



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Briefing Paper: Ministry of Justice
Consultation on Retained EU Case Law**

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Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

3.16 advises that there is a risk to legal certainty if the powers to diverge from retained EU case law is extended to a range of courts too quickly. The NIHRC recommends a cautious approach whereby the power to depart from retained EU case law is limited to the most senior courts (UK Supreme Court and the NI Court of Appeal and its equivalent) in the first instance. The NIHRC further recommends that expansion of these powers to the NI High Court should only be considered if there are demonstrable and compelling reasons.

4.8 recommends that in making regulations to extend the powers to diverge from retained EU law from the UK Supreme Court to lower courts the regulations should not be overly prescriptive. They should, in particular, reflect the principle of judicial independence and allow for the judiciary to find the appropriate test to reflect the need for legal certainty while allowing for the evolution of case law.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with these functions, the following advice is submitted to the Ministry of Justice consultation on retained EU case law.
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas.

2.0 Background

- 2.1 The EU (Withdrawal) Act 2018 provided the domestic legal framework for the UK to leave the EU by repealing the European Communities Act 1972 and creating a new category of retained EU law.¹ This saving provision was essential to ensure that the majority of directly effective EU law and EU derived law would continue to apply as the UK leaves the EU.
- 2.2 There were some notable exceptions to this saving power in section 5, which excluded the EU Charter of Fundamental Rights UK law after exit day. This exclusion "does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter" and "references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles". Section 6 makes clear that EU general principles can only be relied on for interpretive purposes and Schedule 1 clarifies 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".

¹ Sections 2-4 EU (Withdrawal) Act 2018

- 2.3 In March 2018, the Joint Committee of NI Human Rights Commission and Irish Human Rights and Equality Commission published a 'Policy Statement on the UK's Withdrawal from the EU'² and an academic 'Discussion Paper on Brexit'.³ The Joint Committee recommended that as the UK exited the EU, it should "ensure no diminution of rights within the Withdrawal Agreement".⁴
- 2.4 In December 2017 the UK and EU recognised that EU law and practice provided a "supporting framework in NI across the island of Ireland" in relation to the Rights, Safeguards and Equality of Opportunity provisions in the Belfast (Good Friday) Agreement 1998 and the UK Government committed to "ensuring that no diminution of rights is caused by its departure from the EU, including in the area of protection against forms of discrimination enshrined in EU law".⁵
- 2.5 In Article 2(1) of the Protocol to the UK-EU Withdrawal Agreement (the Protocol) the UK commits to:
- ensure that no diminution of rights, safeguards or 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.⁶
- Annex 1 of the Protocol is a list of six equal treatment directives, which in the view of the NIHRC is non-exhaustive.
- 2.6 The EU Withdrawal Act 2018 as amended by the EU (Withdrawal Agreement) Act 2020 incorporates the UK-EU Withdrawal Agreement (including the Protocol) into UK law. Section 7A provides the general residual implementation power of the Withdrawal Agreement and provides

² Joint Committee of NI Human Rights Commission and Irish Human Rights and Equality Commission, Policy Statement on the United Kingdom Withdrawal from the European Union, (NIHRC and IHREC, 2018).

³ Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Discussion Paper on Brexit', (IHREC and NIHRC), 2018.

⁴ NIHRC, 'Press Release: Belfast (Good Friday) Agreement Joint Committee Warns of Brexit Human Rights and Equality Concerns', 14 March 2018.

⁵ Department for Exiting the EU, 'Joint report from the negotiators of the EU and the UK Government on Progress during Phase 1 of Negotiations under Article 50 TEU on the UK's Orderly Withdrawal from the EU' (DExEU, 2017).

⁶ Protocol on Ireland/Northern Ireland to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2020.

that all “the rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be (a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly”.⁷ This is in addition to the specific provisions in section 8C which empower UK Ministers to implement the Protocol and changes to the Northern Ireland Act 1998.⁸

- 2.7 Article 4 of the UK-EU Withdrawal Agreement makes clear the provisions of the Agreement and relevant EU law, “shall produce in respect of and in the UK the same legal effects as those which they produce within the EU and its Member States”.⁹ Individuals will be able to rely directly on the provisions contained in the UK-EU Withdrawal Agreement and Protocol in the courts and this includes the powers for UK courts and tribunals to “disapply inconsistent or incompatible domestic provisions” and to interpret and apply the UK-EU Withdrawal Agreement “in accordance with the methods and general principles of EU law”.¹⁰ Any interpretation of the UK-EU Withdrawal Agreement should be “in conformity with the relevant case law of the Court of Justice of the EU handed down before the end of the transition period” and the courts shall have “due regard to relevant case law of the Court of Justice of the EU handed down after the end of the transition period”.¹¹

3.0 Legal Certainty

- 3.1 The UK committed to the upholding the European Convention on Human Rights (ECHR) in the political declaration which accompanied the UK-EU Withdrawal Agreement. The political declaration also recognised that the UK-EU future relationship should be “underpinned by shared values such as the respect for and safeguarding of human rights and fundamental freedoms, democratic principles, the rule of law and support for non-proliferation”.¹² In addition the UK and EU affirmed “that the

⁷ Section 7A(2), EU (Withdrawal) Act 2018.

⁸ Section 8C(1), EU (Withdrawal) Act 2018; Sections 22-24 and Schedule 3, EU (Withdrawal Agreement) Act 2020.

⁹ Article 4(1), Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2020.

¹⁰ Article 4(2) and (3), Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2020.

¹¹ Article 4(4) and (5), Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2020.

¹² UK Government, ‘Revised Political Declaration setting out the framework for the future relationship between the EU and the UK (Presented to Parliament pursuant to Section 1 of the European Union (Withdrawal) Act (No. 2) 2019 and Section 13 of the European Union (Withdrawal) Act 2018)’, 19 October 2019, at paras 6 and 7.

achievements, benefits and commitments of the peace process in NI will remain of paramount importance to peace, stability and reconciliation".¹³ Incorporation of the ECHR is a requirement of the Belfast (Good Friday) Agreement 1998 and this is reflected in the commitment in the political declaration that it "must be protected in all its parts".¹⁴

3.2 In evidence before the Committee on the Future Relationship with the European Union in April 2020, Minister Gove noted there were differences between the UK and EU about how the ECHR should be recognised in a future relationship agreement between the UK and the EU. However, Minister Gove made it clear that the UK remained committed to the ECHR by stating that:

it is certainly the case that we are not going to leave the European Convention on Human Rights... It is not the case that we want to resile or revoke or retreat from the ECHR at all... Our commitment to human rights is absolute.¹⁵

3.3 The Preamble to the ECHR highlights that this codification of rights is a recognition that "the governments of European countries... are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law". The European Court of Human Rights (ECtHR) makes it clear that the rights contained in the ECHR must be interpreted in light of the Preamble which declares "the rule of law to be part of the common heritage of the Contracting States" and confirms that "one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question".¹⁶ The ECtHR has also made it clear that the "principle of legal certainty... is implicit in all the articles of the [ECHR]".¹⁷

3.4 In the case of *Lupeni Greek Catholic Parish v Romania* (2016), the ECtHR recognised that the principle of legal certainty "guarantees a certain stability in legal situations and contributes to public confidence in the courts" and that the "persistence of conflicting court decisions can create

¹³ Ibid, at para 136.

¹⁴ Ibid.

¹⁵ UK Parliament, 'Committee on the Future Relationship with the European Union: Oral evidence - Progress of the negotiations on the UK's Future Relationship with the EU, HC 203' 27 April 2020.

¹⁶ *Brumărescu v Romania* [1999] ECHR 105, at para 69.

¹⁷ *Beian v Romania*, Application No 30658/05, Judgment of 6 December 2007, at para 39.

a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law".¹⁸ However, the ECtHR also found that the principle of legal certainty is not absolute and that "the possibility of conflicting court decisions is an inherent trait of any judicial system" and that "case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement".¹⁹

3.5 According to Section 6(3) of the EU (Withdrawal) Act 2018 any issue concerning the:

validity, meaning or effect of any retained EU law is to be decided ... in accordance with any retained case law and any retained general principles of EU law, and ... having regard (among other things) to the limits, immediately before exit day, of EU competences.

Currently only the UK Supreme Court (and the High Court of Justiciary in Scotland) have the power to diverge from retained EU case law.²⁰

3.6 Under the terms of the UK-EU Withdrawal Agreement and the Protocol, as implemented through the EU (Withdrawal Agreement) Act 2020, the case law of the Court of Justice of the EU, the EU general principles and the EU Charter of Fundamental Rights will continue to have direct relevance in Northern Ireland as courts and policy-makers interpret and apply the Protocol and, specifically Article 2, which ensure no diminution of rights under the relevant parts of the Belfast (Good Friday) Agreement is caused by the UK leaving the EU.

3.7 In Article 2(2) of the Protocol, the UK Government committed to continuing

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

¹⁸ *Lupeni Greek Catholic Parish v Romania* [2016] ECHR 1061, at para 116(a).

¹⁹ *Ibid*, at para 116(b) and (d).

²⁰ Section 6(4)-(5), EU (Withdrawal) Act 2018.

Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.²¹

The Schedule 3 of EU (Withdrawal Agreement) Act 2020 has augmented the powers of the NIHRC and the Equality Commission for NI in relation to Article 2 of the Protocol.

- 3.8 The UK Government is committed to implementing the Protocol, while at the same time is committed to an integrated internal market for all parts of the UK.²² The UK Government makes the case that “as the UK leaves the Transition Period, and leaves the EU’s legal order, we will need to legislate to ... continued seamless functioning of the UK Internal Market” and “avoiding the creation of new barriers”.²³
- 3.9 Unlike the rest of the UK, Northern Ireland does not have a specific equality law which codifies equality safeguards into a single act. Instead, equality safeguards are protected across a number of legislative instruments and this has meant that NI is particularly reliant on EU laws to fill the gaps. This has been the subject of much commentary by international human rights bodies. In 2016, the UN Committee on Economic, Social and Cultural Rights (UN ICESCR Committee) expressed its regret that no action had been taken on its earlier recommendations to extend “comprehensive anti-discrimination legislation” to Northern Ireland.²⁴ It urged the UK Government and NI Executive to ensure “a similar level of protection to rights holders with regard to all grounds of discrimination for all individuals in all jurisdictions of the State party, including NI”.²⁵
- 3.10 In addition, in August 2017, the UN Committee on the Rights of People with Disabilities (UN CRPD Committee) recommended reform of equality law in NI “to protect persons with disabilities in NI from direct and indirect disability-based discrimination and discrimination through association”.²⁶

²¹ Protocol on Ireland/Northern Ireland to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2020.

²² Cabinet Office, ‘The UK’s Approach to the NI Protocol’ (Cabinet Office, 2020); Department for Business, Energy and Industrial Strategy, ‘UK Internal Market’, (BEIS, 2020).

²³ Department for Business, Energy and Industrial Strategy, ‘UK Internal Market’, (BEIS, 2020), at para 3.

²⁴ E/C.12/GBR/CO/5 ‘UN ICESCR Committee Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ 12 June 2009, at para 16

²⁵ E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 14 July 2016, at para 23.

²⁶ CRPD/C/GR/CO/1, ‘UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI’, 3 October 2017 at para 17(b).

In March 2019, the UN CEDAW Committee recommended that the UK Government and NI Executive “revise its legislation in NI to ensure that it affords protection to women on an equal footing with women in other administrations of the State Party”.²⁷

- 3.11 There are many areas of relevance to human rights in Northern Ireland which are not covered by the UK-EU Withdrawal Agreement and will instead be influenced by the terms of the future relationship agreement currently being negotiated between the UK and the EU. In research commissioned by the NIHRC and the Irish Human Rights and Equality Commission, the interconnection between EU data protection measures and access to justice and security cooperation between the UK and EU was emphasised.²⁸
- 3.12 Section 6(5A) of the EU Withdrawal Act permits a Minister by regulation to amend the Act and change the extent to which other courts can diverge from retained EU case law. The options presented in this consultation are option 1, to extend these powers to the NI Court of Appeal (and equivalent in other jurisdictions) an option 2, to extend these powers to the NI High Court (and equivalent in other jurisdictions).
- 3.13 There is a risk that as these powers to diverge from retained EU case law extend to lower levels of the court system the greater the risk to the principle of legal certainty. Under option 1, there would be less risk of divergence of application of retained EU case law between courts, as the NI Court of Appeal must follow precedents set by the UK Supreme Court and can only diverge from its own decisions in limited circumstances.²⁹
- 3.14 Under option 2, when acting in first instance, the NI High Court is not bound by its own earlier decisions, although these are persuasive. When acting as an appeal court, the NI High Court can diverge from its own earlier decisions in a wider range of circumstances than that of the Court of Appeal.
- 3.15 Option 2 would present a situation where there could be increased diversity in decisions within the NI High Court and with equivalent courts

²⁷ CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland’ 14 March 2019, at para 16(a).

²⁸ Amanda Kramer, Rachael Dickson and Anni Pues ‘Evolving Justice Arrangements Post-Brexit’ (NIHRC and IHREC, 2019).

²⁹ *Breslin v McKenna (Ruling No 9)* [2008] NIQB 49, at paras 19-23.

in other parts of the UK in the application of retained EU law. In addition, as courts and tribunals in Northern Ireland will have to continue applying the relevant EU law under the Protocol, including the obligation to ensure there is no diminution of rights, this may lead to an unintentional divergence between rules in retained EU case law which are applicable in NI and those applicable in the rest of the UK. This uncertainty could lead to unforeseen problems for the protection of rights in Northern Ireland and the rest of the UK and create confusion for individuals, employers, the providers of services in Northern Ireland as to the correct law. Devolution entails a degree of flexibility of arrangements across the different jurisdictions of the UK, nonetheless maintaining a core underpinning of legal certainty within which the protections of the Belfast (Good Friday) Agreement are built on would be prudent.

- 3.16 **The NIHRC advises that there is a risk to legal certainty if the powers to diverge from retained EU case law is extended to a range of courts too quickly. The NIHRC recommends a cautious approach whereby the power to depart from retained EU case law is limited to the most senior courts (UK Supreme Court and the NI Court of Appeal and its equivalent) in the first instance. The NIHRC further recommends that expansion of these powers to the NI High Court should only be considered if there are demonstrable and compelling reasons.**

4.0 Judicial Independence

- 4.1 The independence of the judiciary is stressed within the UN Basic Principles on the Independence of the Judiciary, which state that:
- 1) the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
 - 2) the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions,

improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.³⁰

- 4.2 Article 6(1) ECHR, states that “in the determination of his civil rights and obligations... everyone is entitled to a fair... hearing... by an independent... tribunal”. In interpreting the right to a fair trial, ECtHR has stated that “the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a ‘tribunal’, as is confirmed by the word ‘determination’” and that “this power can also be seen as a component of the ‘independence’ required by Article 6(1)”.³¹
- 4.3 Article 14 of the UN International Covenant on Civil and Political Rights (UN ICCPR) recognises the right to equality before the law. In 2007, the UN ICCPR Committee elaborated that to be compliant with Article 14, a tribunal is “established by law, is independent of the executive and legislative branches of government” and that “the requirement of competence, independence and impartiality of a tribunal... is an absolute right that is not subject to any exception”.³²
- 4.4 The principle of judicial independence is recognised in UK law in section 3 of the Constitutional Reform Act 2005, which states that “the Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary”.
- 4.5 The NIHRC welcomes this consultation in advance of the exercise of the powers under section 6 of the EU (Withdrawal) Act 2018 and notes that particular care must be taken to ensure that there is no actual or perceived interference with the independence of the judiciary. In particular, the NIHRC notes that the section 6(5) of the 2018 Act only permits the UK Supreme Court to diverge from retained EU case law using the “same test as it would apply in deciding whether to depart from its own case law”.

³⁰ UN Basic Principles on the Independence of the Judiciary, 13 December 1985.

³¹ *Van de Hurk v The Netherlands* [1994] ECHR 14, at para 44.

³² CCPR/C/GC/32, ‘UN ICCPR Committee, General Comment 32 on Article 14: Right to Equality before Courts and Tribunals and to Fair Trial’, 23 August 2007 at paras 18-19.

4.6 The House of Lords' Practice Statement of 1966 set out the test as follows:

their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.³³

This test was endorsed by the UK Supreme Court in 2010.³⁴

4.7 The current test creates a balance between the need for legal certainty and the need for evolution of the decisions and precedents of the UK Supreme Court. Section 6(5) of the EU (Withdrawal) Act 2018 recognises the independence of the judiciary and makes it clear that it is for the Supreme Court to decide on the basis of facts and circumstances of individual cases whether divergence from existing precedent is warranted.

4.8 **The NIHRC recommends that in making regulations to extend the powers to diverge from retained EU law from the UK Supreme Court to lower courts the regulations should not be overly prescriptive. They should, in particular, reflect the principle of judicial independence and allow for the judiciary to find the appropriate test to reflect the need for legal certainty while allowing for the evolution of case law.**

³³ Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

³⁴ *Austin v Mayor and Burgess of the London Borough of Southwark* [2010] UKSC 28, at paras 24-28.

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