Northern Ireland Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

Civil Service (Special Advisers) Bill: Briefing from the Attorney General

19 September 2012

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Daithí McKay (Chairperson)
Mr Dominic Bradley (Deputy Chairperson)
Mr Roy Beggs
Mrs Judith Cochrane
Mr Leslie Cree
Ms Megan Fearon
Mr Paul Girvan
Mr David Hilditch
Mr William Humphrey
Mr Mitchel McLaughlin
Mr Adrian McQuillan

Witnesses:
Mr John Larkin Attorney General for Northern Ireland

The Chairperson: John, you are very welcome.

Mr John Larkin (Attorney General for Northern Ireland): Thank you, Chairman. It is a pleasure to be here. I think that this is my first engagement with the Committee, and I am delighted to be here. I see this as an aspect of my engagement with the Assembly and with individual Committees. I was going to give an overview of what I think the Bill does, but it occurs to me that because the Committee had a very full presentation of the Bill from its author, Mr Allister, I might dispense with that and simply make myself available for any questions that the Committee may have.

The Chairperson: Before we do that, it may be useful if you outline to the Committee your role and functions.

Mr Larkin: I am a statutorily independent law officer and chief legal adviser to the Executive, specifically in the context of Bills. I have a jurisdiction under the Northern Ireland Act 1998 to refer, if I think it appropriate, a Bill or any provision thereof to the UK Supreme Court for a determination on whether it is within the Assembly's competence, particularly under the principal competence-limiting measures in section 6.

The Chairperson: In the paper that we received from the Department, the author referred to the fact:

"The Bill contains a retrospective dimension".

Members have been questioning how that may apply to past appointments. Mr Allister's presentation referred to legislation from, I think, the 1950s, under which someone had his contract terminated because of a previous offence. Do you have a particular view of that or of how competent the legislation would be?

Mr Larkin: I see that there is a discussion in paragraph 17 of the explanatory and financial memorandum, which Mr Allister produced, in which he looks at retrospectivity. He referred to three Acts. Two of them, of course, antedate the Human Rights Act 1998 and particular provisions in that that deal with retrospectivity. So, I do not think that those old statutes offer us any assistance about what might happen now. He also referred to the 2011 UK Act, which is about elections to newly created posts, so I do not see the immediate read-across with what is happening or what would happen in this Bill.

The Chairperson: The departmental official's last comment referred to the Civil Service Commissioners (Northern Ireland) Order 1999, which, in his view, is a prerogative order. This may need the Secretary of State's approval. Would that be the case? It is certainly something that I have not seen before.

Mr Larkin: I have to say that it was hugely valuable for me to listen to Mr Baker's evidence. He raised a very important and interesting point. The one thing that one can be absolutely clear about is that, under the Northern Ireland Act 1998, the Civil Service Commissioners are a reserved matter. I would need to look more closely at precisely what is proposed in clause 7 to see whether it might offend that. On the face of things, it does not look as though it takes away from the commissioners' power, but I want to reflect on that a little more.

Mr D Bradley: What is your responsibility in relation to statutory Committees of the Assembly such as this?

Mr Larkin: In what sense?

Mr D Bradley: You said that you had a statutory responsibility to provide legal advice to the Executive.

Mr Larkin: No, I did not. I said that I was chief legal adviser to the Executive. That particular function is not on a statutory basis. The reference to "statutory" was that I am a statutorily independent law officer. My engagement with the Assembly Committees is not, at present, regulated by statute. Standing Orders can provide specifically for my participation in the Assembly, which, I suppose, means plenary sessions, but those Standing Orders have not been made yet. So, this is simply part of what I see as good governance arrangements, whereby I am happy to give as much assistance as I can to the Assembly and its Committees.

Mr D Bradley: Does that assistance extend to individual Members?

Mr Larkin: I think that, from time to time, it could; yes.

Mr D Bradley: Why, then, did you decline to give me your advice on the Autism Bill when I asked for it?

Mr Larkin: That is a very good question, but there are all kinds of reasons, which I cannot go into now, why I cannot answer it.

Mr D Bradley: Right. I thought that we had enough of that this morning in the earlier session.

Mr Larkin: I will not beat around the bush: I cannot answer that question for a variety of reasons that —

Mr D Bradley: Maybe you will write to me and explain.

Mr Larkin: I am not even sure that I can do that. I will see. If you write to me, I will see whether I can answer your question.

Mr D Bradley: I did write to you, and you wrote back but did not answer my question.

Mr Larkin: That is right, but you got an answer. It was not the answer that you were particularly thrilled at. *[Laughter.]*

Mr D Bradley: It was a non-answer. However, I will take the time to write to you again just to clarify that point. I just thought that, since you have come this far, I would take the opportunity to ask you that question.

Mr Larkin: It is a free shop, so why not?

Mr D Bradley: Exactly. That is fine, Chair.

Mr Cree: John, following on from that, perhaps you could clarify something for me. It is really to do with your role vis-à-vis the Bill Office and the normal progress of legislation through the House. Do you, at any stage, impinge upon that, or is your advice sought?

Mr Larkin: To answer the question in the abstract, as you know, most Bills are Executive Bills. Therefore, without going into any particular detail or any concrete instance, there would, very often, be engagement between me and the relevant Minister before a Bill is introduced. That is non-statutory engagement. The formal statutory role that I have is at the very end of the process when the Speaker writes to me to ask me whether, essentially, I am going to refer the Bill or any provision thereof to the UK Supreme Court. There is the additional element — I think it has been touched on this morning — that the Assembly's own legal advisers would, from time to time, reassure the Speaker as to the competence of any proposed Bill.

Mr Cree: So, there is no formal structure. If, for example, I were to put forward a private Member's Bill — I may well do that next week — can I discuss the generalities of that with you?

Mr Larkin: Yes, you can.

Mr Cree: Thank you.

Mr Mitchel McLaughlin: Good morning. This Bill will obviously be of huge significance, not just in public interest terms, but it may go to the core of the principles and foundations of the peace and the political process that emerged from it. As the Attorney General, do you subscribe to the view that prisoners who were released under the 1998 sentences Act did so on the basis of the Good Friday Agreement, which was the catalyst for that particular piece of legislation, and were released because they were adjudged not to be a danger to the public?

Mr Larkin: I think that it is important to clarify something that may have been discussed earlier. The adjudication by the Sentence Review Commissioners that someone was not a risk to the public would have undoubtedly occurred, and I do not think that it would be right, in fairness, to the commissioners to describe that simply as a box-ticking exercise. That applied only to life sentence prisoners, so fixed-term prisoners would not have been subject to the additional criterion in the Northern Ireland (Sentences) Act 1998 that they would be of no danger to the public if released.

Mr Mitchel McLaughlin: OK; that is important information. I am not a lawyer. That would, in fact, apply to the case that was described as the catalyst for this Bill?

Mr Larkin: Yes; I am sure that is right.

Mr Mitchel McLaughlin: Quite clearly, the Bill has implications for domestic law and European human rights law. Do you have any concerns that if the Bill is passed by the Assembly, that decision could render the Assembly vulnerable to European human rights law?

Mr Larkin: Obviously, the Bill has been very carefully considered. It is important to point out — he is probably too modest to do so himself — that Mr Allister and I took silk at the same time. Of course, there are also legal advisers to the Speaker.

Paragraph 15 of the Bill's explanatory and financial memorandum discusses the human rights issues. For reasons that I am happy to go into in greater length if required, I think that it is correct, in view of the compensation arrangements, that article 1 of the first protocol to the European Convention on Human Rights would not be breached by the passage of the Bill. I also agree with the author of the explanatory and financial memorandum that article 6 would not be engaged.

My concerns stem from article 7 of the convention. That does two things, one of which is relevant, potentially, to this Bill. First, article 7 of the convention prohibits retrospective penalisation, so one cannot retrospectively render criminal that which was not criminal at the time. Secondly, and, perhaps, more relevantly for this discussion, it prohibits an increase in penalty or the imposition of a heavier penalty than was available at the time. If the question is asked whether the disqualification that is introduced by clauses 2 and 3 of the Bill constitutes a penalty in domestic law terms, the answer is quite clearly that no, it does not, because our criminal law would not recognise that as a penalty. For the consideration of this issue, it is vital to recall that "penalty", as used in article 7, has an autonomous convention meaning, and that has been clarified in a number of Strasbourg cases.

It strikes me that in taking guidance as best one can from the Strasbourg authorities, one starts with the dominant question in seeing whether article 7 applies. Does the measure, to use a neutral term, follow on as a consequence from a criminal conviction? I think the answer here is that what happens in clauses 2 and 3 does follow on as a consequence of a criminal conviction. You also consider its classification as a matter of domestic law. Again that points the other way. However, you then look at a purpose and its severity. It strikes me that in the cases where retrospective measures have been imposed throughout Europe, in France and the UK — cases that have survived scrutiny at Strasbourg — have been measures that, although retrospective in their effect, have been typically for a public safety purpose. For example, preventing people convicted of serious sexual offences from working with children or issues about measures to enforce the payment of certain sums of money due to Government, as in France, have served a broader public safety or public interest purpose rather than a purely penal purpose.

I am not fully aware of what the purpose may be, but, as I listened, at least partly, to Mr Allister, it seems that that does loom large. It is based, at least in part, on the idea of the public, or a large section of the public, recoiling from the presence of certain people who have serious criminal convictions in the past being in these important posts. If one looks, for example, at the policy objectives, paragraph 3 of the explanatory and financial memorandum states:

> *"The first objective of the Bill is to provide that no person shall hold the post of special adviser if they have been convicted of a criminal offence for which they received a custodial sentence of five years or more".*

So, there is a certain circularity. That is the point of the Bill and that is why, I think, there are dangers in relation to the competence of clauses 2 and 3 as they stand at present. It would be perfectly possible, for example, to have provisions that were regarded as harsh. There is an old Latin tag, dura lex sed lex, but if they are prospective and apply only in the future, no issue arises under article 7.

The Chairperson: John, just in terms of process, if this Bill does go through the Assembly, and there are still concerns about the retrospectiveness of it, and it goes then to the Supreme Court, and if it is not turned down at that stage and is taken to the European Court, what will be the consequences? Could you perhaps explain that a bit more?

Mr Larkin: In terms of procedure, if the Bill makes its way through the various Assembly stages, it may change. Therefore, anything I say today is to be grounded solely on the text of the Bill as it now stands. Obviously, I would consider the issue then. However, if the Bill or any part thereof were to be referred, the Supreme Court decision would, as far as the domestic legal system be concerned, be absolutely final. So, there would be no question, for example, of me taking it to Strasbourg, because Strasbourg is a court open primarily to private citizens and not to public authorities such as me in that context. So, it would, of course, be open to individuals adversely affected by the Bill to seek to have Strasbourg look at this.

The Chairperson: If a citizen were to take it to Strasbourg, how lengthy would the process be?

Mr Larkin: If one assumes that the Bill had been referred and that the Supreme Court had considered the provisions referred to be nonetheless satisfactory, I suspect that the individual citizen adversely affected would not be obliged to do what she or he would usually be obliged to do in those

circumstances, which is to go through the full domestic process herself or himself. Therefore, there might be a direct application to Strasbourg. However, Strasbourg takes quite a long time to determine these issues. It is a hugely overburdened court, as anyone who works for it will tell you.

On the other hand, the UK Supreme Court is very efficient. The Supreme Court is dealing with a referral by the Attorney General for England and Wales of the first Bill passed by the National Assembly for Wales. That was referred at the start of the summer, and the case will be heard at the beginning of October. The Supreme Court prioritises references under the respective devolved constitutional statutes as best it can.

Mr Beggs: Just for clarification, if, for some reason, the Bill were referred to the Supreme Court, which were to come to the decision that it breached human rights legislation in some fashion, would it strike off the entire legislation or just that element of it?

Mr Larkin: No. First, it would be only the provisions that were referred. For the sake of argument, and just to illustrate the point, let us look at clause 3(2)(b). The Supreme Court might say that there is a problem with retrospectivity and take out the words "before or". That would leave the clause reading:

"(2) This section applies whether the person —
(b) was convicted after the coming into operation of this Act."

So, with the excision of a couple of words, that provision might well be saved in European Convention terms.

Mr Beggs: In legislators' coming to a judgement as to whether it was appropriate, they have to consider the human rights of every citizen; those whom it might affect and those who might have been affected in the past by other instances. That is obviously a political judgement, but subsequent to that, there would also be a legal judgement. Is that a correct summation of what would happen?

Mr Larkin: There are undoubtedly political judgements, as you all know infinitely better than I do. However, in terms of the convention, there is a series of legal judgements. First, there would be a legal judgement on whether the Bill or any part thereof is within competence. A decision would then be made, if it was judged at that time that certain provisions were without competence, whether to refer it to the Supreme Court. You then have the views of the individual justices of the UK Supreme Court, and, increasingly, you have split decisions. Therefore, you could have a plurality of perfectly respectable legal views.

Mr Beggs: We are expecting a departmental review at some point, whether in two months' time or a year's time, but certainly by the end of this Assembly mandate. You indicated that, if there were to be a European court case, it could be years before the final decision might be made. Does the temporary nature of the employment of those affected have any bearing on the huge cost of taking or defending a case at European level? Is any regard given to the temporary nature of the post?

Mr Larkin: That is a very important point. First, although the court takes a long time to decide, it is often quite cheap to litigate in Strasbourg. To give a personal example of that, a journalist contacted the office because they had heard that we had made an intervention in Strasbourg. They asked how much it had cost, obviously expecting to hear a figure of many thousands of pounds. However, the cost was in the region of £60, which was the cost of couriering the submission to Strasbourg. Now, that is a small example, but Strasbourg is not particularly expensive as a place in which to litigate.

The larger question, which is implicit in what you have raised, is whether the nature of the post and the severity of the penalty is sufficient to engage article 7. That is an important consideration. A counterweighing factor against that would probably be the factual position that, in theory, the tenure of an ordinary civil servant is pretty fragile, but, in practice, we know that it is, in colloquial terms, more or less a job for life. One imagines that this would be for the duration of this Assembly term, so although an adviser might come and go with a Minister, if, for example, the Bill came into force fairly quickly, there would be quite a stretch of employment that otherwise one would reasonably expect would continue, although, all things being equal, it would be brought to an end.

On the other hand, an interesting question might arise were the position to be terminated anyway as the Minister went out of office with a new Assembly coming in and the Bill just about made it within the life of this Assembly. In that instance, an evaluation might be carried out at that stage.

Mr Beggs: My point is that, even if it were the result of a departmental reorganisation, each of those jobs is temporary and would end. Therefore, the employment is of a temporary nature.

Mr Larkin: It is, and that is an important factor. That is happening for a reason other than a previous conviction.

Mr Beggs: Yes, but then your only argument over human rights was on the retrospective element. At that point it would not be retrospective.

Mr Larkin: If a special adviser lost his or her job as a result of a Department vanishing, for example, does that bring the European Convention on Human Rights into play? I would have thought not.

The Chairperson: Clause 3(2)(a) refers to whether the conviction took place locally or elsewhere. I raised that with Mr Allister earlier. Would that be a typical clause in other legislation, or would other legislation be more flexible on a case-by-case basis? Obviously, if there is carte blanche, there would be a number of cases.

Mr Larkin: As you know, there is also a presumption that an Act of the Assembly is to be interpreted in a way that brings it within competence rather than without. So if, for example, someone was convicted in — I was about to name a country, but perhaps I should not — a country that was completely disrespectful of modern international human rights standards, in the most obvious and most grotesque of show trials that would not remotely comply with article 6 of the convention, I suspect that the Bill would not be interpreted as to embrace such a conviction. So, "convicted" would be read, even though the word may not be inserted, as "duly convicted", for example. It is not at all uncommon to find that effects are given in this jurisdiction to events such as convictions that occur elsewhere.

The Chairperson: This legislation would obviously set special advisers aside from the rest of the Civil Service. Would it be a cause for concern that the Bill would apply only to certain civil servants rather than the Civil Service as a whole?

Mr Larkin: As I understand it, the nature of the special adviser post is already somewhat apart, given the mode of their appointment and in their tenure, so that concern already exists. I suppose that the larger policy question that might be asked is that if it is thought worthwhile to do some of these things, why not do them across the board?

The Chairperson: OK, John, thank you very much.