LADY CHIEF JUSTICE OF NORTHERN IRELAND

NIHRC ANNUAL LECTURE

4TH JULY 2022

OPENING REMARKS

Good afternoon. It is my pleasure to be opening this, the Northern Ireland Human Rights Commission annual lecture. I am looking forward to hearing what Lady Hale has to say on her chosen theme of 'Should there be a British Bill of Rights?' It is certainly a topical issue as the Bill of Rights Bill is making its way through the various parliamentary stages in Westminster.

I am going to speak to you briefly this afternoon, not about Bill of Rights questions or the legislation, but rather about a few Northern Ireland cases where human rights issues have been engaged.

Before doing so I think it is worth remembering the context of any current discussion on human rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms is a treaty, which was signed on 4 November 1959 by governments who were members of the Council of Europe. The Council of Europe was established in 1949 as part of the Allies programme to "reconstruct durable civilisation on the mainland of Europe."

The United Kingdom ratified the Convention in 1951 but unlike other signatories, it did not become part of domestic law until the Human Rights Act 1998. Prior to that, from 1966 the United Kingdom granted the right of individual petition to European bodies including the European Court of Human Rights.

There are always issues of definition in this area. Also, some rights are absolute, some qualified. However, I think we are now familiar with the need for protection of fundamental rights in our law such as the right to life, liberty, family, privacy, freedom of expression and prohibition on slavery and torture and discrimination.

The Human Rights Act 1998 preserved the sovereignty of Parliament but allowed the courts to give effect to Convention rights in primary and secondary legislation by reading down in accordance with section 3 and in appropriate circumstances by making a declaration of incompatibility under section 4. It is then for Parliament to change the law and largely that is what has happened when declarations have been made.

In Chapter 7 of Tom Bingham's 2010 Book entitled "The Rule of Law"[1] the fifth of his core principles is that "the rule of law must afford adequate protection of fundamental human rights." The text refers to what he calls a thick definition of the rule of law embracing the protection of human rights within its scope. He also says that:

> "It must be accepted that the outer edges of some fundamental rights are not clear cut. But within a given society there is ordinarily a large measure of agreement on where the lines are drawn at any particular time, even though standards change over time, and in the last resort the courts are there to draw them."

[1] Bingham, Tom. *The Rule of Law*. Penguin Books, 2011.

The specific Northern Ireland perspective is framed by the Belfast Agreement reached in 1998. This provided for strengthened anti-discrimination and equality legislation to be introduced. It also provided that the governance arrangements in Northern Ireland would include human rights protections based on the European Convention on Human Rights. A Human Rights Commission was established, with the role (among others) of developing proposals for a Northern Ireland Bill of Rights to supplement the Convention.

The North-South dimension provided that human rights protected in Ireland (including socio-economic rights, such as labour and employment rights) were to be equivalent to those in Northern Ireland. It was also provided that Ireland would incorporate the European Convention on Human Rights into Irish law, that there would be a joint committee of the Northern Ireland and Irish Human Rights Commissions, and that an all-Ireland Charter of Rights would be produced.

The Northern Ireland Act 1998, which settled devolution arrangements in Northern Ireland post the Belfast Agreement in 1998 specifically recognises Convention rights in section 6 which refers to legislative competence. In addition, as we know, the Northern Ireland Human Rights Commission was established and mandated under Part VII of this statute.

Of course, difficult questions arise post Brexit but they are for another day. In the time I have, I propose to highlight a couple of areas which illustrate the 'development of a rights-based jurisprudence' in Northern Ireland post the Belfast Agreement. In doing so the obvious point to make is that this jurisprudence has spanned many aspects of life here and been employed by

many different sections of society. I will briefly mention a few areas of current interest.

During the relatively early days of the Covid-19 pandemic, questions came before the courts in relation to the proportionality of the interference caused by restrictions, in particular in family life invoking Article 8 of the European Convention on Human Rights.

By way of illustration, in the summer of 2020, the case of *SB (A Mother)*[2], was an application brought under the Human Rights Act 1998 to challenge a prohibition on physical contact between a mother and a new born baby who had been separated at birth by way of an interim care order.

The fact of the baby being removed from her mother's care was not contentious. Rather the issue in the case was the contact arrangements, in particular, the difficulties in arranging contact while pandemic-related restrictions were in place. While it was agreed that the baby was to have five times a week direct contact with her mother after her removal into care, skin-to-skin direct contact was prevented by the Health Trust on the basis of the Covid-19 restrictions then in place. Claiming a breach of her Article 8 Convention rights, the mother sought relief pursuant to the Human Rights Act.

During the course of the proceedings, the court adopted a pragmatic approach feasible in this jurisdiction. Upon request, the Chief Medical Officer for Northern Ireland provided correspondence noting potential longer-term adverse impacts on mother and baby if direct skin contact did not take place

[2] [2020] NIFam 17 and [2021] NICA 50

in the early months of a child's life. It was his view that the requirements and recommendation for avoidance of direct skin contact at that point in time had become unnecessary and disproportionate. This correspondence led to a change in the Health Trust's policy and direct skin-to-skin contact was resumed.

Another area in which our rights-based jurisprudence has been engaged is through litigation concerning issues of social policy. We saw this in Northern Ireland in relation to the prohibition on same sex marriage, which pertained until relatively recently.

In *Close & Sickles*[3], in a judgment delivered in 2020, the Northern Ireland Court of Appeal dealt with an appeal, from a dismissal by the High Court in 2017, of a claim that the prohibition on same-sex marriage in the Marriage (Northern Ireland) Order 2003 unlawfully discriminated against the appellants on the basis of sexual orientation, contrary to section 6 of the Human Rights Act 1998 and Article 14 of the European Convention on Human Rights. In essence, the trial judge decided that Strasbourg case law did not impose an obligation on a Council of Europe state to provide access to same-sex marriage and did not recognise a 'right' to same sex-marriage. He found that it was not the role of a judge to decide on social policy and dismissed the claim.

The Court of Appeal considered that, at the time the proceedings had been issued, having regard to a range of issues that were not limited to Strasbourg jurisprudence, a fair balance had been struck between the rights of the

[3] [2020] NICA 20

appellants and the interests of the community in preserving the established nature of marriage.[4]

By the time the first instance judgment had been delivered in August 2017, however, the Court of Appeal considered that the landscape was such that the absence of same-sex marriage in Northern Ireland did discriminate against same-sex couples, that a fair balance between tradition and personal rights had not been struck and therefore that the discrimination was not justified.[5]

In the event, provision for same-sex marriage having been legislated for in this jurisdiction in 2019, no declaration under section 4 of the Human Rights Act was necessary. This was similar to the position in *Ewart*[6] where the law was also changed following the Supreme Court decision in *Re NIHRC*[7].

These cases provide an interesting illustration of how the landscape in relation to rights, in particular, the factors that may be of relevance to a court in balancing rights and interests, can evolve over a relatively short period of time, and indeed, as in these cases, during the course of proceedings.

Moving to Article 10 and freedom of expression relative to public order, the Court of Appeal recently determined a case stated *Lee Brown v Public Prosecution Service.*[8] This involved consideration of a legal question as to whether the appellant's conviction for an offence under the Public Order

[4] Paragraph 52

[5] Paragraph 58

[6] [2019] NIQB 88 and [2020] NIQB 33

[7] [2018] UKSC 27

[8] [2022] NICA 5

(Northern Ireland) Order 1987 was lawful. He had been convicted as a result of distributing leaflets in Ballymena complaining of an influx of Roma into the local community and making adverse comments about the Roma community, in the context of Britain First rallies which were taking place.

The conviction could only be lawful if all of the ingredients of the offence were established and the conviction was compatible with the right to freedom of expression contained in Article 10 of the European Convention on Human Rights. This question required consideration as to whether the facts of this case constitute "hate speech" which can be punished by criminal sanction within the meaning of the case law of the European Court of Human Rights.

The term "hate speech" does not appear in the public order legislation under which the appellant was convicted. However, the term hate speech is understood to mean any kind of communication in speech, writing or behaviour that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor. The fact that the expression in question involves hate speech and is intended or likely to stir up hatred or fear does not in principle preclude it from falling within the scope of Article 10.

Whether the speech is protected by the Convention will depend on the specific facts and context of the case. The court found that in this case the conviction did not comply with Article 10 as the relevant factors had not been balanced in reaching a decision and that proper reasons had not been given to

justify an interference with Article 10.[9] Therefore, the case was remitted for hearing.

The legacy of Northern Ireland's past also continues to engage our courts, particularly as regards whether the Article 2 investigative obligation is complied with in a particular case. The Supreme Court has recently provided guidance in a case of *McQuillan, McGuigan and McKenna.*[10] This is an area which will continue to involve rights based arguments. I will say no more on this topic given current issues and challenges that are before the courts.

The courts in Northern Ireland have been willing to make declarations where necessary and, specifically, where Northern Ireland is affected. The most recent case is *The Queen v Seamus Morgan, Terence Marks, Joseph Lynch and Kevin Heaney.*[11] This involved the claim that a 2021 Act[12] retrospectively adjusting sentences for terrorist offenders was in breach of the Human Rights Act 1998. It was contended that the new regime was in conflict with Article 7, Article 6 and Article 5 of the European Convention on Human Rights.

Moreover, the applicants suggested that this court should, using its role as the senior criminal court in Northern Ireland, restore their position to the status quo ante which would have resulted in release. The court declined relief other than a declaration of incompatibility in relation to Article 7 given the retrospective increase in sentence in the particular circumstances of Northern Ireland's sentencing process. This case is now to be heard in the

[9] Para 78

[10] [2021] UKSC 55

[11] [2021] NICA 67, see also *Heaney, Re Application for Judicial Review* [2022] NIQB 8

[12] Counter-Terrorism and Sentencing Act 2021

Supreme Court, leave having being granted to the Ministry of Justice to appeal.

A final case I will mention, which is coming to the Court of Appeal next term is a challenge to the compatibility of the Children (Northern Ireland) Order 1995 where a child is precluded by the Order from terminating the parental responsibility of a married father, who was convicted of the rape and indecent assault of his stepdaughters (the applicant's half sisters) and for which he was sentenced to a period of 14 years' imprisonment. In this case the first instance judge referenced recent Supreme Court decisions in *SC*[13] and *Elan-Cane*[14] which consider the role of the courts in social policy issues.

I will conclude with some additional observations about the potential future direction of Northern Ireland's rights-based jurisprudence. The first, which I have spoken about recently in a lecture looking ahead to the next 100 years of law in Northern Ireland, is the effects which flow from our digital age and changing modes of expression. As our use of the internet as a society has developed, difficulties in regulating expression have arisen bringing the consequent challenge of proper regulation.

Judge Síofra O'Leary, Vice President of the European Court of Human Rights developed this theme recently in her 2022 MacDermott lecture.[15] She highlighted the difficulties in regulation of unlawful forms of speech and the emerging concerns about the spread of misinformation in a democratic society. She also said:

[13] [2022] UKSC 15

[14] [2021] UKSC 56

[15] Northern Ireland Legal Quarterly Spring Vol. 73 No. S1 (2022) 1–22

> "The court has sought to grapple with the 'conflicting realities' (a term used in *Delfi v Estonia*) to which the internet and new technologies give rise. It has recognised, on the one hand, that user-generated expressive activity on the internet provides an unprecedented platform for the exercise of freedom of expression. On the other hand, the internet can act as a forum for the speedy dissemination of unlawful forms of speech which may remain persistently online."

This is an area, which I believe will dominate our law in years to come as we debate freedom of expression and privacy, the protection afforded to political speech and the boundaries of hate speech.

Secondly, there is a "rising tide of climate change litigation around the world" as I heard it described at a recent conference. Against the backdrop of the Paris Agreement 2015 and the Climate Change Act 2008, which sets a mandatory national target for carbon reduction, we are beginning to see what will become a substantial body of law generated in the area of climate justice, some of which is pursued by children and young people. There is already a growing jurisprudence in the United Kingdom. These cases are not only strategic, challenging government action and non-adherence with international targets but also individualistic, invoking Convention rights, in particular Article 8 and Article 2.

The issues highlighted by this inevitably short and snapshot survey of Northern Ireland's rights-based jurisprudence gives some flavour of the variety of ways in which rights issues are engaged day in and day out in the Northern Ireland courts and in the daily lives of those who live here. There can be no doubt that rights are deeply embedded in our legal landscape. Undoubtedly, Lady Hale's lecture this evening will illuminate further on where we are and where we are going.

Thank you.