

2 Historical Context

CONFIDENTIAL

Background of Legal Intervention

2.1 This chapter deals with the historical context of the more important laws and institutions which play a role in securing freedom from religious and political discrimination and promoting equality of opportunity in Northern Ireland. The extent of discrimination and equality of opportunity in either the past or the present is not considered in this chapter. Some relevant evidence relating to the present situation is assessed in Chapter 3.

2.2 The Government of Ireland Act 1920 which created a separate subordinate Parliament for Northern Ireland provided in section 5 that the Parliament could not legislate:

'so as either directly or indirectly to establish or endow any religion, or prohibit or restrict the free exercise thereof, or give a preference, privilege, or advantage, or impose any disability or disadvantage on account of religious belief or religious or ecclesiastical status . . .'

In addition, the Northern Ireland Parliament was prevented from making the validity of a marriage conditional on a religious belief or ceremony, and from requiring a child attending a publicly financed school to undergo religious instruction there. Section 8(6) of the Act prohibited both preferences and disabilities on account of religious belief when executive power was exercised. Until the repeal of the Government of Ireland Act in 1973 this constitutional safeguard was invoked only once in relation to religious discrimination.¹

2.3 In the first decades of the existence of Northern Ireland, no other domestic legal protection existed against discriminatory actions by local government and other public bodies or by private parties in employment or other fields.² In 1969 the Cameron Commission³ reporting on a series of disturbances across Northern Ireland concluded that a sense of injustice had been a general contributory factor behind outbreaks of violence:

'Much of the evidence of grievance and complaint which we heard, when analysed, was found . . . to be concentrated upon two major issues—housing and employment' (paragraph 129).

Another source of feeling of injustice was the manipulation of local government electoral boundaries in order to achieve and maintain predominantly Unionist (and Protestant) control of local authorities and to deny to Catholics influence in local government proportionate to their numbers. Moreover, the Cameron Commission reported:—

'A growing and powerful sense of resentment and frustration among the Catholic population at the failure to achieve either acceptance on the part of the Government of any need to investigate these complaints or to provide and enforce a remedy for them.' (paragraph 229)

1. *Londonderry C.C. v. McGlade* [1929] NI 47.

2. Article 14 of the European Convention on Human Rights provides some protection against religious discrimination at an international level. The United Kingdom Government recognised the right of individuals to petition under the Convention in 1965.

3. *Disturbances in Northern Ireland: Report of the Commission Appointed by the Governor of Northern Ireland* (Cmd 532, 1969).

The Report of the Cameron Commission made it clear that it considered that the safeguards written into the Government of Ireland Act had not been effective.

2.4 Against the background of this rising sense of grievance the British and Northern Ireland Governments issued what has been referred to as the 'Downing Street Declaration' which set down the principle that 'every citizen of Northern Ireland is entitled to the same equality of treatment and freedom from discrimination as obtains in the rest of the United Kingdom irrespective of political views or religion.'¹ Effective action was promised under five headings: equality of opportunity in public employment; protection against incitement to hatred; fairness in allocating public housing; effective redress of grievances against public bodies; and 'proper representation of minorities, to be assured at the elected levels of government by completely fair electoral laws, practices and boundaries.'

Reform Measures

2.5 A series of reforms was introduced from 1969 onwards first by the Northern Ireland Parliament and subsequently, following the prorogation and eventual abolition of the Northern Ireland Parliament, by the United Kingdom Parliament at Westminster. Many of these reforms arose directly out of the Downing Street Declaration. Other measures were introduced with broader objectives but nevertheless were important in dealing with religious and political discrimination. These measures are set out below. The main initiatives which relate to employment discrimination are outlined later.

- (a) The Electoral Law Act (Northern Ireland) 1969 introduced universal adult suffrage for local council elections. The franchise had previously been limited to rate payers. The Local Government Act (Northern Ireland) 1969 and subsequent legislation established an independent Local Government Boundaries Commission to make recommendations on the boundaries of district electoral divisions and local government administrative areas and provided independent procedures for their review and for recommending the grouping of wards into electoral areas. The Electoral Law (Northern Ireland) Order 1972 and subsequent legislation introduced proportional representation for local government and regional elections to the European Parliament.
- (b) The Ministry of Community Relations Act (Northern Ireland) 1969 established a separate Ministry to formulate and sponsor policies for the improvement of community relations. A Community Relations Commission, independent of the Government, was also appointed under the Community Relations Act (Northern Ireland) 1969 to foster harmonious relations throughout the community. Its membership was balanced between Protestants and Catholics. (The Ministry and the Commission ceased to exist in 1975 when, as a part of a wider reorganisation of government in Northern Ireland, certain of their functions were transferred to the Department of Education).
- (c) The Parliamentary Commissioner Act (Northern Ireland) 1969 established the office of the Northern Ireland Parliamentary Commissioner for Administration with powers to investigate complaints of maladministration (including discrimination on the grounds of religious belief or political opinion) by Government departments. Unlike his Westminster counterpart, the Northern Ireland Parliamentary Commissioner was subsequently charged with responsibility to investigate complaints affecting personnel matters in the Northern Ireland Civil Service. Furthermore, in 1971 all contractors tendering for Government contracts were required to adhere to a contractual

¹ The Downing Street Declaration, 20 August 1969, paragraph 6.

term not to practice religious discrimination in the performance of the contract. The Parliamentary Commissioner became responsible on an extra-statutory basis for overseeing the operation of the term. This arrangement was superseded by the Fair Employment Act.

- (d) The Commissioner for Complaints Act (Northern Ireland) 1969 established the Northern Ireland Commissioner for Complaints with powers to investigate grievances against local councils and public bodies. Where the Commissioner for Complaints found injustice in consequence of maladministration, including discrimination on the grounds of religious belief or political opinion, the Commissioner was empowered to certify the facts to the county court for the purposes of an action for damages by the complainant.
- (e) The Prevention of Incitement to Hatred Act (Northern Ireland) 1970 made it a criminal offence wilfully to stir up hatred against a section of the community including any section distinguished by race or religion. This legislation was subsequently consolidated in the Public Order (Northern Ireland) Order 1980 and amended by the Public Order (Northern Ireland) Order 1987.¹
- (f) The Police Act (Northern Ireland) 1970 set up a Police Authority as an independent body to maintain an adequate and efficient police force. One of the Authority's responsibilities under the Act is to keep itself informed as to the manner in which complaints against members of the force are dealt with by the Chief Constable.
- (g) The Housing Executive Act (Northern Ireland) 1971 provided that all public authority house building and its allocation on the basis of an objective points system should become the responsibility of a central housing authority, the Northern Ireland Housing Executive. This measure was in part designed to meet allegations that some local authorities had discriminated in the location and allocation of housing.
- (h) The Local Government Act (Northern Ireland) 1972 reorganised the framework of local government in Northern Ireland into 26 district councils. The Health and Personal Social Services (Northern Ireland) Order 1972 and the Education and Libraries (Northern Ireland) Order 1973 established a number of regional boards to administer those services instead of the local authorities. The legislation also established staff commissions with responsibility to promote fairness in the personnel practices of local government and the newly established boards.
- (i) The Prosecution of Offences (Northern Ireland) Order 1972 set up the office of an independent Director of Public Prosecutions in Northern Ireland. The Director is the sole prosecuting authority in Northern Ireland responsible for the consideration of facts relating to all indictable and certain other offences with a view to initiating or continuing criminal proceedings. The Chief Constable is required to furnish the Director with facts and information relating to all alleged indictable offences and any other alleged offences as the Director may specify.
- (j) The Northern Ireland Constitution Act 1973 provided for an Assembly for Northern Ireland with powers to legislate over a wide range of matters. Part III of the Act made void any legislation whether of the Northern Ireland Parliament or Northern Ireland Assembly to the extent that it discriminated against any person or class of persons on the ground of religious belief or political opinion. Executive actions by Government and public bodies in Northern Ireland which were discriminatory on political or religious grounds were made unlawful and actionable in the courts. These provisions were designed to replace the protections provided by the Government of Ireland Act which was repealed. The Act also established the Standing Advisory Commission on Human Rights to advise the Secretary of State on the adequacy and effectiveness of the law in preventing discrimination on

1. The Commission has recently commented on this legislation. See *Twelfth Report of the Standing Advisory Commission on Human Rights: Annual Report for 1985-86* (HC 151, 1982) Chapter 3.

the grounds of religious belief or political opinion and in providing redress for persons aggrieved by discrimination on either ground. Section 21 made it unlawful to require a person to take an oath or make a declaration, unless specifically required or authorised by legislation, as a condition of membership of, or employment by, a public body.

- (k) The Police (Northern Ireland) Order 1977 provided for the establishment of a Police Complaints Board for Northern Ireland. The Board receives copies of all complaints and, subject to any adjudication by the Director of Public Prosecutions, the relevant investigation reports. The Board's function is to determine whether or not it agrees with the Chief Constable's decision to bring, or not to bring, disciplinary charges. Where the Board disagrees with the Chief Constable it has power to direct that a disciplinary charge be brought. The Police Complaints (Northern Ireland) Order 1987 abolishes the Board and the Independent Commission for Police Complaints for Northern Ireland is shortly to be established in its place.¹

Relevant Employment Measures

2.6 One of the concerns addressed by the Downing Street Declaration was the need to provide equality of opportunity in public employment. Subsequently, in 1972 the Government established a Working Party to examine employment practices in the private sector. Separate reforms were intended to deal with the public sector. However, it was recognised that problems in the private sector required immediate consideration. The Working Party was first chaired by Mr Paul Channon MP and then by Mr William van Straubenzee MP, both Ministers in the Northern Ireland Office. Its terms of reference were:—

'To consider what steps, whether in regard to law or practice, should be taken to counter religious discrimination where it may exist in the private sector of employment in Northern Ireland.'

The Working Party decided that its central aim was to promote full equality in all aspects of employment opportunity. As defined by the Working Party this concept meant more than the removal of discrimination; it was 'a positive concept' which rested 'upon a vision of an open, free and just society', and was 'fully compatible with determined steps . . . to remove the impediments and constraints which at present inhibit the realisation of this ideal.'²

2.7 The Fair Employment (Northern Ireland) Act 1976 (hereafter 'the Fair Employment Act') incorporated the major recommendations of the van Straubenzee Working Party. It made discrimination on religious or political grounds unlawful, and established machinery for the promotion of equality of opportunity. A new Fair Employment Agency (hereafter 'FEA') was made responsible for receiving and investigating complaints of discrimination, and for conducting investigations into the extent of equality of opportunity. The Act also sought to promote voluntary action by establishing a Declaration of Principle and Intent, to which employers and others were encouraged to subscribe. Those who signed the Declaration were certificated as equal opportunity employers. The Act extended both to public and to private employment. The main provisions of the Act are detailed in Chapter 5.

2.8 A more recent initiative in the area of equality of opportunity in employment in respect of religion was announced by the Government in 1981. Tenders for Government contracts would not normally be accepted from firms unless they held an equal opportunity employer certificate issued under the Fair Employment Act. These arrangements were brought into operation from 1 March 1982.

1. The Commission has recently commented on this legislation. *Ibid.* Chapter 10.

2. *Report and Recommendations of the Working Party on Discrimination in the Private Sector of Employment.* (HMSO, 1973).

2.9 In the same year that the Fair Employment Act was passed, the Sex Discrimination (Northern Ireland) Order 1976 became law. This Order is not the direct subject of the review but is referred to throughout the Report for comparative purposes. The Order adopted the approach taken in the Sex Discrimination Act 1975 and the Race Relations Act 1976, which both applied only to Great Britain. It is of particular interest that the Order contained a broader prohibition of discrimination than that contained in the Fair Employment Act. The Order made the industrial tribunals responsible for adjudicating individual complaints of unlawful sex discrimination in employment. A separate body, the Equal Opportunities Commission for Northern Ireland was established. Two of its important functions are to assist complainants, and to conduct formal investigations even where there is no complaint of unlawful sex discrimination.

Summary

2.10 Over the last two decades, therefore, a wide number of measures designed to secure freedom from discrimination on religious and political grounds, and to promote equality of opportunity in Northern Ireland, have been introduced. Of central importance in the present review and in the evidence presented to the Commission is the sphere of employment and the Fair Employment Act. Chapter 3 considers the problems which the Fair Employment Act was in part designed to address, and the problems of inequality of opportunity which exist today. Subsequent chapters assess the adequacy of the existing approach and make recommendations for necessary change.

ANNEX B

FROM: STEVEN BRAMLEY
SIL DIVISION
12 AUGUST 1993
(X 6828 OAB)

CONFIDENTIAL

PS/PUS

SMYTH BRIEFING: REASONABLE FORCE CASE

I attach this case with an indispensable covering note from David Bentley.

(signed)

STEVEN BRAMLEY

MR BRAMLEY

I enclose the Report.

The most helpful speech is Lord Diplock's. See especially page 136A-137B. And 138B-G and 139 G-H. See too Ld Dilhorne at 148 F-.

What this seems to amount to is that a soldier is issued with a lethal weapon and is expected to use it where circumstances require. To speak of "excessive force" will be misleading - it's not like self-defence in a pub brawl. Ld Diplock took the view that an honest and reasonable mistake as to the need to fire would be a defence. Then a reasonable person (in this sort of case acting intuitively anyway) would be likely to fire. Subsequent (English) Court of Appeal authority has established that a mistake as to the need for force used may be honest, not also reasonable.

The upshot is this: if a soldier honestly believes he is preventing very serious crime, then he has got a gun and a job to do and the fact that his belief was mistaken, even unreasonable, is irrelevant. The gun was a lethal weapon but he is guilty neither of murder nor manslaughter.

DAVID BENTLEY
11 AUGUST 1993

RN/SIL/21775