Lester, Pannick & Herberg: Human Rights Law and Practice/Chapter 6 Northern Ireland/B The Impact of the Northern Ireland Act 1998

B

6.02

The primary objective of the NIA 1998 was to give the force of law to the essentials of the Belfast (Good Friday) Agreement of 10 April 1998.[1] It provided for the creation of a Northern Ireland Assembly and an Executive Committee (a mandatory coalition). The Assembly became operational on 2 December 1999 but has since been suspended at various times, notably from October 2002 to May 2007[2]. The Assembly has had limited powers transferred - ie those not listed as 'excepted' or 'reserved' matters in the NIA 1998, Schs 2 and 3.

1 Cmnd 3883.

2 NIA 2000 (Restoration of Devolved Government) Order 2007, SI 2007/1397.

6.03

A provision of an Act of the Northern Ireland Assembly is not law if it deals with an excepted matter and is not ancillary to other provisions dealing with reserved or transferred matters[1]. The observation and implementation of obligations under the Convention are expressly excluded from the category of excepted matters[2], so the Assembly is under a duty fully to comply with the Convention.

1 NIA 1998, s 6(2)(b).

2 NIA 1998, Sch 2, para 3(c).

6.04

Reserved matters include those which might one day be transferred to the Assembly but which in the meantime are to be dealt with by an Act at Westminster or by an Order in Council[1]. The Assembly can pass Acts dealing with reserved matters if the Secretary of State consents[2]. Among matters within the 'reserved' category are: the criminal law[3]; the creation of offences and penalties[4]; the prevention and detection of crime and powers of arrest and detention[5]; prosecutions[6]; the treatment of offenders[7]; compensation for victims of crime[8]; the maintenance of public order, including the conferring of powers on the police and army and the Parades Commission for Northern Ireland[9]; the organisation and control of the police[10]; all matters relating to court procedure[11]; and data protection[12].

1 NIA 1998, s 85(1) allows Orders in Council to be made in relation to the matters listed in the NIA 1998, Sch 3, paras 9-17.

2 NIA 1998, s 8(b). Consent is not required in the case of Orders in Council dealing with reserved matters: *In re Neill's Application* [2006] NI 278. See para **6.34**.

3 NIA 1998, Sch 3, para 9(a).

4 NIA 1998, Sch 3, para 9(b).

5 NIA 1998, Sch 3, para 9(c).

6 NIA 1998, Sch 3, para 9(d).

7 NIA 1998, Sch 3, para 9(e).

8 NIA 1998, Sch 3, para 9(g).

9 NIA 1998, Sch 3, para 10.

10 NIA 1998, Sch 3, para 11.

11 NIA 1998, Sch 3, para 15.

12 NIA 1998, Sch 3, para 40.

6.05

The NIA 1998 states that a provision is outside the legislative competence of the Assembly if 'it discriminates against any person or class of person on the ground of religious belief or political opinion'[1]. It also makes it clear that the Assembly has no competence to enact provisions which are incompatible with the Convention (or with EC law)[2].

1 NIA 1998, s 6(2)(e).

2 NIA 1998, s 6(2)(c) and (d).

6.06

The NIA 1998 provides, in all, eight different ways in which the compatibility of Assembly legislation with the Convention can be officially checked. In theory, these may all lead to court proceedings, but to date none has been initiated. A court is under a duty, if faced with a provision of an Assembly's Bill or Act which can be read as either within or outside the Assembly's legislative competence, to interpret that provision as within its competence[1]. The same interpretative duty applies to provisions in dubiously valid subordinate legislation[2].

1 NIA 1998, s 83(1)(a).

2 NIA 1998, s 83(1)(b).

6.07

First, by the NIA 1998, s 9, a minister in charge of a Bill must, on or before its introduction in the Assembly, publish a written statement to the effect that in his or her view the Bill would be within the legislative competence of the Assembly. This is reminiscent of the HRA 1998, s 19(1)(a)[1]. All of the Bills introduced into the Assembly to date have been accompanied by a ministerial statement under NIA 1998, s 9, and no court challenge has been raised against any of them, whether on human rights grounds or on any other.

1 See para **2.19**.

6.08

Second, by the NIA 1998, s 10(1), a Bill is not to be introduced in the Assembly if the Presiding Officer decides that any of its provisions would not be within the legislative competence of the Assembly. To date, the Presiding Officer has not felt it necessary to query any proposed Bill on human rights grounds and there has been no attempt to seek judicial review of the Presiding Officer's statement that a provision in a proposed Bill is or is not legitimate.

6.09

Third, the Attorney General for Northern Ireland[1] can, within four weeks beginning with the passing of a Bill, refer the question of whether a provision of the Bill would be within the legislative competence of the Assembly to the Judicial Committee of the Privy Council[2]. If the Judicial Committee decides that the provision would not be within the Assembly's competence, the Assembly will have an opportunity to reconsider the Bill[3]. Alternatively, the Assembly can pre-empt any decision by the Judicial Committee by resolving that it wishes to reconsider the Bill, in which case the Attorney General must request that any reference made to the Judicial Committee be withdrawn[4]. Once a Bill has been reconsidered, there is a further four-week period during which the Attorney General can again refer it to the Judicial Committee[5].

1 The holder of this office is (for the time being at least) the same person as the Attorney General for England and Wales. A local person will be appointed to the post when responsibility for criminal justice is eventually transferred to the Assembly.

2 NIA 1998, s 11(1) and (2). Cf para **6.17**. When the Supreme Court of the UK is established in October 2009 this jurisdiction will be transferred to it: see Constitutional Reform Act 2005, s 40(4)(b) and Sch 9, Pt 2, para 109.

3 NIA 1998, s 13(5)(a).

4 NIA 1998, ss 12(2) and 13(5).

5 NIA 1998, s 11(2)(b).

6.10

A fourth method of controlling the Assembly's compliance with the Convention is through the exercise of the Attorney General's power to bring proceedings on the ground that any legislation is incompatible with the Convention[1]. The same subsection makes it clear that the Attorney General can also go to court to challenge acts of a minister or Northern Ireland department (including, therefore, acts whereby draft legislation is brought before the Assembly). It is likely that the Attorney General could also challenge legislation or an executive act by bringing judicial review proceedings against the Assembly itself or against any of its officers or members. If a court decides to uphold the Attorney General's challenge to an Act, the same legislative and judicial remedies apply as in the case of decisions taken by the Judicial Committee on a reference from the Attorney General[2].

1 NIA 1998, s 71(2).

2 See para **6.18**.

6.11

A fifth, albeit indirect, method of controlling a Bill's consistency with the Convention is provided for by the NIA 1998, s 14(5)(a), which allows the Secretary of State not to submit a Bill for royal assent if he or she considers that it contains a provision 'incompatible with any international obligations'[1]. Although 'international obligations' is defined as excluding obligations to observe Convention rights[2], other international obligations (ie under the International Covenant on Civil and Political Rights) are virtually identical to those in the Convention. Again, in such circumstances the Assembly would have the opportunity to reconsider the Bill[3], and the four-week period for referrals to the Judicial Committee applies here too.

1 Cf Scotland Act 1998, s 35(1)(a). See para **5.38**.

2 NIA 1998, s 98(1).

3 NIA 1998, s 13(5)(c).

6.12

A sixth method of control, unique to Northern Ireland, is provided for by the NIA 1998, s 13(4), which requires standing orders to be made imposing a duty on the Presiding Officer to send a copy of each Bill, as soon as reasonably practicable after its introduction, to the NIHRC, and enabling the Assembly to ask that Commission to advise whether a Bill is compatible with human rights. The NIHRC must then advise the Assembly as soon as reasonably practicable.[1] The same provision requires the NIHRC to provide advice 'on such other occasions as the Commission thinks appropriate'.

1 NIA 1998, s 69(4)(a). See para **6.20**.

6.13

Two final channels for challenging the compatibility of Assembly legislation with international human rights standards are available when the question is a 'devolution issue'. In the NIA 1998, devolution issues are defined as meaning[1]:

> '(a) a question whether any provision of an Act of the Assembly is within the legislative competence of the Assembly;
>
> (b) a question whether a purported or proposed exercise of a function by a Minister or Northern Ireland department is, or would be, invalid by reason of section 24[2];
>
> (c) a question whether a Minister or Northern Ireland department has failed to comply with any of the Convention rights, any obligation under Community law or any order under section 27[3] so far as relating to such an obligation; or
>
> (d) any question arising under this Act about excepted or reserved matters.'

The compatibility of proposed or actual legislation with the Convention can qualify as a devolution issue under paras (a), (b) or (c) and the matter may arise either *during* or *outside* court proceedings. These then constitute the seventh and eighth means by which legislation's compatibility with the Convention can be

checked, and they are further explained in paras **6.14-6.18**.

1 NIA 1998, Sch 10, para 1.

2 NIA 1998, s 24 is the equivalent for ministers and departments to s 6 for the Assembly itself, ie it lists the limits to their power to do any act. The first limit relates to incompatibility with Convention rights.

3 NIA 1998, s 27 allows a minister of the UK government to make an order providing for the achievement by a minister or Northern Ireland department of a quantified part of an international obligation.

6.14

A devolution issue can arise *during* proceedings before any court or tribunal anywhere in the UK. The NIA 1998, Sch 10, makes provision for what is to happen in relation to a Northern Ireland devolution issue depending on the particular UK jurisdiction where it arises and appropriate rules of court have since been made[1].

1 Magistrates' Courts (Devolution Issues) Rules (NI) 1999, SR 1999/489; County Court (Amendment No 4) Rules (NI) 1999, SR 1999/490; Crown Court (Amendment No 2) Rules (NI) 1999, SR 1999/491; Criminal Appeal (Devolution Issues) Rules (NI) 1999, SR 1999/492; Rules of the Supreme Court (NI) (Amendment No 3) 1999, SR 1999/493.

6.15

When a devolution issue arises in any court or tribunal in Northern Ireland, other than the Court of Appeal, it may either be referred to the Court of Appeal in Northern Ireland[1] (and if the tribunal is one from which there is no appeal, it *must* refer the issue[2]) or be decided by the court or tribunal itself with the possibility of the issue being taken to a higher court by way of appeal. When the Court of Appeal is faced with a devolution issue *referred* to it, it must determine it, and an appeal can then lie to the Judicial Committee of the Privy Council, provided either the Court of Appeal or the Judicial Committee grants leave[3]. When the Court of Appeal is faced with a devolution issue in an *appeal* from a lower court or tribunal, whether the issue has been raised in the lower forum or not, it *may*, like the lower forum, determine the issue itself or refer it to a higher court; again, the Judicial Committee[4].

1 NIA 1998, Sch 10, paras 7 and 8.

2 NIA 1998, Sch 10, para 8.

3 NIA 1998, Sch 10, paras 9 and 10.

4 NIA 1998, Sch 10, paras 9 and 10.

6.16

Within Northern Ireland itself, proceedings for the determination of a devolution issue may be instituted by the Attorney General[1]. In so far as this sub-paragraph also says that the Attorney General may *defend* such proceedings[2], there is a presupposition that someone other than the Attorney General may institute them, but no other individual or body is specified in the legislation. The Attorney General, or the First Minister and the deputy First Minister acting jointly, may *require* any court or tribunal to refer to the Judicial Committee[3] any devolution issue which has arisen in proceedings to which they are a party[4].

1 NIA 1998, Sch 10, para 4(1).

2 By the NIA 1998, Sch 10, para 4(2), the First Minister and deputy First Minister, acting jointly as always, may also defend such proceedings.

3 From October 2009 the referral will be to the UK Supreme Court: Constitutional Reform Act 2005, s 40(4)(b) and Sch 9, Pt 2, para 118(4).

4 NIA 1998, Sch 10, para 33.

6.17

The Attorney General, or the First Minister and deputy First Minister acting jointly, may refer to the Judicial Committee[1] any devolution issue which arises *outside* court or tribunal proceedings[2]. This raises the prospect of, say, the First and deputy First Ministers referring to the Judicial Committee a question whether a minister in the Executive Committee, through acting or failing to act in a certain way, has complied with a Convention right.

1 From October 2009 the referral will be to the UK Supreme Court: Constitutional Reform Act 2005, s 40(4)(b) and Sch 9, Pt 2, para 118(5).

2 NIA 1998, Sch 10, para 34. Cf the Attorney General's time-limited power to make a reference to the Judicial Committee (see para **6.20**).

6.18

If the Judicial Committee decides that a provision of an Act of the Assembly is not within the legislative competence of the Assembly (or that a minister or Northern Ireland department has acted unlawfully), the Secretary of State may make an order remedying the defect in whatever way he or she thinks is necessary or expedient[1], and such an order may even have retrospective effect[2]. The Judicial Committee itself, when deciding that a provision of an Act is ultra vires, can limit the retrospective effect of its decision or suspend its effect for any period and on any conditions[3]. Decisions of the Judicial Committee under the NIA 1998 are 'binding in all legal proceedings (other than proceedings before the Committee itself)'[4].

1 NIA 1998, s 80(1).

2 NIA 1998, s 80(2)(a).

3 NIA 1998, s 81(2).

4 NIA 1998, s 82(1).