Committee for Finance and Personnel

OFFICIAL REPORT
(Hansard)

Defamation Act 2013: DFP Briefing

3 July 2013

NORTHERN IRELAND ASSEMBLY

Committee for Finance and Personnel

Defamation Act 2013: DFP Briefing

3 July 2013

Members present for all or part of the proceedings:
Mr Daithí McKay (Chairperson)
Mr Dominic Bradley (Deputy Chairperson)
Mrs Judith Cochrane
Mr Leslie Cree
Mr Paul Girvan
Mr Adrian McQuillan
Mr Peter Weir

Witnesses:

Ms Laura McPolin	Department of Finance and Personnel
Mr Oswyn Paulin	Department of Finance and Personnel

The Chairperson: I welcome Oswyn and Laura back to the meeting. Shall we start by reflecting on some of the comments that have been made this morning?

Mr Oswyn Paulin (Department of Finance and Personnel): It would be difficult to reflect fully on what has been said this morning, because it is really quite difficult to take it all in in such a short period. However, we have seen various documents and reports of discussions in evidence taken last week. I am grateful for the opportunity to set out the Department's position.

Let me say first that it is not for us, as officials, to comment on the progress of this issue in the Executive. The Minister is obliged to respect the confidentiality of Executive business, and that obligation extends to officials. The bare facts are that, as previously set out, the Defamation Bill was subject to consultation solely in England and Wales. The Ministry of Justice asked whether the Department wished to seek a legislative consent motion for the Bill to extend to Northern Ireland. An Executive paper was submitted by the Minister, but it was not possible to secure agreement within the required timescale. Accordingly, the Executive did not take a decision not to ask the Assembly to consent to the Bill extending to Northern Ireland. It took no decision on the matter and, as time was very limited, the opportunity passed. So to suggest that the Executive decided not to ask that the Bill extend to Northern Ireland is mistaken.

The law in this area has been described as antiquated. However, legislation in relation to defamation law in Northern Ireland has been enacted in 1955 and 1996, and the courts continue to develop the law to this day. So to suggest that the law has remained unchanged since antiquity is also misleading.

Then there is the issue of the compliance of our law with the European Convention on Human Rights. Mr Potter, in the briefing paper, states, and I agree with him, that the law on defamation is largely located in common law. By that, he means law developed by the courts, rather than in statutes

enacted by Parliament or the Assembly. If the law of defamation was in breach of convention rights, the courts would be obliged to modify it so that it complied with the convention and could readily do so, except for those areas where the law was contained in a Westminster statute.

The UK Government has never accepted the view that the law prior to the passing of the Defamation Act 2013 was in breach of convention rights under the European Convention on Human Rights, and the Department is also of that opinion. If, contrary to the official view, that were the case, current law in England and Wales also would be incompatible with convention rights, as the 2013 Act has not yet been commenced. It is therefore the Department's clear view that Northern Ireland law on defamation is compliant with the convention, and to suggest otherwise is mistaken.

I note that, in the recent debate in the House of Lords, there appears to be a suggestion that the Minister or the Department could be directed by the Secretary of State, under the Northern Ireland Act 1998, to give effect to the Defamation Act 2013, as otherwise there would be a breach — the argument runs — of international obligations, namely the European Convention on Human Rights. Again, that is mistaken, for two reasons. First, the law can only be changed in this respect by legislation, and the Minister cannot legislate on this matter. That is the prerogative of the Assembly. Secondly, the power of the Secretary of State is to give effect to international obligations which are defined in the 1998 Act so as to exclude the European Convention on Human Rights.

I think that there has also been a suggestion from the Northern Ireland Human Rights Commission that the law in Northern Ireland may not comply with international human rights standards. Reference has been made to the International Covenant on Civil and Political Rights. Concern expressed by the United Nations Human Rights Committee about the practical application of the law of defamation in Britain must be seen in the context of the contingent fee agreements, which are not possible at present in Northern Ireland. The issue was considered in the Mirror Group Newspapers case, and changes have been made elsewhere in the United Kingdom to take account of that decision of the European Court of Human Rights.

From this short summary, it will be clear that it is the Department's view that some recent comment on these issues has been, to an extent, misinformed. There has been considerable coverage of the issue in the press, and it would be fair to say that the press and the media are not entirely disinterested observers in relation to the law on defamation. It is also the case that lawyers practising in this field may have interests that they wish to protect or enhance. That does not mean that their views should be discounted, but nor does it mean that they should be accepted uncritically.

The 2013 Act makes major changes to the law on defamation in England and Wales. It is likely that there will be many cases fought over the exact meaning of its provisions. This will provide much work for those lawyers who specialise in the field. It will also mean that legal certainty, which has been referred to quite a bit this morning — the idea that the law should be clear and readily available to all those affected by it — may suffer for a period until what these concepts mean is hammered out by the courts.

The changes that the 2013 Act has introduced are not the only proposals that could be made to change the law on defamation. Since the Act commenced its passage through Parliament, the Leveson inquiry into the culture, practices and ethics of the press has produced its report. It made recommendations on the law of defamation, including the establishment of an arbitration service for handling claims for libel and breach of privacy. Proposals were made for amendments to the Bill as it passed through Parliament, but they were firmly resisted by the supporters of the Bill.

Defamation is clearly a controversial area of policy, and the passage of the Bill through Parliament illustrates that, given that there were 16 Divisions on it. The Bill left the Commons and was amended by the Lords. Those amendments were then rejected by the Commons. The Lords accepted the removal of some, but substituted others. Eventually, that was accepted by the Commons. The 2013 Act is but one approach to this area of the law. Mr Potter's paper demonstrates the range of views expressed in consultation on its provisions. Other approaches are possible, and any review should examine alternatives. A review would be enhanced if information on how the Act had worked in practice could be considered.

I should mention one final issue that has attracted some attention previously, and again this morning — the suggestion that Northern Ireland might become the libel capital of the world. The basis for that appears to be that when the 2013 Act is commenced, our arrangements may be more attractive to those who wish to sue for defamation than those in England and Wales. Both the Ministry of Justice in Whitehall and the Department consider that that is unlikely. One reason for that is that conditional fee

agreements are not lawful in Northern Ireland. That means that plaintiffs are at greater risk in relation to costs than in England and Wales. If, contrary to expectations, there was a notable upsurge in defamation cases in our courts, brought by individuals or bodies with no real connection with Northern Ireland, that could be remedied quite readily and expeditiously.

Devolution permits the devolved legislatures and Executives to develop policies and laws that differ from those in the rest of the country. For some, that may be inconvenient, but it is the nature of devolution, and this is but one example where our laws have diverged from those in England and Wales.

Those are my opening comments.

The Chairperson: OK. Thank you, Oswyn. Does the Department or the Minister recognise the need for reform of the law on defamation?

Mr Paulin: We recognise that there are things that should be changed in the law on defamation. We take the view that that should be done by going through a proper process that involves going to and consulting with people and seeing what the ideas are. The concern with the 2013 Act is that it has set a new path, as it were. We are now presented with a choice: do you introduce the Act in Northern Ireland, or do you do something else? Before we do anything, I think that it would be very important to see how the Act works.

The Chairperson: How long should we wait to see how the Act works?

Mr Paulin: That is an interesting question. I would have thought that a year or two would be necessary.

The Chairperson: Do you see the merit, as well? Obviously, with the legislative process of a possible private Member's Bill, there will be opportunity for the Department to propose amendments, and there will also be a consultation process as a result of that. Surely that will go some way to meeting some of the points that you have just made.

Mr Paulin: The private Member's Bill is very much a matter for the Assembly and the private Member. It has not been introduced, and I do not think that it has been consulted on. From the evidence last week, I gather that there is an issue about drafting. Although a draft has been produced, I assume, there is concern that it needs to be redrafted. However, it is interesting to go with a Bill, as it were, for consultation, rather than looking at the problems and issues in Northern Ireland in relation to defamation and asking where we should go. The proposal seems to be to start with a Bill and then see how it should be changed.

Ms Laura McPolin (Department of Finance and Personnel): If you go out with a Bill, you go out with a preconceived structure and idea. It is then very difficult to really get to the bottom of the problems, especially a Bill that has been devised for a different jurisdiction. Yes, Northern Ireland has similar laws to those in England and Wales, but you need to test how those laws operate on the ground and what the particular difficulties are to this jurisdiction. That is a very important process in terms of law reform and how law reform customarily operates in this jurisdiction. We have a very good tradition of law reform that is evidence-based and operates on the concept of very thorough research and testing the propositions that are made. There is also what I call walking the system, which is what any changes would look like after the event. There is an important point to be made. It was said earlier when evidence was being given that this has now been put in statute and that that is important. I think that you should never regard a statute as an end in itself. It is the English language; it will be interpreted and applied in different ways, and it will be developed. Therefore, there can be some unintended consequences. If you are making any changes to the law, it is really important that you have a very thorough process in place for achieving those changes and offsetting any unintended consequences.

The Chairperson: Can you give us a brief assessment of the costs of defamation at present in the legal system here and how concerned you would be? You referred libel tourism and to the fact that those costs would increase. Has any assessment been done on that possibility?

Mr Paulin: I cannot give figures for the cost of libel actions. I do not think that we have conducted any libel actions. I have a responsibility for conducting litigation on behalf of the Government, but I cannot

recall a defamation action in recent times that we have defended. We would not be bringing them, but we would defend them.

The witnesses from the campaign for libel reform referred to Scotland and said that costs were lower there than in England. Well, they are also lower here than they are in England. They also said that the culture in Scotland was different from that in England and Wales in this regard, and —

The Chairperson: Lower in what sense?

Mr Paulin: It costs less to bring a libel action in Scotland than it does in London. Huge costs are racked up in litigation in London. Our costs are lower than the costs in London, and so they should be. I do not understand the attention that the campaign pays to Northern Ireland as opposed to Scotland. It seems to me that their argument for why they are not interested in what is happening in Scotland applies equally to Northern Ireland.

Ms McPolin: On the cost front, as Oswyn said, it is a very different landscape in Northern Ireland. The big issue in England and Wales is the conditional fee arrangements. Mention was made earlier about the comments of the Human Rights Committee with regard to the law on defamation.

Mr Paulin: The United Nations Human Rights Committee.

Ms McPolin: Yes. It was very much directed at how that law was operating in practice because of these conditional fee arrangements (CFAs) that allow huge uplifts in terms of success fees. Oswyn mentioned the Mirror Group Newspapers case. In that particular instance, there was an uplift of 95% for the solicitors and 100% for the barristers, and that was the big difficulty in that case. It is really important to make the point, which is borne out in that particular case, about the application of the law in the UK and whether it complies with human rights law. I refer to the judgement in the case involving Naomi Campbell, which took great care to set out how the Court of Appeal and the House of Lords had approached the case. It said:

> *"The Court has set out the domestic judgments in some detail ... It observes that the majority members of the House of Lords recorded the core Convention principles and case-law relevant to the case. In particular, they underlined in some detail the particular role of the press in a democratic society and, more especially, the importance of publishing matters of public interest. In addition, and contrary to the applicant's submission"*

— that was the Mirror Group's submission —

> *"each member of the majority specifically underlined the protection to be accorded to journalists as regards the techniques of reporting they adopt and as regards decisions taken about the content of published material to ensure credibility, as well as journalists' duties and responsibilities to act in good faith and on an accurate factual basis to provide 'reliable and precise' information in accordance with the ethics of journalism ... Moreover, the majority recorded the need to balance the protection accorded under Articles 8 and 10 so that any infringement of the applicant's Article 10 rights with the aim of protecting Ms Campbell's privacy rights had to be no more than was necessary, neither Article having a pre-eminence over the other".*

What is important about that case is that it reflects the fact that the substantive law in the UK is in accordance with the convention. It was being properly applied by the courts in that case, and the big issue was the chilling effect that the court felt that the CFAs had in bringing defamation cases. That is what the court was critical of, and that is what was reflected in the reference earlier to the comments that have been made at an international level. Of course, those arrangements do not apply in Northern Ireland, and it is fair to say that, at an international level, when the committee is examining the UK's performance, it very much looks at what happens in England and Wales because it is the UK Government that are submitting the report. So, one would not necessarily expect the committee to go into the detail of what happens in Northern Ireland, but, on the suggestion that our laws are somehow out of step with the convention and will be heavily criticised because of that, that case reflects the fact that our courts operate perfectly well in applying the principles and trying to achieve a balance. It has to be remembered that there are countervailing rights. There are the rights to freedom of expression and also the rights to privacy, which have to be delicately balanced.

Mr Girvan: Thank you for coming this morning. The Northern Ireland Human Rights Commission made some reference in its paper to some issue about Northern Ireland people who felt that they had been defamed by content-generated websites such as Facebook — something like that — not being able to avail themselves of procedures provided in the 2013 Act to assist them in identifying and issuing proceedings against the author of that content. My understanding is that we can, but the Northern Ireland Human Rights Commission tried to portray that, because we do not have the Act in place here, we cannot avail ourselves of such protections. Based on what you have just said, bluntly, is there a necessity for a Bill? Can we not amend what currently exists in legislation to include some additional information?

Ms McPolin: I do not think that there is a particular difficulty, because I think that what has been reflected is that our law can adapt. One of the things about putting something in statute is that it is rigid. As I said, it is there in black and white, but you can argue about the detail. The common law can evolve, and what has been seen in the UK is that our law has evolved, so it is not the case that the internet is there and that there is no redress, because, as is quite clear, we have all seen cases where people have been able to go and say that something has been said about them on the internet and that they are unhappy about it and are going to pursue the matter, and they have been able to do that.

Mr Girvan: We were told this morning that our law has not changed since 1871, since the invention of the light bulb.

Ms McPolin: I smile wryly when I hear that, because I deal with the Constabulary (Ireland) Act 1866, which some lawyers regard as quite a new statute. There is something to be said about the fact that you should not necessarily regard an old law as a bad one.

Mr Girvan: Correct. Look at the 10 commandments.

Ms McPolin: It can be tried and tested, and the nuances of it can be worked through and it can be applied.

To go back to the point about certainty, it can be understood by those who are using it and those who are applying it, which is a big issue, but in terms of the internet we have adapted procedures that have allowed people to seek redress. It is important to make that point.

You asked whether it was necessary to do anything further. In the absence of any kind of specific analysis of the point, as a lawyer, you can always say that there are opportunities for improving the law. Our concern is that you have to be really careful that, in rushing to improve the law, you can sometimes make things a lot worse. For instance, a lot of the defences that have been put into the 2013 Act have changed the terminology, so there will be arguments galore as to what the new terminology means and whether the previous case law is relevant. Mr Weir referred to the reference to "serious harm"; how do you define "serious"? We heard reference earlier on to "reasonably believed"; how do you explain whether your belief was "reasonable" in any particular case?

Mr Weir: That almost puts it at a judicial review level.

Ms McPolin: There is a lot of that.

Mr D Bradley: Is that type of language not common throughout all legislation?

Mr Paulin: It is interpreted differently in different contexts. For instance, "reasonable suspicion" is the basis for arrest for certain offences, and what does that mean? That has led to a whole lot of case law and a lot of consideration, so, the word "reasonable" in itself, well, I am afraid a lawyer's work is looking at what words mean. It takes a long time to explain what they do.

Mr D Bradley: That is why we pay them so much.

Mr Girvan: Bogus or otherwise.

Ms McPolin: We have to be careful with any new provisions that we introduce.

Mr D Bradley: I forget what I was going to ask you now, after all that. You mentioned libel tourism, and you said that if there was an increase in defamation cases coming before the courts here, it could be dealt with pretty quickly and pretty effectively. I think you said that, Oswyn.

Mr Paulin: I did.

Mr D Bradley: Can you explain how it would be dealt with quickly and effectively? As you said yourself, some of these legal processes are far from being quick and effective.

Mr Paulin: The quickest and most effective way to deal with it, if it became a problem, would be through legislation. Because we have a devolved Assembly, that can be done quickly, but it may be possible by changing rules, for example. The courts will not want to have a large number of people coming from all over the world clogging up their business with lots of libel actions, so they will develop ways of dealing with that if it becomes a problem, but legislation can also do that. That is the way I see it. Also, judges can make decisions; there is a reference in the evidence given this morning to decisions in the House of Lords and so on, which would now be the Supreme Court, but decisions could be made that will ensure that the courts deal with matters that should be properly brought in this jurisdiction.

Mr D Bradley: Would it not be more judicious, no pun intended, to try to pre-empt that situation from arising by looking at the situation at the moment and consulting and introducing legislation?

Mr Paulin: Well, if the Assembly was short of legislation to deal with and Departments were short of legislation to propose, you could look around to see what potential problems might arise and legislate to prevent them all from happening. The Ministry of Justice in the UK Government is also of the view that this is not going to be a problem. It is a matter of priorities, then.

Mr D Bradley: Will you summarise the Department's response to the 2013 Act? You are going to wait and see how it pans out in Britain, and then take action or not take action in light of that, is that right?

Mr Paulin: I think that is a fair summary, yes.

Mr D Bradley: Would it not be more practical to look at the Act and the main new measures that have been introduced, perhaps consult about them here and proceed on that basis, rather than waiting to see what happens — be proactive rather than reactive?

Mr Paulin: Yes, but the position now is that there is a new Act that is going to apply in England and Wales, which is a very large jurisdiction where there will be a lot of litigation. The question is whether we want the concepts that are in that new Act or not. Do we say that we will have something totally different — pretend that there is nothing happening in England and Wales and do something totally new? Or do we look at what they have done and see how it is going to work? It is very difficult. We think that it is difficult to work out what a lot of the concepts mean and that the courts will spend some time doing that. Would it not be better to see where that leads to, rather than legislate to bring in something when we really do not know what it is going to do?

Ms McPolin: There is also the thing about other jurisdictions. Reference was made earlier to the position in the Republic of Ireland. I think that, if you are going to consider whether you change your law, it is prudent to consider a number of models and, as Ossie said, look at the operational aspects of those and how they have been applied in practice, and then assess what the position is — taking account of local needs as well, which are a particularly big issue.

Mr D Bradley: The Chair asked you about the length of time. I cannot recall what your response was to that.

Mr Paulin: We think it will take at least a couple of years to see how the whole thing operates.

Mr D Bradley: That will not creep into five years and then 10 years, hopefully.

Mr Paulin: If it is much more than a couple of years, I will not be here, so — *[Laughter.]*

Mr D Bradley: You will not have to worry about it then. OK, thanks for that.

Mr Cree: I think that is a good point, because then it is someone else's problem. *[Laughter.]* I find it a little bit strange that the Department does not have any enthusiasm for initiating improvements to the law in light of developing circumstances. We are told, for example, that across the water the Bill was introduced in light of people being concerned about the existing law, which is pretty much what ours is. Those were people like the UN Human Rights Committee, for example, and the United States, which in fact brought a piece of legislation in specifically aimed against the UK legislation. I find it a bit of a contradiction that we are not at least looking at and discussing those things or consulting on them widely, but saying that we will sit and watch what happens. There seems to be a tension there.

Mr Paulin: First of all, we are interested in improving the law in all of the areas that we have responsibility for in the Department of Finance and Personnel. We have a range of areas where we have proposals that are quite close to coming before the Assembly as legislation.

Mr Cree: On this subject?

Mr Paulin: Not on this subject; on other subjects. You have referred to the United Nations and its views on things, but the Department's first interest is in what pressure there is coming from people based in Northern Ireland and what correspondence the Minister is getting about the issue. The answer is none, I think.

Mr D Bradley: You have a private Member's Bill coming before the Assembly.

Mr Paulin: Yes, but before that we did not have anybody asking what we were doing about libel reform or anything like that in Northern Ireland.

Mr Cree: Was the Department actually looking for opinions?

Mr Paulin: No, but people write in about all sorts of subjects when we are not looking for them to do so. That is where the initiative comes from. People go to their MLAs and say, "Look, this is a big issue". One of the things that struck me this morning was that one of the witnesses referred to the current law as overly discouraging critical media reporting. I do not think that we have that problem in Northern Ireland. I think that we have a considerable volume of critical media reporting. So I am bound to say that I am not complacent about the situation. I think that changes are needed to the law, but I do not know that this is a huge priority. Again, I say that I am surprised at the divergence of views on the libel reform committee's approach to the position in Scotland and the position in Northern Ireland. I am very surprised by that. The arguments that it put forward seem to me to apply equally to Northern Ireland.

Mr Cree: We have a considerable folder now on case law from international sources coming to the UK. I must say that it is very interesting. In response to a colleague's question earlier, you indicated that that was not a problem or, if it became a problem, the courts could deal with it. Do you not see that as a warning sign that, now that the law is tightened up in the rest of the UK, Northern Ireland could, indeed, be a home for that type of libel tourism?

Mr Paulin: It is a possibility. However, neither the Department of Finance and Personnel nor the Ministry of Justice in Whitehall think that it is likely to happen.

Ms McPolin: It is also a fact that there are also very specific jurisdictional laws in place that are designed to ensure that the court that is best placed to deal with the matter actually deals with it. Those jurisdictional laws are actually at a European level.

Mr Cree: With respect, that has not happened in all of those cases, clearly.

Mr Paulin: It has in some.

Mr Cree: It may have done. However, in quite a few, it has not.

Mr Paulin: But they have been brought in London. Those are, largely, London cases. They are not being brought in Edinburgh or Belfast.

Mr Cree: Not yet.

Mr Paulin: Not yet, no. It is a possibility, but there are many possibilities.

Mr Cree: Anyway, it might not be your problem. *[Laughter.]*

Mr Weir: It seems that what you are saying about interest from the public is that this issue seems to exercise, on either side, politicians, lawyers to some degree, and, clearly, journalists, because, at times, the only place where I have seen it written about is in the papers. It does not seem to exercise the public in any way, shape or form.

Mr Paulin: I think that the public, probably, take the opposite view that the problem with defamation law is not that it inhibits free speech, but that they cannot access it in order to get redress.

Mr Weir: So, the access to justice issues in terms of cost. I think that that would be shared widely.

Mr Paulin: It is interesting that the Bill's sponsors were very much opposed to the proposal — which came from a former Lord Chancellor and a former Attorney General, amongst others, in the House of Lords — to open up the access to defamation law through an arbitration service.

Mr Weir: I note that reference was made to the volume of cases of libel tourism. I was looking through the papers. Unless I have missed something, I note, for example, that the group that we had in front of us earlier, the Index on Censorship, essentially highlighted two cases in its letter. One that was mentioned was the Ukrainian case. To be honest, it is not actually named, so it is difficult to find information on it. Interestingly enough, the other one that was referred to was the case of a Saudi businessman. It is interesting that the main problems that were raised were around both the jury trial and the issue of where the threshold — both in terms of defences and the threshold on that. That is a case in point. It is fairly clear from the judgement in the case of Sheikh Khalid bin Mahfouz — if I have pronounced that correctly — that it is actually one that could have been brought here under the 2013 Act. On the threshold side of it, the judge gave indications that, essentially, this was somebody who had been alleged to have been a financier of international terrorism. The judge indicated that it was a most defamatory and serious case. Clearly, it was one that would have cleared the threshold of serious harm. On the issue of the tourism bit that has been mentioned, am I right in saying — I think that Paul Tweed gave evidence last week — that there have been cases where the courts in London have refused to take, say, some American cases on the basis of locus and that there was insufficient —

Mr Paulin: Insufficient connection?

Mr Weir: Because there was insufficient connection and that sort of thing? The concern is that there is some small level of publication here that is, then, used as the loophole. If libel tourism did, clearly, start to become a problem with regard to volume, could one solution be some degree of definition on the level of publication or locus? That could be one way to deal with that. I wonder what your comments are on that and whether it was the right jurisdiction, therefore, to take a case on the basis that the impact on Northern Ireland was so minimal compared with the broader publication of things.

Ms McPolin: That goes back to what I said earlier; if the jurisdictional rules are properly applied, you should really be looking at the court or jurisdiction in which the case should most appropriately be brought and where those rules can be applied properly.

Mr Weir: If those rules need to be clarified in such a way as to ensure that it is not abused in that regard, as is the fear, is that something that lies in the judge's hands, by way of redefinition, or would it be a question of, for example, a statutory rule here that would define it? What would be the route?

Mr Paulin: There could be a series of approaches. The courts could be very conservative in their approach to existing rules or they could look at different ways, but use existing rules, to ensure that only cases that have some connection with Northern Ireland are dealt with. Another way would be for court rules to be changed. The third way would be for primary legislation to go through the Assembly.

Mr Weir: The final point that was raised was the issue, which is, obviously, one of the things that needs to be looked at, of the public interest defence that was mentioned earlier. It seemed to be

suggested that a shift from reasonably believing something to "could reasonably believe" was simply to make things clearer. To my mind, a judge would still have to make a judgement on whether that was fulfilled. I could see where that is with regard to shifting the law — maybe by the back door — from, basically, where there is reasonable belief to a situation that almost places a judicial-review-type burden. You can talk about whether someone is capable of reasonable belief. To stop that, you would actually have to show that, to the contrary, they were acting utterly irrationally. That would be a considerable shift in the legal position, I would have thought, from simply whether somebody reasonably believed something to whether they are capable of believing something.

Mr Paulin: It sounds a bit like Wednesbury unreasonableness being introduced. In other words, unless something was totally irrational, you could not —

Ms McPolin: It is moving from the objective to the subjective. If you are asking "Did you reasonably believe?", there is, obviously, an element of subjectivity there as opposed to "Could you have reasonably believed?". As you say, what would the reasonable person —

Mr Weir: Presumably, we are still relying on the judgement of the judge on that, rather than something's being very clear-cut.

Mr Paulin: On each set of facts, a decision must be made.

The Chairperson: Laura and Oswyn, thank you very much.