

WRITTEN EVIDENCE SUBMITTED BY DR AUSTEN MORGAN
(NIL0010)

On 18 September 2023, the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 received royal assent. On 1 May 2024, the Independent Commission for Reconciliation and Information Recovery was established in Belfast under the leadership of Sir Declan Morgan, the former lord chief justice.

The commission was subjected to legal challenge in Northern Ireland. On 28 February 2024, Colton J made a series of human rights declarations of incompatibility, and also disapplied sections of the 2023 act under European Union law: In the Matter of an Application by Martina Dillon & Others [2024] NIKB 11. On 20 September 2024, the Northern Ireland Court of Appeal dismissed a comprehensive secretary-of-state appeal: In the Matter of an Application by Martina Dillon & Others [2024] NICA 59.

The secretary of state had changed, following the general election on 4 July 2024, from Christopher Heaton-Harris, a conservative, to Hilary Benn, labour. On 29 July 2024 (after the appeal hearing), the new secretary of state withdrew the human rights appeal (but subsequently continued, in September 2024, with a European Union law appeal to the supreme court).

I submit that the secretary of state failed properly to articulate United Kingdom law on article 2 procedural of the European convention on human rights (allowing some in

Northern Ireland to rely solely upon the Strasbourg court and a current Irish inter-state case against the United Kingdom): Human Rights Act 1998 section 2.

I submit further that, in giving no administrative reasons on and after 29 July 2024 for his decision, the secretary of state acted unlawfully, and indeed unconstitutionally: Human Rights Act 1998 sections 4 & 10 & schedule 2.

Parliament should therefore scrutinize intensively the draft statutory instrument laid on 4 December 2024, which refers to compelling reasons (but does not state them): Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (Remedial) Order 2024.

A compelling reason for appealing the declarations of incompatibility must surely be that the secretary of state is proceeding with the major European Union law appeal to the supreme court.

I say nothing about sections 46 and 47 of the Legacy Act 2023 (reversing the Gerry Adams' supreme court decision¹) and endorse the recent Policy Exchange paper: Richard Ekins & Sir Stephen Laws, *Misjudging Parliament's reversal of the Supreme Court's judgment in R v Adams*, January 2025.

I add only that, if parliament does not now act appropriately, the supreme court might have to do so.

¹ R v Adams (Appellant) (Northern Ireland) [2020] UKSC 19.

Lord Reed, the president, discussed the Adams case twice, when giving evidence to the constitution committee in the house of lords, in March 2021 and April 2022. The issue might return to the supreme court, in the form of another appeal. Alternatively, and *in extremis*, the justices may invoke their practice statement of 1966 at a suitable point and look again at Adams in any case about the Carltona principle in public administration – this would be a rare constitutional eventuality.

The Legacy Act 2023

1. The doctrine of parliamentary sovereignty is key to the United Kingdom's ('UK') uncodified constitution; as A.V. Dicey put it in 1885: 'The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever, and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'²
2. On 18 September 2023, the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 received royal assent. I refer to it hereafter (as do most people) as: the Legacy Act 2023. The act, addressing the legacy of the troubles in Northern Ireland ('NI'), between 1968 and 1998, for the first time in 25 years, provided for an independent commission on reconciliation and information recovery ('ICRIR'). ICRIR went live in Belfast on 1 May 2024. The then secretary of state for NI, Christopher Heaton-Harris, had secured the services of the former lord chief justice, Sir Declan Morgan, as chief commissioner. This was a considerable achievement, and one that should not be

² *Introduction to the Study of the Law of the Constitution*, London 1897, p 38.

jeopardized further than it has by the current government, where Hilary Benn occupies the position of secretary of state for NI.

3. The labour party was quick to criticize the Legacy Act 2023 during its passage, as the official opposition, but it has yet to properly deconstruct its criticisms now that it has administrative responsibility. I ask the following questions, but do not answer them here. Who corrupted justice in NI, and to what extent? Are we hearing all the victims: the 60 per cent killed by the IRA; the thirty per cent killed by loyalists; as well as the ten per cent killed by the security forces (only a minority of whom may have been killed unlawfully³)? Does the five-party coalition in NI, which failed to do anything regarding legislation in the NI assembly in 2014-20, agree regarding legacy or are the political parties simply being separately clientelist? UK governments pursued amnesty policies from 1997⁴, openly and less transparently⁵, in order to turn terrorists into politicians, and no party has sought coherently to return us legislatively to an unlimited historical rule of criminal law, with aged and ill republican and loyalist terrorists in the dock alongside a much smaller number of soldiers and police officers. It would be a long list of reforms. On the contrary, history is being rewritten by the selective prosecution of veterans, the project of the legacy practitioners in NI – now being aided and abetted by the labour government, though not to the extent that the former demand. This is the legal mischief the previous conservative government sought to address.⁶ If the terrorists were to be indulged in various ways, some reasonably asked, why should the security forces not be similarly reassured in their senior years?

³ *Da Silva v United Kingdom* 2016) 63 EHRR 12 (the Jean Charles de Menezes killing by the metropolitan police service in July 2005 of a totally innocent person, held by Strasbourg to be lawful).

⁴ Northern Ireland Arms Decommissioning Act 1997 (royal assent 27 February 1997), section 4 (amnesty).

⁵ Austen Morgan, *Tony Blair and the IRA: the 'on the runs' scandal*, London 2016.

⁶ With the Overseas Operations (Service Personnel and Veterans) Act 2021 and the Legacy Act 2023, the latter dealing only with operation banner, 1969-2007.

4. The Legacy Act 2023 quickly came under legal challenge in NI, even before it came into force. On 28 February 2024, Colton J, in the high court in Belfast, handed down a lengthy 738-paragraph judgment: *In the Matter of an Application by Martina Dillon* [2024] NIKB 11. This is sometimes referred to as the Dillon case (after the first applicant), but I will refer to it, as many do, as the Legacy Act 2023 case. Colton J, in deciding all the applications before him, availed of two legal remedies: first, declarations of incompatibility, under the Human Rights Act ('HRA') 1998; and second, disapplication – essentially striking down – of selected sections under European Union ('EU') law three years after Brexit. The then secretary of state, Christopher Heaton-Harris, appealed Colton J on both remedies. The appeal was heard in June 2024, before the general election. On 29 July 2024, the new secretary of state, Hilary Benn, wrote directly to the court, withdrawing the human rights appeal after it had been argued (and before it was handed down). On 20 September 2024, Dame Siobhan Keegan LCJ, giving the judgment of the court⁷, dismissed the secretary of state's appeal (accepting his human rights concession as correct in her opinion) in 313 paragraphs: *In the Matter of an Application by Martina Dillon* [2024] NICA 89. The declarations of incompatibility were tweaked. And the disapplication of sections was similarly treated.
5. Prof Dicey (who died in 1922 at an advanced age) would not have grasped how the HRA 1998 could have affected the Legacy Act 2023, a later statute. But then, he never got to read the HRA 1998. He would have been appalled at the disapplication of legislation, and perplexed at how the UK – which he called England – could ever have

⁷ The other members being: Horner LJ; and Scoffield J.

federated in a European union of continental states, only to exit after 47 years because of the 2016 referendum (a device of which he came to approve in the 1910s).

6. I submit that the NI judges, in undermining the ICJIR legally to the extent they have done, have erred: first, they have not properly applied section 2 of the HRA 1998 (interpretation of convention rights); second, they – but mainly the secretary of state – have mishandled declarations of incompatibility, under sections 4 and 10 (and schedule 2) of the same act; and third, in disapplying sections of the Legacy Act 2023, they have misconstrued EU law in the UK three years after Brexit. This submission, as befits the joint committee on human rights, will deal only with the first two errors. I have made a separate submission to the Northern Ireland affairs committee on the existing supreme court appeal (where permission has yet to be granted), dated 8 January 2025.

Human Rights Act 1998 section 2

7. There is an assumption on the part of some people that all courts are equally important, and even that foreign courts – the European court of human rights ('ECtHR') at Strasbourg, the court of justice of the EU (in Luxembourg); the international criminal court in The Hague, and the international court of justice, also in The Hague – are wiser and more just than UK courts. This is a serious misconception, popular with academic lawyers who specialize in international law. The mere existence of such courts, of course, combined with lazy journalism actively reporting international cases with little legal acumen, does serve to obscure what is the law of the UK. For good or ill, these are our courts and our judges.

8. The UK is a dualist state. There is domestic law, in here. And there is international law, out there. Section 2 of the HRA 1998 (interpretation of convention rights) reads in part: '(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any – (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,...whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which the question has arisen.' The HRA 1998 provided from the first – that is 2 October 2000 – that domestic courts should 'take into account' Strasbourg cases and to exercise 'the opinion of the court or tribunal', clear statutory language which, when properly interpreted, means that, here, Strasbourg case law is not binding, and certainly not as domestic cases are. Section 2 is domestic law. Strasbourg cases are part of international law, most concerning other states and only a tiny minority involving the UK. And the section explains precisely how they are to be used, namely with considerable judicial discretion.
9. So much was stated by the legislative sponsor of the HRA 1998, the then lord chancellor Lord Irvine of Lairg, in a lecture to a London university on 14 December 2011: 'This Lecture invite[s] our Supreme Court to re-assess all its previous statements about the stance it should adopt in relation to the jurisprudence of the EC[t]HR. My objectives are: (a) to ensure that the Supreme Court develops the jurisdiction under the HRA that Parliament intended; (b) that, in so doing, it should have considered and respectful regard for decisions of the EC[t]HR, but neither be bound nor hamstrung by that case-law in determining Convention rights domestically; that, ultimately, it should decide the cases before it for itself; (d) that if, in so doing, it departs from a decision or body of jurisprudence of the EC[t]HR it should do so on the basis that the resolution of the

resultant conflict must take effect at State, not judicial, level; and (e) by so proceeding, enhance public respect for our British HRA and the development and protection of human rights by our own courts in Britain [sic].⁸

The Northern Ireland Troubles

10. I refer to a legal essay I published in 2023: *The Northern Ireland Troubles: Strasbourg's article 2 in legacy cases*, London, 30 pp. The following two subsections are based upon that publication, available from Amazon.

European Court of Human Rights

11. There is a series of nine NI cases at Strasbourg, where the UK lost. It is referred to as the McKerr line of cases. Four, including McKerr, were decided on 4 May 2001. The remainder followed, in various years up to 2013. I strongly suspect that Strasbourg has not facilitated repeat NI cases, even though damages were awardable to each successful applicant.
12. The McKerr line of cases established the existence of article 2 procedural, not the substantive article 2 on the right to life, but the duty to investigate deaths – whether of all the 3,750 persons who died or just the 375 state killings was not clear in 2001, and has been further obscured since then. It is not likely that Strasbourg was informed that NI had only one police force, so, when the court decided that the absence of independent

⁸ I here provide a link to an updated Thomson Reuters article on section 2 dated 8 July 2024, which quotes Lord Irvine: <https://austenmorgan.com/wp-content/uploads/2024/08/Interpretation-of-Convention-rights-Human-Rights-Act-1998-s2-19.07.2024.pdf>.

investigators amounted to a violation of human rights, all killings in NI by police officers were potentially deemed to be improper.

13. This line of UK Strasbourg cases is characterized by: one, no findings of fact regarding allegations (a function performed by the former European commission on human rights); two, the creation of a retrospective obligation on member states, formally requiring the reopening of investigations regardless of when they were first conducted; three, the emergence of a new class of applicants, namely relatives of a dead person impliedly treated as victims regardless of the late family member; four, the failure to ascribe culpability to non-state actors, the loyalist killings being treated as analogous to state killings on the basis of no substantive evidence; five, liberal optimism about investigations – revealing the truth – leading to reconciliation (as opposed to the delegitimizing of the sovereignty of the respondent state); and six, the institutionalization of damages awards for inadequate investigations, regardless of the circumstances (and contrary to the McCann case in 1995⁹, where terrorism was not to be rewarded even though the three victims in Gibraltar were unarmed on the day they were killed.)
14. Article 2 procedural has expanded on the basis of this NI conception from 2001. It may be affirmed by referring to cases from other countries. Given the differences in justice systems among the 46 member states of the council of Europe, there is a great deal other respondent states have been required to do to satisfy this right.
15. This, strangely, is where many in NI start and end. It is as if they only want to know what foreign judges think. And it is where the Irish government started and finished,

⁹ (1995) 21 EHRR 97.

when it brought the inter-state case against the UK on the Legacy Act 2023 on 17 January 2024.

16. None of this, of course, is consistent with the HRA 1998 section 2. A domestic court has a duty to exercise judicial discretion. It is not there to be flooded by Strasbourg jurisprudence.

Domestic United Kingdom Law

17. Turning to domestic law, some of the same applicants in Strasbourg appeared in the house of lords/supreme court. Thus, there is a domestic line of McKerr cases, based upon the same suspected IRA member, from March 2004.¹⁰
18. McKerr domestically is authority for the following proposition: in the UK, one accesses human rights from Strasbourg through the HRA 1998, and from 2 October 2000. Thus, article 2 procedural has no application to NI troubles cases, between 1968-98. That simple idea was articulated by the house of lords in 2004.
19. It is true that the domestic line of cases was overshadowed by the Strasbourg line of cases. However, at no point did the Strasbourg jurisprudence capture domestic law. There is one qualification to this submission, namely the idea of a ten-year push back from 2 October 2000, derived from a Polish case (Janowiec) from 2014 about the 1940 Katyn forest massacre.¹¹

¹⁰ McKerr's Application for Judicial Review, Re [2004] UKHL 12. The cases include: McCaughey's Application for Judicial Review, Re [2011] UKSC 20; R (on the Application of Keyu) v SoS for Foreign & Commonwealth Affairs [2015] UKSC 69; Finucane's Application for Judicial Review, Re [2019] UKSC 7.

¹¹ Janowiec v Russia (2014) 58 EHRR 30.

20. UK law on article 2 is now relatively settled because of three supreme court cases, of which the first and third came from NI: McQuillan [2021] UKSC 55; R (Maguire) [2023] UKSC 20; and In re Dalton [2023] UKSC 36. R (Maguire) is significant because, though it was an English medical negligence case, Lord Sales held: ‘The graduated way in which the procedural obligation applies reflects the fact that the obligation, like the substantive positive obligation under Article 2, is an implied positive duty which is not to be taken to impose an unreasonable or disproportionate burden upon the state.’¹²
21. The principle isolated by the supreme court in McQuillan was retrospectivity: ‘The general presumption is that a statute [including the HRA 1998] which creates rights and obligations does not have retrospective effect. This reflects values of fairness, legal certainty and the rule of law. It is desirable that people, including public officials and public authorities, should be able to determine their legal rights and obligations at the time of acting or omitting to act. It is generally unfair to treat people as subject to obligations of which they were not on notice at the time.’¹³
22. I need to qualify this view. The Strasbourg ten-year rule crept into McQuillan, and, through another earlier case (with sole judgment by Lord Kerr)¹⁴, led to a battle in Dalton in 2022-23, where Lord Hodge, Lord Sales and Lady Rose argued for a bright-line ten-year rule, but the majority of four let ten drift towards twelve, in order to embrace the killing of Patrick Finucane on 12 February 1989.

¹² Para 12.

¹³ Para 151.

¹⁴ Finucane [2019] UKSC 7.

23. I have maintained that the ten-year rule should have no place in domestic law, because of not least the HRA 1998 section 2, and the supreme court's emphasis upon retrospective legislation as contrary to the rule of law. I maintain that position. The supreme court needs to consider again.

The Legacy Act 2023 Case

24. I am concerned only, as noted above, with the declarations of incompatibility, and therefore with the human rights identified by the NI judges, and the sources of those rights: whether Strasbourg or the HRA 1998.

Colton J in the High Court

25. Colton J cited McKerr (above) ten times in his first-instance judgment. Nine of those were referencing the Strasbourg case. There is one reference to the house of lords' decision in 2004.
26. But that is contained in a quotation from Baroness Hale in another case: 'The Human Rights Act 1998 gives effect to the Convention rights in our domestic law. To that extent they are domestic rights for which domestic remedies are prescribed: *In Re McKerr* [2004] 1 WLR 807.'¹⁵ That is to miss the point about dualism, meaning Colton J never even considered the domestic jurisprudence on the McKerr line of cases footnoted above.

¹⁵ Para 58.

27. He cited McQuillan 16 times. He did so, simply to quote the extensive Strasbourg jurisprudence on the elements of a thorough investigation. At no point did he mention the limiting of the temporal scope of the HRA 1998, much less the principle of retrospectivity.
28. There is no reference to R(Maguire), despite that having been handed down, by effectively Sales JSC, a leading public lawyer, on 21 June 2023 – a matter of months before Colton J heard the Legacy Act 2023 case.
29. As for Dalton (decided on 18 October 2023), this was cited eleven times. Here, while Colton J got the point about a twelve-year rule from Strasbourg, he again failed to distinguish the domestic line of cases about no access to human rights remedies before 2 October 2000. Instead, he referred to the twelve-year rule being overridden by Strasbourg, when the convention values test applies – which it rarely if ever does.¹⁶ Even here, the judge missed the principle about retrospectivity.

Keegan LCJ in the Court of Appeal

30. In the court of appeal, Dame Siobhan Keegan LCJ referred to McKerr five times. Each was a reference to Strasbourg jurisprudence. There was no recognition of the UK McKerr line of cases.
31. McQuillan was cited three times, but only for the content of the Strasbourg obligation.

¹⁶ Para 723.

32. R (Maguire) was not cited, despite Sales JSC's attempt to reintegrate article 2 procedural with the original substantive right.
33. As for Dalton, where the lady chief justice had played an important role on the supreme court, she did state: 'we point out that in *The Matter of an Application by Rosaleen Dalton* [2023] UKSC 36 the Supreme Court also endorsed a temporal limit of 10/12 years on the obligation to conduct article 2 compliant inquests, relative to the coming into force of the Human Rights Act 1998'.¹⁷ Strangely, this was in a context of a discussion of the short lifetime of a statutory legacy body (five years being instanced), not whether the NI troubles are wholly or partially off limits with reference to the HRA 1998 being brought into force

Human Rights Act 1998 sections 4 and 10 and schedule 2

34. Parliamentary sovereignty means that the HRA 1998, from being brought into force on 2 October 2000, could not be used to circumscribe a future parliament: parliament had to be permitted to legislate against human rights, if it wished, otherwise its sovereignty would have been limited by the 1998 statute. Thus, section 19 (statements of compatibility), where a minister has to make a statement, before second reading, that a bill is either compatible with convention rights or, where he is unable to so do, 'the government nevertheless wishes the House to proceed with the Bill.' That was an important constitutional principle to uphold.

¹⁷ Para 182.

35. The question then arose about how the courts would deal with such legislation. Section 4 (declaration of incompatibility) begins: ‘(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right. (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.’ The word is may. And subsection (6) is key to such a declaration, if made: ‘A declaration under this section... - (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.’ There is no judicial remedy, of value to either party. Instead, a section 4 declaration of incompatibility is a judicial message to parliament, which may have decided to legislate within, or without, convention rights, to, at best, look at a matter again.
36. The consequence of the message is picked up in section 10 (power to take remedial action). Subsection (1) contains two conditions precedent: first, there will be no further appeal; and second, ‘it appears to a Minister of the Crown...that, having regard to the finding of the European Court of Human Rights...in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.’ Subsection (2) then refers to ministerial discretion (not duty): ‘If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may be order make such amendments to the legislation as he considers necessary to remove the incompatibility.’ These would be Henry VIII clauses, even where parliament had expressly decided to legislate incompatibly.

37. The procedure for a remedial order is laid out in schedule 2: a draft remedial order, approved by resolution of each house, after lying for 60 days; ‘a document which contains a draft of the proposed order and the required information’; if representations are made during the 60 days, the draft must be accompanied by ‘a summary of the representations’; representations is defined as ‘includ[ing] ‘any relevant Parliamentary report or resolution’; and ‘required information’ is defined, in part, as ‘an explanation of the incompatibility which the order...seeks to remove’.
38. I submit that secretary Benn, looking at his actions regarding the Legacy Act 2023 from his appointment, fettered his ministerial discretion, contrary to the intention of the drafter of the HRA 1998 sections 4 & 10 and schedule 2.
39. He did not consider that Brandon Lewis’s section 19 statement had been one of compatibility.¹⁸ He did not grasp the difference between Strasbourg jurisprudence on article 2 procedural and that of the UK. He did not grasp the role of an appeal in section 10(1)(a), whereby he did not have to respond to a declaration of incompatibility if an appeal was still possible. Nor did he consider section 10(1)(b), and how a domestic court could decide whether ‘a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.’ Would it follow Strasbourg or domestic jurisprudence? Section 2 requires the latter. Section 10 specifies the discretion as ‘compelling reasons’, and this still being articulated as may and not must. No compelling reasons have ever been given. In fact, secretary Benn seems to have been moved simply by Colton J, as the first-instance NI judge, saying that sections of the Legacy Act 2023 were incompatible with human rights. I submit that a judicial

¹⁸ Northern Ireland Troubles (Legacy and Reconciliation) Bill, Bill 10.

statement on its own does not amount to even a first compelling reason, much less meets the statutory ‘compelling reasons’ test. During the committee stage in the house of lords, on 27 November 1997, the lord chancellor, Lord Irvine of Lairg, said: ‘we think that it is preferable, in order to underpin Parliamentary sovereignty, to leave this on a discretionary basis. The decision whether to seek a remedial order is a matter for government to decide on a case-by-case basis. It would be wrong for a declaration automatically to lead to a remedial order’.¹⁹ During the committee stage in the house of commons, on 24 June 1998, the home secretary, Jack Straw, said that: the terms ‘compelling’ and ‘necessary’ set ‘a very high test’.²⁰

40. The 2024 labour party manifesto stated, after the judgment of Colton J had been handed down: ‘The Legacy Act [2023] denies justice to the families and victims of the Troubles. Labour will repeal and replace it, by returning to the principles of the Stormont House Agreement, and seeking support from all communities in Northern Ireland.’ This was, at best, a promise to return to the debates before the conservatives, in March 2020, had decided to legislate for a second time in support of veterans. That period of non-decision making had run from April 1998. The labour government has opened floodgates it is unlikely to be able to close. On the one hand, it is attempting to keep the ICRIR in play. On the other, it has toyed ideologically with the Stormont House agreement, which offers a different regime where the troubles would be rewritten finally as (legitimate?) resistance to UK state abuses, with loyalists as semi-state actors.

41. Following appointment, secretary Benn stated:

¹⁹ HL, *Hansard*, vol. 583, col. 1139, 27 November 1997.

²⁰ HC, *Hansard*, vol. 314, col. 1138, 24 June 1998.

- in his written ministerial statement of 29 July 2024, that the government had formally abandoned its human rights appeal: ‘The action taken today to abandon the grounds of appeal against the section 4 Human Rights Act declarations of incompatibility demonstrate that this Government will take a different approach. It underlines the Government’s absolute commitment to the Human Rights Act, and to establishing legacy mechanisms that are capable of commanding the confidence of communities and of victims and survivors.’²¹;
- in his oral statement to parliament on 4 December 2024, having updated the court of appeal on a second appeal to the supreme court on the EU law point, where he stated: ‘aspects of the Legacy Act [2023] have now been found by the Courts to be incompatible with our obligations under the European Convention on Human Rights. This must be remedied and the Government is committed to repeal and replace the legislation, as set out in our manifesto....The [remedial] Order will remedy all the human rights deficiencies in the Act identified by the Northern Ireland High Court in February [2024] in the case of Dillon and Others and one issue from the Court of Appeal judgment in September [2024].’

²¹ HC, *Hansard*, vol. 752, cols. 51WS-54WS, 29 July 2024.

Legal Advice?

42. Did the secretary of state seek legal advice, before he committed the Northern Ireland Office, and indeed the government, to this course? The Northern Ireland Office is not believed to have retained its own lawyers. On 17 January 2025, the *Telegraph* – quoting number 10 – indicated that Hilary Benn had decided this strategy, on his own. That seems unlikely, knowing something of how government works.
43. The reason for number 10 spinning may be related to Lord Hermer KC, the attorney general. Before Sir Keir Starmer brought him into his government, he had acted in an English case for Gerry Adams, being paid reportedly £30,000.²² Giving evidence to the justice committee in the house of commons, on 15 January 2025, and hiding behind the law officers' convention, Lord Hermer refused to say whether he had advised on the abandoning of the human rights appeal on 29 July 2025. Pursued by a conservative MP, the attorney general was at pains to play down his former client.²³ He invoked yet again the rule of law. The last word came from number 10: 'There is an established and rigorous system in place within the Attorney General's office to ensure that law officers will not be consulted on any cases that could give rise to a potential conflict of interest.'²⁴ Nobody mentioned the solicitors general, Sarah Sackman KC and, from 2 December 2024, Lucy Rigby. Somebody gave advice to Hilary Benn, in what became government policy.

²² *The Times*, 17 January 2025.

²³ Oral evidence, work of the law officers, HC 577, 15 January 2025.

²⁴ *Telegraph*, 17 January 2025.

The Draft Remedial Order

44. On 4 December 2024, Hilary Benn laid the following document before parliament: **A proposal for a remedial order to amend the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023.**
45. Schedule 2 of the HRA 1998 specified that the minister had to include ‘the required information’, meaning ‘an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order’.²⁵
46. Pages 4 to 7 of the document of 4 December 2024 is a background to the proposed remedial order. This states that the purpose is to implement the Colton J’s judgment of February 2024. Query whether parliament is not required to only consider the court of appeal decision of September 2024? This later decision is mentioned, but only as the source of a further incompatibility.
47. The background goes on to deal with each declaration of incompatibility. But, in keeping with the secretary of state’s position from 29 July 2024, there is no explanation of any incompatibility. The judgment of Colton J, alone, is cited, and treated as sacrosanct, even though the previous government did appeal the human rights remedy and the EU law point together.

²⁵ Paras 3(1) & 5.

48. The government has failed to say anything about legacy, and about the way endless concessions to mainly republican terrorists have coexisted with state forces attempting to prosecute soldiers and police for atrocities. Strasbourg has remained silent on the topic. And, as for domestic judges, Colton J was not troubled by the impossibility of historical justice, for important reasons – not least the passage of time from when many of the killings took place in the 1970s.
49. It is one thing to say what Strasbourg decided, mainly in 2001. It is another, and the NI judges did refer to this, what the committee of ministers said about UK policy and practice when enforcing court decisions. There was not the dogmatism, and the inflated concept of article 2 procedural, which may be heard from some in NI. The committee of ministers at Strasbourg had even endorsed the historical enquires team within the police, which was the only moment in the history of relatives and survivors benefiting from information recovery.

The 1966 Practice Statement

The View of Lord Reed

50. I do not discuss *R v Adams (Appellant) (Northern Ireland)* [2020] UKSC 19, where Lord Kerr gave the sole judgment of the supreme court, save to refer to what happened subsequently. The date of the decision was 13 May 2020. The case was reported as permitting Gerry Adams, and other republicans who had been detained in the early 1970s on the signature of a junior minister which was not the decision of the secretary of state, as being open to applying in the NI courts for damages for false imprisonment. This duly ensued.

51. On 17 March 2021, the president and deputy president gave their annual evidence to the house of lords' constitution committee. Lord Howell of Guildford, who might have signed Adams' interim custody order in 1973 (on behalf of the secretary of state), raised the supreme court decision with Lord Reed. The latter responded: 'I cannot say much about the particular case because I did not sit on it myself. Lord Kerr wrote the judgment. The Lord Chief Justice and some other justices were sitting with him. I am aware that it is a controversial judgment. I would not want to commit myself to a view about it.' The discussion continued, Lord Reed saying later: 'It sounds like a wayward judgment, in which case it will be put right in another case.'²⁶
52. The following year, on 6 April 2022, Lord Howell of Guildford again raised the Adams' case. Lord Reed said pretty much the same as at the previous evidence session: 'As you say, the court was presided over by Lord Kerr. It included the Lord Chief Justice of England and Wales. The decision it came to was an unanimous decision. I did not take part in it myself. I understand that it is a controversial decision, legally as well as perhaps politically. It is always open for any party, including in this case the Government, who wants to test the correctness of a case to raise the point again. The Carltona principle is one that obviously pervades government and sooner or later there will be another case in which somebody relies on the Adams decision and there will be scope then, if anybody wishes to challenge the correctness of Adams, for us to reconsider it.'²⁷

²⁶ HL, constitution committee, corrected oral evidence, 17 March 2021, pp 12-13.

²⁷ HL, constitution committee, corrected oral evidence, 6 April 2022, pp 11-12.

53. Parliament, of course, spared the supreme court, when it enacted sections 46 and 47 of the Legacy Act 2023. The law was corrected: the Carltona principle was restored.
54. But Colton J, relying upon article 6 (right to a fair trial) and protocol 1/article 1 (protection of property) thought that Gerry Adams – and hundreds of others – should have continued to avail of Lord Kerr’s May 2020 decision in the supreme court. He made a declaration of incompatibility. And the court of appeal maintained this position, seemingly surprised that the supreme court could be corrected by parliament, when every law student knows that the *Burmah Oil Company v Lord Advocate* [1965] AC 75 case was reversed by the Wilson government with the War Damages Act 1965, which was most certainly retrospective legislation. It restored the common law, pre the *Burmah Oil* decision, now as statute law.
55. The joint committee on human rights, clearly wishes to consider a schedule 2 report comprising ‘representations’, from those supporting and opposing the draft remedial order. If this Colton J declaration of incompatibility on sections 46 and 47 is maintained, by the government including it in the final remedial order, then, the supreme court might feel pressured to revisit the Carltona principle in another appeal. Either way, the executive and judiciary would be divided on the question of human rights.

Lord Gardiner the Lord Chancellor

56. There is another option, hitherto not articulated. On 26 July 1966, the law lords were due to deliver their judgments in the upper house. Lord Gardiner, the labour lord chancellor, began by making a statement on the use of precedent in the common law.

Precedent was affirmed. But the lord chancellor went on: ‘Their lordships nevertheless recognise that too rigid adherence to precedent, may lead to injustice in a particular case and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.’²⁸

57. Practice statement 1966 has remained in place, and, in 2009, it was taken over by the supreme court. It has played an important role in maintaining the common law as a system of justice, more especially in public-law rather than private-law cases.

Submission

58. The government is unlikely to backtrack on sections 46 and 47 of the Legacy Act 2023, because that would undermine the decision of 29 July 2024 to abandon the human rights appeal. *R v Adams (Appellant) (Northern Ireland)* [2020] UKSC 19 will, therefore, be restored as a common law authority. Maybe another appeal will make its way towards the supreme court, allowing the justices to rely upon practice statement 1966 in order to restore the *Carltona* principle to its universally accepted place in our system of public law.
59. On 15 January 2025, the leader of the opposition, responding to the Policy Exchange paper release overnight, raised the spectre, in prime minister’s questions, of Gerry Adams getting his compensation. The prime minister’s answer was: ‘That Act [the Legacy Act 2023] was unfit, not least because it gave immunity to hundreds of terrorists and was not supported by victims in Northern Ireland – nor, I believe, by any of the

²⁸ HL, *Hansard*, vol. 276, col. 677, 26 July 1966. See also: [1966] 1 WLR 1234.

political parties in Northern Ireland. The Court found it unlawful. We will put in place – *[Interruption.]* This is a serious point. We will put in place a better framework. We are working on a draft remedial order and replacement legislation, and we will look at every conceivable way to prevent these types of cases from claiming damages – it is important that I say that on the record.’²⁹

60. The prime has yet to say, regarding a problem of his own government’s creation, what he will do to achieve a public policy objective achieved already by the previous government on 18 September 2023.

(Jan 2025)

²⁹ HC, *Hansard*, vol. 760, col. 324, 15 January 2025.