

Northern Ireland Human Rights Commission — Written evidence (RAB0009)

Introduction

The Northern Ireland Human Rights Commission (the Commission) is a statutory public body established in 1999 to promote and protect human rights. The Commission is one of the three ‘A status’ National Human Rights Institutions in the United Kingdom. Pursuant to Section 69(1) of the Northern Ireland Act 1998, the Commission reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with this function the following statutory advice is submitted to the House of Lords EU Justice Sub-Committee inquiry into ‘Rights after Brexit’.

The Commission has been considering the potential human rights risks arising from Brexit and ways to mitigate those risks. The UK Government committed to ensuring ‘no diminution of rights’ as a result of Brexit, in the Joint Report of December 2017. This was later articulated in the Draft Withdrawal Agreement as “The United Kingdom shall ensure that no diminution of rights, safeguards and equality of opportunity as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union...”.

In our work with the Irish Human Rights and Equality Commission as the ‘Joint Committee’ we produced a policy statement on Brexit¹ highlighting the central importance of equality and human rights in Northern Ireland. We raised concerns that continuing EU rights for Northern Ireland’s Irish citizens after Brexit could create nine or more categories of rights-holder and place British citizens of Northern Ireland at a disadvantage; we therefore called for continuing rights to be extended to all “the people of Northern Ireland” at least.

This submission supplements oral evidence given to the Committee on 26 March 2019.

Supplementary evidence

Q12 - supplementary question re: EU Charter

A majority of substantive rights set out in the EU Charter would continue to have some measure of protection under domestic law after Brexit through common law and other statutory mechanisms. Nonetheless, the loss of the EU Charter in its current form would lead to a loss of legal certainty and consistency as legal cases would have to argue whether the EU Charter applies as well as how it applies. In addition, the EU Charter is an accessible document and wider understanding would be hampered through the failure to incorporate it within the Draft Withdrawal Agreement.

Retention of the EU Charter would also provide a degree of continuing equivalence of rights across the island of Ireland in line with the spirit of the 1998 Agreement. Moreover, the Convention-plus approach of the EU Charter, albeit covering EU law only, is the nearest thing we have to the similar “rights supplementary to the ECHR to reflect the particular

¹ Accessible here: : <http://www.nihrc.org/publication/detail/joint-committee-statement-on-the-uk-withdrawal-from-the-european-union>

circumstances of Northern Ireland, drawing as appropriate on international instruments and experience” envisaged for a Bill of Rights in Northern Ireland.

For all these reasons, the Commission continues to hold that the EU Charter should be retained for Northern Ireland at least until a Bill of Rights for Northern Ireland is introduced.

Notwithstanding the Commission’s concerns about the failure to retain the EU Charter in domestic UK law, we note it has been argued that provisions within the Draft Withdrawal Agreement mean that the Charter would continue to apply in various ways². Article 2 of the DWA defines “Union law”, for example, as including the treaties, the EU Charter and general principles and Article 4 states that where EU law is made applicable in the agreement, it must be interpreted and applied in conformity with the methods and principles of EU law. Nonetheless, such an approach leaves the applicability of the EU Charter to be determined on a case by case basis rather than it being available to the general public as an accessible legal tool.

Q14 Change of language regarding UK commitment to ECHR

In its white paper on the Future Relationship³, the UK Government stated that it wished to maintain and enhance existing co-operation on security and justice, in the context of remaining a signatory to the ECHR. For the UK to leave the Council of Europe and withdraw its commitment to the ECHR would diminish potential for mutual cooperation with the EU and other members of the Council of Europe on these matters.

The importance of this commitment was acknowledged in Mr Barnier’s statement of 26 July, commenting on the Government’s White paper, describing the UK’s commitment to the ECHR as “an important safeguard” which would “enlarge the possibilities of what we can do together”, referring to criminal justice co-operation and swift extradition arrangements (short of participation in the European Arrest Warrant). These commitments and comments form the backdrop to the Political Declaration.

Another reason militating against the UK withdrawing from the Convention, is its international commitment under the Belfast (Good Friday) Agreement 1998, to incorporate the ECHR into NI law. This included a commitment to direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.

Further to the discussion on the change of language in paragraph 7 of the Political Declaration, we note that whereas that paragraph refers to the UK respecting the ‘framework’ of the ECHR, paragraph 83 recognises that cooperation “**should be underpinned by long-standing commitments to the fundamental rights of individuals,**

² See Christopher McCrudden – Brexit, Rights and the Ireland-Northern Ireland Protocol to the Withdrawal Agreement, British Academy and Royal Irish Academy, December 2018, available here: <https://www.thebritishacademy.ac.uk/publications/europe-futures-brexit-rights-ireland-northern-ireland-protocol-withdrawal-agreement>

³ Published 12 July 2018, available here: <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

including continued adherence and giving effect to the ECHR and adequate protection of personal data”.

Q16 – Leadership on human rights

Reference was made to the potential for Scottish legislation to be struck down if incompatible with Convention rights. The Committee may wish to note that the Northern Ireland Act 1998⁴ provides similar provisions in respect of legislative competence in this jurisdiction.

Q17 – Supremacy of EU law and absence of Equality Act in NI

To expand on the discussion on removal of supremacy of EU law: the immediate impact of the loss of supremacy will be a reduction in the level of standing of equality and human rights protections. The out-workings of this may not be immediate but could play out on a long term basis. In short, the UK will be free to legislate in such a way as to reduce rights and protections.

Secondly, many EU-derived rights protections are transposed via subordinate legislation, e.g. The Working Time Regulations. Such Regulations are therefore subject to limited scrutiny should a Minister decide to revoke or amend them. Any such legislation is therefore more vulnerable than, for example, the Human Rights Act.

Whilst the UK has committed to no regression in labour standards, some of the arguments for leaving the EU involved removing EU ‘red tape’ which creates understandable anxiety about a future diminution in protections.

Being part of a wider international conversation and policy-making on rights has been important in Northern Ireland. The supremacy of EU law and the body of equality and anti-discrimination law engendered a degree of confidence that a floor of minimum standards had been established in a wider context. This confidence, arguably, facilitated political negotiations and the establishment of devolved institutions.

During devolution, however, Parliament had to intervene to ensure EU obligations were met. In April 2008, even though equality policy was devolved, the Northern Ireland Executive’s First Minister and Deputy First Minister could not agree the transposing legislation so the Gender Directive 2004/113/EC1 was implemented by Parliament for the whole of the UK via The Sex Discrimination (Amendment of Legislation) Regulations 2008.

Rights issues remain to the fore in ongoing political disagreements. These include equal marriage, abortion rights, language rights and (historic) issues relating to victims.

While there may not be a majority in a restored NI Assembly, to reverse key rights commitments, neither can we be confident, based on experience, that the devolved institutions would routinely progress core rights in line with GB or international best practice.

⁴ See sections 6 and 24.

Q19 – Draft Withdrawal Agreement potential to mitigate weakening of human rights standards

The Ireland/Northern Ireland protocol contains a number of important commitments on rights including:

- The UK government’s commitment to ensuring no diminution of the rights contained within the Rights, Safeguards and Equality of Opportunity section of the Belfast (Good Friday) Agreement as a result of leaving the EU⁵.
- That a number of specific EU directives will continue to have effect in Northern Ireland covering equal treatment in the access and supply of goods and services, in employment, self-employment and social security alongside equal treatment between persons of racial or ethnic origin⁶. Article 15(4) of the Protocol states that references to EU law under the Protocol will be to that law as amended or replaced, ensuring we keep pace with future EU law protection in these areas.
- Putting in place institutional arrangements to oversee the protocol (e.g. a specialised committee and a dedicated mechanism comprised of the Commission, Equality Commission NI - and the joint committee of the Commission and Irish Human Rights and Equality Commission). These arrangements, in turn, fit into the architecture of oversight, monitoring, dispute resolution and enforcement mechanisms contained within the Withdrawal Agreement as a whole.
- Article 4 also sets out the UK commitment to ‘facilitate the related work’ of bodies including the Commission, the Joint Committee of the Commission and Irish Human Rights and Equality Commission, and the Equality Commission NI.

Issues remain, nonetheless. The Commission’s case for retention of the EU Charter of Fundamental Rights and recognition of an equivalency of rights contained in the Belfast (Good Friday) Agreement was not reflected in the Draft Withdrawal Agreement.

Another issue is determining the actual scope and extent of the protections provided by the non-diminution commitment within the Rights, Safeguards and Equality of Opportunities section of the Belfast (Good Friday) Agreement. The section of the Agreement was not drafted with EU law in mind. It contains a number of specific commitments to rights but also embraces broader aims, for example, social inclusion, the advancement of women in public life, respect, understanding and tolerance in relation to linguistic diversity and victims’ rights to remember and contribute to a changed society. How these concepts will be translated and interpreted with reference to EU law remains to be seen. The Commission and ECNI have argued strongly that explicit reference should be made as a

⁵ See Annex 1 for full text of Protocol Article 4.

⁶ Directive 2004/114/EC 2004 – the principle of equal treatment between men and women in access to and supply of goods and services.

Directive 2006/54/EC – the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Directive 2000/43/EC – the principle of equal treatment between persons irrespective of racial and ethnic origin.

Directive 2000/78/EC – a general framework for equal treatment in employment and occupation.

Directive 2010/41/EU – the principle of equal treatment between men and women engaged in self-employment.

Directive 79/7/EEC – the principle of equal treatment for men and women in social security.

minimum to EU directives on parental leave, pregnant workers and rights of victims being covered by the non-diminution commitment.

In November 2018, the Commission agreed in principle to form part of the dedicated mechanism, provided for by Article 4 of the Protocol⁷, which will involve the exercise of new powers to monitor, supervise, advise, report and enforce the non-diminution commitment⁸. The value of a dedicated mechanism envisaged under Article 4 of the Ireland/Northern Ireland protocol will, in large measure, be determined by the statutory powers and resources provided to the Commissions.

Alongside this, the Commission and ECNI have argued strongly that there must be individual rights of enforcement with access to legal aid for those on low incomes. In essence, the Commissions must not be the only option when it comes to enforcement of the 'non diminution commitment' contained within the Protocol. Separate individual rights of enforcement are not confirmed within the Protocol though Article 4(1) of the main text of the DWA states that "... legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law." The Commission understands that the UK government is amenable to individual redress under the mechanism.

It is important to note that Article 4 of the Protocol is not part of the 'backstop' and as such it is not envisaged that it would be superseded by a future agreement. It is proposed to further protections offered under the Belfast (Good Friday) Agreement and the Commission considers that in the absence of a deal the UK Government should unilaterally commit to incorporate the non-diminution commitment into UK law.

Q20 – DWA Article 4

To the extent that Article 4(2) (see Annex 1) will require the UK to give the Withdrawal Agreement, and any EU law made applicable under its provisions, the same status in UK law that EU law currently has – in other words, supremacy over incompatible UK law - this will add a welcome layer of protection in respect of any issues of rights addressed in the Agreement including those regarding citizens' rights and rights in Northern Ireland.

Q22 – status of individuals in Northern Ireland who identify as Irish nationals

The Joint UK-EU Report in December 2017 set out a commitment that:
"The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland"

and said that the next phase of negotiations would examine:

*"the arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits"*⁹

⁷ See Annex 1 for text of Protocol Article 4

⁸ Explainer for the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, UK Government, para. 176

⁹ Paragraph 52 of Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, December 2017, available here: <https://www.gov.uk/government/publications/joint-report-on->

This commitment was not developed in any detail in the Ireland /Northern Ireland Protocol, appearing briefly in the recitals only, so the extent of the commitment remains unclear.

Focussing solely on those who identify as Irish within Northern Ireland creates potential for a move towards unequal citizenship counter to the principles of the Belfast (Good Friday) Agreement unless these rights are extended to all the people of Northern Ireland.

An EU fact-sheet states that the continuing rights in question include free movement, non-discrimination and administrative rights. The detail in terms of, for example, continuing access to the EHIC health arrangements, remains unclear but the Commission would regard the listed rights as a floor rather than a ceiling¹⁰.

The Commission is calling for clarity as to the specific rights and entitlements associated with continuing EU citizenship in Northern Ireland, and how those will be accessed in practice. We remain of the view that rights to EU citizenship should be extended to all in Northern Ireland, consistent with the commitment to equality in the 1998 Agreement and the right to identify, and be accepted, as British or Irish or both, without detriment.

A parallel issue places Northern Ireland Irish nationals potentially at a disadvantage as compared with their British neighbours. For Irish citizens in the UK and UK citizens in Ireland, the repeal of EEA free movement rights (under clause 1 of the Immigration and Social Security Coordination Bill, currently in the House of Commons) increases the importance of rights under the 'Common Travel Area' (CTA).

Since, for example, a Northern Ireland born Irish person who had renounced British citizenship, could avail of greater protections under EEA law than the Immigration Act, failure to incorporate the 1998 Agreement birthright protection, could result in a diminution of rights as a result of Brexit, contrary to the commitment made by the UK Government. The Prime Minister's recognised, in her speech in Belfast on 5 February, that: "The birth right to identify and be accepted as British, Irish or both, and to hold both British and Irish citizenship is absolutely central to the Agreement". The Commission welcomed her announcement that she had, therefore, asked the Home Secretary to work with the Secretary of State for Northern Ireland, to review immigration rules "to deliver a long term solution consistent with the letter and spirit of the Belfast Agreement". In answer to a parliamentary question on terms of reference, Immigration Minister, Caroline Nokes stated:

"The Prime Minister asked the Home Secretary to work with the Secretary of State for Northern Ireland to review the issues, not to conduct a formal review. This work is ongoing, and as the Prime Minister has said, a solution which complies with the Belfast Agreement will be set out as soon as possible."¹¹

The Committee may wish to enquire further.

[progress-during-phase-1-of-negotiations-under-article-50-teu-on-the-uks-orderly-withdrawal-from-the-eu](#)

¹⁰ See recent commitment by Irish Government in relation to extending EHIC coverage to all citizens of Northern Ireland after Brexit: <https://www.bbc.co.uk/news/uk-northern-ireland-47955980>

¹¹ Question 238370, asked on 28 March 2019 by Stuart C. McDonald, answered on 3 April 2019.

The CTA is not the subject of any international treaty and any rights or arrangements can therefore be unilaterally amended or withdrawn without breach of international law. The Commission believes the most effective way to provide clarity and certainty as to the rights of citizens, would be for the UK and Ireland to agree a comprehensive bilateral treaty encompassing reciprocal free movement rights, employment rights, rights to education, health, social security, justice and security¹². We want to see legal and financial support in place to allow the continued exercise of rights across the border.

¹² Many aspects of policing and justice cooperation will require to be addressed within the 'Future Relationship'

Annex 1 – Rights and the Draft Withdrawal Agreement of 14 November 2018

DRAFT WITHDRAWAL AGREEMENT

ARTICLE 4

Methods and principles relating to the effect,
the implementation and the application of this Agreement

1. "... legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation".

Ireland/Northern Ireland Protocol

ARTICLE 4

Rights of individuals

1. The United Kingdom shall ensure that **no diminution of rights, safeguards and equality of opportunity as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity** results from its withdrawal from the Union, including in the area of protection against discrimination as enshrined in the provisions of Union law listed in **Annex 1** to this Protocol, and shall implement this paragraph through **dedicated mechanisms**.
2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.

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176. We have agreed to implement the no diminution commitment through a '**dedicated mechanism**'. It is intended that this mechanism will draw on the existing human rights and equality bodies established under the Belfast (Good Friday) Agreement - namely the Northern Ireland Human Rights Commission (NIHRC), the Equality Commission for Northern Ireland (ECNI) and, on issues with an island of Ireland dimension, the Joint Committee - to provide independent oversight of the 'no diminution' commitment. **The UK will confer upon NIHRC and ECNI new powers to monitor, supervise, advise and report on and enforce the**

commitment, as well as provide adequate resources to ensure that they are able to perform their enhanced roles effectively. The UK Government will continue to engage with both Commissions on issues relating to the dedicated mechanism.

Emphasis added in each case.

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