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Northern Ireland Dimensions to the First Decade of the United Kingdom Supreme Court

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This article focuses on the relationship between the United Kingdom Supreme Court and Northern Ireland over the course of a constitutionally significant period of time, namely the first decade of the Court's existence. It does this by exploring what difference the Court has made to the law of Northern Ireland, what significance the cases from Northern Ireland have had for the law in other parts of the United Kingdom, and what part has been played in the Court's work by the sole Justice from Northern Ireland, Lord Kerr of Tonaghmore, and by the Attorney General for Northern Ireland, John Larkin QC. It concludes that the Court has established itself as an indispensable component of the legal system of Northern Ireland.

INTRODUCTION

This article analyses connections between the United Kingdom Supreme Court (UKSC) and Northern Ireland during the first 10 years of the Court's existence (October 2009 to September 2019). It assesses what difference the Court has made to the law of Northern Ireland,¹ what significance the cases from Northern Ireland have had for the law in other parts of the United Kingdom,

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- 1 Unfortunately, the literature on the law of Northern Ireland is relatively sparse. For a general introduction see B. Dickson, *Law in Northern Ireland* (Oxford: Hart Publishing, 3rd ed, 2018); for more specialised books see for example G. Anthony, *Judicial Review in Northern Ireland* (Oxford: Hart Publishing, 2nd ed, 2014) and C. Turner, L. Quinn and T. Murphy (with R. Shields), *The Law of Property in Northern Ireland* (Newtownards, County Down: Colourprint Educational, 2014).

and what part has been played in the Court's work by the sole Justice from Northern Ireland, Lord Kerr of Tonaghmore, and by the Attorney General for Northern Ireland (AGNI), John Larkin QC. The article begins by considering the applications for permission to appeal from decisions in Northern Ireland. It then reviews all 28 sets of judgments delivered by the UKSC on the Northern Ireland appeals it heard. The sets of judgments are categorised into three groups – those relating directly or indirectly to the conflict in Northern Ireland, those relating more generally to criminal law or criminal procedure, and the remaining cases, all of which are concerned with fundamental rights and/or procedural justice. The cases raise a plethora of controversial issues, such as the scope of the right to life, the rules on sexual orientation and political opinion discrimination by providers of services, and the restrictions on access to abortion. Within each group the focus is on the rules and principles enunciated by the Justices, the errors sometimes made by courts in Northern Ireland, the influence of Lord Kerr and the parallels, if any, between the UKSC's approach in the Northern Ireland appeals and its approach in appeals from the two jurisdictions in Great Britain. The following section examines the role played by the AGNI, who has been active in referring matters to the Court and in intervening in other cases. It is there that two remaining sets of judgments in references from Northern Ireland are mentioned. In a short conclusion we consider the impact of the UKSC on Northern Ireland law in light of the foregoing analyses.

APPLICATIONS FOR PERMISSION TO APPEAL

The UKSC issues judgments in only a fraction of the cases brought before it, which underscores the importance of the process by which it selects the cases it wishes to hear.² Le Sueur has explained that the original precursor to the modern procedure was introduced in 1934 'as a way of *promoting access* to justice', but that over the course of some minor reform in the 1960s it had come to be 'seen primarily as a *case management* tool'.³ Unconvinced by the continuing applicability of these rationales for the procedure, Le Sueur went on to argue that 'the process of selecting cases [is] one of the main ways by which a *top-level court defines its role* in the constitutional system and *sets its agenda*'.⁴ This normative interpretation of the case selection process motivated us to investigate whether any trends have emerged in respect of determinations relating to Northern Ireland matters during the UKSC's first decade.

The current procedure entails an application for 'permission to appeal', which requires applicants to demonstrate that their case raises 'an arguable point of law of general public importance'.⁵ Applications are normally decided

2 On the process employed by the Appellate Committee of the House of Lords prior to the creation of the UKSC, see B. Dickson, 'The processing of appeals in the House of Lords' (2007) 123 LQR 571.

3 A. Le Sueur, 'Panning for Gold: Choosing Cases for Top-Level Courts' in A. Le Sueur (ed), *Building the UK's New Supreme Court* (Oxford: OUP, 2004) 274 (emphasis in original).

4 *ibid.*

5 UKSC Practice Direction 3, para 3.3.3, available online at <https://www.supremecourt.uk/procedures/practice-direction-03.html>.

by a panel of three Justices and, while any member of the Court can now view the full list of petitions for permission electronically if they wish to do so, Paterson tells us that it is relatively rare for Justices to intervene in an application if they have not been allocated to the relevant panel.⁶ It is clear, moreover, that applications tend to be allocated to Justices partly on the basis of their judicial ‘specialisms’,⁷ which means, for example, that Lady Hale or Lord Wilson have commonly been allocated applications involving family law while Lord Carnwath and Lord Briggs are usually called upon for applications involving Chancery or commercial issues. It should also be noted that panels have developed a practice of sometimes offering slightly less formulaic reasons for their decisions to refuse permission to appeal, although the Court’s Practice Directions were amended in 2013 to make it clear that no precedential value should be attached to reasons provided in this setting.⁸

Having analysed a range of figures published by the UKSC in its Annual Reports,⁹ alongside the tabular summary of permission to appeal decisions published by the Court every month or so (which do not always exactly tally with the former),¹⁰ we can make four statistical observations about its treatment of applications emanating from Northern Ireland in the years 2009 to 2019.

Firstly, the number of permission to appeal applications received by the UKSC from Northern Ireland was disproportionate to Northern Ireland’s share of the UK population: of the total of 2,235 applications received by the Court, 132 (six per cent) came from Northern Ireland, even though its share of the UK population is just 2.8 per cent.¹¹ The causes of this relatively strong appetite

6 A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Oxford: Hart Publishing, 2013) 68–69.

7 *ibid.*

8 n 5 above. This amendment may have been prompted by Knight’s 2012 critique of the Court’s then emerging practice of providing bespoke reasons: C.J.S. Knight, ‘The Supreme Court gives its reasons’ (2012) 128 LQR 477. The standard reason given for refusing an application for permission to appeal is as follows: ‘Permission to appeal [is] refused because the application does not raise a point of law of general public importance which ought to be considered at this time bearing in mind that the case has already been the subject of judicial decision and reviewed on appeal’. This form of words tells us nothing about *why* some points of law ‘ought to be considered’ on appeal while others ought not to be, given that all the cases will already have been the subject of judicial decision and the vast majority will already have been reviewed on appeal.

9 The Annual Reports and Accounts for the UKSC, which are based on the reporting year (April to March), rather than the legal year (October to September), can be accessed at <https://www.supremecourt.uk/about/planning-and-governance.html>. The Report for 2018–19 does not contain all the permission to appeal figures that can be found in the Reports from previous years, but we were able to fill in the gaps by way of a direct request for the missing information.

10 For example for 2017–18 the Annual Report states (*ibid.*, 26) that 65 PTA applications were granted and 130 refused but, according to the seven tables covering that period, 67 PTA applications were granted and 125 refused. The PTA tables are uploaded to the ‘Latest news’ section of the UKSC website at <https://www.supremecourt.uk/news/permission-to-appeal.html>. The Court occasionally publishes supplementary information about PTA decisions on a dedicated webpage, for example <https://www.supremecourt.uk/news/permission-to-appeal-decisions-16-february-2018.html>.

11 Office for National Statistics, ‘Population Estimates for the UK, England and Wales, Scotland and Northern Ireland: Mid-2018’ 26 June 2019, ch 7 at <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2018>.

for appellate litigation are unclear, but we suspect it is partly due to the high number of troubles-related cases which continue to be litigated in Northern Ireland in addition to the standard fare. It could also be that lawyers in Northern Ireland are more persistent in litigation than lawyers elsewhere in the UK or that the lure of pleading a case before the nation's highest court, so far away from Belfast, is attractive to them. Judicial statistics show that, proportionately, the annual number of criminal appeals and judicial review applications is usually significantly lower in Northern Ireland than in England and Wales,¹² whereas the number of civil appeals is usually much higher,¹³ but the Northern Ireland Courts and Tribunals Service correctly observes that direct comparisons are to be avoided because the court structures of the two jurisdictions do not equate.¹⁴

Second, the data reveal a small differential in the success rate of permission to appeal applications from Northern Ireland compared with the figure for all applications: permission was granted in 29 per cent of the Northern Ireland applications compared with 35 per cent of all applications.¹⁵ This may be a consequence of the fact that more than twice as many applications for permission to appeal are made from Northern Ireland as the population of the area would suggest was proportionate. The success rate can also be contrasted with the ostensibly lower success rate of Scottish applications for permission to appeal, which is just 20 per cent. But until September 2015 appeals from Scotland reached the Court 'as of right' much more frequently than they did from Northern Ireland: indeed of the 196 cases of this kind from across the UK, 80 were from Scotland while only eight came from Northern Ireland.¹⁶ In five of those eight cases the Court of Appeal of Northern Ireland seems to have granted permission to appeal,¹⁷ in two others the cases reached the

12 For example in 2018, 102 criminal appeals were received in Northern Ireland compared to 5,101 in England and Wales, while there were 72 judicial review applications received in Northern Ireland compared to 3,600 in England and Wales: Northern Ireland Courts and Tribunals Service and the Northern Ireland Statistics and Research Agency, *Judicial Statistics 2018* (Belfast, 2019) 23, 24 and 36, and Ministry of Justice, *Civil Justice Statistics Quarterly for January to March 2019* (London: MoJ, 2019) 12. In mid-2018 the population of England and Wales was estimated to be nearly 32 times larger than that of Northern Ireland: Office for National Statistics, *ibid*, Figure 4.

13 For example in 2018, 94 civil appeals were received by the Northern Ireland Court of Appeal compared to 853 by the England and Wales Court of Appeal: *Judicial Statistics 2018 ibid*, 23 and 25 and the *Civil Justice Statistics Quarterly ibid*, 12.

14 *Judicial Statistics 2018 ibid*, 18.

15 The number of applications from Northern Ireland granted permission was 37. No applications from Northern Ireland were carried over to the UKSC from the House of Lords in 2009.

16 Until 22 September 2015 decisions by Scotland's Court of Session in civil cases could be taken to the Supreme Court as of right provided two counsel certified that the notice of appeal was reasonable, but this was a requirement laid down only in Practice Directions (1.7 and 1.8 for the House of Lords and 4.2.2 for the UKSC), not in legislation. Decisions taken in civil cases on or after 22 September 2015 now require the permission of the Court of Session or, failing that, of the UKSC: Courts Reform (Scotland) Act 2014, s 117, although Practice Direction 4.2.2 has not yet been amended on the UKSC's website. The website does however have a fulsome explanation of the current position regarding Scottish appeals: see <https://www.supremecourt.uk/docs/jurisdiction-of-the-supreme-court-in-scottish-appeals-human-rights-the-scotland-act-2012-and-the-courts-reform-scotland-act-2014.pdf>.

17 *In re McCaughey* [2011] UKSC 20, [2012] 1 AC 725; *In re Brownlee's Application for Judicial Review* [2014] UKSC 4, [2014] NI 188; *In the matter of an application by JR55 for Judicial Review* [2016]

UKSC through references instigated by the AGNI¹⁸ and in one case there was both an appeal and two references.¹⁹ Ever since the UKSC's formation, courts throughout the UK have been very reluctant to grant leave to appeal to it themselves: they have accepted that the UKSC prefers to control its own docket as much as possible. Proportionately, the Court of Appeal of Northern Ireland is much more willing to grant permission to appeal to the UKSC than the Court of Appeal of England and Wales.

Third, it is notable that Lord Kerr was allocated to the three-person panel of Justices convened to consider applications from Northern Ireland in 74 per cent of the cases determined between October 2009 and September 2019.²⁰ The second and third most frequent panel members involved in determinations relating to applications from Northern Ireland were Lord Hughes and Lord Wilson who were involved in only 27 per cent²¹ and 24 per cent²² of determinations respectively. This provides an important statistical backdrop to our later discussion of Lord Kerr's influence over the Northern Ireland cases decided by the UKSC where permission to appeal was granted. It also suggests that Northern Ireland law is characterised as a judicial 'specialism' when decisions are made about the formation of permission panels. To that extent Northern Ireland has become more like Scotland. In the four years following the reforms made to the leave system for Scottish civil appeals in September 2015, there were 56 panels convened to consider applications from Scotland. All but three of those panels comprised at least one Scottish Justice and five of them comprised two. The three exceptions were cases where there appeared to be no specific aspect of Scottish law involved.²³

Fourth, the 91 applications from Northern Ireland which were rejected covered a multitude of legal topics, but almost half of them (44) related to appeals against decisions taken on applications for judicial review. At least a further

UKSC 22, [2016] 4 All ER 779; *Makhlouf v Secretary of State for the Home Department* [2016] UKSC 59, [2017] 3 All ER 1 (*Makhlouf*); *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27, [2018] 1 All ER 173. The power of the Court of Appeal of Northern Ireland to grant leave to appeal to the UKSC is conferred by the Judicature (NI) Act 1978, ss 41(1) (criminal cases) and 42(2) (civil cases).

18 The AGNI's powers to refer issues to the UKSC are detailed below, at nn 176–224. See, in particular, the Northern Ireland Act 1998, s 11 and Sch 10. The two cases actually involved three references: one by the AGNI and one by the Court of Appeal of Northern Ireland in *R (Miller) v Secretary of State for Exiting the EU; In re McCord; In re Agnew* [2017] UKSC 5, [2018] AC 61, and then one more by the AGNI in *Reference by the Attorney General for Northern Ireland of Devolution Issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act (No 2)* [2019] UKSC 1. A third reference made by the AGNI slightly outside our timeframe is noted, for completeness, at n 195 below.

19 *Lee v Ashers Baking Co Ltd* [2018] UKSC 49, [2018] 3 WLR 1294 (*Ashers*); see nn 202–208 below, as well as para [90] of the judgment, where the Court found that an appeal could be taken to the UKSC against all aspects of the Court of Appeal's judgment, and then allowed the appeal.

20 i.e., 88 out of the 119 cases.

21 i.e., 32 out of the 119 cases.

22 i.e., 29 out of the 119 cases.

23 They were applications to appeal against the decisions in *Al-Khatib v Secretary of State for the Home Dept* [2016] CSIH 85 (an immigration case), *RSPB v Scottish Ministers* [2017] CSIH 31 (a case on EU environmental law) and *P v N* [2018] CSIH 34 (a case on child abduction and the Hague Convention).

eight related to appeals against criminal conviction. Numerous applications related in some way to the troubles of Northern Ireland,²⁴ including some that were connected to cases which were allowed to proceed to the UKSC on different issues.²⁵ It is clear that the legal system of Northern Ireland is still dealing with many different and difficult aspects of the conflict and that the UKSC is only occasionally involved in them. In one such case the PTA panel granted permission to appeal in July 2019 but in February 2020 the UKSC concluded that it did not actually have jurisdiction to hear the appeal.²⁶

These observations lead us to conclude that lawyers in Northern Ireland are not at all reluctant to engage the interest of the UKSC in their legal arguments. In the remaining sections of this article, we explore the substance of those arguments by considering how the Court dealt with the cases from Northern Ireland which it heard and decided during its first decade. There were 30 such cases, embracing 31 appeals and three references by the AGNI. The success rate for the appeals was 52 per cent, almost exactly the same as the success rate of 50 per cent for all appeals decided by the UKSC during this period.²⁷ Only two of the cases concerned private law issues.²⁸

CASES RELATING TO THE CONFLICT IN NORTHERN IRELAND

Two previous articles in the *Modern Law Review* surveyed the way in which troubles-related appeals from Northern Ireland were dealt with by the Appellate Committee of the House of Lords.²⁹ The first, by Stephen Livingstone, examined 13 such cases decided between 1969 and 1993.³⁰ He concluded that the Law Lords' record was 'an undistinguished one', the decisions demonstrating 'a consistent failure to recognise, let alone fully consider, the human rights implications, and [being] frequently unsatisfactory even as regards their

24 For example *Daly v Breslin* (decision of 9 December 2014 concerning the Omagh bomb in 1998); *R v Wootton* and *R v McConville* (decision of 18 May 2015 concerning the murder of Constable Stephen Carroll); *Duffy's Application for Judicial Review* (decision of 6 November 2017 concerning covert surveillance of legal consultations).

25 For example *McGeough's Application for Judicial Review* (decision of 27 November 2012); *Corey's Application for Judicial Review* (decision of 2 May 2013); *Jordan's Application for Judicial Review* (decision of 26 June 2013).

26 *In the matter of an application by Deborah McGuinness for Judicial Review* [2020] UKSC 6. See too the text at n 223 below.

27 For this purpose, a successful appeal is defined as one where the appellant won on one or more of the grounds of appeal raised. According to the Annual Reports of the UKSC from 2009-10 to 2018-19 (covering nine years and six months of the Court's existence) 340 appeals were allowed and 343 were dismissed. As regards the appeals from Northern Ireland, 16 were allowed and 15 were dismissed. In addition, there were 91 appeals dealt with by the UKSC which led to some other outcome such as an adjournment or a reference to the CJEU.

28 There was one family law case (*In re K (A Child)* [2014] UKSC 29, [2014] AC 1401) and one civil law claim for discrimination (*Ashers* n 19 above). The latter was partly a public law case in so far as the company, in its defence, relied successfully on its right to freedom of expression.

29 'Troubles-related' means cases which are connected, directly or indirectly, to the ethno-political conflict which raged in Northern Ireland from 1969 to 1998 and aspects of which still flare up from time to time.

30 S. Livingstone, 'The House of Lords and the Northern Ireland conflict' (1994) 57 MLR 333. For reasons unknown Livingstone did not include a fourteenth case in his analysis – *Linton v Ministry of Defence* [1983] NI 51, a case on the admissibility of tardily adduced evidence.

technical aspects of reasoning and explanation'.³¹ Livingstone also deduced that if Northern Ireland were ever to be given a Bill of Rights the judges in the UK's top court would be only 'potential assistants' rather than 'essential guardians' in its enforcement.³² The second article critiqued Livingstone's review and conducted a further survey of the 12 troubles-related cases dealt with by the House of Lords between 1994 and 2005.³³ Its conclusion was that the House of Lords was now treating such cases in a more sophisticated way, by bearing in mind not just the political context involved but also the human rights dimensions, particularly after the coming into force of the Human Rights Act 1998 in 2000 (although the retrospectivity of that Act was limited). The House was not as 'pro-government' as in the past and was no more conservative in relation to cases emanating from Northern Ireland than it was in relation to cases emanating from England and Wales or Scotland.

In the period between 2006 and 2009 the House of Lords issued judgments in eight more troubles-related cases from Northern Ireland.³⁴ This is not the place to engage in a detailed survey of those cases, but a strong argument can be made to support the claim that they confirm the trends identified in the article reviewing the period from 1994 to 2005. In *Tweed v Parades Commission for Northern Ireland*³⁵ (*Tweed*) the Law Lords held that first instance judges should adopt a more flexible approach to applications for disclosure of documents relating to judicial review applications, especially when a Convention right is in question, and in *McCaughy v Chief Constable of the PSNI*³⁶ (*McCaughy*) they stressed that in Northern Ireland the police have a *continuing* duty to disclose information to coroners. In *Jordan v Lord Chancellor*³⁷ (*Jordan*) they observed that in an inquest in Northern Ireland a jury is not prohibited from finding facts pointing to the existence of criminal liability, even though it cannot issue verdicts of lawful or unlawful killing. In *In re Officer L*³⁸ (*Officer L*) anonymity was refused to police officers giving evidence at a tribunal of inquiry in Northern Ireland, but in *Ward v Police Service of Northern Ireland*³⁹ the police practice of not telling suspects in advance the sorts of questions they would be asked during a period of detention was upheld as lawful. In *In re Duffy*⁴⁰ (*Duffy*) the Lords corrected the methods used to make appointments to the Parades Commission, in *E v Chief Constable of the RUC*⁴¹ (*E*) they upheld

31 *ibid*, 334.

32 *ibid*, 360.

33 B. Dickson, 'The House of Lords and the Northern Ireland conflict – a sequel' (2006) 69 MLR 383.

34 A ninth case, *In re D* [2008] UKHL 33, [2008] 1 WLR 1499, concerned the recall to prison of a man convicted of murder in 1982 and released in 1996, but it seems that the murder was not troubles-related. For further comments on some of these cases, as well as on the non-troubles related cases from Northern Ireland decided by the Law Lords between 2006 and 2009, see B. Dickson, 'Northern Ireland after 1921' in L. Blom-Cooper, G. Drewry and B. Dickson (eds), *The Judicial House of Lords 1876-2009* (Oxford: OUP, 2009) 312–313.

35 *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650.

36 *McCaughy v Chief Constable of the PSNI* [2007] UKHL 14, [2007] 2 AC 226.

37 *Jordan v Lord Chancellor*, dealt with alongside *McCaughy* *ibid*.

38 *In re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135.

39 *Ward v Police Service of Northern Ireland* [2007] UKHL 50, [2007] 1 WLR 3013.

40 *In re Duffy* [2008] UKHL 4, [2008] NI 152.

41 *E v Chief Constable of the RUC* [2008] UKHL 66, [2009] 1 AC 536.

the way in which the police had protected children and parents during the notorious ‘protests’ at Holy Cross Girls Primary School, in *McE v Prison Service of Northern Ireland*⁴² (*McE*) they confirmed that consultations between a client and his or her lawyer can be bugged, provided special permission has been acquired in advance, and in *McConkey v The Simon Community*⁴³ they agreed that a charity has a right to refuse employment to former paramilitary prisoners on the grounds that the health and safety of the charity’s hostel residents might be put at risk by such employees. Of the nine appeals contained within these eight cases, four were allowed and five were dismissed, a success rate of 44 per cent. Lord Carswell, the former Lord Chief Justice of Northern Ireland who served as a Law Lord from 2004 to 2009, sat in seven of the nine appeals. Kerr LCJ, as he then was, was involved in all four of the Northern Ireland Court of Appeal decisions which were reversed by the Law Lords⁴⁴ as well as in three of the lower court decisions which were upheld.⁴⁵

Between 2009 and 2019 the UKSC dealt with a further 10 troubles-related cases, even though the troubles are considered to have ended with the reaching of the Belfast (Good Friday) Agreement in 1998. The number represents almost 35 per cent of all the Northern Ireland cases decided by the UKSC during its first decade. Eight of the 10 cases were connected in some way to killings that occurred during the troubles: three concerned on-going investigations into killings,⁴⁶ two were about the trial of persons suspected of attempted murder,⁴⁷ and three related to the fall-out from convictions for murder in terms of appropriate sentences, the revocation of a lifer’s licence and claims for compensation for alleged miscarriages of justice.⁴⁸ The ninth and tenth cases related to public order policing: one concerned the privacy rights of a youth whose photograph had been made public by the police because he was suspected of rioting and his identity was not known,⁴⁹ while the other concerned the powers of the police to stop an un-notified parade.⁵⁰ The 10 cases involved 11 appeals. Seven of the appeals were wholly or partly allowed, while four were dismissed – a higher success rate (64 per cent) than the annual average success rate for all appeals dealt with by the UKSC (50 per cent).⁵¹

42 *McE v Prison Service of Northern Ireland* [2009] UKHL 15, [2009] 1AC 908. Lord Carswell expressed some surprise that the Divisional Court granted leave to appeal to the House of Lords in this case, since the appellant had won in the Divisional Court, although not on a wider argument his lawyers had raised.

43 *McConkey v The Simon Community* [2009] UKHL 24, [2009] NI 297.

44 *Tweed* n 35 above; *McCaughy* n 36 above; *Officer L* n 38 above; *Duffy* n 40 above.

45 *Jordan* n 37 above (where Kerr J was the first instance judge); *E* n 41 above (where, as Kerr LCJ, he was again the first instance judge); *McE* n 29 above (where, as Kerr LCJ, he sat in the Divisional Court).

46 *In re McCaughy* n 17 above; *In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7, [2019] 3 All ER 191 (*Finucane*); *In the matter of an application by Hugh Jordan for Judicial Review* [2019] UKSC 9, [2019] HRLR 8.

47 *R v McGeough* [2015] UKSC 62, [2015] 1 WLR 4612 (*McGeough*); *In the matter of an application by Denis Hutchings for Judicial Review* [2019] UKSC 26 *The Times* 31 July 2019 (*Hutchings*).

48 *In the matter of Jason Loughlin’s Judicial Review* [2017] UKSC 63, [2017] 1 WLR 3963 (*Loughlin*); *Re Martin Corey* [2013] UKSC 76, [2014] AC 516 (*Corey*); *In re MacDermott* and *In re McCartney* [2011] UKSC 18, [2012] 1 AC 48 (*MacDermott and McCartney*).

49 *In re JR38* [2015] UKSC 42, [2016] AC 1131 (*JR38*).

50 *DB v Chief Constable of the PSNI* [2017] UKSC 7, [2017] NI 301.

51 See n 16 above.

Lord Kerr sat in all but one of the 10 cases.⁵² He delivered a judgment in each of the cases in which he sat, giving the single judgment of the court in four of them⁵³ and the lead judgment in another three.⁵⁴ He issued a concurring judgment in *McCaughey*⁵⁵ and a long, partly dissenting, judgment in *JR38*.⁵⁶

Several of the 10 troubles-related cases clarified the law in significant ways, not just for Northern Ireland but for England and Wales too.⁵⁷ Mostly the clarification favoured a more ‘rights-friendly’ approach to the law, namely an approach which tends to give greater weight to individual rights than to potentially countervailing community interests or which at least expressly engages with that balancing exercise even if the ultimate decision comes down in favour of giving greater weight to community interests. That was so in *MacDermott and McCartney*,⁵⁸ where Lord Kerr persuaded four of his colleagues (within a court of nine) to define ‘miscarriage of justice’ in a way that is more likely to entitle wrongly convicted people to claim compensation.⁵⁹ Likewise, the seven-judge court in *McCaughey*⁶⁰ confirmed that, notwithstanding the precedent of *In re McKerr*⁶¹ (which it distinguished), if an inquest is held into a death resulting from acts committed by agents of the state before the Human Rights Act 1998 came into force, the inquest has to comply with the free-standing procedural obligation written into Article 2 of the European Convention on Human Rights (ECHR) by the Grand Chamber of the European Court of Human Rights in *Šilih v Slovenia*.⁶² Lord Rodger again dissented, even though the majority stated that ‘the principle that the Convention does not have retroactive effect was left untouched by *Šilih*’,⁶³ and that ‘the most significant feature of the decision in *Šilih* is that it makes it quite clear that the Article 2 procedural

52 The exception is *Jordan* n 37 above. It is not known why he was not selected to sit in that case.

Interestingly, when an appeal over a different matter involving the same death was heard by the House of Lords in 2007 the judge from Northern Ireland, Lord Carswell, again did not sit.

53 *McGeough* n 47 above; *Loughlin* n 48 above; *Hutchings* n 47 above.

54 *MacDermott and McCartney* n 48 above; *Corey* n 48 above; *Finucane* n 46 above.

55 n 46 above.

56 n 49 above. Lord Wilson concurred with the dissent. See the text at n 68 below.

57 In his lecture referred to at the start of this article, Lord Kerr made the larger claim that the cases from Northern Ireland dealt with by the House of Lords and Supreme Court had made ‘a very important contribution to the development of the law and legal principles across the United Kingdom’.

58 n 48 above. These appeals were heard alongside an unsuccessful one against a decision of the Court of Appeal of England and Wales: *R (Adams) v Secretary of State for Justice* [2009] EWCA Civ 1291.

59 Lord Judge LCJ gave a dissenting judgment with which Lords Brown, Rodger and Walker agreed. In a subsequent lecture Lord Kerr argued that appellate courts should be asked to apply a new test when deciding whether to quash a criminal conviction, namely, is the conviction free from the reasonable possibility that it is unsafe? See ‘Miscarriage of Justice – When should an appellate court quash conviction?’ The Justice Scotland International Human Rights Day Lecture 2013, 10 December 2013 at <https://www.supremecourt.uk/docs/speech-131210.pdf>. It was prompted by Lord Kerr’s dissent in a Privy Council case on miscarriage of justice, *Taylor (Bonnett) v The Queen* [2013] UKPC 8, [2013] 1 WLR 1144.

60 n 46 above.

61 [2004] UKHL 12, [2004] 1 WLR 807.

62 (2009) 49 EHRR 37.

63 *McCaughey* n 17 above, at [127] *per* Lord Dyson.

obligation is not an obligation that continues indefinitely'.⁶⁴ The UKSC's decisions in *Finucane*⁶⁵ and *Jordan*⁶⁶ further clarified the scope of Article 2 of the ECHR. The former held that a government's failure to fulfil its promise to set up a public inquiry into a death was not *per se* a violation of Article 2, but the Justices stressed that there had still not been an Article 2-compliant investigation into Patrick Finucane's murder in 1989. The decision in *Jordan* changed the previous practice whereby claims for compensation for a delay in holding an Article 2-complaint inquest were stayed until the inquest had been completed: Lord Reed, for the UKSC, said that such a practice was in breach of the proportionality principle in Convention law.⁶⁷

In *Corey* Lord Kerr explained the limitations on the High Court's inherent jurisdiction to grant bail.⁶⁸ In *JR38* three of the Justices thought that when the police published a photograph of an unidentified rioter this did not engage that person's Article 8 right to a private life, even if he or she was under 18 at the time. Lord Kerr, with whom Lord Wilson agreed, held that Article 8 was engaged in such circumstances but they both agreed that on the facts before them publication of the photograph was justifiable under Article 8(2) because of the community's interest in preventing and detecting crime.⁶⁹ In *McGeough* the UKSC held that information about McGeough's IRA membership – revealed by him during an asylum application made in Sweden in 1983 – should not be excluded from his trial in Northern Ireland because its admission would not amount to unfairness under article 76 of the Police and Criminal Evidence (NI) Order 1989.⁷⁰ In *Loughlin* the UKSC, again through Lord Kerr, confirmed that when a prosecutor is deciding whether to remit a sentence passed on 'an assisting offender' to the original sentencing court,⁷¹ he or she has to be satisfied not only that the offender knowingly failed to comply with the terms of the agreement made with the prosecuting authorities but also that remitting the sentence would be in the interests of justice.⁷² Here the UKSC held that it was acceptable that the prosecutor had not remitted a sentence to the trial court

64 *ibid* at [61] *per* Lord Phillips. He added that 'The spectre that the House of Lords confronted in *McKerr* is shown to be a chimera'. The spectre referred to, by Lord Hoffmann, was that investigations might need to be conducted into the deaths of the princes in the Tower in 1483: [2004] UKHL 12 at [69].

65 n 46 above.

66 *ibid*.

67 [2019] UKSC 9 at [33]-[40].

68 n 48 above.

69 n 49 above.

70 n 47 above. This is equivalent to Police and Criminal Evidence Act 1984, s 78 in England and Wales. McGeough had earlier tried to get his prosecution stayed on the grounds of delay and that he had been promised a letter from the government telling him he would not face prosecution anywhere in the UK, but he failed: *R v McGeough* [2010] NICC *per* Coghlin LJ. He was not as fortunate in that regard as John Downey, whose prosecution at the Old Bailey a few years later was stayed precisely because he had been sent such a promise by the UK government, *R v Downey* judgment of 24 February 2014 at <https://www.judiciary.uk/judgments/r-v-downey/>.

71 In *R v Robert Stewart and Ian Stewart* [2010] NICC 8, Hart J first set a tariff starting point of 22 years for each of the brothers but eventually reduced it to just three years. An 'assisting offender' is someone who admits to certain crimes and supplies evidence in relation to other offenders in the expectation of receiving a lighter sentence for the admitted crimes; see Serious Organised Crime and Police Act 2005, ss 71–75.

72 n 48 above.

even though the evidence provided by two ‘supergrass’ brothers had led to the conviction of only one of the 13 men who had been put on trial as a result of that evidence.⁷³

The two remaining troubles-related cases raised issues that are peculiar to Northern Ireland’s law. In *DB v Chief Constable of the PSNI*⁷⁴ the UKSC held that the PSNI had misunderstood their powers under the Public Processions (NI) Act 1998, which was enacted principally to reduce the tensions that arise during the parading season in Northern Ireland. On this occasion the police let unauthorised parades proceed, believing that they had the power to prevent the commission of public order offences during the parades but no power to stop the parades. The UKSC pointed out, through Lord Kerr, that the police had a more general duty to prevent the commission of any offence, including the offence of participating in an un-notified parade.⁷⁵ The ruling is an interesting contrast to that in the infamous case involving ‘loyalist’ protestors at Holy Cross Girls’ Primary School in 2001: there the House of Lords (dismissing the claimant’s appeal) held that the police had not breached the rights of the children who were the target of that protest, primarily because the police’s measures were proportionate given that more direct intervention to prevent the protests might have ignited much more serious unrest in other places in Northern Ireland.⁷⁶

The threat of violence was also in play in the case of *Hutchings*,⁷⁷ where the UKSC confirmed the views of the lower courts in Northern Ireland that a former British soldier being prosecuted for an attempted murder in County Tyrone in 1974 should be tried by a judge sitting alone, without a jury, as in the old ‘Diplock Courts’. Under the Justice and Security (NI) Act 2007 the Director of Public Prosecutions may require such a juryless trial if he or she suspects that ‘the offence . . . was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons’. The DPP must also be satisfied that in view of this connection or response ‘there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury’.⁷⁸ It is highly regrettable that such juryless trials are still required in Northern Ireland, as no serving or former British soldier has been attacked since the Belfast (Good Friday) Agreement of 1998 and the British army’s operations officially ended in Northern Ireland in 2007, but it would also be rash to assume that the absence of a jury will

73 H. McDonald, ‘Belfast “supergrass” trial judge clears a dozen loyalists of terror charges’ *The Guardian* 22 February 2012 at <https://www.theguardian.com/uk/2012/feb/22/belfast-supergrass-trial-loyalists-cleared>.

74 n 50 above.

75 This is an offence under the 1998 Act, s 6(7).

76 *E v Chief Constable of the Royal Ulster Constabulary* n 41 above. The case later came before the European Court of Human Rights, but the application was declared inadmissible because it was ‘manifestly ill-founded’: *PF and EF v UK* App No 28326/09 (decision of 23 November 2010).

77 n 47 above.

78 Justice and Security (NI) Act 2007, s 1(2) and (6).

necessarily mean that Mr Hutchings will receive a less fair trial than he would have received in front of a jury.⁷⁹

Northern Ireland's conflict-related cases have been dealt with by the UKSC 'with a straight bat'. It is very difficult indeed to infer from any of the judgments either a political bias (which was an accusation made by republicans during most of the conflict period) or an undue preference for a strict 'law and order' approach to such controversial disputes (which was the impression Stephen Livingstone had when he reviewed the House of Lords' judgments prior to 1994⁸⁰). What is detectable is a greater willingness to mark out a discrete regulatory function for the top Court,⁸¹ the hallmark of the reasoning in the decisions being a human rights-based approach. Several of them engage in detailed analysis of the jurisprudence of the European Court of Human Rights and Lord Kerr has been to the fore in persuading his colleagues to decide these cases in the way that he would prefer. It appears that there has been much greater deference to the Justice from Northern Ireland than was ever the case in troubles-related appeals dealt with by the Law Lords. The position is now comparable to that which obtains for Scottish appeals, where it is taken as axiomatic that, unless the issues involved have no special Scottish tinge to them, the leading judgment should be given by one of the two Scottish Justices. The trend in favour of a human-rights based approach in cases from Northern Ireland matches that which is discernible within the jurisprudence of both the House of Lords and the UKSC since the Human Rights Act came fully into force in 2000,⁸² but it displays itself in a context where in previous times the relevance of human rights was very much downplayed.⁸³

CASES RELATING TO CRIMINAL LAW OR PROCEDURE

The UKSC heard nine cases from Northern Ireland in which issues of criminal law or procedure arose in a non-troubles-related context. Four of these were appeals by defendants against conviction (only one of which was successful),⁸⁴ one was an appeal by the prosecution against acquittal (unsuccessful)⁸⁵ and the remaining four were appeals in judicial reviews, three brought by a convicted

79 On this bigger issue see J.D. Jackson and S. Doran, *Judge Without Jury: Diplock Trials in the Adversary System* (Oxford: OUP, 1995).

80 See n 30 above.

81 As R. Masterman and J. Murkens put it in 'Skirting supremacy and subordination: the constitutional authority of the United Kingdom Supreme Court' [2013] *Public Law* 800, 819: 'instead of forming part of a revolutionary constitutional moment or explicit break with the past, the UKSC ushers in a more visible separation of powers by stealth'.

82 B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford: OUP, 2013) *passim*.

83 As demonstrated by Livingstone, n 30 above.

84 *Public Prosecution Service of Northern Ireland v Elliott and McKee* [2013] UKSC 32, [2013] NI 133; *R v Brown* [2013] UKSC 43, [2013] 4 All ER 860; *R v Mackle* [2014] UKSC 5, [2014] AC 678; *R v McCool and R v Harkin* [2018] UKSC 23, [2018] NI 181. The appeal allowed was in *R v Mackle*.

85 *R v Mitchell* [2016] UKSC 55, [2017] NI 181.

person (the first two successful, the third unsuccessful)⁸⁶ and the other by government departments (unsuccessful).⁸⁷ Eight of the nine cases raised issues pertinent in England and Wales too, because the law under scrutiny was the same there. The exception was *In re Brownlee's Application for Judicial Review*,⁸⁸ where the UKSC held that a rule in Northern Ireland's legal aid legislation prohibiting any additional fee from being paid to a new set of lawyers representing a convicted person in a sentencing hearing was *ultra vires* the enabling power.⁸⁹ In this case the UKSC criticised the Court of Appeal of Northern Ireland on two matters.⁹⁰ First, for holding that the challenge to the refusal of legal aid should not have been made through satellite litigation but in the criminal case itself. Second, for failing to recognise that Mr Brownlee needed new counsel at the sentencing stage not because he had dismissed his lawyers but because senior counsel had (self-servingly⁹¹) withdrawn his services.

The *Reilly* case illustrates well how the legal system of Northern Ireland is intertwined with that of England and Wales and how the UKSC polices that situation. In 2002 Mr Reilly had been convicted in London of crimes committed there. In view of his criminal record he was given an automatic life sentence with a minimum term of six years and eight months, due to expire in September 2009. In 2007 he was transferred to Northern Ireland, which is where he was from, but he remained subject to the jurisdiction of the Parole Board of England and Wales.⁹² In March 2009 the Board notified Mr Reilly that he was being considered for release but it refused to allow him an oral hearing at which he could put forward his case for release. This decision was successfully challenged before Treacy J in the High Court of Northern Ireland⁹³ but this was overturned by the Court of Appeal of Northern Ireland, which followed the approach adopted by the Court of Appeal of England and Wales in two similar cases there in holding that an oral hearing would not assist in determining the relevant issue.⁹⁴ All three prisoners were then given permission to appeal jointly to the UKSC, where Lord Reed (with whom the other four Justices agreed, including Lord Kerr) strongly asserted that common law standards of procedural justice in criminal matters had not been complied with.⁹⁵ This meant that there had also been a breach of Article 5(4) of the

86 *In the matter of an application by James Clyde Reilly for Judicial Review* [2013] UKSC 61, [2014] AC 1115 (*Reilly*); *In re Brownlee's Application for Judicial Review* n 17 above; *Gaughran v Chief Constable of Northern Ireland* [2015] UKSC 29, [2016] AC 345.

87 *In the matter of an application by Lorraine Gallagher for Judicial Review* [2019] UKSC 3, [2020] AC 185 (*Lorraine Gallagher*). The departments concerned were the Department of Justice in Northern Ireland and the Home Office.

88 n 17 above.

89 This was the Legal aid, Advice and Assistance (NI) Order 1981, arts 36(3) and 37.

90 [2013] NICA 57 *per* Morgan LCJ, Higgins and Girvan LJ]; Morgan LCJ delivered the judgment of the Court.

91 This was the term used by Morgan LCJ in the Court of Appeal, *ibid* at [16].

92 Under the Crime (Sentences) Act 1997, s 28.

93 [2010] NIQB 46 and 56.

94 [2011] NICA 6 *per* Higgins and Coghlin LJ, and Sir Anthony Campbell; Coghlin LJ delivered the judgment of the court. They followed *Osborn and Booth v Parole Board* [2010] EWCA Civ 1409.

95 *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

ECHR.⁹⁶ The judgment has been widely hailed as a landmark in the common law on human rights, perhaps even as a sign that if the Human Rights Act 1998 were to be repealed the common law could to some extent be relied upon to fill the void.⁹⁷ This is another instance where a decision in a case from Northern Ireland reflects a trend that is manifest on a UK-wide basis, although Mark Elliott has ably demonstrated that judicial efforts to develop a doctrine of ‘common law constitutional rights’ have not yet reached their full potential.⁹⁸

The final two judicial review cases concerned Article 8 of the ECHR, which guarantees the right to a private and family life. In *Gaughran v Chief Constable of Northern Ireland* the UKSC affirmed the Divisional Court of Northern Ireland in holding that the police’s indefinite retention of fingerprints, a photograph and a DNA profile (not the DNA sample itself), all relating to a man who had been convicted of driving with excess alcohol, was a proportionate interference with his Article 8 rights even though the conviction would become spent after five years.⁹⁹ Lord Clarke, for the majority, endorsed the analysis by Girvan LJ in the Divisional Court, but a strong dissent was entered by Lord Kerr, who saw the case as an opportunity to put into practice what he had been preaching about the UKSC not needing to limit itself to ‘mirroring’ the European Court of Human Rights’ position on all issues.¹⁰⁰ While that Court had already expressed its view on indefinite retention of personal data collected from people who were later not prosecuted for, or convicted of, an offence, it had not yet addressed the position of convicted persons. That was enough to allow the majority in this case to hold that the retention scheme in such situations was acceptable, but Lord Kerr argued that there was no rational connection between the legislative objective of the scheme (namely, the detection of offenders) and the retention policy in question because the latter went further than was necessary to fulfil the objective. For him the proportionality test required the measure taken by the state to be ‘the least intrusive means’ of achieving the

96 Art 5(4) provides that everyone who is deprived of liberty by detention is entitled to take proceedings by which the lawfulness of the detention is decided speedily by a court, and ‘lawfulness’ means lawful according to the law of the country in question as well as to the ECHR.

97 For example B. Dickson, ‘Repeal the HRA and Rely on the Common Law?’ in K. Ziegler, E. Wicks and L. Hodson (eds), *The UK and European Human Rights: A strained relationship?* (Oxford: Hart Publishing, 2015) 128–132. Reilly was later allowed a series of ‘unaccompanied temporary releases’ (UTRs), from one of which he returned to prison allegedly drunk, but he won his battle in the High Court of Northern Ireland to obtain another UTR: *Belfast Telegraph* 25 June 2013 at <https://www.belfasttelegraph.co.uk/news/northern-ireland/robber-wins-court-battle-after-being-denied-temporary-release-for-allegedly-returning-to-jail-drunk-29371961.html>.

98 M. Elliott, ‘Beyond the European Convention: Human Rights and the Common Law’ (2015) 68 CLP 85.

99 n 86 above.

100 Here Lord Kerr did not refer to his dissent in *Ambrose v Harris* [2011] UKSC 43, but in the Divisional Court Girvan LJ did do so and seemed to disagree with it: [2012] NIQB 8 at [41]. For more on Lord Kerr’s position on the so-called ‘mirror principle’, see his extra-judicial writings: ‘The conversation between Strasbourg and national courts – dialogue or dictation?’ (2009) 44 *Irish Jurist* 1; ‘The UK Supreme Court: the modest underworker of Strasbourg?’ The Clifford Chance Lecture, 25 January 2012 at https://www.supremecourt.uk/docs/speech_120125.pdf.

desired goal and the measure here did not meet that criterion.¹⁰¹ In the event, Lord Kerr was completely vindicated because when the case reached the European Court of Human Rights it ruled unanimously that the position adopted by the majority in the UKSC violated Article 8 of the ECHR.¹⁰²

In the *Lorraine Gallagher* case,¹⁰³ Lord Kerr was again the outlier, although this time his different reasoning did not lead him to reach a wholly different conclusion from that of his colleagues. The majority found that the two disclosure schemes in question breached the proportionality test, firstly because they required disclosure of multiple convictions even when some of them may have been irrelevant to the person's propensity to reoffend, and secondly because they required disclosure of warnings and reprimands for younger offenders even though the very purpose of those disposals was to avoid the person being damaged by them in later life.¹⁰⁴ Lord Kerr believed that the schemes were even more fundamentally flawed: in his view they failed to fulfil the definition of 'law' because they did not contain any built-in safeguards allowing for a proper evaluation of proportionality and nor did they contain any mechanism for independent review. Just because the schemes were accessible and foreseeable did not mean that they satisfied the 'legality' test.¹⁰⁵ In adopting this approach Lord Kerr was endorsing, and arguably going beyond, an interpretation of a decision of the European Court of Human Rights in a case from Northern Ireland, *MM v UK*.¹⁰⁶ His colleagues, on the other hand, seemed to row back on that decision, and also on the views expressed by Lord Reed in the earlier Supreme Court decision of *R (T) v Chief Constable of Greater Manchester Police*.¹⁰⁷

Three of the five appeals against a decision of guilt or innocence were about what evidence is required, or permitted, to be adduced in court. *R v Brown* confirmed that if a person is charged with unlawful carnal knowledge of a girl under the age of 14 the prosecution does *not* need to prove that the accused did not believe the girl to be over the age of 13.¹⁰⁸ The UKSC, through Lord Kerr, was unanimous in holding that, although the legislation in question was to be interpreted in its amended form,¹⁰⁹ this did not mean that its drafting history was irrelevant. Moreover, 'the policy approach of protecting younger females by ensuring that a defence of reasonable belief should not be available has been unswerving'.¹¹⁰ This latter point is not entirely accurate, for in two of the cases referred to by the UKSC when dealing with the statutory interpretation point

101 n 86 above at [74], citing *Mouvement Raëlien Suisse v Switzerland* App No 16354/06, judgment of 13 July 2012 [GC] at [75] and *Nada v Switzerland* App No 10593/08, judgment of 12 September 2012 [GC] at [183].

102 *Gaughran v UK* App No 45245/15, judgment of 13 February 2020.

103 n 87 above. The case involved one appeal from the Court of Appeal of Northern Ireland and three conjoined appeals from the Court of Appeal of England and Wales. Similar disclosure schemes existed in both jurisdictions.

104 *ibid* at [63]-[64] *per* Lord Sumption and at [78]-[79] *per* Lady Hale. Lord Carnwath agreed with both; Lord Hughes agreed only with Lord Sumption.

105 *ibid* at [169] and [174].

106 App No 24029/07, judgment of 13 November 2012.

107 [2014] UKSC 35, [2015] AC 49.

108 n 84 above.

109 Criminal Law Amendment Acts (NI) 1885-1923, s 4.

110 n 84 above at [37].

(and also by the Court of Appeal of Northern Ireland¹¹¹), the prosecution *was* required to prove that the defendant did not believe the child victim to be over a certain age.¹¹²

Two cases on the admissibility of evidence illustrate well the pragmatic approach adopted by the law of England and Wales as well as the law of Northern Ireland. In the first, *Public Prosecution Service of Northern Ireland v Elliott and McKee*, fingerprint evidence was held to be admissible even though it had been collected by a device which had not been approved for use by the Secretary of State as required by legislation.¹¹³ The general principle therefore remains that even illegally obtained evidence is admissible unless its admission would have ‘such an adverse effect on the fairness of the proceedings that the court ought not to admit it’.¹¹⁴ In the second case, *R v Mitchell*,¹¹⁵ the UKSC rejected the prosecution’s appeal against a ruling by the Court of Appeal of Northern Ireland that Ms Mitchell’s conviction for murder should be quashed. Lord Kerr, for the UKSC, clarified how juries should treat evidence of similar facts or propensity and found that the trial judge in this case, McLaughlin J, had not properly directed the jury on how to approach the prosecution’s evidence that the defendant had a propensity to attack people with knives. Lord Kerr observed that, in so far as the Court of Appeal of Northern Ireland had suggested that each incident claimed by the prosecution to show a propensity on the part of the defendant required to be proved to the criminal standard, it was wrong.¹¹⁶ The jury should simply be asked if it is satisfied that a propensity has been established beyond reasonable doubt and their assessment should depend on a consideration of all the evidence available.¹¹⁷ Lord Kerr concluded his judgment by suggesting that the current ‘Bench Books’ for Northern Ireland and England and Wales, which contain specimen directions for juries, should perhaps be amended to take account of the UKSC’s decision in this case.¹¹⁸

The final two cases raising non-troubles-related criminal issues concerned the vexed topics of confiscation orders and the Proceedings of Crime Act 2002. *R v Mackle*, regrettably, is a terrible advert for the reliability of Northern Ireland’s legal system, because it highlights several mistakes that were made at various levels.¹¹⁹ Firstly, four men who had been convicted of evading tax on imported cigarettes were issued with confiscation orders under legislation

111 [2011] NICA 47 *per* Morgan LCJ, Higgins and Coghlin LJJ; judgment given by Morgan LCJ.

112 *B (A Minor) v DPP* [2000] 2 AC 428; *R v K* [2001] UKHL 41, [2002] 1 AC 462.

113 n 84 above. The legislation was the Police and Criminal Evidence (NI) Order 1989, art 61(8b).

114 Police and Criminal Evidence Act 1984, s 78(1); Police and Criminal Evidence (NI) Order 1989, art 76(1).

115 n 85 above.

116 For the NICA’s decision see [2015] NICA 34 *per* Girvan, Coghlin and Gillen LJJ; Gillen LJ delivered the judgment of the Court.

117 n 85 above at [43]–[44].

118 *ibid* at [57].

119 n 84 above. Although not directly troubles-related, the crimes in question do seem to have been committed by an organised crime group, of which Northern Ireland is assessed as having approximately 140 (see <https://www.justice-ni.gov.uk/topics/policing-and-community-safety/organised-crime>). In 2016–17 the authorities dismantled 23 such groups and a further 106 were frustrated or disrupted: Organised Crime Task Force, *Annual Report and Assessment 2017*, 1 at <https://www.octf.gov.uk/OCTF/media/OCTF/documents/articles/publications/OCTF-Annual-Report-2017.pdf?ext=.pdf>. At the trial of the defendants in *Mackle Hart J*

that was not yet in force in Northern Ireland. Secondly, the men's lawyers wrongly advised them to consent to those orders. Thirdly, the judges who looked at the case in the Court of Appeal were of the view that because the men had consented to the orders they were therefore lawful.¹²⁰ When asked to deal with the appeal in the UKSC Lord Kerr must surely have felt rather embarrassed that things could have gone so wrong in his former jurisdiction. In his judgment, with which the other four Justices agreed, he made it quite clear that a defendant's consent could not confer jurisdiction to make a confiscation order, especially if the consent was based on facts which could not as a matter of law support a conclusion that he had benefited from his conduct. In *R v McCool and Harkin* the UKSC was divided three to two in holding that a married couple who had been convicted of making dishonest claims for state benefits by pretending that they were single could be dealt with under the Proceedings of Crime Act 2002 even though one or more of their offences had been committed before that Act came into force.¹²¹ The majority said that this created no unfairness and avoided 'absurdity', while the dissenting judges, Lord Reed and Lord Mance, could see no absurdity in holding to the contrary. The case illustrates how even the most senior of judges can differ between themselves as to what or is not 'absurd' or 'fair'.

We can observe from these UKSC judgments on criminal law and procedure that cases from Northern Ireland play no small part in the development of those topics in England and Wales too. Given how few criminal cases reach the UKSC each year (just under six cases was the annual average between April 2012 and March 2018¹²²), it is remarkable that such a high proportion of them (marginally over 10 per cent during that same period¹²³) emanate from Northern Ireland, without even counting the troubles-related cases. The reason cannot be a higher crime rate or higher levels of imprisonment in Northern Ireland, since both are substantially lower than in England and Wales.¹²⁴ Whatever the reason, the last 10 years have confirmed that in this field the relevant legal rules differ little

allowed applications by the prosecution that customs officers and police officers be screened from the public, but not from the accused: [2006] NICC 8. Also, Kerr LCJ, as he then was, had already dealt with an aspect of this case in the Court of Appeal of Northern Ireland when rejecting the brothers' appeal against a ruling by Stephens J that their trial should be held by a judge alone, under the Criminal Justice Act 2003, s 44, given an earlier instance of apparent jury tampering: [2007] NICA 37. Stephens J's decision is at [2007] NIQB 105.

120 [2011] NICA 31 *per* Morgan LCJ, Girvan and Coghlin LJ; judgment delivered by Girvan LJ. Later, in a preliminary ruling on the scope of the confiscation hearings, Weatherup J pointed out a further mistake by the prosecution: as it had not entered a reservation at the sentencing hearing about the role of Mr Patrick Mackle in the offence, it could not seek to argue at the confiscation stage that this man was a ringleader in the criminal operation; see in *R v Mackle* [2014] NICC 14.

121 n 84 above.

122 Those are the only years for which the UKSC Annual Report supplies details of the subject-matter of the appeals disposed of during the year in question. From the same sources we know that in the seven-year period from 1 April 2012 to 31 March 2019 a total of 81 applications for permission to appeal were made in 'crime' cases. Of these, 38 were granted and 43 were refused.

123 The numbers are four cases out of 34, those being *R v Brown* n 84 above; *R v Mackle* n 84 above; *R v Mitchell* n 85 above; and *R v McCool and Harkin* n 84 above. The UKSC Annual Reports do not classify as 'crime' appeals in judicial review cases about criminal matters.

124 For a graph comparing crime rates within the UK between 2003 and 2019, see <https://www.statista.com/statistics/1030625/crime-rate-uk/>. For comparative imprisonment rates see G.

as between Northern Ireland on the one hand and England and Wales on the other.

CASES RELATING TO FUNDAMENTAL RIGHTS AND/OR PROCEDURAL JUSTICE

A high proportion of all the Northern Ireland cases considered by the UKSC feature to some extent issues about fundamental rights and/or procedural justice. Indeed, the foregoing analysis of cases with conflict-related and other criminal dimensions has already highlighted the prominence of legal arguments grounded in those constructs as well as the role of Lord Kerr in refining their scope. Building on these observations, we now turn to consider the interesting way in which cases considered by the UKSC outside the context of conflict-related and other criminal proceedings also seem to centre on concepts of predominantly public (rather than private) law. The nine cases we examine at this juncture can be further sub-divided into three themes, namely, proceedings concerning the rights and welfare of women and children, proceedings founded on anti-discrimination provisions, and proceedings about how the value of procedural justice is given effect by law. We accept that some of the cases could fit into more than one category.

Cases on the rights and welfare of women and children

There are four appeals to consider in relation to the rights and welfare of women and children. The first, *In re JR17 (JR17)*, was brought by a male pupil who had been suspended from school after complaints alleging misconduct on his part had been made by two female pupils.¹²⁵ The school principal decided that the distress experienced by one of the female pupils was serious enough to justify suspending the male pupil while a fuller investigation was conducted. The male pupil received a modicum of home tuition arranged by the school during this time but was not given an opportunity to hear or respond to the allegations made against him. The Court of Appeal affirmed the decision of the High Court in deciding that the school had acted lawfully within its powers, but the UKSC allowed the male pupil's appeal against that ruling because the Justices interpreted the scheme governing the school's disciplinary powers in a different way. A majority held that although the school had imposed suspension in a disciplinary context within the remit of the scheme, it had acted unlawfully by failing to give reasons for the suspension and by inhibiting the male pupil from conveying his version of events before the decision to suspend was taken. The majority also dismissed an argument grounded in Article 2 of Protocol 1 to

Sturge, *UK Prison Population Statistics* (House of Commons Briefing Paper 04334, 2019) which indicates (at 4) that in 2018 there were 174 prisoners per 100,000 of the population in England and Wales, 166 per 100,000 in Scotland (2017/18) and 96 per 100,000 in Northern Ireland (2017/18).

125 *In re JR17* [2010] UKSC 27, [2010] NI 105.

the ECHR suggesting that the male pupil's home tuition amounted to a denial of his right to education. This was rejected on the basis of an earlier precedent holding that there could be a breach of that right only if an individual was 'denied effective access to such educational facilities as the state provides'.¹²⁶

As the very first judgment of the UKSC in an appeal from Northern Ireland, the wider significance of *JR17* can be highlighted by reference to a number of factors. It is notable, above all, that the judgment of the Court of Appeal was written and handed down by Kerr LCJ only a few months prior to his appointment as a Lord of Appeal in Ordinary.¹²⁷ Lord Kerr was therefore unable to participate in the UKSC proceedings challenging his judgment. The critical treatment of the Court of Appeal's reasoning must undoubtedly have brought home to Lord Kerr how focused his colleagues on the UKSC were regarding a rights-driven approach to statutory interpretation. It is one which he keenly adopted himself in later cases. The judgment of Lady Hale is also interesting in so far as it approached the issues from a perspective characteristically different from that of her male colleagues.¹²⁸ She emphasised the injustice suffered by the suspended school pupil, whereas her colleagues dwelt more heavily on the unenviable situation faced by the school principal. Indeed, Lady Hale was alone in expressing doubts about the view that the child's right to an education had not been breached, but she decided against 'pressing' her doubts to a dissenting opinion.¹²⁹ Tactical dissenting of this kind appears to differentiate Lady Hale from Lord Kerr's more uninhibited approach.¹³⁰

The second and third cases that fall for consideration in this category both contained an international dimension. *Makhlouf* concerned a father who claimed that neither his rights nor the rights of his children had been taken adequately into account by the Home Secretary when ordering his deportation to Tunisia,¹³¹ while *In re K* concerned a claim of child abduction and a request for the child's immediate return to Lithuania.¹³² The Tunisian father sought to challenge the deportation decision made against him consequent on his

126 *ibid*, 122, citing *Ali v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363.

127 The Court of Appeal delivered its judgment at the end of February 2009: [2009] NICA 14. Lord Kerr was made a Lord of Appeal in Ordinary in June 2009.

128 For a general analysis of Lady Hale's judicial distinctiveness in the early years of her tenure on the UKSC, see E. Rackley, 'Detailing Judicial Difference' (2009) 17 *Feminist Legal Studies* 11.

129 n 125 above at [103].

130 It has been shown that Lord Kerr is consistently the most likely to deliver a dissenting judgment in the UKSC. Lady Hale tended to dissent more often during Lord Phillips' tenure as President of the UKSC than during Lord Neuberger's presidency. See R.J. Cahill-O'Callaghan, *Values in the Supreme Court: Decisions, Division and Diversity* (Oxford: Hart Publishing, 2020) 117. Cahill-O'Callaghan argues that 'Justices who dissent alone must have a deeply held conviction that the law is uncertain, that the majority decision is incorrect, and the strength of that conviction must be sufficient to overcome the psychological and institutional pressures to agree': *ibid*, 70. Recent research by Michael Blackwell also suggests that the greater the number of references to Convention rights in decisions of the UK's apex court the greater the likelihood that there will be dissents in the case: 'Indeterminacy, Disagreement and the Human Rights Act: an empirical study of litigation in the UK House of Lords and Supreme Court 1997-2017' (2020) 83 *MLR* 285, at 304.

131 n 17 above.

132 *In re K (A Child)* n 28 above.

commission of several criminal offences by invoking the right to a private and family life under Article 8 of the ECHR. He submitted that the Home Secretary had failed to carry out sufficient inquiries into the effect his deportation would have on his two children, but these contentions were rejected by Lord Kerr, who spoke for the UKSC in holding that ‘the appellant did not enjoy any relationship with either of his children and . . . they led lives which were wholly untouched by the circumstance that he was their father’.¹³³ Lady Hale added a brief concurring judgment in which she underscored the appellant’s folly in seeking to treat the children ‘as a passport to his own rights, rather than as rights-holders in their own right’.¹³⁴ The child-centred nature of this short addendum bears a clear methodological resemblance to Lady Hale’s approach in *JR17* and reminds us of the value of her distinctive voice on the Court even where the other Justices (Lord Kerr included) are agreed on the proper disposal of a case.

The majority judgment in the child abduction case was delivered by Lady Hale herself, and Lord Kerr and the other judges agreed with her. The case had been brought by the grandparents and primary carers of a child who had been snatched by his largely estranged mother in Lithuania and taken to Northern Ireland. The grandparents argued that they had ‘rights of custody’ under the Hague Convention on International Child Abduction, which entitled them to seek the immediate return of the child to Lithuania. The Court of Appeal had upheld a High Court decision rejecting the arguments, but the UKSC reversed those findings, holding for the grandparents.¹³⁵ The decision is a rare example of a non-criminal case from Northern Ireland providing an opportunity for the UKSC to resolve a legal issue ‘in the interests of consistency within the United Kingdom’ as a whole, given that the lower courts in Northern Ireland had declined to follow English case law on account of its inconsistency with certain authorities.¹³⁶ It is also interesting that the English case law vindicated by the UKSC in this case advances ‘an expansive view of rights of custody’ that pushes at the boundaries of the international law involved.¹³⁷ The Justices clearly did not want Northern Ireland to be an outlier in that regard. Incidentally, this approach to the ‘object and purposes’ of the Hague Convention was put to the court by, among others, Denise McBride QC (for the grandparents) and Siobhan Keegan QC (for the Official Solicitor), not long before both counsel became the first women ever to be appointed to the High Court of Northern Ireland, in October 2015.

The final case under this heading concerned a challenge to the law on abortion which had been identified by the Northern Ireland Human Rights

133 n 17 above, [42].

134 *ibid* at [48].

135 The mother was subsequently allowed to raise an exception to the relevant international law provisions, which could have prevented the return of the child to Lithuania, but her argument was unsuccessful. She was, however, permitted to accompany the child back to Lithuania to minimise any negative effects of further disruption to the child’s life; see *VK and AK v KK* [2014] NIFam 8, [2016] NI 52.

136 See [2014] NICA 15 and [2013] NIFam 6, both under the title *VK and AK v CC*.

137 [2014] AC 1401 at [57].

Commission.¹³⁸ While the case featured an anti-discrimination argument which has some relevance to the following section of this article (it was argued that the prohibition of abortion discriminated against women, contrary to Article 14 of the ECHR, because it ‘necessarily or at least primarily affects women, not men’¹³⁹), the judgment of the UKSC focused much more on the substantive rights and welfare of women by considering whether relevant legislation¹⁴⁰ had the effect of violating the right to respect for private and family life under Article 8 and the prohibition of torture and inhuman or degrading treatment or punishment under Article 3. First, however, the UKSC had to decide whether the Commission’s empowering legislation provided it with the standing necessary to bring the challenge. After detailed analysis of the relevant provisions¹⁴¹ the seven Justices decided by a majority of four to three that the Commission did not have standing, a position contrary to that of both the High Court and the Court of Appeal of Northern Ireland.¹⁴² This decision meant that the UKSC did not need to consider the substantive issues at stake, but no doubt because the Commission’s lack of standing was a rather technical point and the substantive issues were so important the Justices felt obliged to express their views on them regardless.

A majority of the UKSC recognised that Northern Ireland’s law on abortion was incompatible with Article 8 in the context of pregnancies involving rape, incest or fatal foetal abnormalities,¹⁴³ but there was no majority in support of the claim that the unavailability of access to health services in such circumstances amounted to a violation of Article 3. Lord Kerr (with whom Lord Wilson agreed) dissented from the majority on that latter point but was unable to bring Lady Hale with him in the unique context of this particular challenge. Overall, therefore, the decision amounts to a strange mixture of procedural conservatism and substantive activism, standing in sharp contrast with the procedurally relaxed but substantively conservative judgments handed down by the Court of Appeal in this case. Morgan LCJ dissented in the Court of Appeal, arguing that the current law, on his interpretation of *R v Bourne*,¹⁴⁴ did permit abortions in cases of rape, incest and fatal foetal abnormalities, but none of the UKSC Justices agreed with him.¹⁴⁵

138 *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* n 17 above.

139 *ibid* at [134].

140 Offences Against the Person Act 1861, ss 58 and 59 and Criminal Justice Act (NI) 1945, s 25(1). These provisions make abortion a crime.

141 Northern Ireland Act 1998, ss 69 and 71.

142 The majority Justices were Lord Mance, Lord Reed, Lord Lloyd-Jones and Lady Black. Those in the minority were Lady Hale, Lord Kerr and Lord Wilson. The Court of Appeal decision is at [2017] NICA 42 and the High Court decision at [2014] NIQB 96.

143 Lord Reed and Lord Lloyd-Jones thought that even in cases of fatal foetal abnormality Art 8 was not breached; Lady Black joined them in holding that it was not breached in cases of rape or incest.

144 [1939] 1 KB 687.

145 For further analysis of this strange scenario, see J. Rooney, ‘Standing and the Northern Ireland Human Rights Commission’ (2019) 82 MLR 525; Dame Nathalie Lieven, ‘A Pyrrhic Defeat in “an unusually difficult case”: Incompatibility of Northern Ireland’s Abortion Law with Human Rights Law’ in D. Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–18* (London:

Cases on discrimination

We turn next to three further cases which went to the UKSC from Northern Ireland raising issues of anti-discrimination law. The cases of Denise Brewster and Siobhan McLaughlin both involved allegations of discrimination arising from the administration of social security benefits which, both appellants' successfully argued, were incompatible with Article 14 of the ECHR in conjunction in the former case with the right to property protected by Article 1 of Protocol 1 and in the latter case with the right to a private and family life protected by Article 8 of the ECHR.¹⁴⁶ *Brewster* challenged a provision which was unique to Northern Ireland at the time, requiring that, where someone in an unmarried but co-habiting relationship belonged to a pension scheme for local government workers, that person had to complete a nomination form in order for their partner to be eligible for a survivor's pension. In *McLaughlin*, the appellant sought to impugn a rule restricting the availability of widowed parent's allowance to parents who had been either married to or in a civil partnership with their deceased partner. Both cases were successful at first instance before Treacy J (as he then was), but his decisions were overturned by the Court of Appeal. The UKSC reversed the Court of Appeal in both cases, thereby endorsing Treacy J's approach to how the law of social security interacts with the law on human rights. That said, it seems that government officials and lower courts right across the UK are finding it difficult to successfully apply the test of proportionality required by human rights law in that context.¹⁴⁷

The *McLaughlin* case is also a landmark because it was one of two cases heard by the UKSC when it conducted its hearings in Belfast for the first time in April 2018. Several Justices have explained the rationale for this occasion – in tandem with the rationale for visiting Edinburgh in 2017 and Cardiff in 2019 – as being the importance of 'the physical presence of a court in a community,

Appellate Press, 2019) 124. It should be noted, however, that Ms Sarah Ewart was subsequently granted standing to take a case in the High Court of Northern Ireland, where Keegan J applied the ruling of the UKSC by holding that the law on abortion in relation to fatal foetal abnormalities was incompatible with Article 8 of the ECHR: *In re Sarah Jane Ewart's Application* [2019] NIQB 88. The UKSC's decision also figured prominently in the parliamentary debates which led to the Northern Ireland (Executive Formation etc) Act 2019, s 9, which provided for the legalisation of abortion in the event that a Northern Ireland Executive was not restored by 21 October 2019. It was not, and the Abortion (NI) Regulations 2020 have since been made and commenced. In his lecture mentioned at the start of this article, Lord Kerr expressed the view that the UKSC's judgment in the NIHRC case was 'critically important' in bringing about change to the law on abortion in Northern Ireland. On account of these legislative developments, Keegan J subsequently concluded the proceedings in *In Re Sarah Jane Ewart's Application* without ordering any formal relief: [2020] NIQB 33.

146 *Re Denise Brewster's Application for Judicial Review* [2017] UKSC 8, [2017] NI 326 (*Brewster*); *In the matter of an application by Siobhan McLaughlin for Judicial Review* [2018] UKSC 48, [2019] 1 All ER 471 (*McLaughlin*).

147 See for example the two Supreme Court cases arising out of legislative provisions for a 'benefit cap' in England and Wales: *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 and *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289.

and the ability of members of that community to attend the court'.¹⁴⁸ The novelty of these Belfast hearings attracted a significant level of interest within the Northern Ireland legal community, though the attention of the general public was fixated on the second case heard by the court. Indeed, *Lee v Ashers Baking Co Ltd* aroused local, national and international publicity of a highly exceptional nature.¹⁴⁹ In addition to the jurisdictional issues discussed in our section on the AGNI below, the UKSC was tasked with deciding whether the law of Northern Ireland imposed civil liability on the bakery after its proprietors refused, on account of their religious beliefs, to fulfil a cake order placed by the appellant which would have involved icing the phrase 'Support Gay Marriage' on one of their products. While the UKSC was forthright in its dismissal of a statutory interpretation argument suggesting that there had been discrimination on grounds of sexual orientation (which had succeeded in the County Court and the Court of Appeal¹⁵⁰), its refusal to uphold a finding of discrimination against the appellant on the ground of his political belief in same-sex marriage was couched in much more doubtful terms.¹⁵¹ Indeed, Lady Hale's judgment on behalf of the UKSC explained that such a finding was only avoided because the relevant legislation had been purposively interpreted in a way which gave priority to the ECHR rights of the bakery's proprietors. The UKSC's analysis of the proprietors' rights to freedom of thought, conscience and religion under Article 9, together with their right to freedom of expression under Article 10, placed a heavy emphasis on the negative qualities of compelled speech, as reflected in a range of international jurisprudence, but directed comparatively little attention to the relevance of various rights qualifications recognised by the ECHR. It could be argued, for instance, that ECHR provisions which provide that such rights may be justifiably infringed for 'the protection of the rights and freedoms of others' (Article 9) and for 'the protection of the reputation or rights of others' (Article 10) were under-analysed by the UKSC, perhaps most obviously in respect of the appellant's right not to be discriminated against because of his political opinion. Such features will make it interesting to see how the UKSC's approach is treated by the European Court of Human Rights, given that an application has recently been lodged at Strasbourg which challenges the domestic legal position asserted unanimously by the UKSC.¹⁵² To date only two UKSC decisions in appeals from Northern Ireland have been

148 Lord Reed, 'The Supreme Court Ten Years On' The Bentham Association Lecture 2019, University College London, 6 March 2019, 16 at <https://www.supremecourt.uk/docs/speech-190306.pdf>. See too: The Supreme Court, 'UK Supreme Court bound for Northern Ireland' 27 November 2017 at <https://www.supremecourt.uk/news/uk-supreme-court-bound-for-northern-ireland.html>. In his lecture mentioned at the start of this article, Lord Kerr described the UKSC's visit to Belfast as 'of tremendous significance'.

149 n 17 above. For academic commentary, see for example M. Connolly, 'Lee v Ashers Baking and its Ramifications for Employment Law' (2019) 48 *Industrial LJ* 240; K.McK. Norrie, 'Lee v Ashers Baking Co Ltd' (2019) 1 *Juridical Review* 88; S. Fraser Butlin, 'Cakes in the Supreme Court' (2019) 78 *CLJ* 280.

150 [2015] NICty 2; [2016] NICA 39.

151 n 17 above at [48] and [55].

152 'Ashers "gay cake" row referred to European Court' *BBC News* 15 August 2019 at <https://www.bbc.co.uk/news/uk-northern-ireland-49350891>.

subjected to a full review of their merits by the European Court of Human Rights.¹⁵³

Cases on procedural justice

We conclude this section by noting two appeals in which the UKSC clarified how certain dimensions to the value of procedural justice should be operationalised in Northern Ireland. In the *Kevin Maguire* case,¹⁵⁴ Lord Kerr spoke for the UKSC in affirming a decision of the Divisional Court which had held that the appellant's right 'to defend himself in person or through legal assistance of his own choosing' under Article 6(3)(c) of the ECHR was not impeded by a professional rule of the Bar Council. The appellant was required by that rule to instruct a senior counsel if one was available or to proceed with a junior counsel alone, but he had wished to retain a junior counsel to 'lead' his case with the support of a solicitor advocate. Lord Kerr rejected any suggestion that the appellant had an absolute right to select the counsel of his choice at public expense 'independently of the requirements of the interests of justice', reasoning that it was for the appellant's own good to have a senior counsel represent him in addition to the junior counsel he was so keen to instruct in the circumstances.¹⁵⁵ While it can be accepted that the Bar Council's rule did not amount to a breach of human rights on this basis, we are nonetheless unconvinced of its merits in all circumstances. The rigidity of the rule, in particular, smacks of an undesirable air of cartelism which went unaddressed by the UKSC. In *JR55*, however, the UKSC showed little hesitation in holding that the Court of Appeal had been correct to censure the Northern Ireland Commissioner for Complaints after the Commissioner had recommended that an *ex gratia* payment be paid by a doctor guilty of maladministration to the widow of his deceased patient.¹⁵⁶ The UKSC found that, while the Commissioner had the power to conduct an investigation into the doctor's behaviour because it was not reasonable to expect the patient in question to resort to legal proceedings, it would not then be proper for the Commissioner to recommend a payment of money and threaten to report on the doctor's failure to pay it. It added, more generally, that there was no legislative authority for the Commissioner to make recommendations against private individuals of a kind which could have no

153 *Gaughran v UK* n 102 above, and *McCaughy v UK* App No 43098/09, judgment of 16 July 2013. In the latter case, the European Court reviewed the UKSC's decision in *In re McCaughey* n 17 above, and ruled that, while the decision had upheld the applicants' right to an Article 2-compliant inquest, it had not addressed the issue of whether Article 2 had been violated by the excessive delay in investigating Mr McCaughey's death. The European Court found there had been such a violation. While it did not award any compensation to the applicants (only €14,000 towards their costs and expenses) it did order the UK government to take, 'as a matter of some priority, all necessary and appropriate measures to ensure, in the present case and in similar cases concerning killings by the security forces in Northern Ireland where inquests are pending, that the procedural requirements of Article 2 of the Convention are complied with expeditiously', *ibid* at [145].

154 *In the matter of an application by Kevin Maguire for Judicial Review* [2018] UKSC 17, [2018] NI 102.

155 *ibid* at [44].

156 n 17 above.

legal effect.¹⁵⁷ These two cases highlight the actions of different players within the Northern Ireland legal system who were attempting to push at the limits of their roles to achieve procedural justice. A junior counsel cannot act as a ‘*soi disant* leading counsel’¹⁵⁸ in lieu of an objectively qualified senior counsel, just as the Commissioner for Complaints cannot recommend a compensation payment for failure ‘to provide a reasonable level of care and treatment’¹⁵⁹ whenever such relief can be sought by way of proceedings in a court of law. Both cases illustrate the important work of the UKSC in identifying the proper procedures by which the value of procedural justice is to be achieved, as well as its authoritative role in policing the propensity for institutions – with good intentions – to seek greater power, position and payment in the pursuit of that goal.

THE INFLUENCE OF THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Having detailed the considerable influence of Lord Kerr in the course of our thematic evaluation of the Northern Ireland case law above,¹⁶⁰ we will now explore separately the under-appreciated extent to which the AGNI has an influence over this sphere of the UKSC’s business. The office of AGNI was created in 1921 as a non-departmental ministerial position within the newly formed government of Northern Ireland, but it was later modified as a consequence of direct rule such that it was held co-terminously with the office of Attorney General for England and Wales between 1972 and 2010. The revival of a standalone law officer model in 2010 therefore marked an important turning point in the historical development of the office, which was by that time equipped to exert a significant influence over Northern Ireland legal affairs ‘independently of any other person’.¹⁶¹ The first and only person to occupy the office since the constitutional changes brought about in 2010 is John Larkin QC,¹⁶² who since then has accrued a very high profile in the

157 *ibid* at [17] and [24] *per* Lord Sumption, with whom the other Justices agreed.

158 n 154 above at [21].

159 n 17 above at [9].

160 Space does not permit a more detailed analysis here of the wider contribution made by Lord Kerr during his long service as a Justice of the UKSC, but the authors hope to produce such an analysis in the near future.

161 Justice (NI) Act 2002, s 22(5).

162 After his initial appointment in May 2010, Mr Larkin was reappointed for a further term of two years in May 2014. In September 2015, the First Minister and deputy First Minister further extended his appointment until 23 May 2019. On 13 May 2019, the Secretary of State for Northern Ireland announced that Larkin’s tenure was being extended to 30 June 2020. The Justice (NI) Act 2002, s 22(2), provides that the AGNI must be appointed by the First Minister and deputy First Minister ‘acting jointly’, but in the absence of a Northern Ireland Executive it was made possible for a UK Minister to perform this function under the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, s 5, as amended by the Northern Ireland (Ministerial Appointment Functions) Regs 2019. On 31 January 2020 Mr Larkin was sworn in as a Temporary High Court judge in Northern Ireland, joining six others who were sworn in a week earlier. At the time the Lord Chief Justice of Northern Ireland pledged to manage

course of exercising his powers and duties. Where the UKSC has engaged with issues affecting Northern Ireland, in particular, the AGNI has certainly played a noteworthy role. We will analyse his contribution by considering in turn the various routes by which he has been able to influence the thinking of the UKSC.

It is a common misconception to think that the only role of the AGNI in UKSC proceedings is to represent the Northern Ireland Executive. Before the institutions of devolved government for Northern Ireland came to a standstill at the beginning of 2017,¹⁶³ it is true that the AGNI regularly represented quite a number of Ministers and Departments in litigation ‘of particular significance’¹⁶⁴ before the courts in Northern Ireland. He was instructed, for example, by the Department of Health, Social Services and Public Safety to defend a challenge to its controversial maintenance of a ban on blood donations by sexually active gay men.¹⁶⁵ He was even instructed to appear on behalf of one division of the Executive seeking to impugn the actions of another.¹⁶⁶ In contrast to the regularity of his appearances in departmental litigation before the courts in Northern Ireland, the AGNI has only rarely represented Northern Ireland public bodies in litigation before the UKSC. Permission to appeal to the UKSC is not guaranteed in those cases of ‘particular significance’ where it has been deemed ‘appropriate’ for the law officer to appear on behalf of the Executive.¹⁶⁷ In 2013, for example, the Court of Appeal upheld the High Court in affirming that same-sex couples were entitled to apply to adopt children.¹⁶⁸ This decision was contrary to submissions put forward by the AGNI on behalf of the relevant Department, but notwithstanding the AGNI’s involvement the Department was still refused permission to appeal to the UKSC.¹⁶⁹

In re Brownlee’s Application for Judicial Review,¹⁷⁰ which involved a successful challenge to legal aid legislation for Northern Ireland, is an exceptional example of the AGNI appearing in a representative capacity before the UKSC. The office-holder has since noted that ‘the point which found favour with the Court had not been raised on behalf of the Applicant in the courts below and

any potential conflict of interests Mr Larkin might have when undertaking his judicial role: see <https://www.irishlegal.com/article/attorney-general-john-larkin-to-serve-as-temporary-high-court-judge>.

163 For an explanation of the impasse, which finally ended in January 2020, see B. Dickson, ‘Devolution in Northern Ireland’ in J. Jowell and C. O’Cinneide, *The Changing Constitution* (Oxford: OUP, 9th ed, 2019) 261–265.

164 Attorney General for Northern Ireland, ‘Sixth Annual Report – 2015/16’ para 13 at https://www.attorneygeneralni.gov.uk/sites/ag/files/media-files/AGNI%20Annual%20Report%202015-16_0.pdf.

165 *Re JR65’s Application* [2013] NIQB 101; [2015] NIQB 1; [2016] NICA 20.

166 In 2016, for example, the AGNI ‘acted for the Department of Culture Arts and Leisure in an application for judicial review brought by the Minister of Justice in relation to a decision to make the draft Court Files Privileged Access Rules (NI) 2016 without referring the matter to the Executive for discussion and agreement’, see n 164 above, para 21.

167 *ibid.*

168 *In the matter of an application by the Northern Ireland Human Rights Commission* [2012] NIQB 77; [2013] NICA 37.

169 Attorney General for Northern Ireland, ‘Fourth Annual Report – 2013/14’, para 14 at <https://www.attorneygeneralni.gov.uk/sites/ag/files/attorney-general-for-northern-ireland-annual-report-2013-14.pdf>.

170 n 17 above.

was raised for the first time by Lord Reed JSC in the course of the [rolled-up] hearing'.¹⁷¹ This statement implies a degree of dissatisfaction on the AGNI's part with the way in which the case was handled by the UKSC. The substance of the Court's decision is discussed in our section on non-conflict related criminal appeals above,¹⁷² but we highlight it here because it is the only case to have reached the UKSC where the AGNI was instructed by the Departmental Solicitor's Office to appear on behalf of a government department. While the AGNI has *intervened* on behalf the Department of Justice in another case about the cost of access to justice,¹⁷³ it is clear that the vast majority of appearances in the UKSC on behalf of Northern Ireland public bodies have been by other members of the Bar.¹⁷⁴

Contrary to public perceptions, therefore, the AGNI has normally participated in UKSC proceedings *ex officio* rather than on the behalf of a government client. In other words, it has become common for the office-holder to either initiate or intervene in UKSC proceedings on his own behalf and in his own right in order to give effect to independently formed conceptions of 'the rule of law' and 'the public interest'.¹⁷⁵ There are at least six procedural vehicles which enable the AGNI to influence the Court in these ways, which mainly flow from the legislation giving effect to devolution in the UK.

The first route open to the AGNI is to refer to the UKSC the question of whether a Bill passed by the Northern Ireland Assembly would, if enacted, be within its legislative competence.¹⁷⁶ While there are no fixed criteria that the AGNI must apply when reaching a view on whether or not any provision of a Bill should be referred, Mr Larkin has stated that particular weight is placed on 'the desirability for a speedy determination of legal questions that would, if a reference were not made, occupy considerable time in the Northern Ireland Courts'.¹⁷⁷ In fact only one such reference has ever been sent to the UKSC by the AGNI (it was the first law officer reference of this kind ever made to the UKSC), but it was subsequently withdrawn in advance of an important hearing dealing with similar questions about the legislative competence of the Scottish Parliament – the well-known case of *AXA General Insurance Ltd v Lord Advocate*.¹⁷⁸ The second route open to the AGNI is to intervene in cases before the UKSC where a Bill passed by the Senedd Cymru / Welsh Parliament or the Scottish Parliament has been referred to it by another law officer.¹⁷⁹ The

171 n 169 above, para 18.

172 See the text at n 88 above.

173 *Coventry v Lawrence* [2015] UKSC 50, [2015] 1 WLR 3485. See too n 164 above, para 22.

174 Tony McGleenan QC, who is Senior Crown Counsel, stands out as a particularly frequent brief in such matters.

175 For references to each of these concepts, see for example n 164 above, para 3.

176 Northern Ireland Act 1998, s 11.

177 n 164 above, para 42.

178 *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 at [15]. The UKSC held that the Scottish Bill in question was within the competence of the Scottish Parliament. The Northern Ireland Bill that had been referred and withdrawn by the AGNI went on to become the Damages (Asbestos-related Conditions) (NI) Act 2011.

179 References in respect of the legislative competence of the Senedd and the Scottish Parliament are made under the Government of Wales Act 2006, s 112, and the Scotland Act 1998, s 33, respectively.

AGNI declined to intervene in one such case,¹⁸⁰ but he has participated in the other three cases of this nature heard by the UKSC to date.¹⁸¹ On each of these three occasions, the AGNI proposed a reading of the legislative competence powers that was generally consonant with the ‘generous purposive approach to the interpretation of constitutional statutes’¹⁸² advanced by his devolved counterparts,¹⁸³ rather than the more restrictive readings advocated by his analogues in the UK government.¹⁸⁴

The third route by which the AGNI can participate in the UKSC materialises where he has received a ‘devolution notice’ to inform him that so-called ‘devolution issues’ have arisen in a set of judicial proceedings.¹⁸⁵ Devolution issues arise where it is claimed that the Northern Ireland Assembly or Executive has done or is doing something inconsistent with the limits on their powers by failing to comply with certain ECHR rights, EU law, certain international law obligations, or the principle of non-discrimination on grounds of religious belief or political opinion, or something which encroaches upon excepted or reserved matters.¹⁸⁶ Writing with a co-author prior to his appointment as AGNI, Mr Larkin proposed that the statutory definition of devolution issues ‘might also reasonably be viewed as fundamental principles of the constitution of Northern Ireland’.¹⁸⁷ A Northern Ireland court or tribunal must ‘order notice of any devolution issue which arises in any proceedings before it’ to be given to the AGNI, the Attorney General for England and Wales, as well as the First Minister and deputy First Minister of Northern Ireland (at least when those offices are filled and assuming none is already joined as a party to the proceedings in question).¹⁸⁸ The AGNI views the purpose of this procedure as being the need ‘to ensure that a court dealing with issues central to the interests

180 *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3, [2015] AC 1016. The UKSC held that the Bill referred was outside the competence of the Senedd.

181 *Local Government Byelaws (Wales) Bill – Reference by the Attorney General for England and Wales* [2012] UKSC 53, [2013] 1 AC 792 (the UKSC agreed with the AGNI, amongst others, that the Bill referred was within the competence of the Senedd); *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43, [2014] 1 WLR 2622 (the UKSC again agreed with the AGNI, amongst others, that the Bill referred was within the competence of the Senedd); *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64, [2019] AC 1022 (the UKSC held that the whole of the Bill referred was not outside the competence of the Scottish Parliament, but that some of its provisions were; the submissions of the AGNI, amongst others, therefore received a mixed reception). A further reference was made but subsequently withdrawn by the Attorney General for England and Wales in respect of the Law Derived from the European Union (Wales) Bill, which duly became the Law Derived from the European Union (Wales) Act 2018; see [2018] UKSC 64, [2019] AC 1022 at [9].

182 [2012] UKSC 53, [2013] 1 AC 792, 798 (summary of oral arguments).

183 i.e., the Lord Advocate for Scotland, the Solicitor General for Scotland, and the Counsel General for Wales.

184 i.e., the Attorney General for England and Wales (who is also the Advocate General for Northern Ireland), the Solicitor General for England and Wales, and the Advocate General for Scotland.

185 Northern Ireland Act 1998, s 79 and Sch 10.

186 *ibid.* What are ‘excepted’ and ‘reserved’ matters is set out in, respectively, Schs 2 and 3 to the Northern Ireland Act 1998.

187 J.F. Larkin and D.A. Scofield, *Judicial Review in Northern Ireland: A Practitioner’s Guide* (SLS Legal Publications (NI), 2007) 132.

188 Northern Ireland Act 1998, Sch 10, para 5.

of the devolved administration receives all necessary assistance', and while he is not statutorily required to intervene in a case where a devolution notice has been served upon him¹⁸⁹ it is clear that he believes 'active compliance' with the relevant provisions is 'a powerful instrument for enhancing the rule of law'.¹⁹⁰ That said, even where the AGNI intervenes in the Northern Ireland courts he is not obliged to maintain his involvement if an appeal reaches the UKSC, perhaps on grounds other than those relating to the devolution issue.¹⁹¹ In an appeal relating to the judicial review taken by Denise Brewster,¹⁹² for example, the AGNI did not appear before the UKSC despite having made written and oral submissions in both the High Court and the Court of Appeal in support of the public body under challenge.¹⁹³

The fourth route by which the AGNI may appear before the UKSC overlaps with the third route. It relates to powers which may be exercised within proceedings where a devolution notice has been served upon the AGNI and he has been joined as a party, irrespective of whether another party decides to appeal to the UKSC at a later stage. The powers in question flow from Schedule 10 to the Northern Ireland Act 1998, with paragraph 9 providing that the Court of Appeal may refer to the UKSC any devolution issue which has arisen in proceedings before it. In parallel with this voluntary option for the Court of Appeal, paragraph 33 provides that the AGNI may *require* it or any other court to refer any devolution issue which has arisen in proceedings to which he is a party. Under paragraph 34, moreover, the AGNI is entitled to refer a devolution issue to the UKSC which is not the subject of any court proceedings at all, which accounts for the fifth route by which he may exercise some influence on the Court. This complex suite of provisions has given rise to disputes in recent years, with the Court of Appeal and the AGNI disagreeing over their extent and application on more than one occasion,¹⁹⁴ but to date it remains the only route by which the AGNI has – on three occasions – presented a reference to the UKSC which was not later withdrawn.¹⁹⁵

189 *ibid*, para 6.

190 Attorney General for Northern Ireland, 'Third Annual Report – 2012/13' paras 17–18 at <https://www.attorneygeneralni.gov.uk/sites/ag/files/attorney-general-for-northern-ireland-annual-report-2012-13.pdf>.

191 An appeal to the UKSC against a determination of a devolution issue by the Court of Appeal lies only with the permission of the Court of Appeal or, failing that, of the UKSC itself: Northern Ireland Act 1998, Sch 10, para 10.

192 n 146 above. The facts of this case are discussed at nn 146–147 above.

193 Attorney General for Northern Ireland, 'Fifth Annual Report – 2014/15' para 29 at <https://www.attorneygeneralni.gov.uk/sites/ag/files/media-files/AGNI%20Annual%20Report%202014%2015%20Final%20PDF.PDF>. The UKSC ruled against the public body in question.

194 One of the only references of this kind to have been made without some overt form of contention between the AGNI and the Court of Appeal is *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* n 17 above, the substance of which is discussed at nn 138–145 above. The devolution questions referred concerned whether or not the Commission could institute human rights proceedings or seek a declaration of incompatibility other than with respect to an identified unlawful act or acts, and a majority of the UKSC answered them in the negative.

195 *R (Miller) v Secretary of State for Exiting the EU; In re McCord; In re Agnew* [2017] UKSC 5, [2018] AC 61; *Reference by the AGNI of Devolution Issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act (No 2)* [2019] UKSC 1 (on which, see text at n 209

In the first of these references – the Brexit cases of *Miller/Agnew/McCord*¹⁹⁶ – although the AGNI required the High Court to refer four devolution issue questions to the UKSC, which were formulated by the applicants in *Agnew* but which had been approved by the AGNI as being valid for the purposes of a referral under paragraph 33, the Court of Appeal was persuaded to refer a fifth question under paragraph 9.¹⁹⁷ In doing so, the Court of Appeal was requiring a broader assessment of the relevant devolution issues engaged by the litigation – one which encompassed an argument that had been put forward by the applicant in *McCord* alone – to the effect that the consent of the Northern Ireland electorate was required before Article 50 of the Treaty on European Union could be triggered.¹⁹⁸ The AGNI has since surmised that this ‘issue was so devoid of substance that one is driven to conclude that the decision of the Northern Ireland Court of Appeal to refer it must have been driven by the fear, that if it were not referred, it might have longer haunted the Courts’.¹⁹⁹ Interestingly, the independent submissions of the AGNI to the UKSC on all five of the questions put to it were qualitatively different from his previous interventions in respect of legislative competence references made via the first and second routes outlined above. This time his arguments appear to have been strongly underpinned by traditional Diceyan readings of the constitutional issues in question (though, at the same time, he did invite the Court to adopt a purposive interpretation of the devolution legislation).²⁰⁰ This approach was no doubt lamented by the unsuccessful appellants from Northern Ireland given that it was approved, for the most part, in all the judgments delivered in the UKSC.²⁰¹

A much more contentious conflict between the Court of Appeal and the AGNI occurred in *Lee v Ashers Baking Co Ltd*,²⁰² when the Court of Appeal refused to accept that paragraph 33 entitled the AGNI to require the Court to refer devolution issues to the UKSC after it had handed down a judgment but before it had perfected the final order giving effect to that judgment.²⁰³ It was noted by the UKSC in *Miller/Agnew/McCord* that the Court of Appeal’s

below); *Reference by the Attorney General for Northern Ireland of Devolution Issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998* [2020] UKSC 2 (on which, see text at n 216 below). The third case falls slightly outside our timeframe, within which only two references were presented to the UKSC by the AGNI, but we note it here for information purposes nonetheless.

196 *ibid*.

197 The five questions can be read in full, *ibid* at [126].

198 McCrudden and Halberstam note that, in effect, the AGNI ‘referred the *Agnew* case but not the *McCord* case, on the basis that he thought the latter had less merit given the points Mr McCord was seeking to argue’: C. McCrudden and D. Halberstam, ‘*Miller* and Northern Ireland: A Critical Constitutional Response’ in D. Clarry (ed), *The UK Supreme Court Yearbook, Volume 8: 2016-2017 Legal Year* (London: Appellate Press, 2018) 326.

199 J.F. Larkin, ‘*Miller* and Northern Ireland: The Northern Ireland Constitution Before the UK Supreme Court’ in Clarry (ed), *ibid*, 288.

200 [2017] UKSC 5, [2018] AC 61 at [126].

201 *ibid* at [126]–[151]. On the Diceyan dimensions to the reasoning of the UKSC on these points, see G. Anthony, ‘Sovereignty, Consent and Constitutions: The Northern Ireland References’ in M. Elliott, J. Williams and A.L. Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Oxford: Hart Publishing, 2018) 193–194.

202 n 17 above; previously discussed in the text at nn 112–116 above.

203 *Lee v McArthur* [2016] NICA 55.

restrictive interpretation of the AGNI's powers under paragraph 33 in *Ashers* suggested that the High Court may not have had jurisdiction to make the reference it did make in *Agnew*, although the UKSC dealt with the *Agnew* reference anyway.²⁰⁴ This looks, with hindsight, to have been a harbinger of how in *Ashers* the UKSC would resolve the conflict between the AGNI and the Court of Appeal in favour of the former when it accepted that it had jurisdiction to adjudicate on a reference made by the AGNI under paragraph 34 (taken together with the paragraph 33 reference which the question posed by the paragraph 34 reference sought to validate).²⁰⁵ We nevertheless find it surprising that there were 'no jurisdictional objections to these references',²⁰⁶ because it is difficult to discern how the procedural question of whether the AGNI was entitled to require the Court of Appeal to make a reference under paragraph 33 at the stage he sought to do so could amount to a 'devolution issue' as defined in the Northern Ireland Act 1998.²⁰⁷ In any event, the UKSC ultimately decided to uphold the validity of both references based on normative reasons connected to the desirability of ensuring that any UKSC judgment on devolution questions has an effect on the outcome of the proceedings to which they relate.²⁰⁸

In keeping with this pragmatic approach, the UKSC adjourned proceedings in a different reference made by the AGNI purportedly under paragraph 34 because the relevant issues had become moot and, as such, were deemed to be better 'determined against the backdrop of a clear factual matrix'.²⁰⁹ We describe this reference as *purportedly* made under paragraph 34 in light of preliminary questions raised by Lord Kerr about whether the matters referred by the AGNI were valid devolution issues.²¹⁰ The AGNI sought to make his reference following a significant set of rulings by the High Court and Court of Appeal pursuant to a challenge to the legality of decisions taken by civil servants in Northern Ireland in the absence of democratic oversight and without regard to certain procedures required by the Northern Ireland Act 1998.²¹¹ Although in the case in question the Department for Infrastructure had announced that it did not intend to appeal to the UKSC, and legislation had since been passed at Westminster which effectively annulled the effect of the rulings,²¹² the AGNI made an independent decision to refer several questions about devolution issues arising from the case. His questions related mainly to a ruling of the Court of Appeal about the applicability of the Ministerial Code to civil servants, because he thought that section 28A of the Northern Ireland Act 1998 had been wrongly interpreted.²¹³ He was also reported to have stated

204 [2017] UKSC 5, [2018] AC 61 at [127], citing *Lee v McArthur* *ibid*.

205 n 243 above.

206 *ibid* at [75].

207 Northern Ireland Act 1998, s 79 and Sch 10, para 1.

208 n 243 above at [78].

209 *Reference by the Attorney General for Northern Ireland of Devolution Issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act (No 2)* n 195 above at [28].

210 *ibid* at [9].

211 *Re Buick's Application* [2018] NIQB 43; *Re Buick's Application* [2018] NICA 26.

212 Northern Ireland (Executive Formation and Exercise of Functions) Act 2018; this was later supplemented by the Northern Ireland (Executive Formation etc) Act 2019.

213 n 195 above at [4].

that the reference was intended to offer the UKSC ‘the opportunity to give us authoritative guidance about the powers of departments to make important decisions’ during the political stalemate in Northern Ireland.²¹⁴ As noted above, the court ultimately adjourned its proceedings and ruled that the AGNI would be entitled to apply to intervene in relevant lower court proceedings which had been stayed pending the outcome of his reference, despite the fact that he had not been served with a formal devolution notice in those proceedings.²¹⁵

In a further recent case which falls just outside the 10-year period covered by this article, the UKSC again rejected a reference made by the AGNI under paragraph 34.²¹⁶ In effect he asked the UKSC to take a view on whether universal credit is incompatible with the ECHR rights to a family life, to marry, to be free from discrimination and to peaceful possession of one’s property. Three Justices, through Lord Kerr, ruled that the compatibility issue was already scheduled to come before the Court later in the year in an appeal from the Court of Appeal of England and Wales,²¹⁷ and so the AGNI’s reference was premature.

If the AGNI is not appearing before the UKSC in a representative capacity and he has neither intervened in proceedings relating to the legislative competence of the devolved legislatures nor become involved in a case by virtue of the devolution issues raised in a set of judicial proceedings *ex officio*, he still retains the sixth and final option of applying to intervene in accordance with the court’s normal procedures. Under Rule 26(1) of the Supreme Court Rules 2009, the UKSC may permit interventions – either written or written and oral – by, amongst others, ‘any official body . . . seeking to make submissions in the public interest’. While the AGNI does not have to apply for leave to intervene in this way where the UKSC is ‘exercising its devolution jurisdiction’,²¹⁸ it is necessary for him to do so in any other appeal (and such applications are only permitted after permission to appeal has been granted or a notice of appeal has been lodged).²¹⁹ There is limited scholarship on the role of interveners granted permission to participate in proceedings by this procedure, although it seems that the numbers have expanded significantly following the creation of the UKSC as an institution distinct from the House of Lords.²²⁰ Given the far-reaching ambit of the AGNI’s role in cases falling within the ‘devolution jurisdiction’ of the UKSC, it is interesting that he had cause to apply for leave to intervene on only two occasions during the UKSC’s first decade.²²¹

214 M. Devonport and J. McCormack, ‘Arc21 Ruling: NI Attorney General Seeks Clarity Over Case’ *BBC News*, 10 August 2018 at <https://www.bbc.co.uk/news/uk-northern-ireland-45150319>.

215 n 195 above at [29]–[30].

216 *ibid.*

217 *R (C) v Secretary of State for Work and Pensions* [2019] EWCA 615, [2019] 1 WLR 5687.

218 Supreme Court Rules 2009, r 26(3)(b).

219 *ibid.*, r 26(1).

220 Lorne Neudorf, ‘Intervention at the UK Supreme Court’ (2013) 2 *Cambridge Journal of International and Comparative Law* 16, 24–25. By way of illustration, Neudorf notes that 40 per cent of the UKSC’s cases in 2011 ‘involved at least one intervener as compared to the House of Lords in 2005, where only 12 per cent of its cases involved intervention’.

221 *In re McCaughey* n 17 above; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355.

Both interventions were ostensibly driven by a desire to influence the UKSC's jurisprudence on the right to life protected by Article 2 of the ECHR. The AGNI has explained that his application to intervene in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs*, for instance, was prompted by a concern to obtain guidance for public authorities in Northern Ireland about what Article 2 'may require them to do about our troubled past'.²²² In yet another recent case falling just outside our period,²²³ the AGNI made a very successful intervention when the UKSC agreed with his argument that a case in which a panel of Justices had already granted permission to appeal (in July 2019) was, in law, not one which the UKSC had jurisdiction to hear by way of a direct appeal from the Divisional Court of Northern Ireland because the decision in question was not in 'a criminal cause or matter', it being concerned only with whether an earlier criminal sentence had been correctly understood and implemented. Ruling that the appeal should go first to the Court of Appeal of Northern Ireland as a civil matter, the UKSC acknowledged that it was likely to be assisted by that Court's consideration of the operation of the special prisoner regime in Northern Ireland, which was established pursuant to the Belfast (Good Friday) Agreement.²²⁴

It is clear from our analysis of the relationship between the AGNI and the UKSC that the former has to date had a very significant influence over the activities of the latter in so far as they relate to Northern Ireland. Where the AGNI decides to intervene before the court at his own initiative, rather than in a representative capacity, his arguments are generally treated as highly persuasive. This tendency is at its highest in cases involving devolution issues. Indeed, our analysis suggests that the UKSC usually favours the reasoning of the AGNI over that of the Court of Appeal and demonstrates that his independent submissions have tended to tally with the final judgment of the UKSC in a high proportion of the cases featuring his involvement.

CONCLUSION

Having provided a detailed evaluation of Northern Ireland's relationship to the UKSC through a combination of thematic, biographical and institutional analyses, we conclude this paper by relating our findings to a more general point about the reasons for having an appellate Court which divides its attention between Northern Ireland and two other jurisdictions. We find ourselves in support of the triple justification for this arrangement recently suggested by

222 n 164 above, para 33. See too the AGNI's 'Guidance for Criminal Justice Organisations in Northern Ireland on Human Rights Standards Relevant to the Protection of the Right to Life' (2013) at <https://www.attorneygeneralni.gov.uk/sites/ag/files/guidance-on-human-rights-protection-of-the-right-to-life.pdf>.

223 *In the matter of an application by Deborah McGuinness for Judicial Review* [2020] UKSC 6. This too is a troubles-related case involving the sentence which a notorious loyalist killer should be required to serve.

224 *ibid* at [96] *per* Lord Sales.

Lady Hale in a lecture about the purpose of the UKSC more generally.²²⁵ According to Lady Hale, the most important justification for having a UKSC is the need for a wide range of *constitutional* issues to be determined by a judicial body of some kind, with devolution cases forming a significant part of that work. We have emphasised the UKSC's appreciation of Northern Ireland considerations relevant to this function in, for example, our discussion of the AGNI's reference powers, where it was revealed that the Court has been highly receptive to interventions bringing a Northern Ireland perspective to bear upon important questions of constitutional law originating elsewhere.²²⁶ In theory, the powers of the Court of Appeal of Northern Ireland could be reformed so as to entitle it to determine any such questions raised before it. However, we agree with Lady Hale that there are two additional justifications for hosting those functions at a higher tier in the UK court system, namely interpretative *consistency* and practical *capability*.

We have explored examples where it has been possible to achieve greater legal consistency across the UK through decisions in which the UKSC has resolved differences of opinion between the courts of Northern Ireland and the courts of England and Wales,²²⁷ and also through decisions in cases where no explicit differences were apparent but the UKSC has provided a binding precedent in a Northern Ireland appeal on a particular point of law that applies in other parts of the nation too.²²⁸ Likewise, our analyses confirm that the UKSC's dedicated resources have enabled it to apply and develop the law in a more responsible and principled fashion than Northern Ireland's Court of Appeal has been able to achieve at times.²²⁹ On the other hand, in terms of capability there may be some areas of Northern Ireland law, such as property law, on which there is more expertise within the Court of Appeal than within the Supreme Court.²³⁰ This may be one reason why so few private law disputes from Northern Ireland reach the Supreme Court: in the period under consideration only two applications for permission to appeal in private law cases were granted, while 25 were refused.

We have also tentatively identified some trends, such as the UKSC's tendency to treat applications for permission to appeal from Northern Ireland (like those from Scotland) as a special category, the care the UKSC takes to ensure that on issues in public law and criminal law the positions in Northern Ireland and in England and Wales are the same, and the consistency of the UKSC in ensuring that human rights considerations are given every bit as much prominence in cases from Northern Ireland as they are in cases from other parts of the UK. More specifically, there is little if any evidence to suggest that the features of UKSC decision-making in cases from Northern Ireland are divergent from

225 Lady Hale, 'What is the United Kingdom Supreme Court for?' Macfadyen Lecture, Edinburgh, 28 March 2019, 10–13 at <https://www.supremecourt.uk/docs/speech-190328.pdf>.

226 nn 175–215 above.

227 For example *In re K (A Child)* n 28 above.

228 For example *Gaughan v Chief Constable of Northern Ireland* n 86 above.

229 For example *R v Mackle* n 84 above, as explained at nn 119–120 above.

230 See too the recent case mentioned at n 223 above, where the UKSC admitted that it would find the views of the Court of Appeal of Northern Ireland on the special sentencing regime there of assistance to it if it was later called upon to interpret the relevant legislation.

those apparent in cases from the two other jurisdictions, notwithstanding the peculiar nature of Northern Ireland's polity and the centrality of the Belfast (Good Friday) Agreement of 1998 to public affairs there. Lord Kerr has pointed out that cases from Northern Ireland have 'a particular slant', given its recent history, its conservative values and its (occasional) stalemates within its legislature, but he maintains, correctly we think, that the appellate route from Northern Ireland to the UKSC has 'a strong unifying impact by guaranteeing that . . . we are one country in a common understanding and commitment to human rights'.²³¹

Viewing the situation in the round, we submit with some confidence not only that in its first decade the UKSC has established itself as an indispensable component of the legal system of Northern Ireland which corrects errors made in the application of the law by courts in Northern Ireland, but also that cases from Northern Ireland have helped to vindicate what Lady Hale, the then President, saw as the primary role of the UKSC, namely, 'to resolve difficult points of law to which the answer is not clear and which matter to a great many people other than the parties to the case'.²³²

231 See the closing sentences of the lecture by Lord Kerr referred to at the start of this article.

232 n 225 above, at 5.