



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Summary Briefing: Bill of Rights Bill

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1.0 Overview

- 1.1 A Bill of Rights should strengthen human rights protections and build on the success of the Human Rights Act. The present Bill does the opposite. It contradicts fundamental human rights principles and creates barriers to effective remedy. Specific to NI, the UK Government committed, through the Belfast (Good Friday) Agreement, to the full incorporation of ECHR rights, including direct access to courts. The current Bill weakens this commitment and undermines NI's devolution settlement and peace agreement. The Bill also risks creating confusion around the interpretation of Article 2 of the Ireland/Northern Ireland Protocol (Protocol Article 2).
- 1.2 The NIHRC concludes that the fundamentals of the Bill require immediate and thorough reassessment, which should take place through meaningful engagement. The result should be grounded in human rights compliance, with a view to strengthening human rights protection. The NIHRC is of the view that the present Bill is the antithesis of what is required.**
- 1.3 This briefing provides an overview of the NIHRC's comprehensive advice, which is attached and available at www.nihrc.org.

2.0 Repeal of Human Rights Act 1998

- 2.1 Several independent human rights experts have emphasised that any change to the UK's current domestic human rights framework should strengthen, not weaken, human rights protections.¹ Also, specific to NI, any changes should "complement rather than replace the incorporation of the ECHR in NI law".² Clause 1(1) of the current draft proposes that this legislation "reforms the law relating to human

¹ CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI', 17 August 2015, at para 5(c); E/C.12/GBR/CO/6, 'UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016, at para 10; CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty First to Twenty Third Periodic Reports of UK of Great Britain and NI', 26 August 2016, at para 10; CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 11; A/HRC/36/9, 'UN Working Group on the Universal Periodic Review Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI', 14 July 2017, at paras 134.67; 134.68; 134.69; 134.70; 134.71; 134.72; 134.73; 134.74; 134.75; 134.76; and 134.77.

² A/HRC/36/9, 'UN Working Group on the Universal Periodic Review, Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI', 14 July 2017, at para 134.67.

rights by repealing and replacing the Human Rights Act 1998". This will significantly weaken the protection afforded.

- 2.2 Protocol Article 2 requires the UK Government to ensure that no diminution of rights, safeguards and equality of opportunity contained in the relevant part of the Belfast (Good Friday) Agreement occurs as a result of the UK's withdrawal from the EU. The protections in Protocol Article 2, while an important safeguard against the diminution of rights following UK withdrawal from the EU, are not a substitute for the comprehensive framework of human rights protections under the Human Rights Act. The weakening of human rights protections in the present Bill will create uncertainty and confusion, making the interpretation of Protocol Article 2 more challenging and may lead to a culture shift that will further reduce the robustness of human rights protections in NI.

3.0 Relationship between UK Courts and ECtHR

- 3.1 There is already a balanced relationship between the UK courts, ECtHR and UK Parliament by virtue of the Human Rights Act. The principles of subsidiarity,³ margin of appreciation⁴ and the restriction on courts' declarations of incompatibility of primary legislation⁵ preserve respect for Parliamentary sovereignty and already require a balanced relationship between the UK courts and ECtHR.
- 3.2 The Bill proposes that domestic courts focus on the preparatory work of the ECHR,⁶ which only reflects society as it was in the 1950s. It also proposes that the UK Supreme Court is to be the ultimate adjudicator, but only if it is minded to limit rather than enhance human rights protection.⁷ This will weaken courts ability to protect those who do not have the agency or support to test a case before the ECtHR. It creates an imbalance and will lead to uncertainty, prevent the domestic courts from reacting to societal developments and redirect cases away from the domestic courts towards the ECtHR.

³ Protocol No 15 Amending the ECHR, 24 June 2013.

⁴ Protocol No 15 Amending the ECHR, 24 June 2013.

⁵ Section 4, Human Rights Act 1998.

⁶ Clause 3(2), Bill of Rights Bill.

⁷ Clause 3, Bill of Rights Bill.

- 3.3 The UK Government has recognised that the “key rights and equality provisions in the [Belfast (Good Friday)] Agreement are supported by the ECHR which has been incorporated into NI law pursuant to the commitment in the Agreement to do so”.⁸ The NIHRC advises that the non-diminution commitment in Protocol Article 2 encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU obligations in force on 31 December 2020.⁹ Therefore, pursuant to Protocol Article 2, there can be no diminution of those ECHR rights which were underpinned by EU law prior to 1 January 2021.
- 3.4 The EU Charter of Fundamental Rights is also relevant to the interpretation and application of Protocol Article 2.¹⁰ Where an EU Charter right is engaged, which corresponds to a right in the ECHR, the CJEU has consistently found that it should be interpreted in line with the relevant ECHR right and connected case law of the ECtHR.¹¹ The non-diminution commitment therefore maintains its link to the ECHR as interpreted through the ECtHR regardless of any change to how those rights are implemented in the present Bill. Nevertheless, decoupling the link between how UK courts interpret ECHR rights and the case law of the ECtHR in the present Bill creates unhelpful confusion. For example, whereas ECHR rights, and relevant EU Charter rights, within the scope of Protocol Article 2 would maintain a direct link to the ECtHR case law, ECHR rights outside the scope of Protocol Article 2 would be subject to a different, lower standard.

⁸ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in NI: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 3.

⁹ NI Human Rights Commission, ‘Response to the consultation on Human Rights Act Reform: a Modern Bill of Rights’ (NIHRC, 2022).

¹⁰ Article 4(3) provides that where the Withdrawal agreement refers to EU law or concepts, it should be interpreted and applied in accordance with the methods and general principles of EU law. As noted in Kellerbauer et al, “The obligation to apply these provisions in accordance with the general principles of [EU] law means for the UK that it is bound to observe the EU fundamental rights when implementing those provisions of the Agreement. Hence in substance, Article 4(3) has the same effect as article 51(1) of the EU Charter of Fundamental Rights.” Kellerbauer, Dumitriu-Segnana, Thomas Liefländer, ‘The UK-EU Withdrawal Agreement – A Commentary’ (OUP, 2021), at 39.

¹¹ Article 52 of the EU Charter of Fundamental Rights; *WebMindLicences kft v Nemzeti Adó*, Case C-419/14, 17 December 2015, para 70; *AK v Krajowa Rada Sądownictwa v Sąd Najwyższy*, Case C-585/18, C-624/18 C-625/18, 19 November 2019, para 116-118; *Rayonna prokuratura Lom*, Case C-467/18, 19 September 2019, at para 42-45.

4.0 Interim Measures

4.1 The Bill proposes that interim measures issued by the ECtHR are to be ignored by domestic courts, public authorities and any other person.¹² Interim measures are an early warning sign to a State that its proposed actions are incompatible with human rights and will likely be subject to legal action, during which time significant damage is possible that will require remedying. Given the scenarios for which the ECtHR reserves interim measures, simply ignoring one could cost lives – an irremediable outcome.

5.0 Parliamentary Scrutiny of Human Rights

5.1 Parliamentary sovereignty enables the UK Parliament to create or repeal any law.¹³ However, the UK's separation of powers doctrine is relevant whereby "major institutions of State should be functionally independent".¹⁴ The option to assess Parliament's decisions must be practically available and utilised by the courts. This is not the case in the present Bill, particularly within clause 1(2)(c).

6.0 Interpreting and Applying the Law

Positive obligations

6.1 The Bill proposes that, from the commencement of the legislation, a court may ignore the requirement for a public authority "to comply with a positive obligation".¹⁵ Positive obligations are key to preemptively protecting individuals. The margin of appreciation and principles of universality, proportionality, reasonableness, necessity and subsidiarity afforded by the ECHR together ensure that a State has broad discretion to perform its functions so long as it does so in a balanced and effective way. The present Bill will undermine that. It will weaken the protection of victims and increase the likelihood of violations.

¹² Clause 24, Bill of Rights Bill.

¹³ UK Parliament, 'Parliamentary Sovereignty'. Available at: <https://www.parliament.uk/site-information/glossary/parliamentary-sovereignty>

¹⁴ Richard Benwell and Oonagh Gray, 'The Separation of Powers' (HoC, 2022).

¹⁵ Clause 5(1), Bill of Rights Bill.

6.2 The NIHRC has already identified how positive obligations arising under Article 4 of the ECHR in respect of trafficking fall within scope of Protocol Article 2, to the extent that those obligations are underpinned by the EU Trafficking Directive.¹⁶ As noted above, where applicable, an EU Charter right should be interpreted in line with the relevant ECHR right and connected ECtHR case law, including where that jurisprudence gives rise to a positive obligation.¹⁷ While the protections of rights in Protocol Article 2 are not directly impacted by the weakening of positive obligations arising under the ECHR within the domestic legal framework, the present Bill creates unhelpful confusion. There is also a risk that the present Bill will create a culture shift where reduced human rights protections in NI in the future could have implications for how Protocol Article 2 is interpreted and applied.

Proportionality

6.4 The Bill premises that it is for Parliament to decide the appropriate balance of rights by requiring that courts give the 'greatest possible weight' or 'great weight' to decisions made by Parliament.¹⁸ This approach disregards the principle of proportionality and risks misinterpreting how the margin of appreciation doctrine should apply, at the expense of ensuring a fair balance is achieved between the public interest and an individual's rights.

Meaningful consultation

6.5 Several international human rights experts have recommended that the UK Government conducts a meaningful and broad consultation on its plans to revise its human rights legislation.¹⁹ Engagement and consultation were undertaken by the Independent Human Rights Act Review Team, which reported "an overwhelming body of support for retaining the Human Rights Act".²⁰ The UK Government has not

¹⁶ NIHRC, 'Submission to Department of Justice Consultation on Measures to Strengthen the Response to Modern Slavery and Human Trafficking' (NIHRC, 2022).

¹⁷ *Rayonna prokuratura Lom*, Case C-467/18, 19 September 2019, para 42-45.

¹⁸ Clauses 1(2)(c), 4(1), 5(2), 6(2), 7(2)(b), 18(6), 21(2), Bill of Rights Bill.

¹⁹ E/C.12/GBR/CO/6, 'UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016, at para 10; CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty First to Twenty Third Periodic Reports of UK of Great Britain and NI', 26 August 2016, at para 10; A/HRC/36/9, 'UN Working Group on the Universal Periodic Review Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI', 14 July 2017, at para 134.76.

²⁰ UK Government, 'The Independent Human Rights Act Review' (UK Gov, 2021), at 30.

conducted any further meaningful engagement on this issue. Majority support for retaining the Human Rights Act has been ignored within the present Bill, without justification.

7.0 Enforcement of Human Rights

7.1 The Bill proposes that human rights proceedings require permission from the court to proceed. Furthermore, the victim must have or will suffer “a significant disadvantage.”²¹ The Bill also proposes limiting the award of damages to situations where the claimant has “suffered loss or damage”.²² The tone set by the present Bill appears to place its focus on avoiding (as opposed to facilitating) an effective remedy.

8.0 Specific Issues

Universality

8.1 The UK Government continues to frame its human rights reform proposals, including within the present Bill, in divisive language that frames certain groups of rights holders as less entitled to rights protection. For example, within the Bill those involved in criminal activity²³ and immigrants convicted of an offence²⁴ are not deemed worthy of human rights protection. Thus, creating a hierarchy of victims, contrary to the principle of universality.

Hierarchy of rights

8.2 The Bill proposes that freedom of speech²⁵ and freedom of thought, conscience and religion²⁶ are given particular importance. As qualified rights, the UK already has a broad margin of appreciation in how it deems freedom of expression and freedom of religion should be protected. However, it is important that any promotion or interference regarding these rights are proportionate and necessary in the pursuit of a legitimate aim, as guided by the ECHR and its

²¹ Clause 15(1), Bill of Rights Bill.

²² Clause 18(1), Bill of Rights Bill.

²³ Clauses 5(2)(c) and 6, Bill of Rights Bill.

²⁴ Clauses 8 and 20, Bill of Rights Bill.

²⁵ Clause 4, Bill of Rights Bill.

²⁶ Clause 23(2), Bill of Rights Bill.

jurisprudence. Elevating freedom of speech and freedom of thought, conscience and religion creates a hierarchy of rights that is contrary to human rights principles.

Extra-territoriality

8.3 The Bill proposes to prevent cases regarding overseas military operations from being taken within or outside the UK, including removing the ability to rely on the positive obligation to investigate any potential extra-territorial violation resulting from a military operation, as required by Articles 2 and 3 of the ECHR.²⁷ This is not human rights compliant.

9.0 Devolution

9.1 The Belfast (Good Friday) Agreement created a duty on the UK Government to incorporate the ECHR into NI law “with direct access to the courts, and remedies for breach of the... [ECHR]... including power for the courts to overrule Assembly legislation on grounds of inconsistency”.²⁸ This incorporation was achieved through the Human Rights Act. The Belfast (Good Friday) Agreement notes compliance with the ECHR is a ‘safeguard’ for the peace process in NI.²⁹ The Human Rights Act has an enhanced constitutional function and role unique to NI. The present Bill does not adequately consider the Belfast (Good Friday) Agreement, and the integral role of both the Human Rights Act and ECHR in the complex fabric of the NI Peace Process and devolution. It also appears to be incompatible with obligations under the Belfast (Good Friday) Agreement to incorporate the ECHR and provide direct access to the courts.

10.0 NIHRC’s Powers

10.1 The Bill proposes strict limits on who can initiate a challenge.³⁰ To facilitate this, the Bill proposes to repeal the Human Rights Act and amend the NI Act. The NIHRC’s right to bring own motion cases

²⁷ Clause 14, Bill of Rights Bill.

²⁸ The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

²⁹ The Good Friday Agreement 1998, Strand One: Democratic Institutions in Northern Ireland, at para 5.

³⁰ Clauses 7-10, Schedule 5, Bill of Rights Bill.

without a victim is currently jointly linked to these two pieces of legislation.³¹ The Bill does not amend the NI Act to remedy the effects of repealing the Human Rights Act on the NIHRC's right to take own motion cases. This further limits the NIHRC's powers to litigate. It is understood that the UK Government intends to introduce an amendment to remedy, but the NIHRC has not yet had sight of this.

³¹ Section 71(2B), NI Act 1998.

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