Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Criminal Justice Issues: Mr John Larkin QC, Attorney General for Northern Ireland

30 January 2020

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Ms Linda Dillon (Deputy Chairperson)
Mr Doug Beattie
Mr Gordon Dunne
Mr Paul Frew
Mr Raymond McCartney
Mr Patsy McGlone
Miss Rachel Woods

Witnesses:
Mr John Larkin QC Attorney General for Northern Ireland

The Chairperson (Mr Givan): Members, we will divide our time with the Attorney General (AG) into two stages. We want to get some advice from him on the statutory rules that he has laid and talk to him about his broader role in the criminal justice system. We will do the latter first and have a conversation about his overall role, if the Attorney General is agreeable, and then move on to deal specifically with the three statutory rules.

Mr John Larkin QC (Attorney General for Northern Ireland): I am, Chair.

The Chairperson (Mr Givan): You are welcome to the meeting.

Mr Larkin QC: Thank you.

The Chairperson (Mr Givan): We have had good engagement in the past, and I have no doubt that that will continue to be the case.

Mr Larkin QC: Very much so. I think that it was during the East Clare by-election in 1917 that Éamon de Valera got on to a platform and said:

"Well, as I was saying to you when we were interrupted",

referring to his arrest some months previously. I have to say to you, Chair, and members of the Committee, that, had I been asked in November or December would I have imagined appearing before the Committee before the end of January, I am afraid that I have to be candid and say no. I would not have thought that that was at all likely. However, it is no less delightful that the Assembly and the Committee are back up and running.

It is also a particular pleasure for me, because there are a number of former Chairs and Deputy Chairs of this Committee present — my arithmetic is not very good — so it is a Committee rich in experience and expertise. As you say, Chair, over the years, ours has been a very productive working relationship, at least, certainly, from my perspective.

Having done this job now for some time, I am constantly discovering new things about it, and there are new work streams coming along. Reference was made to the Mental Capacity Act 2016, and that is having a very significant effect already in the office. Mr McGlone referred to the interface with the trusts. That is much more the responsibility of the Department of Health and the Health Committee. Nonetheless, because the Act deals with liberty and rights protected by article 5, it is something in which the Committee will no doubt be interested. We now get all the cases in which form 7 has been filled in. Form 7 indicates that a person lacks capacity to, himself or herself, apply to a tribunal. The person comes to me, and I make a determination whether the case should be referred to the tribunal. I looked at some cases today. In the month of January alone, we have more than 100 cases, so you can imagine the extent of the workload coming from that new stream alone.

The Chairperson (Mr Givan): I know that you are giving a broad overview, and it is probably wrong of me to interrupt, but I know that Patsy wants to follow up on that before you move on.

Mr Larkin QC: Absolutely. I will be very glad to respond.

Mr McGlone: Are you OK with that, John?

Mr Larkin QC: Absolutely.

Mr McGlone: People appreciate the work that you have done in a sympathetic role, but it seems to be the case that people who are incapacitated go to a tribunal. There may well be further court proceedings consequent to that, but they are so utterly incapacitated that they are unable to attend. It may have been the unintended consequences of the legislation that those are its outworkings, but can you give us some sort of insight into the real, practical difficulties being caused?

Mr Larkin QC: Time will tell. The provision was commenced only at the start of December, and already, for example, in some cases that have been referred, the patient has in fact died before a tribunal could be convened. That is inevitable when one is dealing with very frail, elderly people.

The legislation is itself a response to a decision of the UK Supreme Court, the case of P v Cheshire West. The Supreme Court took, I think that it is safe to say, a fairly expansive view of the requirements of article 5 of the European Convention on Human Rights. Baroness Hale famously said:

> *"A gilded cage is still a cage."*

Therefore, even though someone is deprived of his or her liberty for the best of motives, article 5 is nonetheless engaged and the article 5 safeguard should exist. That requires, ultimately, the possibility of judicial determination of the legality of that detention. Hence, even though, as you rightly say, people who are not capacitous will have great difficulty in presenting a case — in fact, it may not be in the realm of reality at all for them to present a case — the case should be looked at in certain cases by a tribunal.

Let me give you a relatively concrete example, not referring to any specific case. If people manifest an unhappiness with their detention and express a wish to go home, however fanciful that wish may be in reality, they have objected to their detention. Therefore, the objection should at least be sufficiently respected so that the proportionately of their detention is judicially assessed by the tribunal. Does that have massive resource implications for the tribunal? For me? Yes, it does. The bit that has been acknowledged is the resource implications for the trust and the individual care and nursing homes, but — again, this is where the issue is brought very centrally into the purview of this Committee — it will have an impact on the justice system more generally.

Mr McGlone: I am sorry to labour this, but in an instance in which the consequence of a tribunal ruling, even if a person has moved in a phased manner from being debilitated and somewhat compos mentis to the point at which he or she simply is no longer compos mentis, is for there to be a court appearance or something like that, practically, how would that work?

Mr Larkin QC: There would be no question of someone labouring under disabilities of that kind being, as it were, dragged before a tribunal. Indeed, tribunal decisions that have taken place thus far have been decisions on the papers.

Mr McGlone: Right. OK.

Mr Larkin QC: The tribunal is acutely aware of that. I do not speak for the tribunal, but one can safely conclude that the tribunal is fully aware of the issue, and, to my knowledge, it has thus far treated the matter very sensitively, as shown by paper decisions.

Mr McGlone: Thanks very much for that.

The Chairperson (Mr Givan): I will allow you to get back to giving an overview of your role. Hopefully, this question will help. In intervening in those cases, on what authority do you have the power to decide that there is a public interest here that you, as Attorney General, can get involved in? It is not just with those issues, as you have intervened on a broad range of issues, from Brexit to other cases. Does that take us into your broader remit as the guardian of the rule of law? I am curious to explore that.

Mr Larkin QC: If I may say so, Chair, it is a great question. In fact, the work under the Mental Capacity Act is a very specific, discrete, new set of statutory responsibilities. Someone is detained, at least based on what has been commenced thus far, under schedule 1 or schedule 2 to the Mental Capacity Act, depending on whether it is a six-month or short-term authorisation, and my power comes under section 47.The issue that you raise is important, because one of the traditional roles of the Attorney General in this jurisdiction and, historically, the Attorney General for Ireland before 1922 is guardian of the rule of law, and that means that I look after the public interest in civil proceedings. We have given a certain amount of concreteness to that in all the devolved jurisdictions of the UK. The Lord Advocate in Scotland, the Counsel General for Wales and I here can intervene in devolution issues. In our context, that is defined by paragraph 1 of schedule 10 to the Northern Ireland Act 1998. Even apart from that, however, one can intervene in cases in which it is felt that the public interest ought to be represented. For example, I intervened, at the request of a court just last month in a case involving a very recondite point of company law. I have also intervened in cases with which the Committee will be familiar.

The post, in origin, is a very old one. It now has a statutory overlay in the Justice (Northern Ireland) Act 2002, and there is an aspect of that that I know the Committee will want to discuss, which is the issue of superintendence. It is part of the common law/constitutional tradition of these islands that, often, roles are not over-defined. This role is very much one of them.

I will concretise that a bit. This morning, I hosted a colloquium on illegal moneylending, and that had a number of interfaces. I take the view that illegal moneylending is a scourge on many communities in Northern Ireland. It is sometimes used by certain paramilitary groups as a means of enhancing their control in certain communities, and they do so largely with impunity. We had people from the relevant English anti-loan-sharking teams, the Department of Justice, the Public Prosecution Service (PPS), the PSNI and the Consumer Council, which has done incredible research in the area, to see whether there are creative ways in which we can engage, because, yes, there is a formal criminal law illegality — illegal moneylending is obviously an offence — but if you have a situation in which there is a running, festering sore, I see it as part of my role to try to think of creative ways in which the problem can be addressed, and this morning's session was very successful.

I have interpreted the role in ways in which others may not have done. I think that there is an issue in this jurisdiction with the law and the legal profession seeming very "other" to large sections of our population, not by any religious or ethnic breakdown but simply because of class and economics. One can think of certain schools in the greater Belfast area in which you could not walk down a corridor without bumping into the son or daughter of a lawyer, and there are other schools where that is simply an impossibility. Therefore, I started a programme called Living Law, which is aimed only at the non-grammar secondary sector and is designed to encourage interest in law as a subject to be studied at university or to be thought of as a possible profession. It is even to enable those who do not wish to contemplate either possibility to realise that the law is theirs. We have another programme called It's Your Law. The idea of that is, I think, completely encapsulated in the title: that the law is the common birthright of all citizens, regardless of class or creed, with the emphasis particularly on class, because that is perhaps the dominant issue in this jurisdiction.

The Chairperson (Mr Givan): You mentioned the superintendence issue. I want to ask about the role of Attorney General in Northern Ireland compared with the role in other jurisdictions. Here it is held as an unelected position. There are issues around accountability to the democratic institutions and around the governance arrangements for the Public Prosecution Service. The Office of the Attorney General appoints the director of the Public Prosecution Service, whose prosecutorial decision-making is then independent. Can you just explain what the difference is in Northern Ireland when it comes to superintendence arrangements for the PPS and accountability arrangements for the Attorney General in other parts of the United Kingdom?

Mr Larkin QC: The biggest contrast, even in this jurisdiction, is probably between before and after the commencement of the relevant parts of the 2002 Act. Before the relevant parts of the 2002 Act were commenced, the Attorney General for England and Wales was also the Attorney General for Northern Ireland, and as long as that persisted, she or he had superintendence of the Public Prosecution Service.

It struck me as perhaps paradoxical that, at the moment when you removed the party political component — that is, that the Attorney General for Northern Ireland ceased to be an English MP, essentially, or an English peer, in the case of Baroness Scotland — the superintendence went, although the new Attorney General, unlike the director, had provision for direct interface with the Assembly; for example, by participation in Assembly proceedings — obviously, not voting — principally, one imagines, through the answering of Assembly questions.

At the present time, I suppose, Scotland is the most useful comparator. The Scottish Lord Advocate is considered to be one of the Scottish Ministers, so he is a political appointment to that extent. The relevant devolution statute in Scotland, however, makes clear that the Lord Advocate is independent in his prosecutorial functions and in his investigation-of-death functions. He therefore stands at the very apex of the prosecution system in Scotland, which, admittedly, differs from our own in certain respects. Nonetheless, he is independent utterly as to that, while forming part, for other purposes, of the collective of Scottish Ministers.

It is interesting that when Mr Hamilton and Mr Finlay held the ranks in the PSNI that they did, both of them had significant Scottish experience. Indeed, one is Scottish. One of the issues that I informally discussed with them was their familiarity with the role of the Procurator Fiscal Service, which, again, is ultimately subject to the Lord Advocate, who would superintend police investigations. The police, given their autonomy and expertise, would be left to investigate properly, but if there was something that occurred to the Procurator Fiscal Service, directions could be given. That was a very useful way in which justice and independence could be very effectively secured.

I have said this several times in successive annual reports, but my experience is that we should perhaps ratchet down and have some relationship of superintendence. Even when superintendence existed, 99·9% of decisions made by the director would be utterly unaffected by any input by from the Attorney General of the day, but there was the capacity for doing it. Therefore, with that, came the capacity for greater accountability. It is never right, I think, for a prosecutorial decision to be taken on the basis of public clamour, but, at the same time, there is huge responsibility to make prosecutorial decisions of whatever kind as accountable as possible. The issue is not the legislature bending the director of the Public Prosecution Service to its will; it is so that there is a relationship of mutual understanding of their respective functions between the two bodies.

The Chairperson (Mr Givan): In controversial decisions about whether to prosecute, as it currently stands, the Director of Public Prosecutions in Northern Ireland can take the decision, and there is no recourse to the Office of the Attorney General. The Attorney General cannot interfere in or seek information about the decision. For clarity, he plays no role whatsoever. Unlike in other jurisdictions, given the democratic deficit that exists, we cannot ask the Director of Public Prosecutions via the Attorney General, because the Office of the Attorney General has no role over the Public Prosecution Service. Therein lies the problem. Parliamentarians in Westminster and Scotland can raise those issues, on the very rare occasion that such decisions are taken, and there is a system of accountability that we do not have here.

How do we square that circle? Given that the post of AG is and will continue to be an unelected one, if we wanted to ask questions or get statements — this will take us on to the statutory rules — or if we decided to pray against one of your statutory rules and sought to vote it down in the Assembly, who would speak on your behalf?

Mr Larkin QC: That is absolutely right, Chair. No one does, and therein lies a problem. Before I deal with a larger issue, I will say that, in a way, that shows how one can make a virtue out of necessity, because that very fact has been one of the prompts towards a particularly historic, fruitful relationship between the Committee and me, in that I have to ensure that the Committee gets what we are trying to do through the guidance and, as far as possible, is relatively on board at least with the direction of travel.

You are right. Scotland is perhaps the best example. The position in England and Wales is probably closer to ours, with the exception of national security cases, which give rise to different considerations. In Scotland, there is a regular slot for questions to the Lord Advocate. He simply turns up in the Scottish Parliament and answer questions. Sometimes, they have been about quite significant issues. There was the dreadful and controversial case of the refuse lorry losing control apparently, with several people being killed as a result. That matter would have been the source of many questions to the Lord Advocate at the time.

The remedy is in the hands of the Committee and the Assembly as a whole. If the Committee takes a view on this, it can legislate. Historically, for example, we have less experience, because we have not had a local Attorney General since 1972. That local Attorney General, Sir Basil Kelly, or Lord Justice Kelly as he later was, was a unionist MP. He stalked these corridors, yet the hope was that, when we was dealing with prosecutorial matters, he was not acting as a party politician. There will, of course, be the usual controversy about this, but the constitutional principle is that he was not acting as a party politician.

I would regard it as a statement of great political health of this place if there were no bar to the Attorney General of the day being an MLA. That is something that one might be proud of: that the community would have confidence that someone could be a politician — from the Green Party, the Ulster Unionist Party, Sinn Féin, the Alliance Party or whatever — but would still discharge the core functions of the office in a way that was palpably independent. Short of that, which is probably somewhat utopian, there is no reason that one could not tweak the legislation so that the pre-2002 position applied to the Attorney General, making him or her statutorily independent, with the provision to take questions in the Assembly and there being that measure of accountability from him or her to the Assembly.

The Chairperson (Mr Givan): That would necessitate the Office of the Attorney General having some form of superintendence of the PPS. Otherwise, you would be held to account for things that you have absolutely no locus over.

Mr Larkin QC: Absolutely. That is right.

The Chairperson (Mr Givan): It is two issues: first, the accountability of the Attorney General and, secondly, the Attorney General's ability to superintend while still respecting the kind of decision-making process that the PPS would have to go through, and what level of superintendence you would seek.

Mr Larkin QC: That is right.

The Chairperson (Mr Givan): On the UK's withdrawal arrangements and the role of the European courts in Northern Ireland, can you provide some clarity as to what is going to be the role of the European Court of Justice and the European Court of Human Rights here?

Mr Larkin QC: The only easy part of that question is the reference to the European Court of Human Rights, because the European Court of Human Rights is a Council of Europe court. The UK is still a signatory to the European Convention on Human Rights (ECHR), and the Human Rights Act is still in force, so the European Court of Human Rights will continue to be significant and the ultimate interpreter of the ECHR.

The issue of the continued relevance of the Luxembourg court under the protocol is very much a work in progress. What I will say is that he European Union in its present form is, to a very large extent, the creation of the judicial interpretation by the court of relevant treaty provisions from time to time. For example, the doctrine of the supremacy of EU law is something that is still not found embodied in treaty text. It is a creation in its origin of the Luxembourg court. A coda to that is that it is now acknowledged as a principle of EU law in one of the annexes to the last treaty.

Mr McCartney: May I ask a question on superintendence?

The Chairperson (Mr Givan): Of course.

Mr McCartney: In our jurisdiction, there is a relationship between the Attorney General and the Public Prosecution Service. Are there grounds on which the Attorney General has to satisfy himself before he can ask for a review of a case, or can he do it on any grounds?

Mr Larkin QC: It varies from case to case. In a number of North American jurisdictions, the Attorney General has a limited role. In Scotland, it would be the judgement of the Lord Advocate as to whether he should intervene, in what is essentially a hierarchical position anyway. He is ultimately accountable for prosecutions, and he will decide whether some issue merits his particular attention.

That is reinforced by the extent to which it becomes a matter of public interest through interventions by MSPs asking, "What are you doing about this?". If that is asked, it is usually a very good way of getting someone at least to look at the issue if she or he has not done so before.

Mr McCartney: If a person does not get satisfaction from the PPS, does that not open up a situation in which the Attorney General almost become the complaints department?

Mr Larkin QC: Sometimes that happens already. Where it is particularly useless, you have to write back and almost say, "I can't do anything".

It is often good to have a second pair of eyes. I was able to see, during the period immediately prior to being appointed, a bit of the relationship between the English Attorney General's office and Sir Alasdair Fraser, who was then the director. The relationship was usually on the basis of weekly meetings, and it was a very light touch. I am not aware of any decision that was altered or adjusted as a result of that kind of superintendence.

Mr McCartney: In that relationship, if the Public Prosecution Service felt that something might be "controversial" or needed particular guidance, would it have the power to go to the Attorney General?

Mr Larkin QC: Yes, they would; indeed, there is a sense in which the burden of an issue can be shared.

The Chairperson (Mr Givan): Was there not a case where Baroness Scotland directed a prosecution to take place in Northern Ireland?

Mr Larkin QC: You may be right, but if you are, I cannot recall it.

The Chairperson (Mr Givan): I do not want to name it, but there was a murder of a young individual. I think Baroness Scotland directed a prosecution to take place after —.

Mr McCartney: A review.

The Chairperson (Mr Givan): Yes, when the PPS did not proceed.

Mr Larkin QC: We may be speaking at cross purposes, but I wonder if this was not a case where a very energetic parent continued and would not take no for an answer, and rightly so in the event, because there was a successful prosecution. I am not sure if that was as a result of the direction by the then Attorney General, but simply, if we are speaking about the same case, it was one where the advice of independent counsel was obtained, and, on the basis of that, the decision was reversed. It is important to bear in mind that the director not merely is now, but has always been, open to looking again at cases.

The Chairperson (Mr Givan): Members, if you are happy, we will move on to the statutory rules. Sorry, Rachel.

Miss Woods: Sorry, Chair. Thank you very much for coming. This is the first time we have met, and I appreciate you coming along this afternoon to outline your position. The Committee is aware of the recent appointment of six temporary High Court judges last week. Obviously, I congratulate them on

their appointments. Can I confirm that you are to be appointed as a deputy High Court judge tomorrow?

Mr Larkin QC: I do not carry out a function on behalf of NIJAC or the Office of the Lord Chief Justice. It is probably better if I do not answer your question in the way you have put it, because there are certain protocols about announcements to full or part-time judicial positions. Can I suggest that you might want to ask a hypothetical question?

Miss Woods: OK. So hypothetically, in the interests of openness, transparency and public confidence in the system, are there any hypothetical assurances that you can give, hypothetically, to the Committee regarding any potential hypothetical conflicts of interest in a tenure as Attorney General if it is expiring later this year?

Mr Larkin QC: Excellent question. Hypothetically, the starting point will be, as I understand it, that cases to be assigned to the temporary part-time High Court judges are, in a sense, allocated only if there is a judgement by the person making the allocation that the temporary High Court judge will be able to do the case. There is a fairly rich body of law on the appearance of bias, and on actual bias. All judges — indeed, all lawyers — are pretty well aware of the content of that law.

For example, if temporary lawyer A had advised in a matter that was central to the issue coming before him or her, the judge would not sit in such a case. It really is as straightforward as that. Now, I should say that temporary part-time judges are very frequently used in England and Wales, which is a larger jurisdiction where it might have certain advantages. For what it is worth, I think the Lord Chief Justice is to be commended for undertaking this experiment, because one of the things that Government — both capital "G" and small "g" government — needs to do is to acknowledge that so many of the things that we do are, by their nature, experiments. Sometimes the very best experiments are not those that work but those that do not work so well, because it is from them that you learn most. The short answer is that any temporary or full-time judge is aware of a fairly firm body of existing decided case law on issues such as conflict and apparent or actual bias, and should be expected to comport himself/herself accordingly.

Miss Woods: Hypothetically, of course.

Mr Larkin QC: I am grateful for the addition; yes.

Mr McCartney: I hate asking the question in case my ignorance is exposed. Was a particular reason given for these appointments?

The Chairperson (Mr Givan): I noted the statement around the six individuals last week to deal with the existing volume of caseload.

Mr McCartney: Across the piece?

The Chairperson (Mr Givan): I am not sure why NIJAC has not been able to appoint permanent full-time High Court judges and why it has been necessary to go down this route. I was certainly interested when I read it. I did think, "How will those barristers manage their role as a High Court judge one day and then make representations to, in effect, their colleagues the next day in a different capacity?".

Mr Larkin QC: I agree. The way those issues are successfully managed will not be without interest. It is interesting that the issue, I think, was floated in Dublin, but was thought not to be a runner.

The Chairperson (Mr Givan): The Lord Chief Justice is still the chairman of NIJAC. In the past, the Committee has engaged with the Lord Chief Justice in his role as chairman of NIJAC, and I have no doubt that, when it comes to the judicial appointments, it is something we will pick up again.