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NIALL MURPHY Evidence to the Ad Hoc Committee on a Bill of Rights

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INTRODUCTION

I am a partner in KRW Law LLP, a mixed legal practice whose portfolio includes criminal defence work and public law with an emphasis on human rights specifically in relation to the Legacy of the Conflict through challenges to the decisions of public authorities and through civil litigation. We consider that our work in this regard, although motivated by private instructions is overwhelmingly in the public interest, on behalf of a society emerging from an entrenched and generational conflict. We also conduct extensive engagements on behalf of our clients with those mechanisms currently constituting the Package of Measures, as agreed with the Committee of Ministers of the Council of Europe following the McKerr groups of judgments of the ECtHR, including Police Ombudsman, PSNI LIB and the Legacy inquest system.

The persistent recognition/perception of our jurisdiction as 'a state of exception' demands that access to justice be secured and that legal challenges to public authority decisions, expressed through powers and policies, and through civil litigation private law claims, be pursued as a right, in the absence of a human rights compliant mechanism to satisfactorily investigate the Legacy of the Conflict on behalf of the relatives of the victims and those who survived.

We are approached and instructed because litigation and the judgments and orders of the judiciary serve to fill the void in the absence of human right compliant mechanism to investigate the Legacy of the Conflict and to deliver truth, justice and accountability out-with any particular narrative endorsement from a political constituency and out-with a hierarchy of victims or hierarchy of perpetrators.

I am also secretary of the civic organisation Ireland's Future. Ireland's Future aspires to Irish reunification. It aims to facilitate a discussion towards that end, in line with principles and processes as set out in the Good Friday Agreement.

Ireland's Future recognises and supports the need for widespread and inclusive debate involving all sections of civic, political and democratic opinion on the form of any new future constitutional arrangements.

Partners

Kevin R Winters | Joseph D McVeigh | Gerard McNamara

Niall Murphy | Michael Crawford | Paul Pierce

Ireland's Future is committed to the achievement of constitutional change which is rights-based and protects and promotes the civil and religious liberties of all traditions and identities in Ireland, and in a spirit of mutual respect and parity of esteem

It is in this context that I propose to make my remarks.

Human Rights and the Good Friday Agreement 1998

A commitment to a Bill of Rights has been one of the contributions seeking an end to the Conflict. Infringing rights feeds and prolongs Conflict. The lesson of past decades is that it is only when states abide by the Rule of Law and respect people's rights that a safe and secure society can flourish. The centrality of human rights was one of the key reasons the Good Friday Agreement 1998 was possible, and why it has been successful in maintaining peace notwithstanding uncertainty over the political institutions from time to time.

As merely one example of the spirit of transformation that suffuses the Good Friday Agreement and the role of rights within that transformation, it is worth quoting the declaration of support at the start of the Agreement:

"The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all."

It is a professional duty of the highest calling to be instructed by people who but for the circumstances of the most tragic moment in their lives, might never require the services of a solicitor or to embark on courageous litigation that may define the law for the entirety of the jurisdiction. Very often when receiving such instructions, from a bereaved parent, child or sibling, you will not be surprised to hear that the refined complexities of the law relating to liability or quantum are not issues which dominate the conversation. In the context of deaths which may have occurred over 40 years ago in some circumstances, the next of kin, in the vast majority of instances, will seek to pursue very simple yet compelling concepts. A fact based account of what actually occurred on the night their loved one was murdered, the truth to be rectified for the public record.

That human rights were at the heart of the Good Friday Agreement is beyond question. A cursory search of the text of the Good Friday Agreement shows that the words 'right' or 'rights' appears 61 times.

As noted by the then UN High Commissioner for Human Rights, Mary Robinson:

"... the Good Friday Agreement is conspicuous by the centrality it gives to equality and human rights concerns. Few documents emerging from divisive and difficult political negotiations have so well captured the importance of fairness in creating right relationships." She continued that: "equality and human rights have now moved from the margins into the mainstream of Northern Irish life."

The commitment in the Good Friday Agreement to enshrining in Westminster legislation a Bill of Rights should be seen in this general context. It is not an incidental or optional extra, and surely we should remind ourselves of Martin Luther King Junior's observation that *'true peace is not merely the absence of tension; it is the presence of justice.'*

Surely our system of government and administration of justice must aspire to a higher calling than the mere silence of guns, as deafening and welcome as that silence is? The commitment to human rights is part of what brought us peace; the guarantee that everyone can feel that their rights will be respected and adhered to in the future.

While the formulation around the Bill of Rights in the Good Friday Agreement is complex, there is no doubt that this was the objective. This is confirmed in the St Andrews Agreement in 2006 which contained a commitment to progressing a Bill of Rights in the form of the Bill of Rights Forum, further demonstrating that rights have been at the core of efforts to move the peace process forward.

A Bill of Rights is one of the final parts of the Good Friday Agreement jigsaw; it ensures that rights currently enjoyed cannot be taken away at the whim of a government.

It is intended to ensure, in a divided society, that whoever governs this 'Narrow Ground' cannot rule without respecting the rights of everyone who lives here. It also ensures that those who are not or do not identify primarily as part of the two main communities will have their rights respected also.

WHAT CAN A BILL OF RIGHTS DO?

Bills of Rights are a list of human rights that everyone is entitled to enjoy. They uphold rights and facilitate political accountability and good governance.

They exist in many countries as a constitutional safeguard, to underpin legislation and policy, so as to ensure that rights are protected. As such, any exercise in developing a Bill of Rights should be an exercise in identifying fundamental human rights and in doing so should progress and enhance rights protection, particularly for the most disadvantaged in society, and not undermine or regress on existing protections.

The depth and scope of the process and debate that has taken place over many years here is reflective of the importance and constitutional nature of such a document.

This should provide a timely reminder of the importance of giving permanent effect to the human rights and equality promises held out in the Good Friday Agreement - a function best performed by a Bill of Rights, enacted, justiciable and enforceable.

They can support good governance by creating a rights informed structure of accountability; a bill of rights can therefore be part of a wider project of shaping governance and holding government to account.

They can assist in ensuring that *'legislation, policy and practice does not deny fundamental rights.'*¹ They can limit the actions of politicians in order to strengthen democracy rather than undermining it.

They are a useful mechanism to assure people that whoever is the Minister, irrespective of their political views, everyone's rights must be respected and protected. They also inform how power is exercised and policies are designed.

A bill of rights that only lives in courtrooms is not a constitutional document worth having.²

¹ NIHRC 'Is that right? Fact and Fiction on a Bill of Rights (2012)

² Colin Harvey and Anne Smith *Designing Bills of Rights in Contested Contexts: Reflections on the Northern Ireland Experience* Fordham International Law Journal 361 Vol 44:2

Rights that unite or rights that divide?

Over the 23 years, groups working with and representing people with a disability, women, children, ethnic minorities etc have identified themselves in the human rights and equality framework provided by the Good Friday Agreement. The development of a comprehensive Bill of Rights has been seen by them as a fundamental part of securing that framework and delivering on the promises of the Good Friday Agreement. There is further evidence of huge cross-community support for a Bill of Rights, particularly for the protection of social and economic rights.

It would be misguided to focus a Bill of Rights only on those rights that address specific concerns in a narrow way. Such a Bill of Rights, rather than providing a vision that unites across communities, reinforces the idea that human rights are narrowly concerned as part of a trade-off between those communities. It separates rather than offering a vision of shared common values.

The ‘particular circumstances of Northern Ireland’

Throughout the debate about a Bill of Rights since the signing of the Good Friday Agreement, six words have dominated: “the particular circumstances of Northern Ireland.”

It is clear that interpretations of this phrase vary, and there are many conflicting perspectives. Some of those engaging in the debate want to see the widest possible understanding of this phrase, others understand it to be very restrictive in meaning, and others take stances somewhere in between.

In its response to the advice of the NIHRC in December 2008, the NIO in 2009 argued that most of the rights proposed by the Commission were already protected by existing legislation, policy or practice.³ One, rhetorically asks, what would the problem be then?

The insensitivity of the response was not surprising and ignores the apt advice of Fintan O’Toole:

“Northern Ireland is not Lincolnshire or Somerset. It is a distinct and unique political entity, recognised as such by an international treaty registered with the United Nations”⁴

⁴ Fintan O’Toole *Belfast Agreement is a threat to English nationalism* Irish Times, July 5, 2016

It is worth noting that the NIHRC's 2008 advice was itself a compromise document; it did not include everything that civil society organisations wanted.

The NIO's response⁵ supported the inclusion of only two out of the 78 recommendations put forward by the NIHRC.

- The right to vote / be elected
- The right to identify and be accepted as British or Irish or both.

HOW MIGHT A BILL OF RIGHTS HAVE HELPED IN RECENT YEARS?

The submission by the Equality Coalition in their written evidence⁶ to this Committee last October is illustrative in this regard. A Bill of Rights could have prevented many of the issues that destabilised power sharing and contributed to its collapse, i.e. legislation and policy that would not have been lawful with the Bill of Rights in place. It also includes the diversion of Executive business into repeated attempts to enact rights-based provisions (many blocked from previous agreements) that would already have been in place (or already required as a matter of domestic law) had the Bill of Rights been enacted.

1. *Legacy* The legacy provisions of the Bill of Rights would have ensured the codified incorporation of Article 2 requirements to independent investigations in to unresolved deaths and thus would have prevented the antics of the Secretary of State last year in abandoning the Stormont House Agreement for some theoretical non-investigative information gathering exercise. The High Court is already exercising safe custodianship of the principles of article 2⁷, however victims and survivors should not be required to assert their rights through active litigation in this day and age. A Bill of Rights should and would have protected them. Compliance with article 2 of the ECHR is not merely an issue for Stormont, as Stormont is not a sovereign entity, Westminster is, and it is Westminster that signed the ECHR. Similarly, it is for Westminster to legislate for a Bill of Rights as previously promised.

⁵ NIO *A Bill of Rights for Northern Ireland : Next Steps*, 1, 42 (November 2009)

⁶ Equality Coalition – Written evidence to the Bill of Rights Committee (October 2020)

⁷ See Annex 2 attached of judicial citations by our High Court of judgements upholding the principles of Article 2 ECHR. A list is included of European cases prior to the December 2008 NIHRC Advice to the Secretary of State and a list of domestic decisions after the advice.

2. *Citizenship* Had even one of the two recommendations which the NIO accepted from the NIHRC's 78 recommendations, been adopted in a Bill of Rights, in one subtle but decisive piece of legislative drafting we could have totally nullified and neutered the most vexed constitutional question posed this century, Brexit.

Had this provision been in place it would have most notably precluded the imposition of a 'hard Brexit' on our island. EU free movement law to date has been the underpinning basis to ensure equality for British and Irish citizens in NI across a vast range of entitlements and provision, as well as EU citizens' rights for free movement across the EU. Without this, as things stand, British citizens in NI face detrimental and differential treatment compared to Irish citizens who retain EU citizenship and basic rights to free movement to work etc elsewhere in the EU.

At the same time Irish citizens in NI are placed at in a precarious provision compared to British citizens in relation to entitlements within NI that may now or in future be subject to citizenship restrictions. To date EU free movement law has underpinned legal guarantees of equality of treatment in NI for Irish citizens. At present it is only to be replaced with largely vague and unenforceable declarations regarding reciprocal rights within the Common Travel Area.

The mere adoption of the right to identify and be accepted as British or Irish or both would have foreseen with Solomon like wisdom the Home Office 'hostile environment' decision to treat almost all persons born here as British for statutory purposes.

This decision, well known due to the challenge in the De Souza⁸ case, was expressly taken to prevent Irish citizens born in the north from exercising EU rights tied to Irish citizenship (namely rights to be joined by close family members). This led to the extraordinary position of the UK Home Office suggesting that people renounce a British citizenship, that many hundreds of thousands never considered that they held, should they wish to exercise the rights in question.

These problems could not have arisen had the Bill of Rights citizenship provisions been in force.

⁸ <https://www.theguardian.com/uk-news/2020/may/14/northern-ireland-born-british-and-irish-win-eu-citizenship-rights>

3. *Language* The fact that this jurisdiction is the only region in Britain or Ireland that makes no statutory provision for the protection of a minority language in accordance with the European Charter for Regional or Minority Languages which was signed and ratified over 15 years ago, is remarkable.

Irish is an official language in the Republic of Ireland, with Welsh given statutory protection under the Welsh Language Act 1993, with Scots Gaelic protected under the Achd na Gàidhlig (Alba) 2005. Why is it that citizens of Scotland, Wales and the South all benefit from statutory protection for an indigenous language but it is a right denied to citizens here?

This issue which has contributed to concerns over the sustainability of the institutions, could also have easily been neutralised by a Bill of Rights. Whereas many language rights campaigners have commented that the NIHRC Advice of 2008 could have gone further in terms of protections, the advice did recommend that provisions of the European Charter on Regional and Minority Languages should be justiciable which would have cauterised unlawful intentions at an early stage.

In recent years, I have been instructed by clients who have successfully challenged the unlawful cancellation of the Líofoa bursary scheme in December 2016⁹ and also the unlawful language policy adopted by Antrim and Newtownabbey Borough Council in 2018¹⁰ which sought to adopt a policy imposing a blanket ban on bilingual street signs containing displays in English and in Irish.

Whereas I enjoy receiving instructions, taking and winning cases and getting paid, citizens should not be compelled to seek recourse to the High Court to safeguard their rights, when a Bill of Rights should set this out in stone.

A BILL OF RIGHTS AS AN INSURANCE POLICY?

In deeply divided societies “law is not always viewed as politically neutral and objective”.¹¹ One commentator has noted that unionist ideas about what a Bill of Rights should encompass are deeply informed by perceptions of the legitimacy of the state and its institutions.¹²

⁹ <https://www.irishnews.com/news/northernirelandnews/2017/01/12/news/paul-givan-reverses-cuts-to-irish-language-scheme-882006/> see pre action protocol correspondence 6 January 2017 obo Harron JR/K17590/NPM

¹⁰ See pre action protocol correspondence 16 May 2018 obo Duffy and Order for Costs 7 September 2018 No 18/051468/1

¹¹ Louise Mallinder, *Metaconflict and International Human Rights Law in Dealing with Northern Ireland's Past*, 8 Cambridge Int'l L.J. 5,11 (2019).

¹² See, e.g. Catherine Turner, *Political Representations of Law in Northern Ireland*, 3 Pub. L. 451 (2010)

The DUP in their 2003 document “A Bill of Rights for Northern Ireland” assert caution on the imposition by a bill of rights of constraints and limitations on the Executive giving Judges a more expansive role, although surely that judicial supervision, with the benefit of 18 years, has been expansive in any event, in the absence of a Bill of Rights?

Mallinder argues that “Unionist self-identification with the State means that actions that are perceived as anti the British state are also perceived as anti-Unionist.” The current First Minister, Arlene Foster has stated that “human rights is like a foreign language to most [referring to unionists]”.¹³ A former PUP representative summed this up as: “rights are seen as a Catholic thing, it’s not a Protestant thing”.¹⁴

I hope and trust that if this innate sensibility is considered to be accurate, I would respectfully submit it is misplaced. Rights aren’t British or Irish. Rights are for everyone. Everyone benefits with a strong framework for protection and everyone loses when rights are deprived. The risk is that the value to be derived for all communities, through active engagement with rights discourse is therefore lost.

The NIHRC 2008 advice was faithful to an explicit ‘parity of esteem’ provision within the Good Friday Agreement provided for a right whereby “*Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland.*” The NIHRC added an important qualification that “*No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.*”

The equality of treatment provision protects **both** ‘main communities.’

Indeed, in this week of the census, unionism / loyalism may reflect on changing demographic tide and the fact that unionism has lost its majority, a majority held and in built since the inception of the State, in the three Parliaments it aspires to in the last three elections, a majority which is gone forever. Gregory Campbell spoke on Monday night¹⁵ of three minority communities in the north. It might bear the interests of unionism well to consider ‘a bill of rights as necessary insurance policy in the face of future constitutional change’.¹⁶

¹³ See Arlene Foster, *Protestants Need Rights Explained To Them* 411 FORTNIGHT, at 13 (February 2003).

¹⁴ Anne Smith et al *Political Capacity Building: Advancing a Bill of Rights for Northern Ireland* Chapter 2 (2014) note 3 at 44

¹⁵ Clare Byrne Live *A United Ireland?* Monday 22 March 2021

¹⁶ Colin Harvey and Anne Smith *Designing Bills of Rights in Contested Contexts: Reflections on the Northern Ireland Experience* Fordham International Law Journal 391 Vol 44:2

The Good Friday Agreement and Mutual Equivalence

The Good Friday Agreement requires that ‘the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities’.

The obligation of ‘rigorous impartiality’ will transfer to the Irish Government in the event of reunification. The commitments to parity of esteem, equality of treatment and rights will have implications for reunification proposals.

The Irish Government is under an obligation to provide at least an equivalent level of rights protection and has already made changes to reflect this aspect of the Agreement.

It is notable, for example, that the Agreement anticipated a Bill of Rights for N. Ireland and led to further effect being given to the European Convention on Human Rights, and the creation of the NI Human Rights Commission.

Any Bill of Rights adopted here will have implications for the guarantees required in the event of reunification.

Work will be needed to ensure that there is at minimum equivalence, and that reunification results in no diminution of protection. As noted above, this will also create an opportunity to discuss the adoption of a more expansive range of rights and equality guarantees.

“A democratic society must respect the human rights of all, if it is to be worthy of that name, and should provide assurances that people are to be treated fairly. By affording protections and safeguarding against abuses, a Bill of Rights should move us forward from our contentious past as well as being a point of reference for future generations. No one should feel defensive by the enactment of these rights. A Bill of Rights must be applicable to everyone and should, in this sense, belong to all of us.”¹⁷

¹⁷ Professor Monica McWilliams – NIHRC Advice to the Secretary of State 10 December 2008

CONCLUSION

It should be recalled that the European Convention on Human Rights was drafted by British lawyers, some of whom prosecuted at the Nuremberg Trials, determined to spare Europe from the horrors of communism and fascism. Indeed, one of the draftsmen of the Convention was David Maxwell Fyfe¹⁸ who was also a Conservative politician. When he worked on the European convention in the late 1940s, he and other European conservatives disposed of early drafts that mentioned the rights of workers, nor does it mention shelter or free education and healthcare.

The European Convention on Human Rights is not a radical left wing, liberal document. Indeed, Maxwell Fyfe was a stern advocate for the criminalisation of homosexuality¹⁹. Whilst Home Secretary in 1952, Maxwell Fyfe issued the Maxwell Fyfe Directive²⁰ which became the de facto constitution of the Security Service until the Security Service Act 1989 set it on a statutory basis.

In a celebrated speech in 2009²¹, the late Lord Bingham listed the liberties the European convention protects.

- The right not to be tortured or enslaved.
- The right to liberty and security of the person.
- The right to marry.
- The right to a fair trial.
- Freedom of thought, conscience and religion.
- Freedom of expression.
- Freedom of assembly and association.

"Which of these rights, I ask, would we wish to discard? Are any of them trivial, superfluous, unnecessary? Are any of them un-British?"

There must be no retreat from human rights and equality gains, rather they must be woven into the legal fabric of our society in a Bill of Rights which will benefit **everyone** in the future, irrespective of the prevailing constitutional status.

¹⁸ David Maxwell Fyfe was a member of the Parliamentary Assembly of the Council of Europe from August 1949 to May 1952, becoming the Chair of the Assembly's Committee on Legal and Administrative Questions, and rapporteur on the committee drafting the European Convention on Human Rights.

¹⁹ Stewart, Graham "The Accidental Legacy of a Homophobic Humanitarian", The Times (London), 2 October 2000.

²⁰ The Director General of MI5 (DG) was made directly answerable to the Home Secretary rather than the Prime Minister. Andrew, C. (2009). The Defence of the Realm: The Authorized History of MI5 at p322-323

²¹ <http://www.theguardian.com/commentisfree/2014/oct/04/tory-wreckers-out-destroy-human-rights>

ANNEX 1 – Sample of Rights supplementary to the Human Rights Act 1998 and the ECHR

The right to identity and culture

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. The right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both, as they may so choose, with no detriment or difference of treatment of any kind. This right would not be affected by any future change in the status of Northern Ireland.
2. The right of the people of Northern Ireland to hold British or Irish citizenship or both in accordance with the laws governing the exercise of this right, with no detriment or differential treatment of any kind. This right would not be affected by any future change in the status of Northern Ireland.
3. Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland. No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.
4. Everyone belonging to a national, ethnic, religious, linguistic or cultural minority in Northern Ireland has the right, individually and in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public. No one exercising these rights may do so in a manner inconsistent with the rights and freedoms of others.
5. Public authorities must encourage a spirit of tolerance and dialogue, taking effective measures to promote mutual respect, understanding and co-operation among all persons living in Northern Ireland, irrespective of those persons' race, ethnicity, language, religion or political opinion.
6. No one may be compelled in Northern Ireland to take an oath, or to take an oath in a manner, that is contrary to their religion or belief, or that requires them to express a belief that they do not hold.

Language rights

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Everyone belonging to a linguistic minority has the right to learn or be educated in and through their minority language where there are substantial numbers of users and sufficient demand.
2. Everyone has the right to access services essential to life, health or security through communication with a public authority, assisted by interpretation or other help where necessary, in a language (including sign language) and a medium that they understand.
3. Public authorities must, as a minimum, act compatibly with the obligations undertaken by the UK Government under the European Charter for Regional or Minority Languages in respect of the support and development of Irish and Ulster-Scots.

The rights of victims

Recommendations supplementary to the Human Rights Act 1998 and the European Convention on Human Rights, and to be considered for incorporation in a Bill of Rights for Northern Ireland

Provisions should be drafted to ensure that –

1. Every victim of crime has the right to appropriate material, medical, psychological and social assistance.
2. Every victim of crime has the right to be informed about the progress of the investigation and relevant legal proceedings.
3. Legislation must be enacted to recognise all the victims of the Northern Ireland conflict and to ensure that their rights are protected. These rights include rights to redress and to appropriate material, medical, psychological and social assistance.

ANNEX 2

Sample of Article 2 Judgements, pre and post the December 2008 NIHRC Advice

European judgments pre NIHRC advice on a Bill of Rights (December 2008)

1. *Jordan* [2001] ECHR 327
2. *Kelly and others* [2001] ECHR 327
3. *McKerr* [2001] ECHR 327
4. *Shanaghan* [2001] ECHR 327
5. *McShane* [2002] ECHR 469
6. *Finucane* [2003] ECHR 328
7. *Brecknell v United Kingdom* (2007) 46 EHRR 957

Domestic judgments post NIHRC advice on a Bill of Rights (December 2008)

8. *Ramsbottom's Application* [2009] NIQB 55
9. *Re McCaughey and another* [2011] UKSC 20
10. *Green's (Brigid) Application* [2012] NIQB 48
11. *Re Martin* [2012] NIQB 89
12. *McMahon's application* [2013] NIQB 22
13. *Re Finucane* [2015] NIQB 57 *and* [2017] NICA 7 *and* [2019] UKSC 7
14. *Mulhern* [2016] NIQB 59
15. *Re Hughes* [2018] NIQB 30
16. *Re McQuillan* [2019] NICA 13
17. *Re Barnard* [2019] NICA 38
18. *McGrillen* [2019] NIQB 14
19. *McGuigan, Re Judicial Review* [2019] NICA 46
20. *Re Dalton* [2020] NICA 26