



Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence: Rights after Brexit

Tuesday 26 March 2019

10.45 am

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Members present: Baroness Kennedy of The Shaws (The Chairman); Lord Anderson of Swansea; Lord Cromwell; Lord Dholakia; Lord Judd; The Earl of Kinnoull; Baroness Neuberger; Lord Wasserman.

Evidence Session No. 2

Heard in Public

Questions 11 - 23

Witnesses

Clare Collier, Director (Legal), Equality and Human Rights Commission; Colin Caughey, Director (Legal, Research and Investigations, and Advice to Government) Northern Ireland Human Rights Commission; Dr Katie Boyle, Member of the Scottish First Minister's Advisory Group, Associate Professor in International Human Rights Law, University of Stirling.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Clare Collier, Colin Caughey and Dr Katie Boyle.

Q11 The Chairman: Welcome. Thank you, all three of you, for coming to this session. I know that some of you have travelled to be here. Could you first introduce yourselves? Mr Caughey, perhaps you could start and then I will move across the table.

Colin Caughey: I am the director of legal policy and advice to government at the Northern Ireland Human Rights Commission.

The Chairman: Lovely to see you.

Dr Katie Boyle: I am with the First Minister's Advisory Group on Human Rights Leadership, where I specialise in incorporation and models of the constitutionalisation of economic and social rights. I am an associate professor at the University of Stirling and was previously a qualified solicitor with the Government Legal Service.

The Chairman: Wonderful.

Clare Collier: I am the legal director at the Equality and Human Rights Commission.

Q12 The Chairman: Nice to see you. Some preliminary points. As you know, this session is open to the public, and a webcast of it goes out live that is then available on the parliamentary website. A verbatim transcript will be taken as evidence and it, too, will be put on the parliamentary website. A few days after this, you will be sent a copy of that transcript to check that it is accurate. We would be grateful to receive any corrections as soon as possible. After this session, if anything comes to mind that you feel you would have wanted to elaborate more fully on, we would welcome supplementary evidence; there is no reason why you cannot do that. Do not feel concerned if there is anything that you want to add.

As I say, welcome. This Committee deals with justice issues and the European Union. We have been concerned about some matters relating to law as we leave the European Union, as is the plan. When the Government were planning to bring all that European law into domestic law, they resisted the incorporation of the Charter of Fundamental Rights. I am sure that all of you, who are immersed in rights, know that; it was not to be included in law when the European Union (Withdrawal) Act came into being.

One reason given was that rights would be protected in any event by the European Convention on Human Rights. The Government have confirmed to us that they may still consider reforming the human rights framework by repealing or replacing the Human Rights Act and concomitant legislation in the devolved nations. Once the process of EU exit has been completed, the plan is that they will return to their original intention of reforming and getting rid of the Human Rights Act and having something different in its place.

As a result of all that, are you concerned about the threat to human rights and the

rule of law? I will start with Ms Collier, because she is with the Equality and Human Rights Commission for the whole UK. Then I will go to the specific ways in which this impacts on the devolved nations and the work that you have respectively been doing in this area.

Clare Collier: The short answer is that it is of course difficult to say. We find it hard to speculate on what the Government may or may not say. We are trying to take them at their word: they do not intend to reduce rights, which is obviously a guarantee that they have given previously.

We think that the Human Rights Act is well-crafted legislation. It would be difficult to improve on what the Act has, except in so far as we think that there is room within domestic law to improve the protection of rights and make more treaty rights that we have signed up to on the international stage enforceable and justiciable in domestic courts.

We would not be against any reform, as long as it took what we had at the Human Rights Act level as an absolute guarantee and baseline and then built from that, but the risk of opening that question is that other intentions might come from elsewhere.

The Chairman: What did the Charter of Fundamental Rights provide that is not covered by the Human Rights Act?

Clare Collier: There are a few things in the charter that are not in the European Convention on Human Rights, such as the protections in relation to the rights of the child and guarantees in respect of their best interests. Direct incorporation of the UN Convention on the Rights of the Child could plug that gap, or even some parts of that convention rather than its entire text.

That is one example of something in the charter that is not in the European Convention. Another is the data protection right, in Article 8 of the charter. We know from case law that there is a higher level of protection through that specific right. The Google Spain case, for example, saw a development in the law on privacy rights that goes beyond where you can get to under the Human Rights Act.

The answer to the baseline question is that there is room for improvement, but we do not want to see any risk to the Human Rights Act as it stands when it comes to baseline protection of rights.

Dr Katie Boyle: I echo Clare's comments on the important role that the Human Rights Act plays and on not seeking in any way to undermine that as at least a baseline on which further provision could be made.

On our relationship with the EU and the rights derived from EU law, and our relationship with the ECHR under the Human Rights Act, the general route by which the UK is engaging with supranational bodies indicates a general tendency towards rights regression rather than progression. Some of that highlights huge problems in relation to both the retention of existing rights as well as potentially threatening the

rule of law, particularly because it creates greater uncertainty. It also creates greater complexity.

Generally, what would be perceived as the discourse formulating around regression on rights can in a sense trap the UK discourse in a cycle that is about retention of the status quo rather than about progression beyond what EU derived rights and the ECHR can provide. The discussion that has occurred in Scotland, and to a great extent in other devolved regions, is much more about building and progressing on rights rather than regressing.

These two dialogues do not align. We have two different discourses on rights protection; one is regressive and the other progressive. Obviously, the devolved jurisdictions are restricted in what they can do to fill that gap. Generally, the work that we undertook based on the evidence of the various trajectories on rights showed a significant accountability gap in rights protection. While the Human Rights Act and EU law provide important pillars of the UK constitution, we should focus on where we can build on that rather than regress on it.

Q13 The Chairman: That is very interesting. We were given copies of your report and we heard about the work that has been going on in Scotland in taking rights further forward.

I turn now to Mr Caughey. Is this a question of concern in Ireland or is it very different? Are there concerns about what the backstop might do in relation to rights in Ireland? Do any of these things have implications for you?

Colin Caughey: Certainly, the potential reform of the Human Rights Act is a source of concern in Northern Ireland. We consider that any reform of the Human Rights Act should be embarked upon only in full knowledge of the important role played by the Act in the UK constitution and in the devolved context.

On the loss of the Charter of Fundamental Rights, we should note that it provides protections in addition to what is included in the European Convention on Human Rights. There is a declaratory point about the freestanding right to equality contained therein. One of the outstanding commitments in the Good Friday/Belfast agreement was for the development of a Bill of Rights for Northern Ireland. That point has not been realised some 20 years on.

In the context of being a member of the European Union, the charter addresses the issue to some degree by providing a convention-plus approach to human rights protection. As we exit the European Union, the loss of that charter creates an imperative to return to the Bill of Rights for Northern Ireland and put a renewed focus on developing human rights protections within Northern Ireland.

The Chairman: That is interesting. In the charter there is a freestanding right to equality as distinct from what is in the European Convention on Human Rights.

Colin Caughey: Yes. Article 14 of the European Convention on Human Rights is what is known as a parasitic provision. We have to identify a right that is engaged and

then bring in Article 14 on the back of that, whereas a freestanding equality protection is provided in the charter.

Q14 Lord Anderson of Swansea: The UK Government have an exemplary record of following the European Convention on Human Rights except for prisoners' voting rights in the Hirst case. We have noticed, as no doubt you have, a certain difference of formulation in what the Government have said about the future relationship with the convention, which of course underpins the Council of Europe.

In the summary draft of the political declaration published on 14 November 2018, they said that the UK's future relationship with the EU would be underpinned by a "reaffirmation of the UK's commitment to the European Convention on Human Rights". The final document, published on 22 November, has a somewhat different formulation. It states that the UK would agree to "respect the framework of the ECHR".

Are we nitpicking? Is there a difference between these formulations? Does that concern you? In your judgment, does it have any meaning?

Clare Collier: We sought assurances, as you have, as to whether that change of wording is meaningful. We have been assured by officials that it is not. That is the position as we understand it to be.

The Chairman: Do you agree that it has been said to us that changes in wording invariably have meaning?

Clare Collier: I could not say. The commission's view is simply that it is absolutely and fundamentally vital that we remain committed to the ECHR. When we say that, we mean the convention system as a whole: the text of the convention, the court, the commitment to respect the rulings of the court and the system of protection that we get through the ECHR by respecting the rulings and the relationship that we have in the Council of Europe as it stands.

There has been a development in the relationship between Strasbourg and the Government in recent years. That is evident in the way some of the judgments have come from the court recently, as well as following on from the political agreement made in the Brighton declaration a few years ago and the continuing dialogue within the Council of Europe between all its member states.

It is genuinely possible that some of the points of tension have been resolved and that the apparent threat that seemed to be on the horizon a few years ago is now less real than it was then. That is mere speculation on my part, because all we have are the words of assurance as we have them in Edward Argar's letter. I cannot speculate on whether in that context it is a meaningful change or not.

The other point to make on that issue is that if we were thinking of changing in any way our relationship as a country with the Council of Europe and our involvement in the convention system, that would give us even more reason to say that now is the time to grab the opportunity, if we can, of entrenching more rights from the UN

context into our domestic law so that we do not have just one single point of reference to rights on the international stage within our domestic law.

The Chairman: But you know that there are those who just do not like international courts. In the same way that they did not like the European Court of Justice, they do not like the European Court of Human Rights. When there is talk of staying within a framework, the bit of the framework covering the commitment may be somewhat less strong on the part of the framework that involves there being a court outside the United Kingdom.

Clare Collier: Yes. As I understand it, the Government are committed to retaining the status quo in their relationship with the court, but that is the only information I have.

The Chairman: And each Government are capable of changing their position.

Clare Collier: Of course they are. This is just the position as we have been given it by this particular Government.

Lord Anderson of Swansea: Essentially, you are not concerned about this and you see no sinister motive in the change of formulation.

Clare Collier: I think the issue is live in some Ministers' minds. I do not know whether it is of concern to the Government as a whole at present, and obviously I do not know what led to the late change in the drafting. I cannot speculate further.

Q15 **Lord Judd:** We have all become so myopic and introspective about these things. What is terribly important about the convention and the court is that they establish the principle that there are things to which all of us in Europe aspire. Do you give any time to thinking about what the damage will be to the courts in Europe, if I can put it that way, by our self-preoccupation?

Clare Collier: Obviously I will let my colleagues come in to respond, but from my perspective it is absolutely clear that the attitude being taken by Britain to the Council of Europe affects everyone. In the case of prisoners' voting rights, when we delayed implementing the judgment that had an instant impact in Russia where it was said that, "If the UK doesn't have to do it, we don't have to either".

That principle could be writ large across the piece. I do think that there is a risk across Europe not only from the UK but from any member state that takes seriously the idea of not complying with the convention in the way they have done historically because it has domestic issues on its mind. That will have a knock-on impact across Europe.

The Chairman: Dr Boyle, what is your view of the change of wording? Is it significant?

Dr Katie Boyle: Typically, you would not be too concerned about a change of wording when it is associated with a declaration. None the less, when you place that

within the wider discourse it is important to take note of any dilution of commitment.

Also, in a sense—following on from the questions—it is a loss in many respects for the UK, having taken such a prominent role not only in devising the European Convention on Human Rights but in leading on it, to no longer exhibit the same leadership internationally and within Europe more broadly. It is a loss to that community and to the way we protect rights within the UK framework.

Reflecting on the different relationships that we have shared with the Council of Europe and the European Union over the years, it is not just about the relationships between courts and the way international and European law has played a role within our domestic framework. If you look at it from the perspective of the rights holder, any loss of process or substance of rights is problematic. For example, those different systems have different forms of standing when it comes to access to justice. They also have different forms of remedies available. It is not just the list of rights itself but the processes and access to justice in relation to those rights that are important.

We must look at the broader picture of the dilution of potential rights regimes from the point of view of the rights holder. Undermining in any way the relationship with the ECHR pillar of the UK constitution or the rights derived from EU law is problematic in that sense. We need to consider where the losses are from the perspective of the rights holder.

Colin Caughey: The main observation about the change of language was a move from a positive to a more neutral relationship. From our perspective, we would like to see the UK playing a much more active role in the Council of Europe. Experience has shown that when it adopts an active role it gets results, as we had with the Brighton declaration. That is our main comment on the change of language.

We would also flag up the importance of our continued membership of the Council of Europe and adherence to the ECHR in relation to future criminal justice co-operation with the European Union after Brexit. When the White Paper was produced, Michel Barnier made it clear that there was much more room for criminal justice co-operation because we shared the ECHR as a common framework with the 27 EU member states.

Lord Judd: Could we focus on the charter for a moment? Do you have anxieties about what the elimination of the charter will actually mean? I hope fellow members of the Committee will forgive me if I mention one that is a preoccupation of mine.

I have been tremendously impressed by the amount of groundwork going on in Northern Ireland, not just in the Good Friday agreement as a legal arrangement but in some very courageous, imaginative people building a community. What has been crucial in that is equivalence, so you did not only have a Protestant community with all the British institutions of law but a minority community—it is still just a

minority—that has had the reassurance that the charter was there providing it with a framework of support.

Do you have any thoughts about the impact on the dynamics of Northern Ireland?

Colin Caughey: With regard to the loss of the charter as an instrument and the rights that it puts into law, there is a slight limitation in that its application is dependent upon EU law. However, there is a general point that it contains substantive rights that are beyond what is in the European Convention on Human Rights. It also provides protections for socioeconomic rights and is an accessible document that people can refer to.

On the charter and its implication for rights protection, even over the past few years we have seen that its relevance will grow and grow, particularly as new EU laws are developed. The loss of the EU charter is as much of a concern when it comes to what could have been, and the direction in which we were going—with rights broadening into other areas, such as data protection—as it is for immediate loss.

We are also aware of the loss of legal certainty and potential inconsistencies after Brexit with regard to the continued relevance of the charter to issues that fall under the body of contained EU law.

Q16 Lord Cromwell: My question is initially for Dr Boyle, who referred to leadership in this area.

It has been proposed that an Act of the Scottish Parliament could provide leadership on human rights. I have two questions. First, how far will that prevent what has been politely called regression—I would call it backsliding—on our position on human rights, relative to being EU members? Secondly, how would that Act interact with the wider UK human rights framework?

Dr Katie Boyle: The Act that was proposed as part of the First Minister’s advisory group recommendations should be viewed within the wider context of those recommendations, so it is not just the Act itself. Essentially, the group adopted a methodology that recognised the importance of the different actors across a multi-institutional approach: the work of pre-legislative scrutiny in Parliament, with the Parliament acting as a guarantor of rights; decision-making across the public administration sphere; the role of the Executive in complying with rights; and, ultimately, the role of the judiciary in upholding rights as a means of last resort and accountability. It therefore very much builds on the existing framework for human rights within the devolved context.

In relation to preventing backsliding, our remit essentially included looking at the context of Brexit and the wider discourses I have already mentioned, where there is a history of progressive reform on human rights in devolved trajectories. We formulated our advice on the principles of non-regression and no backsliding on rights in the context of Brexit, keeping pace with developments, such as where the charter might go in the future. Much is unexplored, of course, when it comes to what the charter might protect.

Finally, our remit also included leadership and how to exhibit it in that context. The Scottish constitutional framework is limited in relation to the non-regression principle in so far that it can only pass legislation that falls within devolved competence. There is potential to try to fill some of that gap, but only in devolved areas, so Brexit results in regression on areas that are reserved and that the Scottish Parliament cannot touch. Major areas of concern in that respect are immigration, data protection, employment law—that is largely reserved—and equality. These are pretty significant gaps where there are issues in the context of Brexit.

On progression, we took a step back and looked at the broader international human rights framework. While the charter reflects many of the rights that are protected in international human rights law, as Colin has already mentioned they do not necessarily bite within the scope of EU law. None the less, we thought that if we looked at the incorporation of international human rights standards we would, where we could, incorporate those rights into the devolved framework.

You would see, for example, more protection in relation to: the devolved aspects of social security; the right to a healthy environment, which also engages with EU law; and the right to housing, health, education, food and an adequate standard of living. The Scottish Government has also committed to incorporating the UN Convention on the Rights of the Child. You may see some areas where rights listed in the charter are engaged, even where they may not necessarily bite domestically. Scotland could take the lead on progressing on those type of rights.

Our remit was about trying to address the broader international human rights framework and the gaps that emerge in that area by using the devolved competence to implement and observe international obligations. That is how we thought we could address the biggest gap within devolved competency.

In relation to how the proposed Act of the Scottish Parliament engages with the broader UK framework, the Human Rights Act is, of course, a protected Act meaning it cannot be modified by the Scottish Parliament, so the recommendations are about supplementing and building upon the Human Rights Act framework. The Human Rights Act engages largely with the reserved provisions of law. The Scotland Act itself, in Sections 29, 57 and 101, creates the devolved framework for the ECHR, which is a much stronger type of framework. For example, if the Scottish Parliament passes an Act that is incompatible with the ECHR, the court can strike it down. So it is a different type of power than what exists under the remedy of a declaration of incompatibility.

The Chairman: This was an interesting thing that came to light when the Equality and Human Rights Commission taxed me with some work on this. It is interesting that Scotland has this additional power of being able to strike down, which does not exist anywhere else in the United Kingdom.

The other thing that we learned is that Wales had progressed on children's rights in a way in which the rest of the United Kingdom had not, and that Scotland had been particularly active with regard to women's rights and had advanced rights in these

areas. It has been interesting that Mr Caughey has raised the business of equality, because, not surprisingly given the history of Northern Ireland, making sure that one community was not left behind is particularly important, so equality issues become vital in that part of the UK.

It is therefore interesting that there are these differences, which we as a Committee should be mindful of. Thank you for drawing that to our attention. I will move us on.

Lord Cromwell: First of all, thank you, and thank you for adopting the term “backsliding”—I appreciate that. I do not know whether either of your colleagues wanted to add anything from their areas—or do you need to move us on, Lord Chairman?

The Chairman: I need to move us on, but I am sure that they can come back to this business about the extent to which backsliding is an anxiety that we all share.

Q17 Lord Dholakia: My question is in two parts. First, how significant is the removal of supremacy of EU law, and, based on past precedent, what impact would you see this having generally on the law as it is implemented now?

Secondly—this is quite specific to Northern Ireland—given that the Equality Act 2010 does not apply there, is the removal of the charter and the supremacy of EU law of greater significance there?

The Chairman: That allows you to say what you might have said on the question from Lord Cromwell. The Equality Act does not run in Northern Ireland, so were you given comfort from the charter?

Colin Caughey: Yes, we were, and our position as a commission has been that the charter should be retained in Northern Ireland law with respect at least to devolved issues until such time as a Bill of Rights for Northern Ireland, as is envisaged in the Belfast/Good Friday agreement, is realised.

With respect to the point of supremacy, as has been said, rights and equality discourse in Northern Ireland can be slightly more contested than in the rest of the UK. The supremacy of EU law has acted as a pole for reform in a progressive way—we have seen that with issues such as the gender directive. The loss of supremacy will remove that impetus for progressive reform in Northern Ireland and to a degree leaves existing protections more vulnerable to reform. The absence of a single equality Act that consolidates, strengthens and makes more accessible the equality protections that are provided in our law makes us again more vulnerable.

As a practical example, we have in the European Union (Withdrawal) Act a provision whereby a Minister has to have regard to the Equality Act before exercising powers contained therein, but there is no comparative in Northern Ireland because we do not have the single accessible Act. When that Act was progressing through Parliament, that made our job more difficult because you could not point to one instrument that a Minister should have regard to when embarking on a reform process.

It is our position that Northern Ireland should have a single equality Act that consolidates, strengthens and makes more accessible equality protections, and that position—that there is a need for reform—has been reiterated by a number of UN treaty bodies.

Q18 Baroness Neuberger: Schedule 1 to the withdrawal Act provides that, “There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law”. We would be interested to know what, between you, you think the impact of that provision will be.

I add to that a subsequent thing you might want to address, on Francovich: “There is no right in domestic law on or after exit day to damages in accordance with the rule in Francovich”. Where does this go?

Clare Collier: One of the points that has not come out from our evidence yet but is really important is the whole problem of legal uncertainty, which you heard a lot about in your last evidence session. We think this is a classic example of where we are in the territory of uncertainty. Our fear is that we do not know what is going to happen and that there is a risk that there will be protracted, long-running litigation about what this or that means, and about what the impact of Brexit is across a range of issues.

This is merely another area where we are losing continuity, losing certainty about what the law is and what it means, and reducing access to remedies. That will not make people not have problems that need a remedy, so they will still be in court looking for one and the courts will struggle to identify what to do in the absence of what they would have done before.

So the question for us is whether the problem is about legal certainty.

The Chairman: Can I pause you for a minute, Ms Collier? For some people listening, legal certainty will seem abstract and not so vitally important—everyone lives with a level of uncertainty, so why should it be so important? As any of us who are lawyers know, a key part of the rule of law is that it applies to everybody, from the king down to the poorest—or it should do.

Secondly, there should be legal certainty, because without it you can get forms of tyranny: there can be forms of abuse because of not knowing where the law is and what your position is with regard to the law.

So it is not just about lawyers being like bandits and making tons of money out of uncertainty but about the pain that it causes in the lives of ordinary people.

Clare Collier: Absolutely. I completely agree with everything you have said. It is absolutely a problem. There may be situations, of course, where we end up in the courts in the long run, and there may even be a mini-flurry of cases. But it is never a good thing for people’s lives to be on hold while the courts work something out because they have been put in the position where they or the lawyers advising their

clients do not know the answers because the law has changed in a way that was essentially preventable; it was not necessary. That is a problem.

This comes back a little to the earlier point about the supremacy of EU law, because a combination of those things creates additional uncertainty. If you lose the safety net that you get from the existing protections that we have in EU law, and we lose the remedy mechanisms, it all plays into the same problem, which is that we do not know how it will all play out.

I will give you an example of where there might be a problem in real life. At the moment, one of the things that EU law does is provide a way for the courts to interpret the law if the UK has implemented EU law in a way that may not go far enough. If, for example, there is a directive from the EU, such as the employment rights directive, and the UK has implemented that law into domestic law, if a real-life person challenges something that has happened to them and the EU law gives them slightly better, or clearer, protection, they can rely directly on the EU law, regardless of what the domestic law says.

Losing that ability creates another layer that an individual person has to get through, another barrier to them achieving justice. In the context of equality law, for example, we might say that there is doubt about whether the exemption in the Equality Act in relation to the employment of teachers in faith schools correctly transposes the directive from the EU on that subject.

At the moment, if that case were to come to court, the court would be able to rely directly on the EU law provision. In the post-Brexit world that will not happen, so the rights will be fossilised as they are in the current domestic law. People will not be able to look to the EU. Eventually that will also drive levels of protection across Europe in different directions.

Dr Katie Boyle: On Francovich, I defer to the evidence given recently by Professor Colm O'Cinneide in which he covered the issue eloquently. I am not an EU lawyer, but the obvious added complexity here is that we are trying to grapple with areas across a broad spectrum of EU law that requires one to be a specialist and a generalist at the same time. I would add that the difficulty is that we are dealing with very different regimes at the same time and trying to anticipate what that means for rights.

The European Union (Withdrawal) Act removes the charter and emasculates the general principles by not allowing for a cause of action on those points. But that is a different type of arrangement from what would have been required in the withdrawal agreement, which took a different approach. We are looking at what might happen in the context of Brexit under an agreement as well as what may happen in a hard Brexit. The implications and the consequences are different, which makes it all the more difficult to predict what may happen in relation to the different areas of rights.

Added to that complexity, of course, is the fact that there are different types of force for retained EU law that embody a new type of law from the one that existed when it was part of the EU system. With some of the consequences, depending on whether we have an agreement, we may see in the context of a hard Brexit serious difficulties for the protection of rights because it is very difficult to scrutinise how much is happening in terms of change.

So while we lose rights under the charter and general principles, EU law covers many areas, which in some cases give better protection of rights. For example, regulations and directives may engage with rights that are not necessarily fully covered within the charter itself. You can see that in the social security regulations that are going through now. In the case of a hard Brexit, there is the possibility that the statutory instrument that is going through Parliament will remove the equal treatment provision that ought to provide protection for EU citizens living in the UK.

There are general consequences that we might not foresee depending on which regime we move into, whether that be under an agreement in a transition period or under the withdrawal Act. It is about navigating different regimes at the same time. That makes it complex and all the more difficult to predict. That in itself is a challenge for lawyers, but if you think about it from the perspective of the rights holder or the citizen, it causes problems for the application of the rule of law because of the expectation of navigating these different regimes. That makes it difficult to establish what exactly the rights and remedies in the jurisdiction of the UK will be depending on what happens as a result of Brexit.

Colin Caughey: My main comment on the extract from Schedule 1 to the 2018 Act is that I am not sure how it complies with the provisions set out in the draft withdrawal agreement.

In particular, the part of the withdrawal agreement on the island of Ireland protocol contains a commitment for the UK Government to ensure that there is no diminishment of the rights contained in the rights safeguards and equality of opportunity section of the Belfast/Good Friday agreement as a result of Brexit.

My institution has been involved with the Government and the European Union in working out the implications of that provision. We now feel strongly that that commitment to no diminution should include a right of individual redress whereby individuals can go to court if a breach of that commitment is considered to have taken place.

The Chairman: Lord Wasserman, that might fit in with the question you were going to ask.

Q19 Lord Wasserman: I was going to ask about Northern Ireland, but a very good answer has been given. Dr Boyle, you have also touched on much of what I was going to ask about.

Assuming that we agree a deal with the European Union—it is a ridiculous time to ask this question—how much and in which areas do you think the current draft of

the withdrawal agreement and the political declaration might mitigate any weakening of human rights standards on the domestic law regime?

A lot of this is speculation, because we do not know what is going to happen, but let us assume for a moment that we have a deal that is based on these documents. Dr Boyle, this carries on from what you have been saying.

Dr Katie Boyle: Yes. There are some commitments in the agreement to continuing protection along with important points, especially in relation to the backstop and no diminution of rights in the context of Northern Ireland. We also have additional protections in relation to labour rights and environmental rights, as well as provision for retaining to an extent the remedy for a disapplication of primary law that is incompatible with EU law that is captured within the scope of the agreement.

However, as I mentioned, there is also the difficulty of knowing, should an agreement be reached, whether this is essentially the regime that we move into. There are complexities and uncertainties in relation to how that will play out and what that means in the context of access to justice for people whose rights are violated. There is also the uncertainty that we may not have an agreement, in which case we have to look at the potential Brexit scenario in which the rights that are protected in the agreement are also missing.

But, again, the withdrawal Act and the agreement do not necessarily speak to each other when it comes to what kind of vision that might be. That is a huge problem, because we have not yet had a chance to look at what statutory regime would govern the UK in the context of a withdrawal agreement. It is hugely problematic, first, from the point of view of certainty about the rule of law and dealing with the super-complexity of that; and, secondly, because there has been insufficient time for scrutiny, which suggests that more time is needed in order to prepare for that eventuality.

Q20 The Earl of Kinnoull: Article 4 of the withdrawal agreement is a very important mechanical article that is concerned with how the agreement will apply and work. Paragraph 2 envisages that the UK courts will be granted powers to disapply “inconsistent or incompatible domestic provisions” of legislation, which is quite a surprising and powerful thing.

First, how contentious do you expect that provision to be, assuming that it becomes a provision of an agreement? Secondly, have you thought of any way of providing some form of future precedent for this area?

Clare Collier: It is difficult to say, because it is a complex constitutional situation. I do not think that we at the Equality and Human Rights Commission have really thought through what the full implications might be.

To echo what Dr Boyle said earlier, without having seen the draft text of the legislation to implement the agreement it is difficult to know exactly what it is going to look like. That is a matter of real concern. A lot of thinking needs to be done in Parliament, and no doubt we can all take it away and think about it. We need to consider what the relationship looks like and how it compares with the ability under

the charter to disapply inconsistent legislation or the current remedies under the Human Rights Act in relation to the declaration of incompatibility, the different situation in Scotland under the Scotland Act, and so on.

It is quite a complicated picture, so it is contentious, but I am afraid I would not hazard a full answer to what it will mean in the longer term.

The Earl of Kinnoull: I had better ask you again when we have a draft Bill.

Dr Katie Boyle: This relates to what remedy might be available. The different regimes under the withdrawal agreement and the withdrawal Act do not necessarily speak to each other in that respect. From a devolved perspective, such a remedy is not unusual. We operate in the devolved regimes under legal constitutionalism, while at the national level it is political constitutionalism. This may be more controversial and difficult in the context of the UK's perspective on whether disapplication of legislation ought to be available as a remedy. It is a remedy, but it is not unusual within the devolved contexts. The Northern Ireland and Welsh devolved settlements reflect the same approach as is available in Scotland, where disapplication of devolved legislation is a remedy that is available, should it be incompatible with EU law or ECHR law.

This speaks to whether an effective remedy should be available and should be compared with the declaration of incompatibility available under the Human Rights Act. Having different remedies available for different rights in different contexts is an important part of facilitating human rights adjudication. I do not necessarily think it is a bad thing, but how it will be received might be problematic. That time has not been available to scrutinise it in greater detail is problematic, because it undermines the legitimacy of the process. By doing so, it undermines the legitimacy of the outcome.

Colin Caughey: Again, our consideration of Article 4 has been mainly through the prism of the non-diminution commitment in the Ireland-Northern Ireland protocol. It is not clear to us what rights of remedy individual citizens will be able to obtain as a result of the draft withdrawal agreement if there is a successful claim on the non-diminution commitment.

That commitment, in the way it is framed in the draft withdrawal agreement, refers to the Belfast/Good Friday agreement, which was not drafted with EU law in mind. It contains a number of specific commitments to rights, but it also embraces broader aims such as social inclusion, the advancement of women in public life, and respect, understanding and tolerance in relation to linguistic diversity. How these concepts will be translated and interpreted with reference to EU law remains to be seen.

In general, how individuals will access what rights protections are contained in the draft withdrawal agreement is not yet clear. What remedies will be open to them is not clear. We are keen to see the implementing legislation.

Q21 The Earl of Kinnoull: That is very helpful. That takes us naturally through to another issue that has arisen. There has been quite a bit of comment about the Northern Ireland and Ireland protocol. It has been suggested that if it became operative there would be a democratic deficit. That point concerns a possible breach of Article 3 of the First Protocol to the ECHR. Do you have a view on the strength of that concern?

Colin Caughey: My commission has not adopted a view on that specific issue. The list of issues that we have been addressing has been quite significant.

We considered the right to vote within the broader discussions on the rights of citizens in Northern Ireland and the impact of Brexit on them. Previously, we produced a number of policy papers with the Irish human rights commission in our role as a joint committee under the Belfast/Good Friday agreement. In there, we added the need for clarity on continuing citizenship rights for those identifying as Irish within Northern Ireland and some consideration of voting in that context.

We have not adopted a view on this specific issue yet, but the proposed arrangements are novel, and a novel solution will need to be adopted to ensure that the rights provided for in Article 3 of the First Protocol are real and meaningful, which is the test applied by the European Court of Human Rights. The rights should not be illusory but meaningful for individuals.

Q22 Lord Judd: Concerns have been expressed about the status of individuals in Northern Ireland who identify as Irish nationals and how their rights will be protected under the withdrawal agreement. As I understand it, the UK Government have begun to negotiate agreements with the Irish Government to formalise some of the arrangements relating to the common travel area; I hope that social security is included in that. Will this be sufficient to resolve these issues?

Colin Caughey: We have carried out some research on the common travel area. It has developed informally over a number of decades. Leaving the EU changes the legal dynamic that underpins the common travel area. We have identified that the formal legal underpinnings relating to the common travel area are scant and have been developed with reference to EU law, and we have advocated that the UK Government and the Irish Government adopt a legally binding treaty in relation to the common travel area setting out the rights and entitlements for individuals in both Ireland and the United Kingdom to address the issues that have come up.

In relation to citizenship rights for those who identify as Irish in Northern Ireland, there is still a need for clarity to be provided by the UK Government and the European Union in relation to what those rights will entail. The 27 December joint EU-UK report indicated that the rights that Irish citizens would enjoy as EU citizens would be quite broad, but on publication of the draft withdrawal agreement it appears that they are more limited than initially anticipated. There is a need for clarity about what those rights will entail.

Lord Judd: Do you feel that this issue, which of course has been an ongoing special arrangement for a long time, is being given sufficient priority or real attention, or is it just on the list?

Colin Caughey: We always call for more attention to rights issues. In the context of Brexit, those issues need more consideration. There is a need for greater consideration of the requirements in the Belfast/Good Friday agreement, the right of individuals to identify as Irish, British or both, and how that is realised in law.

The Chairman: I am one of the few people in this House who has repeatedly raised the common travel area, but I never seem to get very far. I usually get benign, soft words and good will in response, but nothing about firming it up and making it clear. There is just an assumption that it will continue as is and there will be that special relationship between Ireland and the UK, as there has been since 1921. It is hard to know how this will proceed.

Q23 Lord Anderson of Swansea: Last year, this Committee produced a report on dispute resolution and enforcement post Brexit. In that report, we expressed concerns that, if disputes relating to the withdrawal agreement and future relationships were governed by an arbitration process, this would have an adverse impact on individuals and businesses being able to enforce their rights. The report was produced before the draft withdrawal agreement in November 2018. In light of that, do you have any concerns or any additional remarks relating to the withdrawal agreement and the arbitration process?

Clare Collier: This is another area where the Equality and Human Rights Commission has not looked in detail at what that will look like. Primarily, we are likely to be concerned about how it is going to play out in practice. We know that there is potentially some confusion about exactly how a three-layered system will work. The role of the CJEU is the potential saving factor in terms of continuity, but we do not know how that will impact on the decisions of the arbitration panel, nor what the panel will look like. I know that you heard from one of your previous witnesses that it looks quite a lot like a court.

The Chairman: It looks very much like a court to anybody who know what a court is like.

Clare Collier: If it is essentially a court, that allays some concerns.

The Chairman: It is familiar.

Clare Collier: We know more about what it looks like, how it works and so on. As I said, the commission does not have strong views on what that means. Our only concern is for some certainty on how it operates and that it does not impact on individual rights.

Lord Anderson of Swansea: So watch this space.

Clare Collier: I am afraid so.

The Chairman: If you are the Equality and Human Rights Commission, surely the concern must be that the difference is that individuals do not have access to this arbitral system. It is state to state; it does not give access to individual citizens, so they do not have a leg in.

Clare Collier: No, absolutely. They have to go to the domestic remedies that are available to them in the ordinary course of events. They are not able to challenge in that way.

The Chairman: To those listening, there was this great concern that we do not want other courts telling our courts what to do. What has been invented is something else that is not very different from what we have had before, but if you call it by a different name you might be able to persuade the people that they are getting something different. Does it have that appearance to some extent, or am I being sceptical?

Clare Collier: No comment.

The Chairman: The Equality and Human Rights Commission is not going to comment. Are you prepared to comment, Dr Boyle?

Dr Katie Boyle: I am certainly prepared to comment, in respect of my own research into the evidence in this area.

The FM's advisory group did not necessarily look at this at the time as it did not fall within our remit and came some time later. However, we did reflect on the importance of the right to an effective remedy. Article 47 of the EU charter is an example of a right that goes much further than exists under ECHR law.

To reflect on some aspects of that, while it might look and act like a court, some issues might arise. From the perspective of the rights holder, and access to justice, if a violation of a right occurs you have to think not only about the substance of the right itself but about access to a body that can adjudicate on it. You need to think about legal standing and participation in an adjudication process in order to vindicate your rights.

You also need to reflect on the extent to which participation is enabled. If rights holders themselves are excluded, that is problematic. You need to think about the procedural and substantive aspects of the rights that any such body might protect, the deliberative nature of it and the importance of courts—such as UK courts—referring to other courts in the determination of rights and how to give substance to them.

Removing that type of dialogue can be problematic for giving substance to rights. The courts should be able to act in a way that offers an effective remedy to individuals whose rights have been violated. If it does not perform those types of roles, it is problematic for an adjudicative panel to uphold and guarantee rights and perform an important role in determining differences of view between state parties. It does not necessarily fulfil the role of accessing an effective remedy for individuals.

Colin Caughey: The Northern Ireland Human Rights Commission has not adopted a specific view on this issue. Our main comment would be on the importance of ensuring that the rights provided for in the draft withdrawal agreement are

accessible to individuals and that they are able to bring causes of action and obtain remedies.

The Chairman: Are you saying that in the way it is set out at the moment it does not provide that individual access so would be a matter of concern?

Colin Caughey: We would have to take a more detailed look at those specific provisions. Our focus has been on other areas of the draft withdrawal agreement, but I can certainly take it back to our commissioners, seek a view and inform the Committee.

The Chairman: Are there any other matters that the Committee would like to raise with our witnesses? No.

This has been very helpful and useful to us. We are grateful to you for coming over from Northern Ireland, down from Scotland and from north London. I thank all three of you for an illuminating session. It was great to have your expertise before us.