier form in the context of the Downing Street declaration in 1993. It is a paragraph of several different parts, some of which we will get on to, I suspect.

The so-called bullet point right that you will be familiar with from previous evidence—that is the list of specific rights that are listed in paragraph 1—basically originated from loyalist paramilitary circles, specifically the so-called Combined Loyalist Military Command, before being carried to Dublin by the late Reverend Roy Magee, whom some members of the committee will know. They were then incorporated into the 1993 Downing Street declaration and then, with several additions, into the Belfast/Good Friday agreement.

In terms of the relevance for today, the point is that the bullet point right, and indeed the whole paragraph, was constructed from several different sources. As I say, it was Combined Loyalist Military Command for the original bullet points, but then, over the period of the negotiations from 1993 on to 1998, several other hands contributed, including the two Governments, but also the Women's Coalition, which was heavily involved in negotiation. Some of the bullet point rights bear the imprint of the Women's Coalition.

Essentially, you have republican, governmental, loyalist and feminist contributions to the story, which makes identifying one particular purpose, as it were, really quite difficult, because there are several different hands coming from different parts of the political spectrum. I hope that helps.

The Chair: Thank you. Can I welcome you, Mr Willis? You are very welcome as a witness here today. I have just asked the first question: what are the origins of the rights, safeguards and equality of opportunity paragraph provisions on human rights in the Belfast/Good Friday agreement? You have heard part of Professor McCrudden's response. Do you want to add anything? Are you hearing me?

Samuel Willis: I can hear you. Sorry, my connection is somewhat difficult. I am probably best able to assist the committee on the meaning of Dillon and what the Supreme Court decided in that case. Professor McCrudden is probably better placed to talk about the history and the provisions.

The Chair: That is fine. We will come to that in a moment. Can you just introduce yourself very briefly to the committee?

Samuel Willis: Thank you very much for inviting me to give evidence today. I am a barrister at 11KPW chambers in London. I specialise in constitutional law, among other things. Before coming to the Bar, I was a research fellow at Public Law Project working on retained EU law and other Brexit-related matters. I have also worked as a trainee at one of the courts in Luxembourg; that is where my knowledge and practical experience of EU law come from.

Q30 **Baroness Sanderson of Welton:** Thank you for attending today. Professor McCrudden, prior to Brexit, how were the RSEO provisions of the Belfast/Good Friday agreement protected?

Professor Christopher McCrudden: There are a couple of preliminary points I could mention. The first is that the provisions, particularly in the RSEO chapter of the Good Friday agreement, as you call it—that is the rights, safeguards and equality of opportunity paragraphs—were in essence agreements between the parties and between the Governments that were intended to set up the framework that would then be subsequently implemented in legislation. They were not intended at the time to be directly enforceable. They were intended to be political commitments that would then be carried through.

One of the ways in which the particular rights in RSEO were protected was by ordinary legislation at Westminster. That was always intended to be the case. You have a series of provisions coming in, either just before or after the Good Friday agreement, which deal with several of the rights that we are talking about. We have the fair employment legislation from 1989 through to 1998 and then 2003. We have the Race Relations (Northern Ireland) Order. We have, of course, the Human Rights Act itself. Prior to that, we had direct access to the European Court of Human Rights. In addition to that, we have the Northern Ireland Act itself, which includes several provisions that are relevant, not least the non-discrimination provisions in Section 76 and the public sector equality duty equivalent in Section 75.

Here we now come to the crux of the matter for today. In addition to the parliamentary legislation and various statutory rules and orders, we also had European Union law. European Union law then was incorporated, as you well know, into UK law via the European Communities Act 1972. In addition to all the statutory protections, that provided an underpinning for several of the provisions in the RSEO chapter, in particular but not exclusively the equality provisions. That was an important and operational element of European Union law.

That led to a whole series of changes in Northern Ireland, and indeed in UK law more generally, over the course of time. Think about the equal value provisions in the Equal Pay Act. I will just concentrate on the sex discrimination issues; it provides a good example. That includes the special provisions on pregnancy, the provisions on gender reassignment discrimination, disability discrimination Acts, prohibition of associative disability discrimination and so on. All of those derived from or were influenced strongly by European Union law.

To be brief, it is a combination of ordinary statute, the Human Rights Act, and European Union law.

Baroness Sanderson of Welton: That is very clear and very helpful. Thank you very much.

- Q31 **Baroness Ritchie of Downpatrick:** You are both very welcome. Why did the UK and the EU negotiate and include Article 2 in the Windsor Framework? How does it relate to the Belfast/Good Friday agreement, and in particular its RSEO provisions?

Also, last week we were referred to the fact that the current status of the explainer document, which was provided by the Northern Ireland Office back whenever the protocol and the Windsor Framework was published, is not necessarily now on the website. What exactly is the position? Will the NIO do a revision of the document? What is probably in its mind?

The Chair: Can I just top that question with one of my own? Was the purpose of what happened with the inclusion of Article 2 fundamentally an attempt to sustain the rights that existed beforehand? If so, how successful or unsuccessful, in general terms, has that been?

Professor Christopher McCrudden: That is a series of questions. I could take them one by one. I should say that it is a pleasure to be in front of Baroness Ritchie, who was MP for the area I now live in. It is always a pleasure to see her.

Baroness Ritchie of Downpatrick: I knocked on your door on many occasions.

The Chair: It sounds like you were a good MP.

Lord Hain: Did he get any joy? That is the question.

The Chair: Carry on, Professor. Thank you for that.

Professor Christopher McCrudden: I do not know whether that is a declaration of interest or not.

First of all, why did the UK and EU negotiate and include Article 2? There are several elements to what we call Article 2. There is Article 2 itself, and there are the provisions for enforcement of Article 2. The enforcement provisions, if you want to put it that way, are partly in domestic law and partly in international law. We may turn to some of those later on.

The commitment in Article 2 was the result of a commitment by the UK Government very early on in the process. They committed themselves to the non-diminution of provisions in the Good Friday agreement generally. It was a general commitment that the UK Government made. That led to several provisions in the protocol, including Article 2.

The fear in Article 2 that was being addressed was that, in some way, Brexit would undermine the provisions in domestic law, particularly those that derived from or were influenced by EU law—the ones that I have mentioned in answer to the previous question.

Essentially, it was a commitment by the UK Government to address those kinds of concerns, but we then have a period after that first commitment is made in the negotiations on the question of how or whether to enforce that commitment. That was being pushed heavily by the European Commission, I have to say under pressure also from the Dublin Government and from civil society in Northern Ireland, to have effective enforcement provisions for that commitment.

Professor Dickson in his evidence to you said that the EU wanted an enforceable Article 2 because of the lack of trust between the UK and EU following Brexit. Any of you who have read the various recollections or memoirs from those who participated in those negotiations will know that there was, at the time, a very significant lack of trust. I do not want to be crude about this, but basically the enforcement provisions were put in because of the lack of trust on the EU side that the political commitments would be honoured or made effective.

In that context, therefore, the resulting package, as it were, of Article 2, together with the enforcement provisions, were intended to stave off any backsliding by future British Governments. Indeed, part of the Brexit argument was a strong commitment to parliamentary sovereignty. Parliamentary sovereignty has beneficial sides, obviously—you are sitting at the heart of parliamentary sovereignty—but it does have the following downside, which is that where you are making international commitments, if all those commitments are subject to parliamentary sovereignty, it makes it quite difficult sometimes to persuade the other side that you are serious and that there will not be subsequent backsliding.

These provisions were introduced in order to deal with the lack of trust at that time and the potential downside, as it were, of parliamentary sovereignty at the international level. I hope that addresses the first question that Baroness Ritchie asked.

The second question that Baroness Ritchie asked was with regard to the explainer document. The explainer document emerges into public view just after the signing-off of the final package of the withdrawal agreement, including the provisions of the Northern Ireland protocol, as it then was called, and now the Windsor Framework. That was a statement by the UK Government of their understanding of what Article 2 meant. It resulted from a series of discussions with the two commissions, the Northern Ireland Human Rights Commission and the Equality Commission, and indeed with elements of civil society. I should say that I was advising civil society at the time, so I was aware of those discussions.

The explainer document was then published and put on the website. It was a statement of commitment to the understanding of what Article 2 meant, including the domestic enforcement provisions.

When it came to the question of what the argument of the UK Government was in Dillon, we may turn to this later on, but there was in essence somewhat of a change of mind—sorry, that imputes motivation. There was certainly a change of practice by the Government as to what they understood the scope of Article 2 to include. During the course of Dillon, particularly when it came to the Court of Appeal, somewhat different arguments were being put than had previously been put in other cases by the UK Government representatives.

In that context, the question then became what weight, if any, should be given to the explainer document. It looked like—and the argument was put to the court—what the Government were saying in their arguments in the Court of Appeal, and then subsequently in the Supreme Court in *Dillon*, diverged from those that seemed to be understood from the explainer document. The question then became quite central in the Supreme Court as to what weight, if any, should be given to the explainer document.

There are two different ways in which the explainer document could be said to have legal weight. One argument was put to the Supreme Court; the other was not. The argument that was put to the Supreme Court, by me, I am afraid, representing the Equality Commission, was that the explainer document evidenced the intentions of both the EU and the UK Government at the time immediately following the signing-off of the withdrawal agreement.

That was relevant to the argument because the Vienna Convention on the Law of Treaties has various provisions that seek to set out how the text of international agreements can be understood and interpreted. One of those provisions deals with the intention of both parties. The argument was put that the explainer document, for various reasons, indicated the intention both of the UK and of the EU. That argument was rejected.

Lord Thomas of Gresford: How did they get around it?

Professor Christopher McCrudden: The argument that was put was relevant for the application of the Vienna Convention on the Law of Treaties. I emphasise that point because it is that point that is rejected by the Supreme Court.

The question still remains of whether the explainer document has legal effects in another way under domestic law as representing the intentions of the Government, and indeed of Parliament, at the time the 2020 amendments to the European Union (Withdrawal) Act were passed, because the explainer document was clearly around at the same time as the 2020 amendments. That argument was not put to the Supreme Court and therefore was not rejected by the Supreme Court.

From that point of view, therefore, it still remains open to argue that the explainer document is relevant for understanding the intentions of the Government and Parliament in passing the 2022 amendments to the 2018 Act. Sorry, that is a rather complicated story.

The Chair: Can I just ask a supplementary question that arises from what you have said? You keep referring to the explainer document. Is there any reason why the Government should not put on the internet an explainer document that is amended, taking into account whatever relevance *Dillon* has for the contents of that document? The explainer document is surely intended for people to understand what has been going on and what the law means to them.

Professor Christopher McCrudden: Yes, absolutely. There are two different reasons for the explainer document, one of which is very sensibly the one that you have just put forward, Lord Chair, which is that it is directed at public authorities and the public to set out what the Government's current intentions are. From that point of view, amending and replacing it in light of Dillon is a clear possibility. I have no inside knowledge as to what the Government intend to do on that.

There is a different point that arises with regard to the argument that the explainer document, as originally published, remains relevant for the understanding of what Parliament intended in 2020 in terms of the famous Section 7A in particular, which we may come on to. As you say, Lord Chair, the explainer document has now been removed from the website, as I understand it. The Government could well replace it with another explainer document after Dillon, but that would not take away from the fact that the original explainer document may remain relevant for the purposes of understanding parliamentary intention at the time of the legislation.

Lord Thomas of Gresford: In the explainer document, they said quite directly that there was direct effect for the enforcement of the rights set out in the RSEO. Is that not right?

Professor Christopher McCrudden: That is correct, Lord Thomas, and that is indeed the argument that was put to the Supreme Court. It is also relevant in another way for a subsequent question that you may be coming on to, which is the remedies provisions. The remedies provisions are quite clearly interpreted in the explainer document in a way that seemed to go against the approach that was being taken by the Government subsequently in the Dillon case.

Lord Chair, I am afraid that I have not addressed your third question. Would you mind repeating it? My apologies.

The Chair: Yes. I cannot quite remember how I framed it, but my third question was about the effectiveness of the provisions contained in Article 2. The question I was going to ask as a supplement is whether the Dillon judgement has made what was intended in terms of effectiveness less effective. Perhaps Mr Willis would like to come in at this stage if he wishes to.

Samuel Willis: I am happy to follow Professor McCrudden's answer to that question. I can deal with my answers compendiously if that is convenient and if Professor McCrudden wants to answer that.

The Chair: We will come back to you in a minute, then, because we are going to come more directly to the Dillon judgment in a moment.

Q32 **Baroness Foster of Aghadrumsee:** I just had two points that I wanted to make. In relation to the explainer document, of course, at the very end of the explainer document the Government are very clear that this document is an initial overview and is for information purposes only,

which I am sure was something that the court took into consideration.

It does reference the rights in the rights, safeguards and equality of opportunity section of the Belfast agreement, but of course—and I am sure both gentlemen will agree—that was a political agreement. Those were political calls that were made. They were suitably vague. We have talked about constructive ambiguity in the past to allow for political agreement between people who had very different views on a lot of these issues. It is not a legal text.

I would be interested to hear your views on whether that, in and of itself, creates a problem. I would say that that allows the court to have a wide interpretation of what those rights are because it is a political document and not a legal document. I would be interested to hear what the views are from both gentlemen.

Professor Christopher McCrudden: I agree with several of the points, Baroness Foster. You will not be surprised to hear that. The first is that the explainer document is not in itself a legal document. You are quite right in saying that the final paragraph says that the interpretation by the Government is subject to the courts. That is quite right.

However, as you well know as a former graduate of Queen's School of Law, not all documents that are not legal do not have legal effects in certain respects. That is the argument that is being put with regard to the explainer document. It is not that it is in itself a legal document, but rather that it indicates the intentions of the Government at the time, of course subject to subsequent judicial interpretation. We do not disagree with that, but it is a nuance that is important going forward.

The Chair: It is right to say that there are probably hundreds of government explainer documents, not necessarily called explainer documents, all over the internet, for example—and this is a real example—to explain the circumstances in which a farmer can use red diesel to collect building materials from a builder's merchants. There are explainer documents for very detailed issues such as that. They do not necessarily have the force of law, but they are intended to provide accurate information to citizens.

Lord Thomas of Gresford: They are also evidence of what the intention of the parties was.

The Chair: Absolutely—that is why they are there.

Professor Christopher McCrudden: They are evidence at least of the intention of the UK Government, but not, the Supreme Court said, of the EU. We can agree or disagree with that, but that is the ruling. That may become an issue subsequently if any issues get to the international arbitration system, but let us leave that aside.

Turning back to Baroness Foster's point, yes, it is not a legal document. Yes, it is subject to subsequent judicial understanding, but I come back to the point that it may have legal effects that have not yet been ruled out.

As to the broader point that Baroness Foster is rightly making, I indicated at the beginning of what I said some time ago that the way in which the RSEO provisions were negotiated was intended for them to be political statements and political commitments. We both agree with that, but whether wisely or not—and I am not here to defend or attack particular decisions that were made—simply as a statement of the obvious, those provisions then became the cornerstone of the Article 2 protections.

While you are right that the original intention was not that they would be legally enforceable, and indeed subsequent courts held them not to be legally enforceable before Brexit, after Article 2 comes into effect, they are now in the legal domain, and the question then becomes how courts should interpret them, given their origins but given the legal status that has now been accorded to them. That is where the whole question of direct effect comes in, because the issue that you are describing, Baroness Foster, of how the court is to grapple with the vagueness of the language but nevertheless giving it appropriate legal effect, is where we get to the direct effect issue.

- Q33 Baroness Ludford:** The Supreme Court said in Dillon that Article 2(1) Windsor Framework is capable of direct effect in certain circumstances. In your view, what are those circumstances? What rights are covered in those circumstances? Just to make it a bit long, how would you respond to suggestions that the Supreme Court has severely restricted the operation of Article 2 Windsor Framework in a wide range of cases?

Samuel Willis: Thank you very much for the question. I just wanted to take a chance to make two comments in relation to the previous questions, one of which, happily, is an answer to one of your questions, so that is useful.

The first concerns the issue of the status of the explainer document. It is right that the Supreme Court rejected the submission that this is an admissible aid under the Vienna convention, but another further point that is worth noting and bringing to the committee's attention is at paragraph 124 of the judgment, where the Supreme Court said that subsequent practice is only an aid to interpretation. The issue of direct effect is not a question of interpretation, but one of applying the EU law test for direct effect. It is a question of EU law rather than international law, and it is a question of interpretation.

The Supreme Court said, "It is therefore only if it satisfies the requirements for direct effect in EU law that a provision of the Windsor Framework can be relied upon before a domestic court. That cannot be changed by practice establishing the agreement of the parties as to its interpretation".

I just wanted to bring that to the attention of the committee. There are two separate questions here. First, what is an admissible aid under the Vienna convention? Secondly, in any case, is that relevant to an EU law question of direct effect? The Supreme Court said no at paragraph 124.

In relation to what the Supreme Court said about the direct effect of Article 2, paragraph 118 is the key paragraph. The key sentences are, "Before us, it was common ground between the Secretary of State and the applicants that Article 2(1) might operate in conjunction with a directly effective provision of one of the annexe 1 directives so as to give rise to a directly effective obligation not to diminish such a right". Those are the equality directives that Professor McCrudden referred to earlier.

Then the Supreme Court went on to say, "We agree". The Supreme Court agrees with that, so that is common ground.

The Supreme Court went on to say, "However, the directives in annexe 1 have no application in the present case", and so on. This is the important part for your question, Baroness. "We also consider that Article 2(1) may be capable of having direct effect in conjunction with other EU instruments falling within the ambit of the rights listed with bullet points in paragraph 1 of the RSEO chapter, or within the ambit of paragraphs 11 or 12, if the Demirel requirements are satisfied in respect of the obligation imposed. Both the Secretary of State and the applicants accepted as much before us, at least in relation to paragraph 1".

The key question here—I am sorry that this is a lawyer's answer—is that you would need to apply the Demirel test, which is basically the test of direct effect in the context of an international agreement, in relation to the particular part of the RSEO chapter that an applicant is trying to rely upon. You would need to take whether that has direct effect in conjunction with the EU law instruments. Taken as a whole, does the obligation that is being posited by the applicant satisfy the test of direct effect? That is the test. That is what the Supreme Court said here. It does not rule out the possibility.

In terms of those bullet-pointed rights that were not relied upon by the applicants in the Dillon litigation, the examples given are the right of free political thought; the right to freedom and expression of religion; the right to pursue democratically national and political aspirations; the right to seek constitutional change by peaceful and legitimate means; the right to freely choose one's place of residence; the right to equal opportunity in all social and economic activity regardless of class, creed, disability, gender or ethnicity; the right to freedom from sectarian harassment; and the right of women to full and equal political participation.

The question, which is a matter for litigants to argue and for the courts to decide on a case-by-case basis, would be whether reliance upon one of those bullet points in conjunction with an EU law instrument would satisfy the test of direct effect. Some of those bullet points look a lot like convention rights; some of them do not and look *sui generis*. That would be something that people would want to argue about down the line.

Lord Thomas of Gresford: Would you agree that it is very perilous litigation if there is not sufficient definition or help in the judgment for a person who wishes to test whether a particular right can be pursued by direct effect?

- Q34 **The Chair:** Can I put the same question in another way, Mr Willis? Supposing that I was a trade union district official somewhere in Northern Ireland who had a trade union member who wished to have some advice as to one of the rights that is not in the list that you read out, which is not an exclusive list, how helpful is Dillon in enabling that trade union official to advise their member? Having to go to a court to interpret or reinterpret a decision of the Supreme Court is not very helpful, is it?

Samuel Willis: The first point to be made in relation to that is that this is the first Supreme Court judgment on this particular issue. This is a developing area, and it is inherent to the way our legal system works that, when you have new legal provisions that are relatively underdetermined in terms of case law, that can pose difficulty for litigants and parties to know their legal position. I would sympathise with that position.

It is hard to speak in hypotheticals, but the trade union rep in that situation would want to seek the advice of a lawyer to analyse the judgment and apply it to the facts of that particular case. As for the issues of uncertainty, I cannot read the tea leaves here, but one would expect that over time, as case law accumulates on this issue, those points would be sharpened.

One other point I would make is that, in this particular case, the applicants were relying upon two provisions of the victims' directive, Article 11 and Article 16, which the Supreme Court robustly said were not relevant here. They did not regulate the issue of when prosecutions would or would not be brought in relation to immunities.

This case can be read as falling at that point. That was very difficult for the applicants. If a case were to reach the Supreme Court where the right was more squarely within the scope of EU law or the argument that the right was underpinned by EU law was stronger, you would maybe see a sharper delineation of these issues on direct effect. This was not the judgment where that happened. That is my answer to that.

The Chair: Professor McCrudden, we are a Select Committee of the House of Lords; we are not an appellate court. We therefore have it in our scope to suggest, for example, that the Dillon judgment is actually not very helpful to people who wish to define what their rights are, if that were our view, and I am not saying it is. What would you say about how helpful or unhelpful the McCrudden judgment is in the determination of human rights in Northern Ireland? Sorry, I meant the Dillon judgment.

Professor Christopher McCrudden: I am afraid it is not the McCrudden judgment, which might have differed in some respects.

You will not be surprised to hear that I am not going to criticise the Supreme Court. As Lord Bingham always used to say, we are where we are. You are right that you are not going to relitigate it; nor am I. The Supreme Court has made its judgment.

This is not a criticism; it is simply an observation. There are very considerable uncertainties about the future of Article 2 in terms of its interpretation. That is obvious, and we can get into some of those uncertainties later on.

As Mr Willis said, in part that is because it is just new legislation, but it is also very complicated legislation. It looks simple, but it is actually quite complex, and it is complex because there is an interrelationship between domestic law, European Union law and international law. Simply describing the fact that there are these interweaving layers is an indication that there is likely to be complexity here. So I am not going to criticise the Supreme Court. There are significant uncertainties.

With regard then to what we do about this, and turning to your point, Lord Chair, about the poor trade union official who has received a complaint, there is a simple answer and a more complex answer. The simple answer is that the trade union official should look at what the complaint is. If it indicates that the answer would have been different prior to Brexit, you have a question mark that needs to be further pursued.

Essentially, Article 2 is quite simple, believe it or not, in its intentions, which are to prevent diminution of these human rights and equality provisions after Brexit. If there has been diminution, there is an indication of a potential problem here. For the trade union official, therefore, that would be the first port of call.

What is the second port of call? Lawyers always say, of course, that you need legal advice. I saw Baroness Foster smiling at this point. We would say this, wouldn't we? There is also the role of the Human Rights Commission and the Equality Commission here. They are set up as the so-called dedicated mechanism. They have the specific role of interpreting the legislation, and indeed they do, of course.

The ordinary position would have been that the trade union official, wisely advised, would have gone to the relevant commission and asked for its view of it, but we have the problem. The problem is that, given the uncertainties of the judgment—again, this is not a criticism but simply an observation—that means that certainly the Equality Commission, which I have represented but am not representing today, as I should make clear, is in the position of having to deal with those uncertainties. In the evidence that it presented to you last week, it indicated that it is taking various steps to try to clarify precisely the uncertainties that we may well get on to subsequently.

The concern that you have, Lord Chair, is that the poor trade union official or indeed the poor individual would have to go to court to try to get those uncertainties sorted out. That is both expensive and a long process, inevitably. The Equality Commission indicated to you last week that it is trying to, in a sense, short-circuit that by taking the responsibility itself to get clarification from the High Court in Belfast and

indeed the Court of Appeal, if it comes to that, on certain of these key uncertainties.

- Q35 **Baroness Ludford:** Could I just press that last point? Just to complete what I had asked but had not really got answered, you both agreed that the Dillon judgment is complex. We can all agree on that. I also wondered whether you could make a simplistic judgment call on whether the Supreme Court has severely restricted the operation of Article 2 in a wide range of cases. Is that too simplistic a question? It is a yes or no.

Professor Christopher McCrudden: It may be a yes or no, or it may be a maybe. I pointed out in a previous answer, and I think Mr Willis was agreeing, that there are significant uncertainties, which we can get on to. Given those uncertainties, the answer as to how restrictive the Supreme Court has been in Dillon really does remain to be seen. If all of those uncertainties were resolved in one way, it would be a very significant limitation on Article 2. If they resolved the other way, the effect may be more marginal.

Until we get clarification on these points, I am afraid that it is the answer that you do not want and that you did not give me the option of answering. On whether it is yes or no, the answer for me at least is "maybe". It may be the case that it could be highly restrictive, or it could be the case that it is not.

The Chair: Mr Willis, I think your answer to that question would have been that it is not restrictive; they simply gave examples of situations in which they would say that there was the possibility of determining direct effect.

Samuel Willis: Yes. Reading the judgment, what we get from the judgment is that Article 2(1) did not have direct effect in this particular case, but the Supreme Court gave an indication of where it might do.

I agree with Professor McCrudden on the issue of scope still being worked out, but one point we do know from this judgment is that the reference to civil rights on its own in paragraph 1 is not going to satisfy the requirements of direct effect. An applicant seeking to rely upon that as the hook is not going to work. In a sea of "we-don't-knows", uncertainties and much to be argued about, just to provide one point of certainty to the committee, that is something the Supreme Court did say.

Professor Christopher McCrudden: Could I just explain very briefly why, from a non-lawyer's point of view, it looks like we are dancing on various heads of various pins? Having to explain this to first-year students makes you try to be as simple as possible here.

The judgment is addressing two different things, if you like. Firstly, it is addressing the particular facts of that case. What lawyers call the ratio of the case deals with the application by the Dillon representatives for the application of Article 2 in their case. The court said no, as Mr Willis said.

The reason why the court said no, in narrow terms, is that it disagreed with the interpretation of the victims' directive by the Court of Appeal. That was the killer point, but in the course of explaining its understanding of Article 2 it also said, looking forward, "Here is our understanding of the general way in which we should think about Article 2". Many members of the committee will know as well as I do that those are obiter dictum in the sense that they were not necessary for the judgment, but nevertheless it is the Supreme Court speaking, and of course therefore they are going to be highly influential for subsequent courts.

Subsequent courts will have to grapple with these issues and to decide whether the obiter, as we would call them, that the Supreme Court gave, should be given legal effect in a particular case where the actual issue arises for determination. Several of the cases before both the High Court and the Court of Appeal in Northern Ireland will have to grapple with precisely that issue.

I want to distinguish the narrow reading of the case from the views of the Supreme Court more generally that were not necessary for the determination in that particular instance.

Q36 Lord Dodds of Duncairn: On this issue of restriction of the operation of Article 2, could I ask Professor McCrudden just on this point? You mentioned earlier about the explainer document; the Government took a particular attitude at the time, and now they argued differently in the Dillon case and have withdrawn the explainer document.

Likewise, there is a Command Paper that was published a couple of years ago, *Safeguarding the Union*, Command Paper 1021. Again, it seemed to alter the Government's view of Article 2. They said, "This Windsor Framework is all about trade and trade only".

To what extent is that statement in *Safeguarding the Union*, an official government Command Paper, true? To what extent is it true in the light of the Dillon judgment, given that it does seem to have restricted it? Are the Government being accurate when they say that the Windsor Framework is only about trade?

Professor Christopher McCrudden: Lord Dodds, you know much better than I do the context in which the *Safeguarding the Union* paper was released, which was, as I understand it, the way in which the Government set out their stall to try to persuade your party, in particular the then-leader of your party, to bring the party back into government in the Executive. That is the context for *Safeguarding the Union*.

There are various bits of the *Safeguarding the Union* paper. In particular, there is an annexe, and there was a letter that was sent to Sir Jeffrey, leader at the time, setting out particular understandings of Article 2 as well.

A question then arises: was a significantly different approach being taken to Article 2 in the *Safeguarding the Union* paper from that which had previously been set out by the Government? I have to say that the

answer is yes; it is significantly different. It is different not just from the explainer document but also from the position that the Government set out in some of the cases that had gone through the courts, in particular the so-called SPUC case in which the Government were represented and put forward their views. At that time, the Government's views were very much similar to the ones that the Equality Commission and the Human Rights Commission had put forward. There was a united phalanx of approaches that were being taken.

It is clear, at least in my reading, that a different approach is being taken in the *Safeguarding the Union* document. It is different in two respects that are relevant to today. The first is the point that you made, Lord Dodds. The protocol, as it then was, is interpreted as being all about trade. With the greatest respect for the Government, that is simply not correct, and it was never correct. Indeed, you just have to read the protocol, as it then was, and see in Article 2 the provisions that we are talking about today, and Article 3 with regard to the common travel area, which of course extends well beyond issues of trade.

The provisions that they are referring to in the document as being about trade are in essence articles 5 through to 11 or 12, which are in essence the provisions dealing with customs and the provisions dealing with what we might call single market issues. Those are clearly all about trade, broadly defined, and certainly economic affairs, if you like, but the other provisions go well beyond that. As I say, with respect, that was an inaccurate statement at the time by the Government. I can understand why it was put forward, but it was inaccurate.

Coming to the second point, the way in which Sir Jeffrey at the time tried to pin the Government down on this was by raising the question of migration. You will see in the parts of the document that you referred to, Lord Dodds, references to whether there would be differences between GB and Northern Ireland with regard to migration policy. Clearly, that is a major question. It was in an attempt to try to get rid of the problem, as it was seen, that Sir Jeffrey had identified at the time that the Government came up with this alternative interpretation.

If I may drop a footnote to this, that remains a continuing issue with the Government of the day. Indeed, it was originally taken up by the then Conservative Administration and was continued by the current Labour Administration. It is a concern that clearly bridged both parties. The concern is that a broad interpretation of Article 2 would have effects on migration policy.

Indeed, the committee has been informed already that there was a case in the High Court in Belfast that contested the Illegal Migration Act. The High Court at that time issued a judgment that disapplied the application of the Illegal Migration Act in Northern Ireland under Article 2 of the Windsor Framework. I suspect that the Government were not enormously pleased with that, and indeed they have appealed it to the Court of Appeal. That appeal remains outstanding.

That is a convoluted explanation of both the political context but also the policy context. To some extent, they came together at that time and led to what I take to be an altered approach being taken by the Government.

The Chair: Can we move on now? Thank you very much. You have given a very clear answer, but I would like to get through a few more questions.

- Q37 **Baroness Goudie:** Good morning. Thank you for coming today. How does the direct effect differ from the non-diminution obligation of Article 2 of the Windsor Framework? What obligations are imposed on the UK Government by Article 2 of the Windsor Framework, as determined by the Supreme Court? Further, what is the significance of this obligation for Northern Ireland, for the United Kingdom's Government and, very importantly, for rights on the island itself?

Samuel Willis: It is rather the case that the stated obligation in Article 2 is the non-diminution obligation. It is a question of whether that has direct effect in certain circumstances. Rather than these being separate obligations, it is the case that the Supreme Court in this case and courts in subsequent cases will need to grapple with the extent to which this non-diminution principle in Article 2 has direct effect.

To take a step back and talk about direct effect for a moment just so that the committee has this information, it is obviously well established that direct effect is in essence a question of whether a provision of EU law that is not directly applicable can be directly relied upon in a domestic legal system and is justiciable before domestic courts. That is the question here. It is whether Article 2(1), the non-diminution principle, can be relied upon and is justiciable before domestic courts.

In terms of the significance of the obligation for the UK Government, that is probably a question for the Secretary of State to answer and give a view on. Where the Article 2(1) obligation is engaged and does have direct effect, and where it is breached—we may come on to this shortly when we perhaps touch on remedies, because it goes to that—it may have consequences that are similar to the consequences that would follow from a breach of EU law when we were in the EU. I suspect that we may be coming to the question of remedies; I might address that more fully at that point.

The Chair: We will, yes.

Professor Christopher McCrudden: I agree with Mr Willis. The difference is that the non-diminution is the obligation—it is the result that is to be achieved—and direct effect is one of the means by which that result can be achieved; that is, enforcement through domestic law. The reason why it is an important distinction is that the obligation that is set out in Article 2(1) speaks both in domestic law and in international law.

A provision that is not directly effective for the purposes of domestic law may nevertheless engage the United Kingdom's obligations at the international law level, where the question of direct effect does not arise.

Ruling it out as a remedy in domestic courts does not mean that it undermines the international obligations of the United Kingdom. That was the argument that was being put in the first session of witness evidence a couple of weeks ago.

Baroness Goudie raised the question about the significance of the obligation for Northern Ireland, for the UK Government and on the island of Ireland. With regard to the island of Ireland—we have not really touched on this previously—clearly, the obligation in Article 2 is an obligation on the United Kingdom Government alone. It is not an obligation on the EU. It is an obligation on the UK Government in respect of Northern Ireland. It is not an obligation on the Government of the Republic of Ireland or the courts of the Republic of Ireland.

From the point of view of legal technicality, therefore, there is no ability to go to the courts in Dublin to get a remedy because it simply does not apply. That said, of course—and that is not the answer that you want. It is not a technical legal answer. It is, “What is the real effect likely to be?” That depends on the scope of Article 2.

Coming back to the migration issue, if the judgment of the High Court is upheld striking out the Illegal Migration Act, for example, that indicates that Article 2 applies to migration policy more broadly. That clearly does affect the island of Ireland not least because of the common travel area. There are complexities and implications for all this that are not strictly legal but that clearly will have weight in policy dimensions. Does that answer your question, Baroness?

Baroness Goudie: It does.

The Chair: Lord Hain, we have probably dealt with question 8, but I am not going to stop you asking a question that arises in your mind now.

Q38 **Lord Hain:** This is what would help me and I suspect any lay person looking at and listening to all this. Imagine that you are in an elevator for 20 seconds. Can anybody rely on Article 2 of the Windsor Framework after the Supreme Court’s judgment in Dillon?

Professor Christopher McCrudden: If I am in your elevator for 20 seconds, the answer is yes. I assume you want more than that, but I am happy to stop at that point, if that satisfies you.

Samuel Willis: The Supreme Court was clear that, in principle, it can have direct effect. Yes, I agree.

The Chair: If you were in the elevator for 40 seconds, Lord Hain, I suspect it would be suggested that you obtain counsel’s opinion.

Lord Hain: I thought that was what we have been doing.

Professor Christopher McCrudden: There is another distinction that we need to introduce into this. At the risk of your eyes glazing over yet more, there is a distinction that we make in law between the scope of a

particular obligation and who can enforce that obligation. What Mr Willis said about direct effect is, "What can be enforced?" That is direct effect, but that does not really answer your question about who can enforce it. In that context, two different issues arise.

First, what is the standing that someone has in domestic law? Most of these cases go through judicial review. Standing in judicial review is fairly straightforward. Does the plaintiff have sufficient interest to raise the issue in the judicial review? Again, that is not the answer you want. That is simply saying how you get into court in the first place.

The real question is who can rely specifically on the Article 2 commitment. In previous cases, the court's approach was to interpret the RSEO provisions, particularly the first sentence of the first paragraph, where it refers to everyone in the community.

The courts have interpreted that in three cases. In the SPUC case, which was a case dealing with contesting the abortion regulations that were brought in, the court said that the obligations did not apply to a foetus. We can agree or disagree with that, but that is the decision of the High Court upheld in the Court of Appeal in the SPUC case. The question there is, "Who is everyone in the community?" The court in effect applied the European Convention on Human Rights test of the victim.

In two subsequent cases, both dealing with migration and asylum, the question arose also. One was the *Re Angsom* case and the other was the *Illegal Migration Act* case. In both of those cases, the High Court held that "everyone in the community" did apply to asylum seekers and migrants. Again, I suspect that will be one of the issues that will be heavily litigated in the Court of Appeal. The Supreme Court did not address the issue of who can enforce. That is the position that we have at the moment.

Q39 Baroness O'Loan: Good morning, gentlemen. Drawing on the rights that the Supreme Court concluded fell within the scope of Article 2 of the Windsor Framework—there are obviously questions about that—how will a diminution of rights be determined? What is the role of the dedicated mechanism framework in determining a breach? Can you give us an example, please? I will start with Mr Willis, if I may.

Samuel Willis: I suspect Professor McCrudden is better placed to talk about the dedicated mechanism than I am, I am afraid.

The Chair: Let us move to Professor McCrudden then.

Professor Christopher McCrudden: Ultimately, the decision as to whether there is a breach in domestic law will be by the courts. As I pointed out to you last week, the dedicated mechanism has no role in making final legal determinations as to whether there has been a breach. It has the role of bringing cases in its own name or on behalf of others and intervening in cases. The dedicated mechanism at domestic level is in essence the mechanism by which cases could get into court. It also has the role of advising public bodies more broadly. That is at domestic level.

At international level, cases may also be determined as to whether there is a breach. The domestic remedies do not exhaust the process. There is some debate at the moment as to whether the international mechanism should be mobilised. Personally, I think it would be unwise to do that at the moment, but nobody has asked me yet. There is an international mechanism.

The role of the dedicated mechanism at the international level is that it can bring issues to one of the specialised committees set up under the Windsor Framework, which triggers an indication of concern as to what may be happening at domestic level. It is then up to the parties—that is, the EU and the UK—to negotiate on that. If the negotiation is not successful, one or other party can bring—

The Chair: Professor, we were told last week that no cases have been brought under the dedicated mechanism. Baroness O’Loan asked for an example or two of the kind of cases that might be brought. Can you help with that?

Professor Christopher McCrudden: I hope so. Although no cases have been brought with regard to Article 2 to the international mechanism, cases of international arbitration with regard to the trade and co-operation agreement have been taken to the same mechanism. One case has been taken dealing with a fisheries dispute, in which the United Kingdom won against the Commission. It is not quite true to say that the mechanism has not been operationalised. It has, but not in the Article 2 context.

With regard to examples, as I said, one of the debates that is going on at the moment is whether Dillon should be taken in this context. There is a significant barrier here, which is that the arbitration mechanism that I have been talking about can only be triggered by one of the parties to the international agreement. It cannot be triggered by an individual, an NGO, the Equality Commission or the Human Rights Commission. They can indicate concerns, but it is up to the Government or the Commission as to whether to mobilise.

As to what cases other than that might come, any case that is currently before the court that is seen to go “the wrong way”—I put that for the sake of the transcription in heavy quotation marks—potentially might end up in the international mechanism.

The Chair: Can I offer you one possible example? Is it a realistic suggestion that one of the parties in For Women Scotland could take up a case through the dedicated mechanism? That might be an example of the sort of case that might be started in that way.

Professor Christopher McCrudden: In that case, it could be mobilised by, for example, the Equality Commission or an individual. The international mechanism cannot be mobilised by individuals.

The Chair: If the European Union thought that the decision in that case was troublesome, it could start a case.

Professor Christopher McCrudden: Potentially, yes. Can I just enter a caveat at this point? Given that we are involved in litigation on this, you will understand that I tread warily in answering this, but, yes, that is potentially the sort of case that might end up before the international mechanism.

Just to be clear, I should say that that issue is currently before the High Court in Belfast at the initiative of the Equality Commission precisely to try to resolve the ambiguities and uncertainties of the Dillon judgment and its application. It would be beyond too early to try to mobilise the international mechanism before it has gone through the domestic procedures.

Q40 **Lord Thomas of Gresford:** The witness from the Equality Commission who we heard last week told us in terms that the Equality Commission has standing to instigate proceedings through the specialised committees, all the way to arbitration and beyond. It is just that nobody has done it so far. She did claim that there was standing for the Equality Commission to do that. The explanatory paper produced by the Government originally did suggest the same thing.

Professor Christopher McCrudden: If I may, Lord Thomas, can I make various distinctions? The Equality Commission and Human Rights Commission clearly have standing before the domestic courts. Indeed, the 2020 amendments to the Northern Ireland Act specify that they have standing before the domestic courts. Both commissions have taken cases either by intervention in their own name or by supporting others. That is the domestic side. They clearly have standing.

With regard to the international mechanism, you may be over-reading what was said. I have reviewed the transcript. The representatives of the Equality Commission were, I think, intending to say that both commissions have the ability to bring issues to the attention of one of the specialised committees set up under the Windsor Framework and indeed under the withdrawal agreement more generally, but that is in essence a mechanism of notification of concern.

Lord Thomas of Gresford: Does it not trigger that mechanism?

Professor Christopher McCrudden: Potentially, yes, but it has to be triggered. To go beyond this notification by the commissions, it has to be taken up by either the European Commission or the UK Government. It becomes entirely an interparty case at that point. Neither commission has any formal role. Certainly, they would not have standing to initiate an arbitration.

Lord Thomas of Gresford: If they notify, the UK Government can ignore it if they wish?

Professor Christopher McCrudden: Yes, unless the European Commission in effect steps in and initiates the process.

Q41 **Baroness Ritchie of Downpatrick:** You addressed this in your answer to the previous question, Professor McCrudden, in relation to breaches. How should a breach of Article 2 of the Windsor Framework be remedied? Maybe I will come to you first and then Mr Willis.

Professor Christopher McCrudden: This issue was not addressed by the Supreme Court in Dillon. The remedies question did not arise because there was no breach found. There was no breach found for the reasons that we set out earlier. Because there was no breach of Article 2, the court said, "We are therefore not going to go further and talk about remedies. That is for another day". The previous courts have said that the remedies that are applicable to breaches of Article 2 are ordinary EU law remedies; that is, the same remedies that applied prior to Brexit.

They did that in both the High Court and the Court of Appeal in Northern Ireland on the basis of an interpretation of Section 7A of the European Union (Withdrawal) Act 2018, as amended in 2020. I just want to get that clear as to where its origins are. It is an interpretation of domestic UK law.

Section 7A of the statute—obviously, it is a parliamentary statute—replicates the provisions under the European Communities Act 1972. On the basis of that, the courts have said, "Well, the same remedies apply". That is where the disapplication remedy arose in the various High Court decisions in both Dillon and the IMA case.

The ordinary EU remedy of disapplication applies, which is basically the suspension of the offending statute, unless the courts can, in good conscience, in good faith, interpret the statute to conform to the EU requirements. In other words, the first attempt will be to interpret the offending statute, if we can call it that, in a way that would comply. If it cannot do that, it disapplies the Act.

Samuel Willis: I do not want to repeat what Professor McCrudden has covered, but the issue that may be litigated and argued down the track is to what extent there is any discretion not to disapply legislation that breaches Article 2(1).

I will just bring to the committee's attention the fact that there is case law from the last decade on this very question in relation to both EU law, in the domestic courts and the CJEU, and retained EU law, the body of law that was copied and pasted or photocopied from the *acquis* into domestic law on IP completion day.

In the case of Chester in the Supreme Court, the issue was discussed *obiter dicta*, but it was suggested that there might be a discretion not to disapply legislation.

The Divisional Court in a case called *Liberty* came to the conclusion that it was not obliged to disapply provisions of the Investigatory Powers Act that were incompatible with EU law.

In the Open Rights Group series of cases, which relate to retained EU law, the Court of Appeal came to the conclusion that it also had a discretion not to disapply legislation that was incompatible with directly effective EU law. The question that arises from the Open Rights Group case is the status or relevance of the CJEU's own case law.

There is a particular case that is relevant called *La Quadrature du Net* and there are others that are cited in the Open Rights Group case. In effect, the CJEU said that there may be circumstances where the effect on legal certainty and other overriding public interest factors is so great that immediate disapplication would not be justified and there would be a case for suspending disapplication. In those cases, the CJEU reserved to itself the jurisdiction to do that. It basically said that, if the domestic courts think that this sort of situation has arisen, they have to make a reference to the CJEU. That is not possible under retained EU law. The Court of Appeal—I am not going to go into the details of how it got there—came to the conclusion that it could do that itself.

The question that may come up in the course of litigation would be whether the domestic courts can do that in relation to Article 2. There is no provision to make a preliminary reference to the CJEU in relation to Article 2. That might be a key argument, a key battle line or a key point that is litigated by parties going forwards.

- Q42 **The Chair:** We are running out of time. If Lord Elliott will forgive me, I am going to jump to our last question. Lord Murphy's independent review of the Windsor Framework recommended that the UK Government and the Northern Ireland Executive have due regard to Article 2 of the Windsor Framework when drafting legislation and monitor all relevant EU legislation in this respect. Could a ministerial statement of compatibility or similar for Article 2, similar to Section 9 of the Human Rights Act 1998, offer an effective mechanism in this context?

Could more routine and formalised engagement between Parliament, the Northern Ireland Assembly and the dedicated mechanism ensure that Article 2 Windsor Framework issues are considered at the outset when making legislation? In other words, should we have the same sort of statement that we have at the top of a parliamentary Bill in relation to the Human Rights Act in relation to Article 2? Do you want to take that, Professor?

Professor Christopher McCrudden: The brief answer is yes. At the moment, the difficulty would be, internally within government, advising what exactly the scope of Article 2 is. Given the current state of uncertainty, until that is resolved, it would be a herculean task.

The Chair: How is that going to be resolved? We have a Government. Whatever Government we have, they are supposed to know the answers to these questions. How is that question going to be resolved so that

Article 2 has a reasonably well-defined meaning?

Professor Christopher McCrudden: I am afraid ultimately it is going to be resolved in the courts. Indeed, as Baroness Foster said, the last sentence of the explainer document said, "This is all dependent on what the courts are going to say". Until these uncertainties are resolved in the court or at least until we know the trajectory of the approach that the courts will take, it would be a pretty difficult task, to be honest, for government lawyers to advise as to whether the Minister can sign off.

The Chair: Mr Willis, does this question have to be resolved in the courts or could it be resolved by legislation?

Samuel Willis: Article 2 has its status by virtue of Article 4 of the withdrawal agreement and Section 7A of the withdrawal Act, such that it has primacy. If a court took the view that Article 2 required one thing, and Parliament legislated another thing and said, "No, Article 2 means this", there could be a situation where the courts might be required to disapply. That is a difficult course of action.

Of course, it is open in principle to Parliament to amend the withdrawal Act. It is in principle possible to do that. That is a political question, not a legal question. It may raise issues with the UK's commitments under international law. Again, that is not within the scope of our evidence today.

In relation to whether advice can be given, let me turn back to the issue of the suggested mechanisms in the question, so something similar to Section 19 of the Human Rights Act or formalised engagement. Again, this is a policy choice. It is a question of how the institutions of the state are going to co-ordinate and talk to each other.

It is the case that the Government and the institutions of the state do take positions on what they think legislation means. In due course, that can be challenged and overturned by the courts, but that is no reason for institutions not to have a dialogue and take this—

The Chair: That is a very realistic answer, if I may say so. It is open to government to obtain legal advice either internally or externally. They can express their view, if it wishes to, on these issues, but that remains subject to challenge in the courts because of the architecture of the provisions we are discussing. Is that a fair summary?

Professor Christopher McCrudden: Yes.

Samuel Willis: Yes, that is a fair summary.

The Chair: Lord Dodds, you had a question that you were waiting to ask. You can have the last word.

Q43 **Lord Dodds of Duncairn:** I have a very simple question. Going back to the issue of remedies, we talked about domestic remedies and disapplication. On the issue of going to joint committee and one of the

parties taking it to arbitration, what would happen if the EU were to win at arbitration in the Dillon case? What would happen? Is it a bit like the ECHR, in that the Government would be under an obligation?

The Chair: What would happen?

Lord Dodds of Duncairn: What is the remedy if arbitration finds against the UK?

Professor Christopher McCrudden: It is a good question. The subsequent activities, as it were, of dealing with a recalcitrant Government are set out in very significant detail in the withdrawal agreement, which accompanies the Windsor Framework. There is in essence a series of escalating sanctions if the Government refuse.

It is not really like the ECHR in the sense that, ultimately, it goes to the committee of Ministers in the ECHR. It is then in essence a political process of negotiation, which can go on for years. You will well remember the debates over prisoner voting that went on for 10 to 15 years.

That is not what happens here. There is a very clear set of timetables set out in the withdrawal agreement for compliance with any decision of the arbitration panel. A failure to adhere to those can give rise to sanctions.

You understand that I am simply setting out the position here; I am not advocating any of this. The sanctions can be in the form of financial penalties—the UK has faced financial penalties in the past—but it can also give rise to the suspension of other agreements that the UK is a party to within the EU. This is a delicate area. If a breach of the Windsor Framework were held to be a breach by the arbitration and then the UK Government refused to accept that, it could lead to the suspension of other agreements in the long term.

I am sure no British Government, certainly at the moment, would contemplate that, but the EU is quite serious in terms of its enforcement mechanisms, as you know.

The Chair: I am afraid we have run out of time. Thank you both very much for the evidence you have given this morning, which has given us a lot to think about. I should remind you that you are going to receive a verbatim transcript of the evidence that you have given, which will be sent to you for correction.