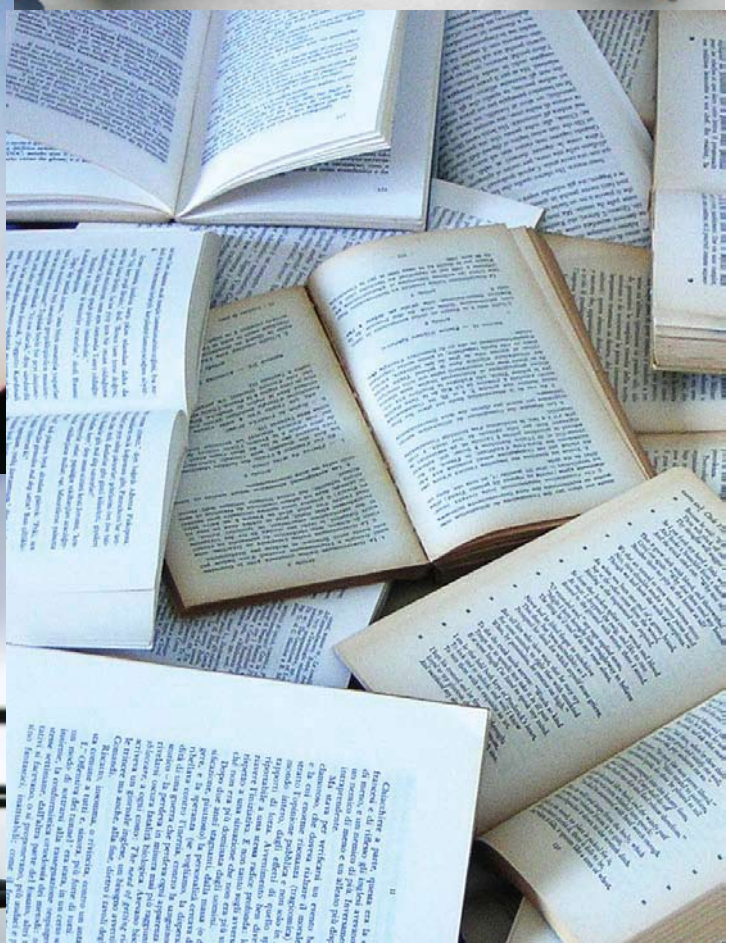
"Minority Rights and Protection: International Standards & The Bill of Rights for Northern Ireland"



Friday, 12 January 2007
Wellington Park Hotel, Malone Road, Belfast

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Acknowledgements

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Minority Rights and Protections: International Standards and the Bill of Rights for Northern Ireland.

NICEM Annual Human Rights and Equality Conference 2007, Friday 12th January 2007

Conference Report

Introduction

This conference was held at a crucial time for a Bill of Rights for Northern Ireland, as well as for the rights of Black and Minority Ethnic (BME) Communities. The inaugural meeting of the Bill of Rights Roundtable, with politicians and civil society committed to a dialogue, had just been held and the Government had recognised the importance of involvement of BME communities in this process by offering a seat to the sector.

The Criminal Justice Inspectorate had also just published their report into Hate Crime in Northern Ireland, which confirmed NICEM's earlier findings that the criminal justice system is failing victims of race hate crime, while on social and economic rights we had recently published a report that found gaps in securing the right to health for BME communities.

Bills of Rights have played a crucial role in many societies emerging from conflict, both in the content of the final document and in the process by which they are produced. A Bill of Rights and Single Equality Act for Northern Ireland are key to placing Human Rights and Equality at the cornerstone of peace building in Northern Ireland. A key challenge in this is recognising the long history of conflict while moving beyond the traditional 'two communities' approach to discussing how we can use the Bill of Rights to build an inclusive society.

It was for these reasons that we felt the time was right to begin a constructive dialogue around what good protection for minority rights would, or could, look like. We wanted to bring all the actors together to scope the issues and, if not to find answers, to at least identify the relevant questions. There were some common themes running throughout, not least that rights must be guaranteed to *all* and that nationality, citizenship or residency status, in particular, should not lead to a denial of Human Rights. However, the conference raised as many questions as answers, and the second common theme was that the dialogue needed to continue. We look forward to working with the Bill of Rights Roundtable to see this happen, and hope that this report offers some help in moving forward.

Thank you

Tansy Hutchinson
Coordinator of Policy and Research
Northern Ireland Council for Ethnic Minorities

NICEM
9TH ANNUAL HUMAN RIGHTS & EQUALITYCONFERENCE

"Minority Rights and Protection: International Standards & The Bill of Rights for Northern Ireland"

Date: Friday, 12 January 2007
Venue: Wellington Park Hotel, Malone Road, Belfast

Programme

0915 – 0945 **Registration**

0945 – 1000 **Introduction**
Chair of the Conference:
Mr. Patrick Yu,

One minute silent tribute to David Ervine, Leader of Progressive Unionist Party, great friend of ethnic minorities communities and NICEM

1000 – 1030

Section 1: International and Regional Standards

"How we translate international human rights & equality Standards into domestic protection?"
Professor Martin Scheinin

1030 – 1100 **"European standards and tools of rights: an overview"**
Professor Olivier De Schutter
University of Louvain

1100 - 1115 **Coffee Break**

1115 – 1145 **Open Discussion**

1145 – 1205 **Section 2: EU Experience and Practice**

"The role of the Committee of Regions in the Protection of Minorities"
Councillor Peter Moore

1205 – 1225 "The Finnish experience on Minority Protection under the Bill of Rights"
Mr. Ali Qassim Mohamed,

1225 – 1300 **Open Discussion**

1300 – 1400 **Lunch**

1400 – 1420 Afternoon Session Introduction
Chair: Dr. Joseph Mwuaura

"NGOs perspective on Minority Protection in Europe"
Ms. Snjezana Bokulic

1420 – 1600 **Workshop Discussion (Will include coffee break)**

Workshop 1: **"Protection of Rights and Dignity of Migrant Workers"**

Workshop 2: **"Protection of Rights and Dignity of Roma,Gypsy and Travellers"**

Workshop 3: **"Protection of Rights and Dignity of Asylum Seekers and Refugees"**

Workshop 4: **"Education for all: English as additional language and religious education"**

Workshop 5: **"Language and Cultural Rights"**

1620 – 1630 **Conclusion and Closing**

Introduction
Patrick Yu, Executive Director, NICEM

I would like to extend our warmest welcome to all of you attending NICEM Annual Human Rights and Equality Conference 2006. This is our 9th Annual conference. We are delighted to see that every year we have at least 120 people attending this annual event. It reflects the attraction from our international speakers and experts as well as the contents of this important event.

Before I start the proceedings I would like to say a few words about the sad news of the sudden death of David Ervine, the leader of the Progressive Unionist Party.

Ethnic minorities lost a great friend and a comrade who fought for social justice and social inclusion for loyalist working class and other people. He worked tirelessly to support ethnic minorities who experiences vicious attacks and diffused tension between the loyalist community and ethnic minorities.

When the time people made condemnations on racist attacks, he worked behind the scene with his colleagues to provide enormous support and in a pragmatic way to resolve the problem in south Belfast and beyond (both inside and outside Belfast).

His pragmatic, practical, down to earth character and his passion to help and support others shall be remembered.

NICEM would like to pay tribute to David and his family today. In another 15-20 minutes time his funeral will take place in the Upper Newtownards Road. Before we start the proceedings I would like to ask you to stand for a minutes silent to pay tribute to David and his family. Please stand.

(Silence)

The Good Friday (or Belfast) Agreement in 1998 is a sacred document. This is our mini constitution and it is in this context that the Bills of Right was established.

In the chapter of Rights, Safeguards and Equality of opportunity it highlights a number of measures to strengthen human rights protection and equality.

Paragraph one states that, "the parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict the parties affirm, in particular, the right of free political thought, the rights to freedom and expression of religion. The rights to pursue, democratically, national and political aspirations, the right to seek constitutional change by peaceful and legitimate means. The right to freely choose ones place of residence. The right to equal opportunity in all social and economic activities regardless of class, creed, disability, gender or ethnicity. The right to freedom from sectarian harassment and the right of women to full and equal political participation."

Paragraph four further states that, "the new Northern Ireland Human Rights Commission will be invited to consult and to advise on the scope for defining in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the European Convention on Human Rights – to constitute a Bill of Rights for Northern Ireland."

Among these issue for consideration by the Commission will be the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland and a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sector.

I just read it out for all you these key paragraphs of the Good Friday Agreement. I think it is extremely important when we start to debate the Bill of Rights to look into

under what context of the bill address to. In most cases the people tend to forget about the context. That's why I just wanted to remind the people of this conference again about this context.

It is also this background and the context to produce the Bill of Rights for Northern Ireland. A Bill of Rights plays an important role in many societies emerging from conflicts, both in the content of the final document and also, more importantly, in the process by which it is produced.

The process is a most important part in which it is both the human rights education and the political process of engagement, compromise and agreement. I emphasis more on, you know, compromise in agreed contents.

Without a political process of engagement and compromise in finding agreement on the contents, Bills of Right can be more divisive and the final document will be less protective and less effective. It is not about a zero-sum game. It is the human rights protection for all. We need to find a win-win situation.

A Bill of Rights and a Single Equality Bill for Northern Ireland is the key safeguard on human rights and equality for all in which it is the cornerstone for the peace building in Northern Ireland. Crucial to this is moving the discussion beyond the traditional two communities approach to discuss how we can use the Bill of Rights to build an inclusive society.

The government has set up a Bill of Rights Roundtable Forum, comprising of political parties and civil society to debate the way forward. The first meeting happened last month.

This conference is taking place at a crucial time and will enable us to debate how we can assure that minority rights and protection based on the highest international standards can be assured through the Bill of Rights. It is not just about the rights for ethnic minorities, it is the same rights shared by all communities regarding cultural, ethnic, religious and linguistic rights.

Today we are very pleased to bring a group of international and local experts in the area to assist this debate. Without further for me to do so, I would like to introduce the speakers in section one: International and Regional Standards.

The first speaker is Professor Martin Scheinin who is on my left. Professor Scheinin is the professor of constitutional and international law at Åbo Akademi University and is currently the UN Special Rapporteur on the Protection of Human Rights While Countering Terrorism.

The second speaker is Professor Olivier De Schutter. Professor De Schutter is the professor at the Catholic University of Louvain in Belgium where he is a member of the Centre for Legal Philosophy. He is also the founding member and former coordinator of the EU Network of Independent Experts on Fundamental Rights since 2002, supported by the European Commission under the Director General of the Justice and Home Affairs.

I would like to ask Professor Scheinin take the floor.

Section 1: International and Regional Standards

"How we translate international human rights & equality Standards into domestic protection?"

Professor Martin Scheinin
UN Special Rapporteur on the Protection of Human Rights While Countering Terrorism
Former member of UN Human Rights Committee

European standards and tools of rights: an overview

Professor Martin Scheinin

Good morning Ladies and Gentlemen it's a big honour to speak here at the conference of NICEM.

My theme relates to the question, how to translate international standards on human rights, equality, and minority protection into domestic protection. And that is, of course, a very relevant question in the process for a Bill of Rights and I will address, more specifically, the issue, how to translate international standards towards the end.

First, some qualifications. What's meant by international standards here? I am referring primarily to the International Human Rights Treaties that flow from the United Nation's framework and other intergovernmental organizations of global reach.

In that way I'm making a distinction compared to Professor De Schutter's presentation which will deal with European instruments. I will make some brief remarks to existing European instruments but my point of departure is at the UN level.

Of course there we primarily think of the International Bill of Human Rights which was first reflected in the Universal Declaration of 1948 and in the two twin Covenants of 1966 which are the Universal binding Treaties which in treaty form codify the substance of the Universal Declaration of Human Rights.

There are other human rights treaties flowing from the UN, including non-discrimination treaties as such as the CERD Convention against racial discrimination and CEDAW, Convention against discrimination against Women, or as it's nowadays called, the Women's Convention or the Convention on Women's Rights.

And, there's an interesting, important Migrant Worker Convention which covers specific groups in many of our countries but so far western countries have been very reluctant to ratify. Just recently the UN General Assembly adopted two new Human Rights Treaties. One on disappearances and one on people with disabilities. And, in particular, the latter Convention will be of great importance in designing domestic Bills of Right's or other forms of domestic protections for human rights for specific groups, including persons with disabilities. They take further the idea of special measures and accommodation at the universal level.

In addition, one has to mention that there are a high number of Conventions from the framework of the International Labour Organisation and, of course, then the Regional Human Rights Treaties of which Olivier De Schutter will soon speak more.

Specifically, when we look at non-discrimination and minority rights. I already mentioned that two of the UN Human Rights Treaties deal specifically with non-discrimination.

But, beyond those two Non-Discrimination Treaties, importance is attached to the ICCPR, the International Covenant of Civil and Political Rights which provides the most ambitious universal standard on non-discrimination. It is most ambitious because of two reasons.

Firstly, it is open-ended. It lists a number of prohibited grounds of discrimination but then continues with 'or other status'. So it's open ended in prohibiting discrimination.

And, secondly, it is a freestanding provision of non-discrimination. Many existing standards on discrimination address only discrimination in the field of rights otherwise protected under the same instrument. That's the case, for instance, under the European Convention on Human Rights. But, under the ICCPR, a freestanding right of non-discrimination exists on its own. Non-discrimination in any field of life is covered by the treaty obligations.

Incidentally, the same Treaty, ICCPR, happens to be the one with the most ambitious minority rights provision what comes to these Universal Human Rights Treaties.

That is Article 27, following immediately after the non-discrimination clause in Article 26.

ILO Conventions include as a red thread non-discrimination norms, for instance, in relation to labour union activity or political opinion in the working life. And when one addresses global non-discrimination standards, there's a need to mention also a UNESCO Convention of 1950 concerning discrimination in education. That includes a specific norm which is then understood by way of interpretation within the other frameworks. Namely, that in the field of education, segregation, as such is a form of discrimination because it tends to perpetuate differences in education and leads to educational dead ends.

So, for instance, the de facto situation of placing Roma children in special schools in many European countries is a form of discrimination even when it's based on individual assessment of the learning abilities of the child because it is a form of segregation and perpetuates the educational distinctions amounting to discrimination.

My question is how to translate International Standards into Domestic Protection and of course an International Lawyer thinks primarily of the old traditional but outdated distinction between dualism and monism. For instance, the legal systems on the British Isles fall under the notion of dualism. International Law is, in principle, treated as a separate legal order and it's a matter for the legislature to incorporate into the domestic system of law the norms of International Law.

I said that's a traditional but outdated distinction because more and more we see how countries develop different compromise solutions which bear features of monism, the unity of International and Domestic Law, even when the constitution, formally speaking, is a dualist one.

The ultimate bottom-line is the international legal duty to comply with your international legal obligations. This duty is reflected, for instance, in the Vienna Convention on the law of treaties. Every state must comply in good faith with its international legal obligations and then it's a matter for that state how, in practice, it translates its international obligations into domestic protection.

Monistic countries utilise the form of automatic incorporation. Every international obligation is automatically invocable as a piece of domestic law as well. Compromise countries, including my own, Finland, apply a position of statutory incorporation; meaning parliament enacts specific pieces of law saying that this treaty becomes part of domestic law. That is formal incorporation.

Some more dualistic systems apply primarily the method of transformation, that is amending their existing domestic law so as to obtain conformity with international treaties.

But, whatever is the model on the legislative level there's always room for what's called judicial incorporation. The judges can be creative in making good use of international treaty obligations even when they, formally speaking, are outside the domestic legal order. One can speak of direct application of international norms in dualist countries with formal incorporation or in monistic countries. One can speak of presumptions of compliance and of indirect application through interpretive effect also in strictly dualist countries.

It is making more and more common sense to the domestic judge that the law of the land has to be interpreted and applied in a manner which does not result in conflicts with existing international obligations.

And, of course, for understanding the substance of international treaty obligations, international case law is extremely important. So in order to inform and convince your judges that they should comply, you also need to tell them how, for instance, the European Court of Human Rights or the UN Human Rights Committee has interpreted and applied the relevant treaty provisions.

Judges will not necessarily buy at face value the treaty provisions. They want to hear about practice. How this treaty provision was applied, how it was put into practice through concrete international case law.

For instance, you may want to illustrate the role of the UN Human Rights Committee in applying the freestanding norm of nondiscrimination in ICCPR Article 26 by starting from early Dutch social security cases, making it clear that discrimination in the field in social and economic life falls under the non-discrimination clause in the Covenant on Civil and Political Rights.

Under the European Convention on Human Rights we are not in the same situation because there non-discrimination is merely an accessory right requiring that the discrimination occurs in the enjoyment of a right otherwise protected under that Convention. However there are some promising cases suggesting a more independent role for the non-discrimination clause. Nevertheless, that is still an open issue which I will not deal with now.

The non-discrimination treaties from the UN, CERD and CEDAW, include clauses that define discrimination. There's the test of purpose or effect in both of these provisions. Meaning that not only intentional discrimination is prohibited, and not only discrimination which is clearly visible at face value when reading pieces on domestic legislation. Any arrangement or law that produces results that, in effect, are discriminatory would also be covered by the definitions of discrimination in these two treaties.

The ICCPR, in turn, does not include a definition of discrimination on the level of the text of the treaty but the CEDAW and CERD provisions have been of great value for the Human Rights Committee in developing its understanding of what is, indeed, discrimination.

There's a general comment, number 18 by the Human Rights Committee where it codifies its understanding of what's covered by Article 26 and there the Committee refers to the purpose or effect test. And, for a long time that was seen as the way how the Human Rights Committee and the UN Human Rights Treaties deal with the issue of direct and indirect discrimination.

When we have discriminatory intent or purpose we speak of direct discrimination. Whereas, in other situations that produce discriminatory effects we would speak of indirect discrimination.

That was the starting point on the basis of the definitions of discrimination in the CERD and CEDAW Conventions and the general comment by the Human Rights Committee. However, later on, in a case called Althammer, decided in 2003 the Human Rights Committee developed a more sophisticated understanding of what is indirect discrimination. The Committee's reasoning includes a reference to a seemingly neutral provision or practice producing, in effect, discriminatory results.

That is a more elaborate definition of indirect discrimination and corresponds to a high degree with how indirect discrimination is understood in the context of EU law. So there is good coherence between the way indirect discrimination is understood in the UN Human Rights Treaty framework and EU law.

Another crucial matter is how UN Human Rights Treaties deal with special measures, positive measures, or affirmative action which term was used previously but now has become a bit out of fashion. Both non-discrimination treaties CERD and CEDAW again, address the issue of special measures. CERD speaks of special measures and CEDAW about temporary special measures.

Both exclude from the scope of prohibited discrimination special measures that are aimed at implementing de facto equality. Measures that produce, in fact, equality even if they include differentiations are not, by definition, a form of discrimination. They are a part of non-discrimination programmes when they are strictly defined so that they comply with these conditions, which, for instance, include the condition that there is an identified situation of inequality and the special measures in question have a remedial function in respect of that inequality situation.

Again, under the ICCPR, the Human Rights Committee in its general comment has built upon the provisions in the non-discrimination treaties. General comment number 18 in paragraph 10 discusses special measures and

here uses affirmative action as a notion.

After that the Human Rights Committee has been moving more to the usage of the term special measures which you find, for instance, often when the Committee deals with state party reports. The Committee's concluding observations often address the question of the need for special measures. For instance, they may be called for in respect of women or minorities in order to eradicate existing patterns of discrimination in society.

Here the Human Rights Committee appears to go further than the non-discrimination treaties. The non-discrimination treaties simply declare that special measures are permitted, whereas, the Human Rights Committee seems to say that there's actually an obligation for states to eradicate de facto discrimination by taking special measures.

So, special measures are not only an arrangement which is left at liberty for states to take without breaching non-discrimination. It is actually an inherent part of the obligation of nondiscriminatiion to take special measures when circumstances so require.

This is of course logical if discrimination is defined not only through discriminatory purpose or directly discriminatory clauses but also, through discriminatory effect. If that is how discrimination is defined then it is logical that special measures, at least in some situations, amount to an obligation under non-discrimination.

This occurs to be also the position of the European Court of Human Rights, at least if we take seriously the landmark case of Thlimmenos against Greece from 2000 where the European Court explicitly said that the rule of non-discrimination is also violated when states, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different.

The case deals with a Jehovah's Witness who had served a prison sentence for refusing military service. Because of his prison sentence he was not eligible to be recognised as a chartered accountant. The European Court is saying he should be treated differently than others who have been in prison because he is not an ordinary criminal. He is simply a conscientious objector.

In the case the European Court reads into the very traditional, non-discrimination clause in Article 14 of the European Convention
an obligation to treat differently persons whose situations are different. So, special measures amount to an obligation under the non-discrimination clause in Article 14 of the European Convention on Human Rights.

This has remained a bit of an empty promise so far in the case law of the European Court of Human Rights, in the sense that the Court has returned to the Thlimmenos case often, but not really on this dimension of special measures as an obligation for states.

Minority members in dissenting opinions in the European Court have built upon this position but so far unsuccessfully in convincing the majority, for instance, concerning special measures in respect of Travelers in the UK.

Well, I said the ICCPR also covers minority rights and that's because of the basic provision in Article 27 of the ICCPR calling for states to respect the right of minorities to speak their language, to profess and practice their religion and to enjoy their own culture. It is an umbrella provision but very broad and general and covers many different aspects of life.

It's important that the Universal Bill of Human Rights includes such a minority rights clause because of the constant questioning, even within human rights circles, of the legitimacy of minority rights. There is a tendency, among states and among scholars, to question the justification for minority rights by saying that equality and non-discrimination suffices, that when everybody is treated as equal then there is no need for specific minority rights. But, these speakers need to be reminded that there is a specific clause in ICCPR, Article 27, and it has to mean something beyond mere non-discrimination.

The Convention on the Rights of the Child in Article 30

repeats the clause. Furthermore, the CERD Convention, the Migrant Worker Convention and the Disability Convention, which is brand-new, also develop standards that would apply in respect to specific groups.

Here the European Court of Human Rights has been silent or very conservative even pronouncing that the absence of a minority rights clause in the European Convention means that minority rights cannot obtain protection through interpretation of other provisions.

I think that this position is wrong, and I'm trying to illustrate that the elements of minority rights in ICCPR, Article 27, are actually universal human rights. The clause refers to the right to profess and practice one's religion which is, of course, freedom of thought, conscience and religion protected as a human right as such.

The right to use one's own language in public and private is at least covered by freedom of expression. That right, freedom of expression, does not extend to the right to engage in official correspondence with authorities in a language of your choice, but, at least, it protects the right to use your own language in private and public with anybody who wishes to communicate with you in that language.

There are other linguistic dimensions in other human rights including fair trial rights but, again, the point here is to illustrate that minority rights are not really separate from universal human rights but build upon existing universal rights and apply them in a manner which is sensitive in respect of the situation of persons belonging to minorities.

The third element, the right to enjoy one's own culture finds its home in the right to private and family life, which is a universally respected and acknowledged human right. So, it's ultimately wrong to say that the European Convention on Human Rights would not include a home for minority rights. The home could be found in freedom of expression, freedom of religion and the right to protection of private and family life. All that is needed is that those provisions were given a favorable interpretation in respect of persons who live in a specific situation.

That is further supported by the reference in ICCPR, Article 27 to the requirement on states that minority rights shall not be denied. This, of course, is one way to address the issue of non-discrimination. When we combine this with a broad understanding on non-discrimination, meaning special measures are not only permitted but even an obligation then we end up in a situation where minority rights actually are very well in harmony with universal human rights. As far as we speak of groups that are in, one way or the other, in a vulnerable situation where failure to treat them differently would amount to discriminatory effect.

I wanted to highlight the element of membership in a minority. Here we have a kind of tension within human rights law because in the field of non-discrimination law, strictly speaking, including the UN Committee for the Elimination of Racial Discrimination, there's a tendency to say the individual always decides whether he or she belongs to a group or not. You can't force anybody to become a member of a minority by, for instance, statistically indicating him as belonging to a religious or ethnic group. It's up to the individual to decide.

That's fine within a pure non-discrimination framework but the Human Rights Committee goes further because it also deals with positive state obligations such as securing lands and resources to indigenous peoples. Then you can't say simply that everybody has a free choice to choose which tribe you belong to. The Human Rights Committee therefore applies a different test – a combined test of subjective and objective criteria.

You cannot force a person to become a member of a minority but the person neither has a clean slate to decide his or her own identity. The state may legitimately require some sort of objective criteria when it decides who belongs and who belongs not, and the state is not allowed to apply standards that would be in breach of such objective criteria.

Lovelace against Canada is the leading case where the Canadian Federal Indian Act was determined incompatible with the ICCPR because it excluded women

marrying an outsider from their previous tribe to which they ethnically and subjectively belonged. The bottom line is a combination of subjective and objective criteria in determining membership in a minority.

I'm not here to speak about European standards but I wanted to make the point that there are certain strong advantages in EU Law. So when I come here to speak about UN Human Rights Treaties and their contribution to equality and minority protection it doesn't mean that one would have to say that they are superior compared to European Law.

In particular, EU Law has certain uncontestable strong features that relate to the direct effect of regulations and many provisions of the constituting treaties and the strong obligation of loyalty, to implement in good faith also directives through domestic transposition.

So, one may very well continue to work on EU Law and its faithful implementation in the member states. However, one need not be limited by EU Law because it has also inherent weaknesses in the field of non-discrimination and minority rights. There are different provisions in the constituting treaties concerning discrimination on the basis of nationality of another member state, discrimination on the basis of sex or gender, and other forms of discrimination that are under Article 13. Finally, discrimination on account of nationality of a non-member state seems to be allowed in the field of EU Law.

In order to put these norms in line with Universal Human Rights Standards there is a need to focus on other international norms and try to soften or eradicate the differences in the standards that in EU Law address various grounds of discrimination.

I'm moving to the final part of my lecture which is really the answer to the question, how to translate international standards into domestic protection.

One of the themes you are discussing is the question of a Bill of Rights for Northern Ireland. The question is whether a constitution or a similar instrument is a proper way to translate international obligations into sphere of domestic law. Yes, it is one of the proper ways.

A constitution or bill of rights always carried strong, symbolic national importance. It also translates into public consciousness and awareness the idea of individual rights and an intention to protect them.

Constitution-drafting also may mean willingness to transform existing international treaty obligations into domestic law on the highest level. It may be a way out from the traditional deadlock of dualist legal systems. You may not be able to incorporate all international treaties but you may be able to achieve a domestic bill of rights, which is in full harmony with international standards transforming into domestic law the substance of existing treaty norms. And that, of course, would help to resolve priority issues because usually domestic bills of rights have a really high ranking within domestic hierarchies of law.

This is linked to the issue that using the form of a domestic constitution also brings with it specific remedies such as judicial review over the constitutionality of ordinary statues. This is not by definition an element of a constitution but it often comes with a constitution.

Another dimension is that a constitution or bill of rights as a superior norm guides legislation so that that legislature is bound and feels bound by the provisions of the constitution. There may also be in place special arrangements for advance scrutiny of that compatibility.

One of course should not strive for a domestic bill of rights at any cost because it's important that the result is up to existing current international standards. Constitution-making must not mean watering down what already has been accepted by the country in question through its treaty obligations.

Another form of translating international norms into domestic protection is the use of ordinary, statutory law. There is an objective need for non-discrimination clauses in many pieces of legislation. Even if you have constitutional clauses, those constitutional clauses result

in constitutional remedies but not necessarily remedies in all fields of life. Usually, you would still need, for instance, in the criminal code specific non-discrimination clauses for the most serious forms of discrimination that merit criminal sanctions.

In other fields of life you may be able to work with reverse burden of proof, which is inapplicable in the field of criminal law. But, nevertheless, when we deal with civil damages, specific statutory clauses on specific forms of discrimination may come with civil damages which apply reverse burden of proof and hence, help to advance the standard of non-discrimination.

Gender equality statutes are very common across the board in many countries and they are often quite advanced and provide for good models to apply also in other fields of discrimination. This includes the issue of burden of proof.

It's part of the influence of the UN CEDAW Convention that gender equality statutes usually apply a very broad notion of discrimination so that, for instance, family violence is identified as a specific form of discrimination.

Further, one area of life where there is a need for statutory provisions is employment and inspiration can be sought from EU Law, from universal and regional human rights treaties and also, international labour organisation conventions.

I said that international norms are also incorporated through the judiciary, through judicial incorporation, irrespective of whether the country belongs to the dualist or monist school of thought. Indeed, there are various ways in which the judiciary can, through legal doctrines, be active in incorporating international norms.

Doctrines on indirect discrimination may be developed through case law, pilot cases, test cases, or jurisprudence by courts in identifying discrimination in seemingly neutral laws or practices.

Statistical information may be important to present for courts in order to identify systemic discrimination - situations where discriminatory effects of different arrangements result in an overall discriminatory situation in respect of a specific group.

Segregation as a form of discrimination can be addressed at least in the field of education, as we know from the US Supreme Court case Brown versus Board of Education.

The judiciary can also be active in developing areas where the burden of proof is reversed, or at least shifted. What is the threshold? An applicant has to show in order to create a presumption of discrimination after which it is the defendant who will have the burden of proof of demonstrating that the intent was not discriminatory and there was an objective and reasonable ground for the treatment the person received.

The judiciary can also be active in incorporating the need for special measures in the framework of non-discrimination. There is no obstacle for the judiciary pronouncing in the similar way as the European Court of Human Rights in Thlimmenos that a failure to treat differently is a form of discrimination.

We have promising Canadian case law on this point, and there is no obstacle for judges in other countries taking the line of thought onboard as well.

Finally, one needs to emphasise that non-judicial remedies may be important. Often discrimination occurs in society in subtle forms that are not captured by the judiciary, at least, not by a conservative judiciary. And that's why it is often important that there are non-judicial remedies that show the way. Ombudsman institutions, national human rights commissions, equality and non-discrimination commissions – they often are in a position that they can apply a richer analytical framework and be more open to new doctrines such as reverse burden of proof, special measures, indirect discrimination, etcetera.

Often they have complaint mechanisms but they are not judicial bodies in the sense that they would make definitive legally binding decisions on the basis of those complaints. Rather, these institutions often operate through guidance, recommendations, settlement

procedures. What I would like to emphasise is that it is important that there are also teeth involved that serve as a backup for the softer methods.

If you have an ombudsman who primarily applies the soft methods of conciliation, settlement and recommendations they may not carry weight unless there is also a residual power to prosecute. And that's one lesson from my part of the world where the Swedish and Finnish Ombudsman are one of the few in the world who also have the power to prosecute formally in court.

I think it is important that there is a residual power to institute court proceedings, either so that the commission or ombudsman itself institute these proceedings or, at least, that it has a binding power to initiate proceedings by a prosecutor.

How to Translate International Standards into

Professor Martin Scheinin

NICEM, 9th Conference

Belfast, 12 January 2007

1

International Standards on Human Rights

- The International Bill of Human Rights
  - Universal Declaration of 1948
  - The twin Covenants of 1966, on
    - Economic, Social and Cultural Rights (ICESCR)
    - Civil and Political Rights (ICCPR)
- Other UN human rights treaties
  - CERD, CEDAW, CAT, CRC, MWC
  - New: Disappearances, Disability
- ILO Conventions (more than 180)
- Regional instruments, incl. European

2

Specifically on non-discrim-ination and minority rights

- CERD and CEDAW as non-discrimination treaties
- ICCPR art 26 as the most ambitious non-discrimination provision
  - Open-ended (”or other status”)
  - Freestanding
- ICCPR art 27 as an umbrella provision on minority rights in binding treaty law
- Discrimination in employment one dimension of ILO Convention
- UNESCO Convention: segregation (in education) as a specific form of discrimination

3

How to ”translate”?

- Classic (but misleading) distinction between ”dualism” and ”monism”
- International obligation to comply and to implement in good faith (Vienna Convention)
- Automatic incorporation (monism)
- Statutory incorporation (formal incorporation)
- Transformation by the legislature
- Judicial incorporation (direct application, interpretive effect, presumption)
- Importance of international case law

4

Freestanding norm of non-discrimination

- ICCPR art. 26: right to equality and non-discrimination
  - Zwaan-de Vries v. the Netherlands (1987)
    - nondiscrimination in relation to economic and social rights is covered by the ICCPR irrespective of the existence of the ICESCR
  - one dimension where the CCPR affords stronger and additional protection compared to European instruments
- ECHR art. 14: a principle or ”an autonomous but non-independent right”
  - the ”in conjunction” jurisprudence
  - towards an independent right?
    - Schuler-Zgraggen v. Switzerland 1993 (art. 14 + art. 6)
    - Gaygusuz v. Austria 1996 (art. 14 + art. 1 of Protocol No. 1)
  - Protocol No. 12 - is it a solution?

5

Definitions of discrimination

- Convention for the Elimination of Discrimination Against Women
  - For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. (art. 1)
- Convention for the Elimination of Racial Discrimination
  - In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. (art. 1.1)

6

Without a definition

- ICCPR art. 26: no definition
- General Comment No. 18 by the HRC
  - 7. … the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms
- Intent or purpose ≅ direct discrimination
- Adverse effect ≅ indirect discrimination

7

Indirect Discrimination:
Althammer et al. v. Austria (2003)

10.2 The authors claim that that they are victims of discrimination because the abolition of the household benefits affects them, as retired persons, to a greater extent than it affects active employees. The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such **indirect discrimination** can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionaly affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. In the circumstances of the instant case, the abolition of monthly household payments combined with an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket, and the authors have not shown that the impact of this measure on them was disproportionate. Even assuming, for the sake of argument, that such impact could be shown, the Committee considers that the measure, as was stressed by the Austrian courts (paragraph 2.3 above), was based on objective and reasonable grounds.

8

Positive/special measures (or affirmative action)

- CERD art. 1.4
  - Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved
- **CEDAW art. 4.1**
  - Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved

9

Affirmative action (continued)

- CCPR: General Comment No. 18
  - 10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant
- See, also, General Comment No. 23 (article 27), para. 6.2
- Permitted or required? On what conditions?

10

Thlimmenos v. Greece
Eur. Court HR 6 April 2000

"The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification… However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently whose situations are significantly different."

11

International standards on minority rights

- ICCPR article 27
  - In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
- CRC article 30 similar
- CERD, MWC and the Disability Convention afford protection to specific groups
- ECHR is silent on minority rights and so far the European Court of HR has been very cautious

12

Basics of ICCPR art. 27

- **What groups are covered?**
  - Ethnic, religious or linguistic minorities, compare to "national"
  - "existence" an objective fact, compare to "recognition regimes"
- **Indigenous peoples as minorities**
  - Lubicon Lake Band v. Canada, Kitok v. Sweden
  - General Comment No. 23, paras. 3.2 and **7**
- **Positive and negative obligations**
  - "shall not be denied"
  - General Comment No. 23, paras. 6.1, 6.2 and 7
- **Membership in a minority**
  - Lovelace v. Canada, paras. 14-17
  - subjective or objective criteria? CERD and HRC approaches
- **The notion of "culture"**
  - Kitok v. Sweden, Lubicon Lake Band v. Canada, I. Länsman v. Finland paras. 9.2 and 9.3
  - General Comment No. 23, para. 7

13

ICCPR article 27 and universal human rights

- Profess and practice their religion
  - Article 18 (ECHR art 9)
- Use their language
  - Article 19 and partly 14 (ECHR arts 10 and 6)
- Enjoy their culture
  - Articles 17 and 23 (ECHR art 8)
- Shall not be denied
  - Article 26 (ECHR art 14)

14

Advantages and disadvantages of EU Law

- Problem: different legal standards for different grounds of discrimination
- Problem: varying legal basis – different thresholds and remedies
- Positive: direct effect, including direct horizontal effect of treaties and regulations and state liability under non-implemented directives
- Positive: duty to transpose directives in a faithful way

15

Some key instruments

- TEC articles 12 (nationality) and 141 (sex)
- TEC article 13
  - (1) Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- Racial Equality Directive 2000/43/EC
- Employment Equality Directive 2000/78/EC
- Nationality of non-member-state?
  - EU Charter of Fundamental Rights, art. 21

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Art. 21 of the EU Charter on Fundamental Rights,

- 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
- 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

17

Methods of Domestic Protection: 1. Constitution

- Symbolic national importance, incl. in public consciousness
- May mean transformation of international standards at the highest level
  - Helps to resolve priority issues
- Constitutional remedies are available
  - E.g., judicial review of legislation
- Guides all legislation
  - Specific arrangements for advance scrutiny may exist
- But: not at any cost
  - Comprehensiveness and freestanding status needed

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Methods of Domestic Protection: 2. Statutory law

- Nondiscrimination clauses in criminal law
  - Comes with all the benefits (sanctions) and disadvantages (burden of proof) of criminal law
- Gender equality statutes
  - Often quite advanced in respect of indirect discrimination, burden of proof, sanctions
  - CEDAW influence = broad notion of discrimination
- Provisions on discrimination in employment
  - Based on a rich combination of influences (ILO conventions, HR treaties, EU law)
  - Open to progressive doctrines

19

Methods of Domestic Protection: 3. Doctrines

- Indirect discrimination
  - Disproportionate effect of seemingly neutral law or practice
- Systemic discrimination
  - No immediate cause can be shown
- Segregation as discrimination
  - At least in education
- Reversal of burden of proof
  - When is a prima facie case made out?
- Role of statistics
  - Crucial for proving indirect discrimination
  - Greatly assisted by objective data collection
- Special measures and nondiscrimination
  - Not an exception to but an essential element of the norm

20

Methods of Dom. Protection: 4. Non-judicial remedies

- Ombudsman, or human rights commission, or equality commission
  - Usually informal complaint mechanism
- Soft but effective forms of implementation
  - Guidance
  - Recommendations
  - Settlement
- Power to prosecute/sue in court essential
  - civil, criminal or mixed

21

"European standards and tools of rights: an overview"

Professor Olivier De Schutter
University of Louvain

Founder and former Co-ordinator of the EU Network of Independent Experts on Fundamental Rights

How We Translate International Human Rights And Equality Standards Into Domestic Protection?

Olivier De Schutter1

Okay, thank you it's always a pleasure to speak after Martin Scheinin although it's a bit intimidating. Especially since his own luggage was not lost at the airport.

I'd like to discuss especially European instruments, which protect from discrimination but to do so by emphasising the dilemmas we are currently facing in Europe in how to protect minority rights through anti-discrimination law.

I feel we are at a turning point and I'd like to illustrate why we're now facing new questions—new problems which impose on us to identify a new European model of combating discrimination.

What I'd like to emphasis is in fact the following: that we are moving from a situation where equality of treatment and self-determination were complementary to a situation where more and more they are conflicting values, conflicting norms in a number of situations.

What do I mean by equality of treatment? What do I mean by self-determination? Equality of treatment which has been discussed extensively by Martin Scheinin in his presentation of especially international instruments. It's protected in Europe by a number of instruments.

Most obviously, Article 14 of the European Convention on Human Rights, adopted within the Council of Europe in 1950. And which has now been enriched by an additional Protocol, Protocol number 12, entered into force for the Member States of the Council of Europe who have agreed to this Protocol on the first of April 2005. It extends the protection from discrimination making it a self-standing provision under this new Protocol whilst Article 14 was applicable to the rights and freedoms protected under the Convention providing that these rights and freedoms would be guaranteed without discrimination.

We also have the European Social Charter. Now, the European Social Charter had, initially, in its initial formulation in 1961, had no non-discrimination provision. However, non-discrimination was mentioned in the preamble of the European Social Charter and moreover, the second paragraph of Article 1 of the European Social Charter guarantees the right of the worker to earn his living in an occupation freely entered upon. And, this provision, this formulation, was read by the Committee of Independent Experts as implying a requirement of non-discrimination in the field of employment, recruitment, promotion, working condition, etcetera.

This non-discrimination warranty was substantially reinforced when the European Social Charter was developed into a new instrument. The revised European Social Charter in 1996, which now contains in Article E, this is a very strange way to work on the European Social Charter but the first Articles of the Charter are numbered but the horizontal provisions of the European Social Charter have letters.

This is Article E of the revised European Social Charter which contains a non-discrimination clause. In the field of application of the European Social Charter all the rights guaranteed must be guaranteed without discrimination. So this is the equivalent, if you wish, within the European Social Charter, to Article 14 within the European Convention on Human Rights.

And, then we have, of course, the Framework Convention for the Protection of National Minorities, adopted in 1995, which entered into force on the first of February 1998. And, which imposes an obligation on the states parties to guarantee to persons belonging to national minorities the right to equality before the law and equal protection of the law. In respect of the Framework Convention any discrimination based on membership to a national minority shall be prohibited.

But, we have also provisions which guarantee what might be called in a non-technical sense, self-

1 *The text is a transcript of a lecture delivered orally.*

determination of individuals. This expression of self-determination I borrowed from the case law of the Bundesverfassungsgericht, the German Constitutional Court to which I will return in a few minutes.

What I mean by self-determination is that that there are certain guarantees that individuals, first of all, shall not be treated against their will as members of minorities and this has already been alluded to by Martin Scheinin. But, secondly, that certain data, which are personal data in the sense that they relate to specific individuals, may not be treated without specific guarantees. Especially when this data relates to sensitive information. For example, membership to a particular ethnic group, affiliation with a religion or disability.

We have a number of instruments which I'd like to refer to here before highlighting the conflict potentially with the recent developments on equal treatment. First of all, we have within the Council of Europe the Convention for the Protection of Individuals with regard to automatic processing of personal data – this is the1981 Convention – which, in particular, in Article 6 relating to special categories of data states that, personal data which reveal racial origin, political opinions, religion or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards.

This Convention concluded with the Council of Europe in 1981, was implemented into European Community Law by a Directive adopted on the 24th of October 1995 which, in fact, strengthens this protection and extends the scope of this guarantee.

Indeed, this Directive 95/46, applies to all processing of personal data, not only to automatic processing of personal data and it has a number of supplementary guarantees which move this instrument beyond the 1981 Council of Europe Convention for the Protection of Individuals with regard to the automatic processing of personal data.

Finally, I'd like to mention Article 3, paragraph 1, of the Framework Convention for the Protection of National Minorities of the Council of Europe, which says, and this has been alluded to by Martin Scheinin, 'Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice'.

Why is it necessary to put in the picture these provisions relating to self-determination in the broad, non-technical sense of this notion when discussing equality of treatment? Well, the reason is the principle of equal treatment has now been interpreted by a number of bodies as imposing affirmative obligations on states which move us into a new territory.

What is – I like to call the territory of affirmative equality. The European Court of Human Rights has not been the most progressive in this development. In fact, it lags behind other bodies in this development in a number of cases, the references which you have here presented in this slide.

In particular, the European Court of Human Rights has considered that although statistics relating to the impact of apparently neutral measures or policies are interesting in order to identify instances of discrimination, in the sense of the European Convention on Human Rights, they are not decisive and they do not necessarily result in shifting the burden of proof on the defendant State to defend the measure which has such a discriminatory impact.

Now, the initial position of the European Court on Human Rights was stated in a case concerning the United Kingdom – Jordan v UK where statistics were presented showing that the nationalist or Catholic community was disproportionately affected by the activities of law enforcement authorities. The vast majority of those killed in security operations were members of the catholic/ nationalist communities.

And, nevertheless, the Court considered, and this is, in fact, an extract of the judgment: 'where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be

considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, says the Court it does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14 of the European Convention on Human Rights.'

In other terms, statistics do not, per se, prove discrimination. There need to be other indicia, other signs that discrimination is being practiced for discrimination to be found to exist by the European Court on Human Rights.

Now, this has been confirmed in later cases – McShane versus the UK and, more recently, D.H. and Others versus the Czech Republic. This is a very interesting case which is now referred to the Grand Chamber which will be having a hearing on this case next week.

This is a case concerning the segregation, de facto segregation of Roma children in the educational system of the Czech Republic. And, the litigants in this case, the applicants in this case, have presented data showing that a Roma child has 27 times more chances of being put in special institutions, special schools, than non-Roma children.

And, these special schools are actually schools which are meant for children with learning disabilities. They do not provide the same kind of chances for the future to these children and nevertheless, the court in its judgment of the 7th of February 2006 considered that this was not discrimination.

Now, the Grand Chamber might adopt a different attitude but this is of course – in D.H and Others versus the Czech Republic – this is the outcome of the Hugh Jordan versus the UK approach to statistics as a means of proving discrimination.

However, although the European Court on Human Rights has not been very progressive in its approach to the non-discrimination clause of Article 14 of the European Convention on Human Rights, other bodies have been much more assertive. Perhaps, indeed, because their findings do not have the same authority.

I'd like first to mention the Advisory Committee of the Framework Convention on the Protection of National Minorities. The Framework Convention establishes this Advisory Committee, a Committee of Independent Experts, on the basis of the opinions of which the Committee of Ministers of the Council of Europe then may adopt resolutions or recommendations.

And, in a number of opinions, the Advisory Committee encourages states to prepare statistics about the impact of their legislation and policies on national minorities – be they defined by ethnicity, by language or by religion or by a combination of these different characteristics.

And, for example, in an opinion on Germany delivered in March 2002, where Germany put forward, because of the history of Germany the great sensitivity of this issue, collecting data on ethnicity in Germany is something which is considered unthinkable similarly for collecting data concerning religious affiliation.

And, nevertheless, the Advisory Committee of the Framework Convention said, "The lack of good statistical data makes if difficult for the German authorities to ensure that the full and effective equality of national minorities is promoted effectively. The German authorities state that they have no statistical data enabling them to evaluate the unemployment rate for each national minority or more elaborately broken down by age, gender, or geographical differentials. The authorities assume that, in principle, membership of a national minority has no impact on a person's economic, social or cultural status. The Advisory Committee notes, however, that evidence presented to us—presented to it indicates that members of the Roma/Sinti minority, in particular, find it significantly more difficult than the rest of the population to find work."

And, the Advisory Committee therefore considers that German authorities should seek to better evaluate the socio-economic situation of members of national minorities, in particular, the Roma minority and undertake measures in their favour to promote the full

and effective equality in the socio-economic field.

And, indeed, I had cited, a few minutes ago, Article 4, paragraph 1 of the Framework Convention, the right to non-discrimination on the grounds of membership to a national minority. But, there is also Article 4, paragraph 2, which says that the state parties through the Framework Convention "undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between person belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities."

Now, in the view of the Advisory Committee for this to be complied with – for this full and effective equality to be guaranteed - states must collect data, they must have statistics in order to allow them to react to existing inequalities. In order for them to target measures they adopt to remove existing inequalities. And, without statistics states simply are not equipped to deal with the challenge of improving the status of national minorities.

Similarly, the Committee of Independent Experts established under the European Social Charter, which since 1999 has renamed itself European Committee of Social Rights, has read the provisions of the European Social Charter relating to non-discrimination in the sense that these provisions impose positive obligations to affect affirmative equality.

For example, the right to work freely in the Article 1, paragraph 2 of the European Social Charter, both in the original text of 1961 and in the revised text of 1996, is considered to impose not only the adoption of a legal framework prohibiting discrimination in employment, although it does impose this, it also imposes that practical measures must be adopted in order to ensure the elimination of inequality and discrimination in practice.

The European Convention of Social Rights says that, although a necessary requirement, appropriate domestic legislation in conformity with the Charter is not sufficient to ensure that the principals laid down in the Charter are actually applied in practice. It is not sufficient therefore merely to enact legislation prohibiting discrimination as regards access to employment; such discrimination must also be eliminated in practice.

And so, the Committee requests from states that they provide them with data concerning effective access to employment of women, ethnic, religious, linguistic minorities in order to evaluate whether equality is realised in practice and not only whether a non-discrimination guarantee is present in domestic legislation.

Even more importantly in reading Article E of the revised European Social Charter, the 1996 version of the European Social Charter, the European Committee of Social Rights has sought inspiration from the Thlimmenos case, mentioned by Martin Scheinin, from the European Court of Human Rights. Discrimination may result from not treating differently person who are in a different situation that was the message of the Thlimmenos.

And, in the case of Autisme-Europe versus France, the European Committee of Social Rights says the following, on the basis of Article E of the Revised European Social Charter. This provision says the Committee "not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all."

Now, this statement was made in the context where in France since 1975 there was a very ambitious legislative framework for the integration of persons with disabilities. And, lots of money had been put into implementing this legislation but, it didn't work as regards autistic adults and as regards the access to education of children with autism. The European Committee of Social Rights considered that the States parties to the European Social Charter should carefully monitor the impact of their legislative and budgetary choices on the most vulnerable segments of society, the improvement of whose situation should be a priority even where the rights concerned, due

to their complexity, may not be immediately realized. It said: "When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allow it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings ».

Turning now to the conflict between affirmative equality as I've tried to describe it and the right to self-determination, the first question I would like to ask is whether there exists a real conflict? What is the conflict? And, secondly, I'd like to take two examples, provocative examples. One is the debate concerning the Bill of Rights for Northern Ireland and the implementation of Article 3 of the Council of Europe Framework Convention for the Protection of National Minorities. And, the second example with the example of racial or ethnic profiling.

Now, let me first clarify what the conflict might be between the new requirements of affirmative equality as I've tried to describe them and these norms I've referred to which relate, broadly, to the self-determination of the individual. I think the conflict is sometimes exaggerated but sometimes it is real.

It is sometimes exaggerated because many EU Member States, especially States such as Greece, Spain, Italy, France are reluctant to, for example, develop statistics on the impact on certain ethnic minorities of the measures they adopt. In fact, they consider that this would be in violation with their obligations not to treat sensitive data, not to process personal data which are of a sensitive character.

And so, this is basically the answer to, for example, to the Advisory Committee of the Framework Convention for the Protection of National Minorities is it just to say, well, we cannot do this, try to evaluate the impact of the measures we adopt on certain groups defined by ethnicity, religion, for example. But, in certain cases the conflict, nevertheless, is real.

I'd like to distinguish four measures which belong to this affirmative equality set of obligations. And, try to identify what problems might emerge as regards to these norms relating to self-determination.

I believe first that if all that is required is for states to collect statistics in order to orient their public policies, to make them better targeted to meet the requirements of affirmative equality, this is not a problem. These statistics concern the population overall. They do not require the processing of personal data, i.e., data which relates to an identified or identifiable individual. So that is possible to do without any problem arising as regards, the limitations on the allowability of the processing of personal data.

On the other hand, when statistics are prepared in order to allow for victims of discrimination to prove the discrimination they allege they have been subjected to, this may require the processing of personal data by the defendant. For example, you cannot imagine allowing victims of discrimination in the field of employment to put forward statistics relating to the racial composition of the workforce, for example, without making it possible for the employer to collect data about her personnel. Because otherwise the employer would be in a very difficult situation not being able to anticipate the risk of legal suits against the undertaking and not being able to manage diversity within the workforce.

Thirdly, I mentioned affirmative policies aimed at removing obstacles to the improved participation of minorities. This again does not require the processing of sensitive personal data. However, such processing is required when you try to launch, and this is the fourth component of affirmative equality, positive actions benefiting particular individuals, members of under-represented groups, whom in order to benefit from these measures should, indeed, be categorised as members of these groups. Otherwise, it's impossible to implement such a [inaudible].

And this may be a problem not only under the rules relating to the person—to the processing of personal data but also under Article 3, paragraph 1 of the Framework Convention on National Minorities of the Council of Europe.

Now, the European Parliament has adopted in May of last year a very important resolution where it states a need to move EU equality law beyond the current framework. And, insists that the limitations on the collection and processing of data is not an obstacle to more affirmative equality obligations being imposed on the EU Member States.

And, it states, at paragraph 14 of its resolution, I dare say, very closely inspired by the work the EU Network of Independent Experts on Fundamental Rights has done on the issue of minorities, thanks in particular to Martin Scheinin. The European Parliament says that, "data collection on the situation of minorities and disadvantaged groups is critical and that policy and legislation to combat discrimination must be based on accurate data."

It calls upon the group of experts following the implementation of Directive 95/46 to deliver an opinion to state that such statistics are not in violation with the requirements of the Personal Data Directive. And it says many other interesting things, which, unfortunately, I don't have time to enter into the details of.

But, my point is the European Parliament is very much in favour of this new development in equal treatment of and considers there's no violation of the principles of self-determination.

Now, let me look at two examples of how this conflict plays itself. The first example is, of course, the de facto 1998 Fair Employment and Treatment Order for Northern Ireland which is one of the very important results of the Belfast Agreement. And which, as you all perfectly know much better than I do, imposes on employers that they return monitoring reports to the Equality Commission. And, in order to perform this monitoring, of course employers must determine whether individuals belong to the catholic or protestant communities.

And, there is the principle method which is self-determination, self-identification, of the individual – by the individual. And, there are the residual methods which are also allowable which define membership in a particular community by a number of indices, such as the school one has attended, the neighborhood one resides in, etcetera.

Now, there has been, I understand, quite some discussion about whether this was in violation or not with the requirement of Article 3, paragraph 1 of the Framework Convention for the Protection of National Minorities. And, this debate was launched when the Human Rights Commission prepared discussions on the Bill of Rights for Northern Ireland which implemented rephrasing, basically, identically Article 3 of the Framework Convention.

And, in order to shed some clarity on this issue the Council of Europe was asked to deliver an expertise on this. Three experts, Aalt Heringa, Georgio Malinverni and Joseph Marko adopted these comments on the 3rd of February 2004 where they said, there could well be a clash of rights, for example between the right of self-identification on the one hand, Article 3 of the Framework Convention, and the need, on the other hand, to ensure equality as under the 1998 Fair Employment and Treatment Order.

Very cautiously, because they didn't want to be, I suppose, enmeshed in a national debate, they said a Bill of Rights might not be a good place to, restate Article 3 of the Framework Convention for the Protection of National Minorities. It may be better to seek a balance between these two conflicting requirements in implementing regulations or in compendia of best practices, for example.

And, as a reaction to this opinion the Human Rights Commission adopted the following position, which I think is the last statement of the Northern Ireland Human Rights Commission on this issue, saying that the incorporation of Article 3 of the Framework Convention will not mean that the current requirements on employers

in Northern Ireland to monitor the community background of their workforce will be unlawful. It simply means that employees and applicants, when being monitored, will be able to insist that their chosen community affiliation will be recorded, as well as any perceived community background.

In other terms, the self-identification by the individual, although important, is not necessarily decisively determinative for the purposes of monitoring the composition of the workforce. I believe this is the right position.

And, if you look at the explanatory report to the Council of Europe Framework Convention for the Protection of National Minorities the explanation it provides concerning Article 3 says, while this provision leaves it to every person to decide whether or not he or she wishes to come under the protection of the Framework Convention, the individual subjective choice is not decisive - it is inseparably linked to objective criteria relevant to the person's identity.

Now, my second and last example concerns racial or ethnic profiling. I'm sorry I'm going beyond my time limit but I think this is a really crucial issue in Europe today. And the research done by a number of NGO's on this has demonstrated how important the issue is and how it may lead to divisiveness between communities if it's not addressed adequately.

Racial/ethnic profiling may take two forms. First of all it takes a form of law enforcement authorities exercising their discretionary powers. For example, in stop and search procedures, in exercising border controls, in checking identity in a discriminatory fashion because there are very few limits to their discretion they actually base themselves on stereotypes, associating particular ethnicities to particular behaviour, criminal behaviour. Or suspecting that a person might be a terrorist because that person comes from the Middle-East or is a practising Muslim, for example. So this is the first manifestation and you have examples of this, for example, the House of Lords has adopted on the 9th of December 2004 a very important decision concerning the checks performed by Immigration Officers of the UK at the Prague Airport against the Roma. The checks prohibiting the Roma basically from entering to the UK to request asylum in the UK. And that was typical ethnic profiling.

Or similarly, you have a judgement by the European Court on Human Rights, in the case of Timishev versus Russia which concerned a Chechen who was stopped from crossing a check point because he was a Chechen. And this led to a finding of discrimination by the European Court on Human Rights.

Now, another instance or example of racial profiling is racial/ethnic profiling by automatic data processing and this consists of law enforcement authorities checking data banks and identifying individuals on the basis of data such as data relating to their religion, their national origin, the kind of studies they've been doing, etcetera.

And, using, in that process, sensitive data linking particular religions, ethnicities, national origins to suspicions of terrorist behaviour. And, this is what the German authorities have been doing after 9/11, after September 2001, in order to identify other Mohammad Attah's, if you wish, in Germany. They used data banks in order to identify individuals who could be sleeping terrorists and this was condemned by the German Constitutional Court in a decision it adopted on the 4th of April 2006.

Now, I mention this example because you see this is a typical case of racial/ethnic profiling where on the one hand you need statistics to identify discriminatory practises by authorities. How other than by statistics can you highlight the fact that stop and search procedures, for example, are discriminatory against visible minorities? You need to monitor the behaviour of law enforcement authorities by using data about the affiliations of persons they arrest about their membership to visible minorities.

On the other hand, the use of this data is highly sensitive as shown by the German episode of Rasterfahndung. It is very dangerous to use such data and there needs to be very strong protections for the use of such data. So this is a second instance where you see a potential conflict and a

need to balance these conflicting requirements.

Now, I'll finish by saying very simply, I would have much more to say, that in Europe we have the impression that we have two big models of combating discrimination. There is summarily there is the, you know, UK-Dutch approach which is based on multi-culturalism - the recognition of differences which favours positive action polices as a tool for integration of minorities, which allows proving discrimination by statistics and which has an institutional dialogue between communities, on the one hand.

And, on the other hand, you have the French or Republican approach which defines non-discrimination by invisibilisation [sic] of these communal affiliations. Not recognising even the existence of minorities and certainly not taking as a need to be mutually corrective of one another.

I think the multicultural approach risks leading to instances of separate development and I think UK authorities are aware of this and are now questioning a number of decisions made in the 1980's in that respect. And, I think, the French authorities are completely aware that assimilation is not a solution, it's not feasible, it doesn't work – discrimination continues.

And, these two models should now be confronting one another and should try to identify what recipes each model can transfer to the other in order to improve our combats against discrimination.

Thank you for attention.

NICEM
9TH ANNUAL HUMAN RIGHTS & EQUALITY CONFERENCE

Minority Rights and Protection: International Standards and The Bill of Rights for Northern Ireland

OLIVIER DE SCHUTTER
UNIVERSITY OF LOUVAIN AND COLLEGE OF EUROPE

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EQUALITY OF TREATMENT AND SELF-DETERMINATION : FROM COMPLEMENTARITY TO CONFLICT

Equality of treatment

- Article 14 ECHR and Protocol n°12 to the ECHR
- Preamble and para. 2 of Article 1 ('right of the worker to earn his living in an occupation freely entered upon') of the 1961 European Social Charter and Article E of the 1996 Revised European Social Charter
- Article 4(1) of the Framework Convention for the Protection of National Minorities ('The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited')

EQUALITY OF TREATMENT AND SELF-DETERMINATION : FROM COMPLEMENTARITY TO CONFLICT

Self-determination

- Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (28.1.1981), esp. Art. 6 (Special categories of data) : 'Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. (…)'
- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [Personal Data Directive]
- Article 3(1) of the Framework Convention for the Protection of National Minorities ('Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice').

EQUALITY OF TREATMENT AND SELF-DETERMINATION : FROM COMPLEMENTARITY TO CONFLICT

Equal treatment as requiring affirmative equality

- **European Court of Human Rights**

  Eur. Ct. HR (3d sect.), *Hugh Jordan v. the United Kingdom* (Appl. N° 24746/94), judgment of 4 May 2001; Eur. Ct. HR (4th sect.), *McShane v. the United Kingdom* (Appl. No. 43290/98), judgment of 25 May 2002 ; Eur. Ct. HR (2nd sect.), *D.H. and Others v. the Czech Republic* (Appl. No. 57325/00), judgment of 7 February 2006 (referred to the Grand Chamber):

  'Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, […] the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14'.

EQUALITY OF TREATMENT AND SELF-DETERMINATION : FROM COMPLEMENTARITY TO CONFLICT

Equal treatment as requiring affirmative equality

- **Advisory Committee on the Framework Convention on the Protection of National Minorities**, Opinion on Germany, 1 March 2002 (ACFC/INF/OP/I(2002)008): '24.The lack of good statistical data makes it difficult for the German authorities to ensure that the full and effective equality of national minorities is promoted effectively. (…) the German authorities state that they have no statistical data enabling them to evaluate the unemployment rate for each national minority or more elaborately broken down by age, gender, or geo-graphical differentials. The authorities assume that, in principle, membership of a national minority has no impact on a person's economic, social or cultural status. The Advisory Committee notes, however, that evidence presented to it indicates that members of the Roma/Sinti minority, in particular, find it significantly more difficult than the rest of the population to find work. …

EQUALITY OF TREATMENT AND SELF-DETERMINATION : FROM COMPLEMENTARITY TO CONFLICT

…In view of the preceding paragraph, the Advisory Committee considers that the German authorities should seek better to evaluate the socio-economic situation of persons belonging to this minority and, as appropriate, undertake measures in their favour to promote full and effective equality in the socio-economic field'

Article 4(2) of the FCNM : 'The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.'

EQUALITY OF TREATMENT AND SELF-DETERMINATION : FROM COMPLEMENTARITY TO CONFLICT

Article 1 para. 2 of the European Social Charter (1961):

> **'…**although a necessary requirement, appropriate domestic legislation that is in conformity with the Charter is not sufficient to ensure the principles laid down in the Charter are actually applied in practice. It is not sufficient therefore merely to enact legislation prohibiting discrimination (…) as regards access to employment; such discrimination must also be eliminated in practice'

Article E of the Revised European Social Charter

> '… not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all' (European Committee of Social Rights, *Autisme-Europe v. France*, Collective Complaint n°13/2002, decision on the merits of 4 November 2003).

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EQUALITY OF TREATMENT AND SELF-DETERMINATION : FROM COMPLEMENTARITY TO CONFLICT

Components of 'Affirmative Equality'

- Statistics allowing to identify the impact of religion, 'race' or ethnic origin, national origin, or disability on employment, education, housing,… in order to guide public policy and in order to facilitate the task of victims of alleged discrimination in proving discrimination
- Reversal of the burden of proof of discrimination where statistics are presented which justify establishing a presumption of discrimination
- Affirmative policies aimed at improving the representation of under-represented categories in education and employment, and at desegregating housing and education -- may take the form either of generally applicable measures (better accommodating the needs of the underrepresented categories, outreaching, etc.) or of positive action measures (implying differential treatment)
- Equality body in order to assist victims in filing claims, to prepare studies and recommendations

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THE CONTRIBUTION OF THE RACIAL EQUALITY AND EMPLOYMENT EQUALITY DIRECTIVES TO 'AFFIRMATIVE EQUALITY'

Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

- impose the possibility of shifting the burden of proof in discrimination cases (civil or administrative, not criminal cases) BUT do not require that victims may rely on statistics in order to establish discrimination
- allow for, but do not require, the adoption of positive action measures, whose legal status may be uncertain
- the Racial Equality Directive requires the establishment of an Equality body in order to assist victims in filing claims, to prepare studies and recommendations

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THE CONTRIBUTION OF THE RACIAL EQUALITY AND EMPLOYMENT EQUALITY DIRECTIVES TO 'AFFIRMATIVE EQUALITY'

Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Article 5 - Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Legal uncertainty : when are positive action measures allowable?

- Limitations resulting from legislation relating to the processing of personal data
- Applicability of the case-law of the European Court of Justice on equal treatment between men and women in employment

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THE CONTRIBUTION OF THE RACIAL EQUALITY AND EMPLOYMENT EQUALITY DIRECTIVES TO 'AFFIRMATIVE EQUALITY'

When are positive action measures allowable?

- Limitations resulting from legislation relating to the processing of personal data : Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data -- need for an opinion from the Working Party created under Article 29
- Applicability of the case-law of the European Court of Justice on equal treatment between men and women in employment - may be problematic :

  a) beyond employment, which baseline criteria?

  b) obligatory character of positive action measures under international law (Art. 2(2) ICERD and General Recommendation 27, Discrimination against Roma (2000) of CERD, FCNM) (comp. Case E-1/02, *EFTA Surveillance Authority v. Kingdom of Norway* (judgment of 24 January 2003), para. 58)

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THE CONFLICT BETWEEN AFFIRMATIVE EQUALITY AND THE RIGHT TO SELF-DETERMINATION:

1. IS THERE A REAL CONFLICT ?
2. THE EXAMPLE OF THE DEBATE ON THE BILL OF RIGHTS FOR NORTHERN IRELAND AND THE IMPLEMENTATION OF ARTICLE 3(1) FCNM
3. THE EXAMPLE OF RACIAL PROFILING

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THE RELATIONSHIP OF 'AFFIRMATIVE EQUALITY' TO SELF-DETERMINATION

Statistics prepared in order to orient public policies	Do not require the processing of (sensitive) personal data since such statistics may be prepared under condition of anonymity
Statistics prepared in order to facilitate proof of discrimination by the victim	May require the processing of personal data by the defendant in order to monitor, eg, the composition of the workforce
Affirmative policies aimed at removing obstacles to improved participation of minorities	Do not require the processing of (sensitive) personal data
Positive action benefiting individual members of underrepresented groups	Requires the processing of personal data and may require that Article 3(1) FCNM be taken into account

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DEFINING THE BALANCE BETWEEN AFFIRMATIVE EQUALITY AND RIGHT TO SELF-DETERMINATION

European Parliament resolution on non-discrimination and equal opportunities for all - a framework strategy (2005/2191(INI)), 8 May 2006 (rapp. T. Zdanoka))

13.Considers that far from constituting an obstacle to the collection of data relating in particular to ethnic origin and to religion, Directive 95/46/EC provides necessary and desirable protection against any abuse of sensitive data collected for statistical purposes;

14.Considers that, notwithstanding cultural, historical or constitutional considerations, data collection on the situation of minorities and disadvantaged groups is critical and that policy and legislation to combat discrimination must be based on accurate data;

15.Considers that the Article 29 group set up pursuant to Directive 95/46/EC could usefully issue an opinion designed to clarify the provisions of the Directive which may hinder the collection of statistics relating to certain categories of individual and thus to ensure that those provisions are interpreted uniformly throughout the Member States;

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DEFINING THE BALANCE BETWEEN AFFIRMATIVE EQUALITY AND RIGHT TO SELF-DETERMINATION

16.Draws attention to the fact that once personal data have been rendered anonymous for statistical purposes, the information contained in the statistics is no longer to be regarded as personal data; points out that there are also reliable techniques which enable anonymity to be observed and are traditionally used in the social sciences and which should enable statistics based on criteria deemed sensitive to be established; (…)

19.Considers that if effective action is to be taken against all forms of indirect discrimination and if the Community directives on discrimination under which those forms are specifically prohibited are to be correctly transposed, it is essential that authorisation be granted for the supply of proof based on statistics;

20.Calls upon the Member States to develop their statistics tools with a view to ensuring that data relating to employment, housing, education and income are available for each of the categories of individual which are likely to suffer discrimination based on one of the criteria listed in Article 13 of the EC Treaty;

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DEFINING THE BALANCE BETWEEN AFFIRMATIVE EQUALITY AND RIGHT TO SELF-DETERMINATION

21.Draws attention to the fact that if an individual is to benefit from preferential treatment by virtue of his membership of a protected group, it must be possible for him to be identified as such, which means that sensitive data relating to him must be available; points out that such data must be processed in accordance with – in particular – the legislation relating to the protection of personal data and with Article 3(1) of the Framework Convention on the protection of national minorities…

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IMPLEMENTATION OF THE FAIR EMPLOYMENT AND TREATMENT (NORTHERN IRELAND) ORDER 1998

Fair Employment (Monitoring) Regulations (Northern Ireland) 1999, SRNI No. 148, as amended by the Fair Employment (Monitoring) (Amendment) Regulations (Northern Ireland) 2000, SR 2000 No. 228: for the preparation by the employer of 'monitoring returns', the community to which a person is treated as belonging to be determined by reference to his or her written answer to a direct question regarding his or her community affiliation, however if this 'principal method' does not result in determining affiliation, the employer may use the 'residuary method' (determination of community affiliation through proxies, indicia, and not exclusively self-identification).

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EQUALITY OF TREATMENT AND SELF-DETERMINATION : FROM COMPLEMENTARITY TO CONFLICT

Explanatory Report to the Framework Convention for the Protection of National Minorities, explanation relating to Article 3 :

34. Paragraph 1 firstly guarantees to every person belonging to a national minority the freedom to choose to be treated or not to be treated as such. This provision leaves it to every such person to decide whether or not he or she wishes to come under the protection flowing from the principles of the framework Convention.

35. This paragraph does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity.

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EQUALITY OF TREATMENT AND SELF-DETERMINATION : FROM COMPLEMENTARITY TO CONFLICT

Northern Ireland Human Rights Commission, "Progressing a Bill of Rights for Northern Ireland: An Update" (April 2004)

The Commission understands that incorporation of Article 3(1) of the Framework Convention will not mean that the current requirements on employers in Northern Ireland to monitor the community background of their workforce, or of applicants for their workforce, will become unlawful. It will simply mean that employees and applicants, when being monitored, will be able to insist that their chosen community affiliation will be recorded, as well as any perceived community background. Under the existing Monitoring Regulations employees and applicants cannot be absolutely sure that the reality of their current community background is accurately recorded by the employer.

COMBATING RACIAL OR ETHNIC PROFILING

TWO MANIFESTATIONS OF RACIAL/ETHNIC PROFILING

1. **Arbitrariness and discriminatory practices in areas in which law enforcement authorities are allowed discretionary powers (stop and search procedures, border controls, identity checks)** (eg *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, 9 December 2004; Eur. Ct. HR, *Timishev v. Russia* (13 December 2005))
2. **Profiling by automatic data processing** whereby police authorities and public prosecutors combine certain sets of personal data of private individuals as available on general registers (such as name, address, date and place of birth) with additional data (in particular sensitive data) from other registers in order to identify potential suspects (see German Constitutional Court, April 4th, 2006, 1 BvR 518/02 (about the profiling operation (*Rasterfahndung*) developed in Germany from the end of 2001 until early 2003 : violates individual's right to self-determination over personal information)

COMBATING RACIAL OR ETHNIC PROFILING

Therefore, racial/ethnic profiling

- **can only be effectively combated by collecting data about the impact of law enforcement authorities' exercise of their discretionary powers,** particularly since 'As with other systemic practices, racial profiling can be conscious or unconscious, intentional or unintentional. Racial profiling by police officers may be unconscious' (*The Queen v. Campbell*, Court of Quebec (Criminal Division) (n° 500-01-004657-042-001) (judgment of 27 January 2005 by The Honourable Westmoreland-Traoré), at para. 34)
- **requires strict protection under existing data protection legislation**

DIFFERENCE IN DEMOCRATIC SOCIETIES : COMPETITION BETWEEN PARADIGMS

MULTICULTURALISM	REPUBLICANISM
In favor of positive action policies as a tool for the integration of minorities	Hostile to positive action as a reification of differences and a violation of equality
In favor of allowing proof of discrimination by statistics	Hostile to classifying individuals according to their race/ethnicity, religion, national origin…
In favor of the institutionalization of dialogue between communities	Hostile to structures which promote such institutionalized dialogue
But should not lead to 'separate development'	But should not lead to 'assimilationism'

DIFFERENCE IN DEMOCRATIC SOCIETIES : COMPETITION BETWEEN PARADIGMS

- Failures of both models are becoming apparent :
  - inability of the multiethnic approaches in the UK and the NL to ensure harmonious relations between communities
  - inability of the republican approach in F to effectively protect from discrimination (ex. Job seeker of Northern African origin has 36 chances to be interviewed, comp. to 100 for the candidate of French native origin -- 17/100 for white collar positions, 47/100 for blue collar positions)
- Both models are questioning their approach, seeking to redefine themselves
- Need to promote a discussion between diverse models, in order to allow for mutual correction, but without presuming the need to arrive at one single 'European model' of integration

DIFFERENCE IN DEMOCRATIC SOCIETIES : PROMOTING DIALOGUE BETWEEN PARADIGMS

- **INTI - Integration of third country nationals - EU funding programme** for preparatory actions promoting the integration in the EU member states of third country nationals and aiming also to promote dialogue with civil society, develop integration models, seek out and evaluate best practices in the integration field and set up networks at European level.
- The Hague Programme adopted by the European Council on 4-5 November 2004 underlined the need for greater co-ordination of national integration policies and EU initiatives in this field and the JHA Council adopted **Common Basic Principles** on 19 Nov. 2004 to assist the Council to reflect upon and, over time, agree on EU-level mechanisms and policies needed to support national and local-level integration policy efforts, particularly through EU-wide learning and knowledge-sharing
- **Network of National Contact Points on integration** set up by the Commission and endorsed by the Thessaloniki European Council conclusions in June 2003 which stressed the importance of developing co-operation and exchange of information within this network with a view in particular to strengthening co-ordination of relevant policies at national and European level; serves as a forum for the exchange of information and best practice between Member States at EU level with the purpose of finding successful solutions for integration of immigrants in all Member States and to ensure policy co-ordination and coherence at national level and with EU initiatives.

Section 2: EU Experience and Practice

"The role of the Committee of Regions in the Protection of Minorities"

Councillor Peter Moore

Commission for Constitutional Affairs, European Governance & the Area of Freedom, Security & Justice (CONST) Committee of Regions, EU

The role of Committee of the Regions in the Protection of Minorities

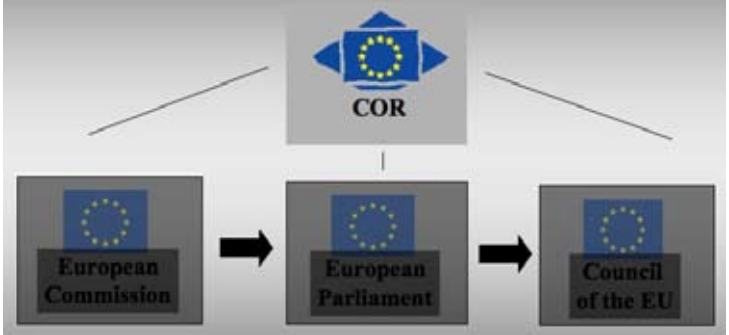
Peter Moore

- Councillor in Sheffield
- Council leader 1999 - 2002
- Member of Committee of the Regions

The Committee of the Regions

An advisory body of the European Union representing local and regional authorities

The COR and EU decision making



Membership of Committee of Regions

- Regional and local representatives proposed by member states
- Four year term of office
- Represented in political groupings
- Represented in national delegations

Northern Ireland representation

- Cllr Maurice Morrow from Dungannon and South Tyrone Borough Council
- Conor Murphy MLA from The Northern Ireland Assembly
- Cllr Edwin Poots from Lisburn City Council
- Cllr Bernice Swift from Fermanagh District Council

The role of Committee of the Regions in the Protection of Minorities

2007 European Year of Equal Opportunities for All

Aims of the Year

- Make European Union citizens aware of their right to non-discrimination and equal treatment
- Promote equal opportunities for all – access to employment, education, in the workplace or in the healthcare sector
- Promote the benefits of diversity for the European Union.

Key Themes of the Year

- Rights – Raising awareness on the right to equality and non-discrimination and on the problem of multiple discrimination
- Representation – Stimulating debate on ways to increase the participation of groups in society which are victims of discrimination and a balanced participation of men and women
- Recognition – facilitating and celebrating diversity and equality
- Respect – Promoting a more cohesive society

Activities during the Year

Taking Part in the Year

UK National Implementing Body

Commission for Equality
and Human Rights
Kingsgate House
66-74 Victoria Street
London SW1E 6SW

Thanks for Listening

Any Questions?

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"The Finnish experience on Minority Protection under the Bill of Rights"

Mr. Ali Qassim Mohamed,
Chair of ENAR Finish
Co-ordinating Team

NICEM Annual Human Rights & Equality

- §6 of the Finnish Constitution stipulates that all people are equal in the eye of the law.
- No-one may without acceptable ground be given different status on the basis of sex, age, origin, language, religion, convictions, opinion, state of health, disability or other personal reason.

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- This general ban on discrimination is part of fundamental rights and human rights and is based on international agreements to which Finland is bound.
- § 17 of the Finnish Constitution prescribes the right of different ethnic groups to maintain and cultivate their own language and culture
- In many international agreements, such as the UN Covenant on Civil and Political rights,

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- The Council of Europe's European convention on Human Rights, which guarantees enjoyment of the rights and liberties recognised in the agreement free from any type of discrimination based on sex, race, skin colour, language,religious belief, political or other opinion, national or social origin, membership of a national minority, wealth, descent or other status.
- EU directive 2003/43, which creates the framework for the prevention of discrimination on the grounds of race and ethnic origin, in order to realise the principle of equal treatment in its member state.

3

4

The Equality Act 21/2004, came into force 1.2.2004

- §6 Discrimination in forbidden
  No-one may be discriminated against on the basis of age, ethnic or national origin, nationality, language, religious belief, convictions, opinion, state of health, disability, sexual orientation or other personal reason.
- The ban on gender discrimination is prescribed in the Law on equality between women and men (609/1986)

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By discrimination is meant

1. That a person is treated in a less favourable way than another person is treated, has been treated or would be treated in a comparable situation (direct discrimination);
2. That some apparently impartial rule, principle or practice in fact places someone in a particularly unfavourable position compared to others who can be seen as a reference point, unless the rule, principle or practice has an acceptable goal and the methods taken to realise it are relevant and necessary (indirect discrimination);

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3.That the dignity and inviolability of a person or group of people is deliberately or actually made to suffer by the creation of a threatening, hostile, disparaging, humiliating or aggressive atmosphere (harassment);

4. An instruction or order to discriminate

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- The Equality Act is applicable to the hiring of labour, working conditions, conditions of employment, career advancement and training and also to the prerequisites for self-employment and the support of business activity.
- Adherence to the law in employment and service relationships is supervised by the occupational safety and health inspectorates.

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- Nor may a person on the basis of ethnic origin be given different status in matter relating to social and health service, social security benefits or other social welfare allowances and benefits.
- The same applies with regard to obligatory military service, women's voluntary military service or civilian service and the supply and availability of goods, property and service (including housing services) between others than individuals.

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- Adherence to the law with regard to ethnic discrimination is supervised by the ombudsman for minorities
- A person breaking the law can be made to pay up to a maximum of 15.000 euros compensation to the victim of the discrimination.

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National Minorities of Finland, The Roma

- The task of the Advisory Board on Romani Affairs is to enhance the equal participation of the roma population in the Finnish society, to improve their living conditions and socio-economic position ant to promote their culture.

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A Roma mother and daughter

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Advisory Board on Romani Affairs in Finland 50 years

- The Government appointed the first Advisory Board on Romani Affairs in 1989, but its work actually began in 1956 under the name Advisory Board on Gypsy Affairs.
- The Advisory Board celebrates its 50 Anniversary in April 7 in Finlandia Hall, Helsinki.

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Teaching and use of the Romani language

- Today, it is mainly elderly Roma who employ the Romani language, more specifically the *Kàlo* dialect of it, and it is they who speak it best. Middle-aged and young adult Roma mostly use Finnish in everyday communication, but they are able to understand Romani.
- Efforts to promote the teaching of Romani have succeeded in revitalising its use. Since 1989, Roma children have been able to learn Romani in some comprehensive schools, initially only at evening classes, but nowadays also as part of the daytime school curriculum
- Since December 1992, the National Board of Education has regulated the number of courses in Romani in the comprehensive school

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Education Challenges

- In 2002, the Roma Education Unit of the National Board of Education (see below) conducted a survey of school attendance among Roma children. In the 2001-2002 school year, teaching of Romani and Roma culture was arranged in nine municipalities at a total of twenty comprehensive schools.
- These schools represented 5% of the schools with Roma pupils. Only 73 (8.5%) of the total of 859 Roma pupils had the possibility of studying their own language.

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The Roma

- Finnish Roma are also active in the work of the International Romani Writers' Association which was founded in Finland in July 2002.
- The Association is a member of the European Writers' Congress and its office is in Helsinki.

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National Minorities of Finland, The Swedish-speaking Finns

- The principle of equality of the Finnish and Swedish languages
- With the rise of the Finnish nationalistic movement in the 19th century, calls for official recognition of the Finnish language in the Grand Duchy of Finland were increasingly heard
- Since 1863, Finnish, alongside Swedish, could be used when dealing with the authorities in Finland

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- From 1883 onwards civil servants were obliged to use the Finnish language and issue documents therein, and in 1892 Finnish finally became an official language on an equal footing with Swedish.
- With the Parliament Act of 1906, which introduced equal and universal suffrage and a unicameral Parliament, Finnish became de facto the primary official language of Finland.
- When Finland gained independence in 1917, while World War I was still going on and the Revolution was ravaging Russia, it became necessary to settle relations between the Finnish and Swedish-speaking communities in Finland, there were two dominant views.

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- One maintained that two ethnic groups or nationalities, the Finns and the Swedes of Finland, lived together within the borders of the same country.
- The other view held that the people of Finland constituted a single people or nation, in which one part happened to have Finnish and the other Swedish as their mother tongue.
- The second view, most eloquently propagated by the national poet Zacharias Topelius, stressed the unity of the people of Finland, which had been established through centuries of common history and intermarriage where the choice of language had been very much a matter of historical accident.

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The right to use Swedish for official purposes

- As explained already, Finnish and Swedish are, under Finnish law, national languages of Finland, and as such they are dealt with on an equal basis.
- The status of the Swedish language is extensively protected.
- Both Finnish and Swedish are used in parliamentary work.
- For instance, Government Bills sent to Parliament and official communications from Parliament must be issued both in Finnish and Swedish.

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- During parliamentary sessions Swedish may be used alongside Finnish.
- Laws and decrees are adopted and published both in Finnish and Swedish.
- In addition, orders or regulations issued by the Government, ministries or administrative authorities which contain general rules binding on citizens have to be published simultaneously in Finnish and Swedish.
- The Finnish Language Act protects the linguistic rights of the Finnish-speaking and Swedish-speaking populations as required by the Constitution.

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- The Language Act of 1922 was recently replaced by a new Language Act (423/2003) that became law on 1 January 2004.
- Also this new legislation presupposes that Finnish and Swedish can operate as both majority and minority languages, depending on where and in what connection they are used.

22

Swedish-language education

- The language of instruction in Finnish schools is either Finnish or Swedish, depending on the pupils' mother tongue.
- There are Swedish-speaking primary schools , secondary schools , gymnasia (senior secondary schools) and vocational schools.
- Municipalities are obliged to provide day care and pre-school education for children in their mother tongue, either in Finnish or Swedish.

23

Political participation

Jan-Erik Enestam is leader of the Swedish People's Party of Finland. Its members are mainly Swedish-speaking Finns.

24

- In Finland there is only one political party that declares itself to be a Swedish-language party.
- It is Svenska folkpartiet (SFP), the Swedish People's Party.
- The Swedish-speakers have an umbrella organisation, the Swedish Assembly of Finland (*Svenska Finlands folkting*).
- Its 75 members are indirectly elected every fourth year, most recently in October 2004, on the basis of the outcome of municipal elections.
- They represent Swedish-speakers in the various political parties.

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- The Assembly fosters the cultural needs of the Swedish-speaking population and submits initiatives to that effect to the Government and other authorities.
- It is partly subsidised by the state.
- National Minorities of Finland, The Swedish-speaking Finns and Roma

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NGOs perspective on Minority Protection in Europe"

Ms. Snjezana Bokulic

Europe & Central Asia Programme Co-ordinator
Minority Rights Group International

NGOs Perspective on Minority Protection in Europe

NICEM
9th Annual Human Rights & Equality Conference
12 January 2007, Belfast

Role and importance of NGOs in MR protection

Minority Rights Group International

- Aims:
  - Working to secure the rights of ethnic, religious and linguistic minorities, and indigenous peoples
  - Promoting cooperation and understanding between communities

- MRG Methods:
  - Advocacy + capacity building for advocacy
  - Partnership
  - Rights-based approach to programming

Minority rights – working definition

Minority rights are based on four key pillars:
(1) protection of existence,
(2) protection and promotion of identity,
(3) non-discrimination, and
(4) effective participation.

Minority Rights Advocacy – working definition

Minority rights advocacy acts for the implementation and expansion of minority rights through participatory lobbying and campaigning, as well as capacity building for the benefit of non-dominant minority groups at all levels of governance including local, national and international.

NGO advocacy in practical terms

- Awareness raising
- Capacity building
- Empowerment of minority communities
- Contribution to standard setting
- Strategic litigation
- Monitoring of implementation

Minority rights in conflict resolution

- Bipolar societies with exclusion of 'smaller minorities'
- In Southeast Europe: BiH, Macedonia, Kosovo
- Role of NGOs in breaking the closed circle:
  - At grassroots, national and international level
  - Raise voice/give voice
  - Keep issues on the agenda: national channels and international channels
  - Promoting cooperation/dialogue among communities / dialogue with government

Sustainability of civil society effort

- Conducive legal framework
- Conducive societal framework
- Capacity and skills
- Availability of funds

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Workshop 1: "Protection of Rights and Dignity of Migrant Workers"

Chair:
Pamela Dooley, UNISON

Speakers: Patrick Taran, ILO Senior Migration Specialist
Ms. Sofi Taylor, UNISON
Mr. Wilf Sullivan, TUC
Mr. Peter Bunting, ICTU

NICEM 9th Annual Human Rights and Equality Conference
Friday 12th January 2007

Executive Summary

The aim of the workshop was to discuss the protection of rights and dignity of migrant workers to promote debate and the cross-fertilisation of ideas across a wide range of different actors and sectors. The workshop gave Members attending a valuable opportunity to consider the main issue for use in the Roundtable discussion on the Bill of Rights.

A summary of the main speakers and papers is provided in the main body of the report and gives a flavour of a wide range of experiences discussed. This is followed by a summary of the key conclusions reached in the group discussions.

Chair: Pamela Dooley, UNISON
Speakers: Patrick Taran, ILO Senior Migrant Specialist, Ms Sofi Taylor, UNISON, Mr Wilf Sullivan, TUC, Ms. PaulineBuchanan, Irish Congress of Trade Unions.
Rapportuer: Yassin M'Boge

Patrick Taran, ILO Senior Migrant Specialist

Mr Taran began with the main proposition that in general, labour mobility, defined as the freedom of movement, is required to ensure that labour is available to meet demand and to ensure its most productive use. He explained that this is a feature that is applicable at both a European level and the domestic level, i.e. the U.K. and Northern Ireland. He illustrated this point with a projection based on an ILO simulation which predicted that by 2050 the standard of living in Western Europe, as measured by per capita income of gross national product, will be 78% of what it is today, in other words 22% lower.[1]

1 ILO. Towards a Fair Deal for Migrant Workers in the Global Economy. International Labour Conference 92nd Session June 2004. Report VI. P 37-38. Available online at: http://www.ilo.

Mr Taran pointed to immigration as a means to change this outcome, and that restrictions on labour mobility will only enhance this inefficiency. He continued by pointing to the hurdles placed before such a goal, such as migrants attempts to form unions being faced with the threat or actual practice of deportation. He pointed to the need for implementation of the extensive body of international law regarding international migration, already in existence, being implemented domestically. This he argues is a challenge.

He referred to three principles that need to be reflected in national legislation:

1. Equality of treatment between regular migrant workers and national employees.
2. International standards for the conditions of treatment apply to all workers.
3. Core universal human rights apply to all migrant workers regardless of status.

He outlined the content of the international charter on migration which consists of

- ILO Migration for Employment Convention, 1949 (No.97),
- the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143), and
- the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

He summarized the importance of the different compilation of legal instruments as follows:

4. The three Conventions establish a comprehensive "value based" legal foundation for national policy and practice regarding non-national migrant workers serving as tools to encourage States to establish or improve national legislation in harmony with international standards.
5. They provide a framework for consultation and cooperation among States on labour migration policy formulation, on issues such as, exchange of information, providing information to migrants, orderly return and reintegration.
6. They establish that migrant workers are more than just economic entities and labourers, they are social entities with families and accordingly have rights. These norms reinforce the principle of equality of treatment with nationals in a number of legal, political, economic, social and cultural areas.
7. The Conventions resolves the gap of protection for non-national migrant workers and members of their families in irregular status and in informal work by providing minimum protection norms for national legislation.
8. The extensive and detailed text in the conventions provides specific normative language that can be directly incorporated into national legislation. Therefore reducing ambiguities in interpretation and implementation across diverse political, legal and cultural contexts.

He stressed the need to examine the draft Bill of Rights in conjunction with these minimum international standards. He highlighted that the international conventions are not poorly ratified. In particular he pointed out that in considerable number of EU countries, national law and practice on migration are based at least in part on relevant international standards. Nevertheless, he calls for EU countries that have not ratified ILO Conventions to do so. He encourages renewed advocacy for ratification of Convention 143 and the 1990 International Convention on the protection of migrant workers.

His key point was that advocacy is important in order to ensure implementation, active civil society action important. He suggests several lines of action that could be taken as the following:

- Advocacy for adherence of national standards to basic international human rights standards,

org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf

elaboration of the Bill of Rights for Northern Ireland provides an ideal opportunity to undertake such an exercise.

- Establishing national committees or coalitions bringing different actors together. They are essential mechanisms for effective advocacy, obtaining public visibility and achieving political impact.

- Political leaders need to take a leadership role and promote initiatives to promote an effective Bill of Rights.

- Elaboration of a national strategy and action program against racism, discrimination and xenophobia can set a key symbolic as well as practical commitment for national action. The Republic of Ireland serves as an example of a model that could be put into practice.

- Provision of direct services, attention to and support for migrants by trade unions and civil society organisations.

The promotion of human rights, labour standards, humanitarian principles and respect for diversity are the guarantors of democracy and social peace in increasingly diverse societies. Trade unions and civil society organisations have a key leadership role to play in order to implement a rights-based approach. He concluded by offering the support and advice of the ILO.

Ms Sofi Taylor, UNISON

She began by pointing out it is essential that rights, such as the freedom of association and collective bargaining, must be accessible to all. She warned that the private sector remains outside the migrant rights framework despite the amount of power they wield. Furthermore, she questioned the contradictory approach often taken towards migrant workers using the example of how migrants are paying income tax and national insurance yet denied access to public funds such as child benefits, but are required to learn English. She argued that the burden on migrant workers is heavier than the national population. She continued to warn that unprotected migrant workers move across Europe and yet the Government takes a restrictive view of undocumented workers, perceiving them to be mainly victims of trafficking. However, UNISON Scotland agues that the reality is that undocumented workers are mainly over-stayers such as Australians and New Zealanders and workers whose employers refuse to renew their work permits.

Ms Taylor outlined the approach that UNISON Scotland is taking to address the issue:

9. Trade unions have a role to play in the integration process, for instance being part of the election process, and acting as a collective voice which migrant workers would otherwise be deprived of.

10. Establishing a migrant workers wide network, as part of the process to provide a forum for influencing migration issues.

11. Establishing partnerships in order to protect vulnerable workers is a key part of the overall framework of protection. One such partnership is with the TUC.

12. Establishing regional and international partnerships which are also important and reflect the multiple level of application of the migration issue and the tripartite system in which it operates namely, the business sector, government and non-governmental organisations.

She asks the essential question of are trade unions doing enough? Are they part of the debate? Her answer was in the negative, arguing that the trade unions are reactive as opposed to taking on a leadership role. She emphasises that the trade union agenda is the membership agenda and the fight is not limited to securing today's rights but tomorrow's rights. She concluded by stressing the need to campaign for access to rights for migrant workers.

Mr Wilf Sullivan, TUC

He began by highlighting that the migrant workers issue is not a new issue, it has always been a feature of the British labour market. Yet there is a contradiction in the UK's policy. On the one hand they need migrant workers to sustain growth yet the political rhetoric is unwelcoming of migrants. The public discourse on migrant workers is similar to that of previous decades particularly the manner in which migration is catergorised remains unchanged.

He observes that although there are positive experiences, exploitation remains an issue for instance:

- Migrant workers having jobs that are well below their skill level.
- Lower paid wages than nationals.
- Poor accommodation.
- High fees being charged to workers for situations bordering on forced labour and slavery.

He affirmed that trade unions need to address these challenges and raised the following questions:

- How can trade unions build support for migrant workers?
- How to organise migrant workers?
- What are the principles underlying that?

Fundamentally, Mr Sullivan maintains that the only way to protect current workers and migrant workers is to prevent the undercutting of wages and allowing migrant workers to join trade unions. This, he argues, is the principle that should inform trade union policy.

He warned that while the TUC welcomes the Government's examination into the migration issue, there are a number of disappointing features with the new system. For instance it only looks at the migration issue in terms of economic objectives. In addition low skilled labour demands will mainly be met from within Europe, thus reinforcing the perception of 'fortress Europe'. Finally, the concept of guest workers denies any right of family reunification or employment rights.

In answering the question posed as to how to build support for migrant workers Mr Sullivan pointed to three areas:

13. Building Union support and organising migrant workers in order to build a consistent response.
14. Building public support in order to dispel myths of migrant workers in the media and exploitation of the issue by far-right politics.
15. Building policy support within the context of a rights-based approach through
    - Better protection for temporary workers.
    - More action targeting agencies, such as regulation.
    - Establishing employment rights from day one for all workers.
    - Enforceable rights irrespective of residential status (documented/undocumented workers).
    - Rigorous enforcement regime – the focus should be on bad employers rather than the workers themselves.
    - Ratification of the UN Convention on Migrant Workers and their Families.

Ms. PaulineBuchanan, Irish Congress of Trade Unions

She began by presenting the workshop with a new report based on qualitative research into the experiences of Migrant workers and their Families in Northern Ireland that was produced in partnership with other parties such as NICEM, and Animate. She highlighted the importance of addressing this issue in Northern Ireland which has been perceived as the so called 'race hate capital of Europe'.

In outlining the challenges for migrant workers, governments, employers and trade unions she pointed to the following issues:

- Employers making redundancies and subsequently using agency workers as replacements. This she warns perpetuates the myth that migrant workers are taking jobs from current workers and warned that prejudice will only be detrimental to all.

- There is a pattern of misinformation emanating from recruitment agencies.

- Trade unions need to work in partnerships in order to inform migrant workers of their rights and attempt to enforce their rights.

The report published underlies that trade unions need to organise workers whatever their background or status. In order to ensure protection of rights and dignity of migrant workers action is needed to be taken by trade unions such as:

16. Trade unions recognise their moral duty and their unique capacity to assist migrant workers.
17. Establish a unit for migrant workers' rights.
18. Campaign for the investigation of recruitment agencies treatment of migrant workers.
19. Provide specific union courses for migrant workers.
20. Take a lead in policy development.
21. Contribute fully to the process of establishing a bill of rights.

She concluded by stating that leadership and active civil society is vital and trade unions have a role. The ICTU aim is to build a better life for citizens in the country regardless of class and creed.

Debate Conclusions

The open forum debate ranged over a number of issues and the workshop agreed that:

- Incorporation of international standards. For instance in dealing with forced labour international definitions are crucial.

- Scope of protection – rights should be protected for all who are in the jurisdiction; distinctions should not be based on nationality and status. Thus, the Bill of Rights should be targeted for all.

- Key principle in a Bill of Rights – fair and equitable treatment for all; building a rights-based culture is fundamental.

- Content of Bill of Rights: inclusion of socio-economic rights such as right to education and health, right to enjoy social progress. It was noted that a right to be different within certain perceived groups need to be remembered. There is also a need to detach the work permit for the migrant worker from the employer.

- Cooperation and dialogue – stakeholders need to come together to recognise commonalities and common solutions. NIO, PSNI, Home Office, TUs, employers need to brought together in a cooperative relationship.

- Publicity campaign – a multilingual campaign targeting migrant workers in order to inform them of their basic rights/entitlements; an additional campaign to combat ignorance towards migrant workers.

- Monitoring Mechanism – establishing a monitoring body such as a labour inspectorate in order to investigate working conditions. Reporting needs to be followed with action, in order to establish confidence in the system.

- National Action Plan – discussion with many actors in devising a long term strategy action plan to deal with issues surrounding migration such as racism and open exploitation.

In sum, it was agreed that the achievement of a Bill of Rights is very important for the migrant workers issue; however it is only as good as its content.

Workshop 2: "Protection of Rights and Dignity of Roma,Gypsy and Travellers"

Chair:
Gabrielle Doherty, NICEM

Speakers: Ivan Ivanov, Executive Director, European Roma Information Office

Derek Hanway, Director, An Muia Tober

Rapportuer: Mari O'Donovan

Summary of the talks delivered by Ivan Ivanov and Derek Hanway

The Workshop on the "Protection of the Rights and Dignity of Roma, Gypsy and Travellers" commenced with a talk delivered by Ivan Ivanov, the Executive Director of the European Roma Information Office on the functions of the ERIO, and the problems facing Roma people in Europe.

Mr Ivanov informed the group that the main function of the ERIO is to disseminate information, both to European Union Institutions and Roma people. The Office provides EU institutions with information concerning the issues and problems facing the 8-10 million Roma people in Europe, who comprise Europe's largest minority group.

Mr Ivanov stated that Roma people face discrimination in many spheres, especially social exclusion and segregation in the areas of healthcare, education and housing. He spoke in particular of the European Court of Human Rights case of D v. Czech Republic (57325/00), which concerned the placing of Roma children in special schools for pupils with learning disabilities. The European Court of Human Rights rejected the applicants Article 14 and Protocol 1 Art. 2 arguments and the case is now on appeal before the Grand Chamber of the European Court of Human Rights. Mr Ivanov stated that segregation in the area of schooling and healthcare, and the negative attitudes of the general population towards Roma people results in their having a low self-esteem which leads them to naturally segregate themselves into areas outside cities, despite the fact that they really wish to integrate with the rest of society. He believes that the prevalence of anti-gypsyisum across Europe is reflected in and exacerbated by the exploitation of nationalism and hate speech by the media.

Capacity building is also a principal function of the ERIO. The Office educates young Roma people on their rights and encourages them to enhance the rights of Roma people by lobbying at a national and international level.

Mr Ivanov stated that while the Race Equality Directive improved the human rights situation of minorities, in that it resulted in EU states adopting anti-discrimination legislation, the Directive failed to adequately protect Roma people from the many aspects of discrimination that they face in society, particularly segregation which is a form of discrimination. The Directive does not explicitly refer to desegregation and while it can be eliminated by positive action, the Directive does not oblige states to take positive action, but merely leaves it open for them to do so. Mr Ivanov spoke of the need for a Directive specifically aimed at encouraging the integration of Roma people.

A talk on the problems facing the Traveller community was then delivered by Derek Hanway, the Director of Munia Tober. Mr Hanway spoke about the different ways in which Travellers are received and perceived by the general population. He stated that there is a need to educate the general population about Traveller's culture and to inform them that they are a distinct ethnic group which should not be forced to change and assimilate into majority culture. The concept of cultural diversity needs to be promoted and encouraged as Article 8 of the UN Declaration on Minorities obliges states to protect the identity of minorities.

Mr Hanway believes that the current challenge facing governments is the achievement of Travellers' social development while at the same time ensuring that their culture and identity is preserved. Mr Hanway stated that many human rights violations occur because individuals are part of a particular group or community. Travellers face segregation and prejudice. Because of the prejudices they suffer, they isolate themselves from the rest of society in order to preserve their culture. Mr Hanway opines that many Travellers may wish, however, to integrate into society. He stated that human rights norms may hinder this integration. Promoting Travellers as being "different" may result in furthering their segregation and isolation from the rest of society. He therefore identifies a need to achieve a healthy balance in state policies regarding Travellers. Another challenge is the education of Traveller children. While the Travellers' Article 8 rights to private and family life necessitates the need to respect their preference for a nomadic way of life, the State must also ensure that the rights of the child to an education are respected.

Issues raised by the Group

The first issue raised was the need for Travellers to be permitted to practice their own culture within the general community. They should always enjoy the same housing, healthcare and education facilities as the rest of society. They should not be segregated or feel the need to segregate themselves from the general population. Segregation has a negative impact on society.

The problem on the other hand of forcing assimilation was raised. The tension between segregation and forced assimilation was identified. The necessity of consulting the Traveller community as to their preferred choice was stressed. If they genuinely wish to live separately from the general population, this cannot then be perceived as segregation. While segregation is regarded as a form of apartheid in South Africa, if Travellers wish to live in their own communities they should be allowed to do so. One speaker stated that we cannot impose our perceptions of equality on groups in an effort to homogenise. We need to consult and respect Travellers' wishes.

Many in the group recognised differences between the issues of Travellers and those of the Roma people. While most Roma people are keen to integrate and only segregate themselves through necessity, it was thought that most travellers are keen to live separately from the rest of society. They choose to live in their own communities and are more interested in exercising their indigenous and cultural rights. The fear that their population is diminishing was recognised as one reason for this. It was thought that present government integrationist policies are perhaps failing to adequately accommodate Travellers' preferences in this regard. Present trends are to provide integrated housing and to withdraw funding for Traveller-exclusive adult education programmes. Such trends were perceived as serving to erode travellers' culture and their nomadic way of life.

The problem of inadequate services on Travellers' halting sites was also identified. This was opined to be a serious area of discrimination. Travellers have an equal right to the facilities enjoyed by the rest of society. Further, the number of legal sites needs to be increased. Travellers' preference for a nomadic way of life needs to be respected.

The need to incorporate all international human rights standards concerning anti-discrimination and the protection of minorities into the Bill of Rights was stressed.

The right to education of Traveller children was an issue raised by the majority of the group. It was questioned whether the present manner in which education is being delivered to Traveller children should be changed. The example of St Mary's primary school was given. While pupils are being delivered the same standard of education as the rest of the population, members of the group pondered on whether this school, which is attended exclusively by Traveller children, could be perceived as an example of racial segregation. A member of the group informed, however, that Traveller children do not have to attend this school, and that the only reason that it is attended by Traveller children only is that settled parents withdrew their children from the School. The group identified the need for the state to increase and promote the capacity for Travellers to engage in mainstream education and pre-school services so as to avoid unwanted segregation.

The poor levels of attendance at schools by Traveller children was also raised. The need to ensure their right to education, while accommodating their traditional way of life was recognised as pivotal. Of further concern was the need to ensure their right to health. The need for a tracking service to ensure recognition of these rights was stressed

The need to promote the education of Travellers' rights was also identified. Further, Travellers need to be consulted on all their needs and wishes, and have these reflected in the Bill of Rights. These wishes cannot, however, undermine existing equality protections. This was identified as a complicated issue. The need for a Traveller representative was also raised.

Finally, it was thought that a failure to accommodate Travellers' nomadic way of life results in a decimation of their economy, which relies on self-employment and seasonal work.

Areas of Consensus

Consensus was reached on all of these points:

- Segregation (both enforced and by choice);
- The manner in which enforced housing may erode Travellers' preferred nomadic way of life;
- The need to provide adequate sites and services;
- Rights of the child;
- The need to consult Travellers on their needs;
- The economic rights of Travellers;
- The need to incorporate international standards in the Bill of Rights.

Workshop 3: "Protection of Rights and Dignity of Asylum Seekers and Refugees"

Chair:
Ronald Vellem, NI Committee for Refugee & Asylum Seeker (NICRAS)

Speakers:
Professor Colin Harvey
Director, Centre for Human Rights, QUB

Les Allamby
Director, Law Centre

Report prepared by Ilaria Allegrozzi

I. Presentation
By Professor Colin Harvey, Director of the Human Rights Centre at Queen's University, Belfast

The aim of this presentation is to locate the debate in its international legal context. There are three main themes:

1. International Refugee Law
2. Beyond the 1951 Convention: International Human Rights Law
3. Trends in Law and Policy?

International Refugee Law

The 1951 Convention relating to the Status of Refugees and the 1967 Protocol remain the cornerstone of global refugee protection. According to Article 1 A(2) the term "refugee" applies to any person who:

"...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return to it".

The Convention defines "refugee" for international law purposes. The definition of refugee as set out in the 1951 Convention contains several distinct elements but must be read as a whole:

- the individual must be outside her state of origin. The 1951 Convention does not protect internally displaced persons (IDPs);

- the state of origin must be unable or unwilling to provide protection;

- the individual must have a "well-founded fear of being persecuted". The subjective "fear" must be "well-founded" (objective). The "well-founded fear" must relate to treatment that amounts to

persecution. The persecution standard is connected directly to human rights law;

- the well-founded fear of persecution must be for a "Convention reason". Debates have arisen over these Convention grounds. It is generally accepted that they should be interpreted in a purposive way linked to the progressive development of human rights norms.

While the definition is of significance, the principle of *non-refoulement* contained in Article 33(1) is widely viewed as fundamental.

"1. No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Inclusion is the starting point in refugee law. However, the Convention also contains provision for exclusion. The Convention's exclusion clauses bar a person from refugee status where there are serious reasons for considering that she has committed certain acts: crimes against humanity, war crimes, serious non-political crimes committed outside the country of refuge and acts contrary to the purposes and principles of the United Nations. The use of the exclusion clauses continues to raise interesting questions about the interaction between refugee law and human rights law. What is clear is that the list is exhaustive and the interpretation must be informed by human rights principles.

International refugee law also has institutional support from the UN High Commissioner for Refugees. UNHCR is the principal UN agency mandated to provide assistance and international protection to refugees and other persons of concern, and to assist in finding durable solutions. It continues to have a significant role in promoting best practice.

Many states currently adopt hostile and restrictive policies. States have subjected refugees and asylum seekers to arbitrary detention, questionable procedures and a denial of basic social and economic rights. In the worst cases, the most fundamental principle of refugee protection, *non-refoulement*, has been violated, and refugees have been forcibly returned to countries where they will face persecution. Since September 11th 2001, many countries have enacted emergency anti-terrorism legislation that continues to have a negative impact on the treatment of refugees and asylum seekers. Debates are frequently constructed around "myths" and appalling practices legitimized. That is precisely why a focus must remain on the international normative framework and its practical use.

There are several practical issues to keep in mind. We are discussing matters of life and death. There are real risks attached to getting this wrong. Refugees and asylum seekers flee terrible human conditions, and this fact must inform legal and policy development at all levels. Asylum seekers are forced to flee to find protection. Many asylum seekers do not have the luxury - and very often the ability - to comply with immigration formalities. Refugee law makes it clear that they should not be penalized for this fact.

One of the core issues in refugee determination is in fact credibility assessments. The story of the refugee is often horrific: rape, beatings, incarceration, torture, threats of death to the claimant and her family. Interviewing applicants for protection is a crucial task. To do it well requires real skill. All those involved should never forget that being recognized – or not – as a refugee will have direct repercussions on the life and well-being of the individual and her family. This places a heavy burden of responsibility on the person conducting the interview, whether or not this person is the final decision-maker. The importance of the quality of the determination process for the applicant's future and that of her family should always be considered carefully in national practice. If the promise of international refugee law is to be realised then it is essential that its basis in international human rights law informs all aspects of the process at the national level. This applies at all stages and all times during the asylum process.

2. Beyond the 1951 Convention: International Human Rights Law

Refugee law is part of a wider body of international human rights law. Two principal Conventions govern international refugee law: the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. Although the Refugee Convention retains its significance and relevance there is life beyond it and it is not without problems. The definition is limited and the Convention has little to say about the precise procedural obligations on states. It has been supplemented regionally. The 1969 Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees reaffirm the basic principles of the Convention and Protocol, but expand the definition of refugee to include causes such as war, internal conflict, and massive human rights abuses. In the EU, for example, the concept of subsidiary protection has been formalized.

An examination of the rules of refuge law must include reference to international human rights law. It provides protections which supplement refugee law in important ways. Human rights conventions offer additional tools to use in the international protection of refugees and asylum seekers and, in some cases, they offer more protection. A basic starting point in international human rights law is the importance of protecting the "person", as well as vulnerable groups and communities. The guarantees tend to apply to a person even though she may not be a citizen of the state she is in. The language used is often "everyone". The question is whether the person is within the jurisdiction of the state and not simply whether she is a citizen. The point is best made in Article 1 of the Universal Declaration of Human Rights 1948: "All human beings are born free and equal in dignity and rights." This is confirmed in instruments such as the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966. While the International Convention on the Elimination of All Forms of Racial Discrimination 1966 does provide that "the Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens"[1] and that nothing "in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization"[2] in the latter case this is "provided that such provisions do not discriminate against any particular nationality".[3] The Committee has stated:

"1. Article 1, paragraph 1, of the Convention defines racial discrimination. Article 1, paragraph 2 provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality;

2. Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;

3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the

1 Article 1(2).
2 Article 1(3).
3 Ibid.

Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;

5. States parties are under an obligation to report fully upon legislation on non-citizens and its implementation. Furthermore, States parties should include in their periodic reports, in an appropriate form, socio-economic data on the non-citizen population within their jurisdiction, including data disaggregated by gender and national or ethnic origin…"[4]
The Committee's General Recommendation No. 30 contains further detail on what is required from states in order to comply with the Convention.
There are of course specific guarantees for refugees and asylum seekers in the international instruments:

- Universal Declaration of Human Rights 1948 which provides for a right to seek and enjoy asylum from persecution (Article 14);
- UN Convention against Torture 1984 which provides for the principle of non-refoulement in Article 3;
- UN Convention on the Rights of the Child 1989 (Article 22, relating to the rights refugee children);
- Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live 1985

The UN treaty-monitoring bodies have provided useful guidance on the relevance of the treaty provisions to the plight of refugees and asylum seekers. UNCAT cases like *Agiza v Sweden*[5] demonstrate the scope of the obligation of *non-refoulement* in the context of the Convention against Torture; and General Comment No. 1 on the Implementation of Article 3 of the Convention in the Context of Article 22 again provides clear guidance.

4 CERD General Recommendation No. 30 "Discrimination Against Non-Citizens".
5 UNCAT Comm. No. 233/2003.

The UN Human Rights Committee in cases such as *Bakhtiyari v Australia*[6] has confirmed the applicability of the ICCPR to those seeking refuge, particularly in this instance those who are detained. The application of the international instruments to the plight of refugees and asylum seeker is clear from the work of the treaty-monitoring bodies.

The regional human rights context should not be forgotten. The European Court of Human Rights has developed an extensive jurisprudence on the rights of refugees and asylum seekers including recent cases such as *Salah Sheekh v The Netherlands*.[7] There are of course other regional human rights instruments of note and relevance.

3. Trends in Law and Policy?

Despite the many human rights standards in existence trends are generally not encouraging. Law and policy is too often characterized by deterrence and restriction. A general climate of "tougher" restrictions has emerged. While not formally disavowing international standards, national practice often suggests a lack of commitment to the institution of asylum. The underpinning premise of much current European policy is that asylum in Europe should be a last resort. This is reflected in the notion of "deflection", the policy of discouraging asylum seekers, or preventing them from seeking protection by placing obstacles in their way. The message this sends is: "seek asylum elsewhere." Measures on visa policy, carriers' liability, human trafficking, safe third countries, external processing, readmission agreements, and the internal flight alternative all point in one direction.

The challenge for those working in this area in the UK, as elsewhere, is to make sure that the rhetoric and practice of deterrence and restriction does not fatally undermine the right to seek asylum as well as the letter and spirit of international refugee law. By ensuring that national practice continues to be placed in its international legal context it just might be possible to begin to realize the promise of human rights. But this always depends on the

6 UNHRC Comm. No. 1069/2002.
7 Judgment of 11 January 2007.

capacity of individuals, communities and organisations to make active use of the existing protections. While it is vital to have standards and institutions they must have an impact and be used in practice by those who need rights most. Refugees and asylum seekers need the promise of human rights to be realized now.

II PRESENTATION
"Protection of Rights and Dignity of Asylum Seekers" (UK)

by Les Allamby, Director of NI Law Centre

Two twin pressures emerged on asylum seekers over the past ten years: reduced welfare support and diminished legal rights.

Legislation – 3 Steps

I. Immigration and Asylum Act 1999.
What did it do?

- It removed asylum seekers from mainstream welfare provision;
- It introduced the National Asylum Support Service (NASS). New support arrangements created a parallel system of inferior support paid principally in vouchers. Asylum seekers, supported by a system of vouchers, received a small amount of cash each week;
- It dispersed asylum-seekers to areas of the country where there was surplus housing but not necessarily services such as legal advice, interpreters, community support;
- It introduced tougher provision and less support for asylum seekers whose claims had failed.

II. Nationality, Immigration and Asylum Act 2002

- What did it do?
- It reduced eligibility for support;
- Section 55 allowed the Home Office to withdraw access to the National Asylum Support Service from asylum applicants who did not apply for asylum 'as soon as reasonably practicable', effectively denying support to most in-country applicants. Since its implementation on 8 January 2003, Section 55 led to significant change within the Asylum Support Programme. Many recommended that the Government repeal section 55. There was significant evidence to support the view that this policy was causing unnecessary distress to newly arrived asylum seekers. There was no evidence that section 55 was meeting its objective to reduce abuse of the asylum system.
- It created (section 94) a list of 'safe countries' from which claims would be dealt with in a different way. Applicants whose claims were rejected and returned home and can only appeal from outside the UK. The designated countries are Albania, Bulgaria, Jamaica, Macedonia, Moldova, Romania, Serbia and Montenegro, Brazil, Ecuador, Bolivia, South Africa, Ukraine and India. Bangladesh was removed from the list in April 2005 following a legal challenge. Sri Lanka was removed in December 2006. In October 2005 the Home Office announced it would be further expanding the list to include Mongolia, Ghana (male applicants only) and Nigeria (male applicants only). The list is referred to as the 'white list'.

III. The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

What did it do?

- It sets out the third phase of reforms to the asylum and immigration system begun with the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002. Passed in 2004, it set various rules for immigrants to the United Kingdom.
- Sections 11 and 12 of the Immigration and Asylum Act 1999, which permitted the removal of asylum claimants, to an EU member state under the Dublin Convention, or to a designated country which respects the Refugee Convention, were

repealed.

- Schedule 3 of the new Act - removal of asylum seeker to safe country - includes a first list of 26 safe countries (the other EU member states plus Norway and Iceland), and provision for a second list of countries selected by Secretary of State.

- It restricted the right of failed asylum seekers with dependant children to receive asylum support unless they left the UK.

- In 2006, section 19 of the Act was declared to be incompatible with the European Convention on Human Rights (introduced into UK law by the Human Rights Act 1998). Section 19 dealt with the problem of so-called "sham marriages", where immigrants marry British citizens merely to gain leave to stay.

Decision-making procedures and other issues

- greater use of white list countries (where assumption is that there is no basis for asylum);
- fast track procedures for those where initial assessment claim is unfounded;
- time limits for appeals have been significantly reduced;
- access to legal aid diminished (particularly in England and Wales);
- criminalisation of those arriving without valid travel documents

Growing Concerns

- Lack of material support, for example: destitution trap, research into destitution among refused asylum seekers in the UK (see Refugee Action, Nov. 2006), policies inhumane and ineffective - Studies in London (Amnesty International, 2006)

The findings contained in the Amnesty International and Refugee Action reports showed the suffering caused by an inhumane and ineffective government policy that cut off support for refused asylum seekers. The reports stated that the government is deliberately using destitution in an attempt to drive refused asylum seekers out of the country. But the research found that, far from encouraging asylum seekers to return to their countries of origin, destitution made return less likely. Amnesty International UK Director Kate Allen said: "Refused asylum seekers in our towns and cities are being reduced to penniless poverty - forced to sleep in parks, public toilets and phone-boxes, to go without vital medicines even after suffering torture, and to relying on the charity of friends or drop-in shelters to survive".

Refugee Action's Chief Executive Sandy Buchan said: "As a policy for dealing with refused asylum seekers, destitution simply is not working. Driving people onto the streets makes return even less likely. This policy is causing enormous suffering to vulnerable people and does nothing to enhance public confidence in the system".

Refugee Action and Amnesty International stressed the necessity for the government to make sure that refused asylum seekers remain on the same financial support and accommodation as during the asylum process until their situation is resolved. Other studies on the adverse treatment of asylum seekers and others with immigration issues include:

- Newcastle (Open Door 2006)

- Trafficked/separated children (Garden Court Chambers, formed in 1996, is a progressive set of barristers dedicated to providing a high-quality service to all clients, particularly those disadvantaged by discrimination and inequality. See 2006 Studies on Immigration and Nationality)

- Lack of healthcare (Refugee Council and Oxfam 2006)

Over recent years there has been a serious shift in government policy away from seeing asylum seekers as individuals with legal rights to be determined and support, housing, health and care needs, towards seeing all aspects of their lives and experiences purely through

the lens of immigration control.

The Government introduced restrictions (tighter charging regulations, introduced in April 2004) on free healthcare for asylum seekers whose claims are unsuccessful. This had a devastating impact on individuals and families.

Forthcoming work

- Joint Committee on Human Rights is conducting an inquiry into treatment of Asylum Seekers;

- Joseph Rowntree Charitable Trust Enquiry also into destitution among asylum seekers and refugee in Leeds;

Quality of decision-making
Get it right (Amnesty International Report, 2004) - Home Office decision-making fails refugees.

The report noted that asylum is one of the most contentious issues in the UK's political discourse. The Government response has been to introduce more legislation, the cumulative effect of which is to undermine protection. Since 1997, the government has introduced three pieces of asylum-related legislation into Parliament designed to deter asylum applicants and make access to the UK's territory, asylum procedures and welfare benefits difficult for those fleeing human rights violations. Amnesty International's report examines the quality of initial decision-making on asylum claims in the UK.

Asylum statistics produced by the Home Office show that in 2002, 22% of rejected asylum applicants won their appeals against the refusal of asylum. This means that in nearly 14,000 cases the initial decision on the asylum claim was wrong – a serious indictment where such a mistake could be a matter of life and death for the individual. Statistics from July to September 2003 revealed that the Home Office continued to get the initial decision wrong as one in five refusals were overturned on appeal.

The report examines the impact of the following factors on the quality of initial decisions: the asylum application process, the availability and comprehensiveness of, and weight attributed to, information about the country of origin, and the methods used to judge credibility, in particular in relation to cases where the applicant claims to have been tortured. The report then recommends a number of changes that should be implemented in order to improve the quality of initial decision making.

Report Findings:

- Failures in the decision-making process: certain aspects of the determination process contribute to poor decision-making. There is a tendency to use the Statement of Evidence Form and the initial interview as tools to identify discrepancies rather than as opportunities to elicit all information relevant to the claim. There is insufficient understanding of language difficulties and the impact of cultural norms.

- Country information: caseworkers rely on reports produced by the Home Office's Country Information and Policy Unit. These reports are sometimes out of date or incomplete.

- Credibility: caseworkers frequently make assertions about an individual's credibility that are unreasoned, subjective, and not supported by independent evidence.

- Torture: insufficient weight is given to the difficulties that applicants face when articulating experiences of torture.

Impact

The impact of legislative changes and the Home Office has gone beyond material deprivation and reduced access to justice by driving people underground, creating intemperate climate – pushing people into doing unlawful activities (survival strategy). This fuels prejudice and creates a negative self-fulfilling prophecy.

In protecting rights the Human Rights Act (1998) has played an important role in terms of asylum issues;

- Series of challenges to Section 55 of the

Nationality, Immigration and Asylum Act 20028 under Art. 3 of the ECHR; see, for example, the following cases:

- R (Q and others), 2003
- R (S D and T), 2003
- Limbuela (2005)

- The threshold to reach inhumane and degrading treatment is quite high, but application of section 55 met it in practice.

- Other challenges in particular around Art. 8, right to family life

- The Act has helped to challenge the restrictions on rights and support introduced by the Home Office.

Specific issues relating to the treatment of asylum seekers in Northern Ireland

It is difficult to establish the exact number of asylum seekers and refugees living in Northern Ireland. In 2004, the Refugee Action Group estimated that there were perhaps around 2,000 refugees. This number included those who had received refugee status, those who had claimed asylum in other parts of the UK and those who had claimed asylum in Northern Ireland. In its figures for the first quarter of 2006, the Home Office has stated that it was supporting 135 asylum seekers through National Asylum Support Service (NASS), with an estimated 10 others receiving subsistence only support from NASS.

1. Northern Ireland presents unique issues in relation to the treatment of asylum seekers, including:

The adverse impact of the lack of a Public Enquiry Office in Northern Ireland;

Unlike the rest of the UK, there is no Public Enquiry Office in Northern Ireland. The Law Centre understands that the existing NASS agent in Northern Ireland, the Northern Ireland Council for Ethnic Minorities (NICEM), will discontinue its work of providing services to asylum seekers from the end of March 2007 and there is some uncertainty as to how Home Office services will be delivered in Northern Ireland after this time. While there is increasing uncertainty on future provision of services to asylum seekers within Northern Ireland, the Home Office is nevertheless currently investing significant resources to establish a sizeable enforcement presence in Northern Ireland from 2007. The Law Centre believes that the provision of the full range of Home Office services to asylum seekers in Northern Ireland, including the establishment of a Public Enquiry Office, is vital to meet the needs and human rights of asylum seekers in Northern Ireland and to expedite the processing of asylum claims.

The impact of a land border with another EEA state (crossing the border and detention - Dublin Convention) and the legal status of Irish-born children of asylum seekers;

Northern Ireland has different issues in the treatment of asylum seekers compared to the rest of the UK. Geographically, it is the only part of the UK to share a land border with another EEA state. This can lead to individuals who are legally seeking asylum in the Republic of Ireland finding themselves, unwittingly or unintentionally, in Northern Ireland, resulting in their detention. Northern Ireland is also unique within the rest of the UK in that a child born in Northern Ireland may be eligible for dual citizenship (of both the Republic of Ireland and the UK). This entitlement means that a child born in Northern Ireland may, legally, be an EEA citizen, residing in another EEA country from the one where they are a citizen. The child may, therefore, be entitled to rights that the child of an asylum seeker born in Wales, England or Scotland would almost certainly not be able to access. However, the Home Office has at times appeared to be unaware of these rights and has removed children who are EEA citizens and may be legally entitled to remain in the UK.

See: Chen and Zhon case – daughter born in Belfast (Irish

8 Section 55 of the 2002 Act now provides that the Secretary of State 'may not provide or arrange for the provision of support' to a person making a claim for asylum where he 'is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom'. (a) what is meant by reasonably practicable and (b) what procedural safeguards does the section require?

citizen) moved to Wales, applied for a right to residence document as a self sufficient person (freedom of movement rights under EC Law). ECJ held entitled to reside in UK. UK amended immigration rules which has led to further legal challenges through the law centre – restriction on entitlement to Irish citizenship by birth in Ireland from 1 January 2005 – there are also challenges to the new legislation

The policy of removal of asylum seekers out of the juridical area to Scotland or England

Due to the absence of a holding centre in Northern Ireland, asylum seekers were, until recently, detained in prisons such as Magilligan, Maghaberry, Crumlin Road working out centre, Hydebank. The Law Centre (NI) and other organizations campaigned vigorously against the practice of detention in prison and strongly welcomed the decision to abandon this practice in January 2006.

However, the Law Centre is deeply concerned that this practice has been replaced by the process of removal of asylum seekers to Scotland or England, following initial detention in Police Service of Northern Ireland accommodation. This not only separates individuals from their legal representatives and places them in a new juridical area but also separates them from any friends, family and community they may have begun to establish in Northern Ireland. This removal raises issues, such as the difficulties for the relatives to visit the prisons, isolation, family support, access to legal advice, manner of removal, etc.

Research has been undertaken by the Human Rights Commission (which has visited the prison in Scotland) and later this year by the Refugee Action Group to look at the impact of the new arrangements and to monitor the impact of opening a new immigration enforcement office in Belfast.

There are also concerns around inadequate or delayed provision of health care, lack of appropriate mental health services, treatment of children of asylum seekers and unaccompanied minors both within community settings and when detained.

Conclusions

The focus of asylum and immigration detention is rarely placed in Northern Ireland. In practice, the general reduction of rights, withdrawal of welfare and financial support and demonizing of immigration issues has had an adverse impact on individuals and caused serious hardship. In addition, there are specific Northern Ireland and cross border issues to be addressed. Although not a transferred issue it will be important to ensure that if a Northern Ireland Assembly is restored, then the issue of asylum and immigration is given a raised local profile.

Bill of Rights issues

Will the Bill of Rights deal solely with two communities? Composition of society changed significantly since 1998.
What are the particular circumstances of NI re asylum and immigration?
What international instruments should we draw on in a Bill of Rights?

Workshop 4:

"Education for all: English as additional language and religious education"

Chair
John Curran,
Staff Commission for Education & Library Board

Speakers:
Anne Brown,
Solicitor Post-Graduate TESOL Student

Dr. Mamoun Mobayed,
NI Interfaith Forum

Rapporteur:
John Keers, Transitional Justice Institute,

John Curran introduces himself as the groups Chair with a brief outline of his career and qualifications to date. He highlighted how fear can arise when we are unsure about something or simply do not know. This has been true when issues around gender and sexual orientation have arisen we cannot expect to have good judgement about such matters unless we are informed about them. So just as in the example highlighted we must be educated and informed about matters that may lead to direct or indirect discrimination here in Northern Ireland and in particular within the education system.

ENGLISH AS AN ADDITIONAL LANGUAGE AND A BILL OF RIGHTS FOR NORTHERN IRELAND

Anne Brown was introduced to group by the Chair.

Anne presented a very detailed presentation on "English for All: English as an Additional Language".

She highlighted and explained the following areas for consideration:

- The need to have in Northern Ireland (NI) a more specific provision for English as an Additional Language (EAL) than that found in either the European Convention on Human Rights and Fundamental Freedoms or the statute provision of the Human Rights Act 1998.

- So far (up to 2004) EAL in NI has developed more as practical responses to the needs of minority ethnic pupils. Due to changing demographics within NI there was now increased numbers of EAL pupils requiring assistance. That each Education Library Board (ELB) has a different policy in regard of EAL pupils. There is a need for a form of central support for non-EAL teachers.

- A brief review of The Race Relations (NI) Order 1997 (RRO) which included the acknowledgement that this provides rights to minority ethnic communities and that racial discrimination in

education is unlawful.

- Art 20 RRO and Art 18 RRO discussed.
- EAL and Sec.75 Northern Ireland Act 1998; Due regard for the need to promote equality of opportunity between persons of different racial groups.
- This only applies Dept. of Education and ELBs but not to school governors.
- RRO applies to governing bodies of schools and ELBs as well as the Department of Education and ELBs.

Anne further highlighted a guide to good practice as follows:

- Discussion of the Equality Good Practice Guide to Racial Equality 2000; The Report of Conference on Racial Equality in Education 2001; Education and Training inspectorate Report on EAL 2006.
- What the provision of EAL entailed including mother tongue maintenance.
- An update on EAL from 2004 to 2007; this included details on the Common Funding Scheme, the chaotic effect that the change in funding brought about in particular for EAL and the move to support and train teachers with EAL pupils.

We then moved to discuss more current issues in the following terms:

- The imminent consultation for a formal EAL policy.
- As of the 1st of April 2007 a new Ethnic Minority Achievement Service will be in place.
- Training is required for teachers and Boards or Governors.

Next we looked at the rights of pupils:

- A review of general rights as set out above under local legislation and international treaties.
- Art 26 (1) & (2) UNDHR 1948
- Art 14 Charter of Fundamental Rights of the European Union 2000.
- ECHR Art2, Schedule 3 Part ii (reservation)

We then looked at recent case law from the House of Lords

- *Ali (FC) v. Headteacher and Governors of Lord Grey School* (HL) (2006)
- *R v. Headteachers and Governors of Denbigh High School* (HL) (2006)

European Court of Human Rights case law:

- Belgian Linguistic case (No.2) (1968)

International Instruments:

- United Nations Convention on the Rights of the Child 1989
- European Charter for Regional or Minority Languages 1992
- European Framework for the Protection of National Minorities 1995
- Art 12
- Art 14
- The proposed Bill of Rights for NI 2004 Sec 3

European Union Council Directive on the Education of Children of Migrant Workers 1977 was finally discussed.

Four questions were posed for the working group:

1. How do we safeguard minority ethnic children's right of access to the education system?

2. How do we ensure they have real equality of opportunity unhindered by language issues?

3. How do we provide for maintenance of the mother tongue/bilingualism of EAL pupils?

4. What limitation of education rights is acceptable?

The Group discussed:

- That there needs to be procedures in place to involve children from Poland (as only one example) to integrate into the educational system.

- Children Aged 4 or 5 need to be given special attention to start them off on the right track.

- What form these courses should take, whether they should be intensive courses or longer term.

- All efforts should be made to avoid litigation between parents and their respective children's educational providers as they have a real need to work together for the child's future.

The group recommended the following:

That all efforts should be made to see a specific right enshrined within the NI Bill of Rights for EAL pupils to receive all assistance from the Department of Education down to local providers within our education system. This should be a minimum requirement.

Coffee break

RELIGIOUS EDUCATION AND A BILL OF RIGHTS FOR NORTHERN IRELAND

The Chair next introduced the group's second speaker Dr. Mobayed.

Dr. Mobayed presented a real life and personal experience of his own family.

He highlighted for the group that his family had enjoyed largely their experience of being taught in the NI educational system. However he felt that when it came to religious education (RE) that certain frustrations were being felt in particular by religious/faith minorities.

The school in which Dr. Mobayed's children were educated was exclusively Christian and as such the RE classes reflected this.

He informed the group that in 1993 there had been a campaign for the syllabus to become more inclusive of all the cultural and religious backgrounds of pupils.

However the only religious denominations to be consulted were the 4 main churches here in NI. Again in 2003 the consultation in respects of the review of the syllabus was only carried out with the 4 main churches. The question was then raised why were no other denominations consulted in this review?

Dr. Mobayed highlighted that the practice in NI to consult only with the 4 main churches as to the way forward did not sit well with the rest of Europe's best practice. He highlighted examples of where the state did not leave this in the hands of churches which may not be best placed to decide what religious/faith minorities required by way of RE.

The English system was then highlighted as being exemplary in the way all cultural and religious groupings had been consulted on matters such as the educational syllabus.

It was next explained to the group that the Islamic community felt that proper education needed to be given in respects to not only its religious outlook but also its cultural heritage. One reason for this was to show the difference between the perpetrators of the likes of 'the 911' atrocity and general Muslim culture which did not support such actions.

It was further argued that it is not enough for schools to acknowledge that not all in attendance are from a Christian background but rather they need to take positive steps to include religious/faith minorities.

The point was made that while religious/faith minorities were free to carry out their respective religious practices at home that there was also a need to be able display these away from the home environment.

The Group discussed the following:

5. The need for not segregated, but rather fully inclusive schools where tolerance of others religious views were encouraged.

6. That while RE could be refused by parents on behalf of their children rarely were parents made aware of this (one example was citied).

7. Should Religious Education/Instruction be banned from schools altogether as it is for example in France.

8. That the Dept. of Education needed to move beyond just the 4 main churches when carrying out consultation on RE syllabus matters.

9. Why had there been an absence at this conference and every other conference by the 'leaders' of education namely the Department of Education?

The Groups recommendations:

That information should be made available to parents that it is their legal right to withdraw their children from religious instruction.

That the Department of Education must become more proactive in consulting with all religious denominations rather than with only the 4 'main' churches in NI as it has done in the past.

The Department of Education needs to ensure that the entire education syllabus is reflective of today's diverse society. The syllabus as it is currently is neither inclusive nor representative of the religious communities in NI and that all minorities, in particular religious/faith, must be accommodated by the NI educational syllabus.

Workshop 5:

"Language and Cultural Rights"

Chair:
Tansy Hutchinson, NICEM

Speakers:
Snjezana Bokulic
Europe and Central Asia
Programme Coordinator
Minority Rights Group International

Young leaders from ethnic minority community

Rapportuer:
Sharon McCaffrey

NOTED: The UK government operations a dualist system whereby international law is binding on a state, not binding in a state; this necessitates a Bill of Rights to bring in international standards for use in the domestic courts.

Discussion

Why are language and cultural rights important?

- To create identity and sense of place;
- as a link to the past and a sense of history;
- to create a steeping stone to create confidence within a community;
- as a means of self-expression;
- to exert dominance within one's own country over a particular area;
- to ensure effective presentation;
- as a means of communication; and
- as a contributor to one's mental, social and economic well being.

The definition of minority rights used in the discussion consisted of four pillars:

1. Protection of existence;
2. protection and promotion of identity;
3. non-discrimination; and
4. participation.

These four pillars are derived from the Council of Europe's (COE) Framework Convention for the Protection of National Minorities (FCNM) and other treaties designed to protect minority rights, each generally containing four main areas of rights. All are equally important but prioritisation depended upon the society affected, for example whether it is post-conflict. The Group considered under which heading(s) language and cultural rights would fall.

- AGREED that the right to use language fell under Pillars 2, 3 and 4 (protection and promotion of identity; non-discrimination; and participation respectively) as follows:

identity – mother tongue as a public identifier of who we are, how we are educated etc;

- *non-discrimination* – where one does not speak a language/is not fluent and those who do speak the language
- *participation* – the ability to communicate which is vital for assertion of political, social and economic rights and interaction.

AGREED that cultural rights fell under Pillars 2 and 3 (protection and promotion of identity and non-discrimination) and could possible stretch to Pillar 4 (participation).

Brief consideration was given to the UN's International Convention on Economic, Social and Cultural Rights (ICESCR). The ICESCR covers education, language and cultural rights. Its Expert Committee's last opinion in 2002 on the UK's engagement made considerable reference to Northern Ireland (NI) and Irish culture and other minorities.

Brief context was given on the international system of protection of human rights post-World War II, eg UN covenants, conventions and treaties.

NOTED: - that such international documents constitute international law with the commitment of states who have signed and ratified the covenants/conventions. Without ratification, a state has no obligation to abide by its provisions.

The monitoring procedures of international instruments ensure implementation of a treaty in each country whereby Member States draft a State Report on their engagement with each article of the Convention, eg ICESCR, FCNM and usually submitted every four years. This report is then scrutinised by a specialised expert body and compared with the state's actual engagement; this body will rely upon non-state providers of information, eg non-governmental organisations (NGOs) to provide a shadow/alternative report to ensure a balanced view, rather than an official line, before the expert body issues its opinion as international law. Much political interaction and game playing ensures state implementation of the Expert Committee Report; however, not all recommendations are implemented.

The short, nine-part UN Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, inspired by ICCPR Article 27, is soft law, without the legal strength of an international treaty, yet it is accepted that it should be applicable to all states. It was adopted in December 1992 following the downfall of the former Yugoslavia, after 30-40 years of debate. Articles 2[1] and 4 refer to *"…persons…ethnic and linguistic…religion and language…private and public…"*. It is a weaker document without a monitoring body; however, it previously had a UN Working Group on Minorities (UNWGM) which met for one week per year to review implementation of the Declaration, providing a forum for NGO/ethnic minorities. However, its apparent vagueness and long, slow process have been criticised.

The UN human rights system is presently under review and the Human Rights Commission was replaced by the Human Rights Council. UNWGM last met in August 2006 and it remains to be confirmed whether it will be reconvened this year as 2000 Special Expert mandates expire in June 2007, eg Ms. Gay McDougall's (USA) tenure as Independent Expert on Minority Issues. Many states would prefer non-renewal of the mandates as minority rights are unpopular in Europe as they demand self-examination by each state. Poorer nations suffer a socio-economic bar to involvement. The UNWGM Report is considered by the Sub-Commission.

The COE's Framework Convention for the Protection of National Minorities, adopted in 1995 and in effect since 1998 was initially hailed as valuable development. However, practitioners express concern as it is vague and does not define who minorities are; equally, this may prove beneficial/positive, for example when France stated

1 *"Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination".*

it did not have ethnic minorities, which was proven to be untrue when the first report was submitted, whilst the second report remains outstanding. The Advisory Committee reviewed the first report in 2001 and will also review the State report.

NOTED: - that the UN is divided into five geographical regions: Europe, North America and Central Asia region, Arab region, African region, Asia-Pacific region and Latin American and the Caribbean region;

- Article 9 of the UN Declaration states that the UN should work to promote minority rights; and

- that the Minority Rights Group International (MRG) deliver considerable minority rights training.

Concern was expressed over several areas of the UN Development Programme which provides only weak support for minority rights, lacks true accountability, participation is a crucial issue, it is structurally flawed, lacks application of rights-based approach and is predominantly white, middle-class and male heterocentric.

AGREED that NI requires a domestic Bill of Rights due to limitations in the UN treaties.

Under the FCNM, the Advisory Committee visits Member States when examining reports which is unusual in the International system. In 2001, NICEM hosted the Advisory Committee's visit to NI, yet the 26-page report was dominated by Irish and Ulster-Scots linguistic issues, rather than other issues, as a result of timing. The next round of reporting in 2007, should redress the balance. International standards and mechanisms can be utilised but a domestic Bill of Rights would provide the greatest access and remedy for violation of minority rights.

The CoE's European Charter on Regional and Minority Languages[2], whilst weaker than the FCNM, offers Member States an a la carte menu from which to select a certain number of protections, thus attracting criticism due to who decides which language to include.

The Organisation for Security and Co-operation[3] (OSCE), based in Vienna, was created to foster communications between East and West in post-Cold War Europe. It is a regional instrument and mechanism to securing stability, based on democratic practices and good governance. The OSCE has an High Commissioner on Minority Rights (HCNM), Rolf Ekheus, who acts as a conflict prevention tool at an early stage; however, it cannot engage in areas where terrorism is an issue, eg Spain, NI. HCNM's recommendations on language and education brought together one dozen experts, who worked through a number of situations concerning language and education, eg:

Language
guaranteed use in private, public and with government authorities involved in administration, judiciary, prisons and public services where the desire is expressed and numbers are high enough to warrant the use of the language. However, who decides?

International instruments do not set a percentage threshold before a language is considered a minority language, thus permitting a wide margin of appreciation of what is sufficient, substantial, reasonable and traditional. It is widely accepted that a minority must generally be politically and economically non-dominant. However, this requires a costly and complex mechanism to decide.

Education
how should education in the mother-tongue be used? One should consider the HCNM's recommendations not to exclude ethnic minorities from the majority

2 *Created in 1992.*

3 *Established in as the Conference on Security and Cooperation in Europe (CSCE). "With 56 States drawn from Europe, Central Asia and America, the OSCE is the world's largest regional security organization, bringing comprehensive and co-operative security to a region that stretches from Vancouver to Vladivostok. It offers a forum for political negotiations and decision-making in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation, and puts the political will of the participating States into practice through its unique network of field missions". http://www.osce.org/about/*

language and stated the necessity of bilingual ability for secondary education. Simply, concrete recommendations were that nursery education should be delivered in the mother-tongue, primary education predominantly in the mother-tongue with the majority language and secondary education should be delivered in mainly the majority language.

Personal names
Minorities should be allowed to use and spell traditional, ethnic names, eg all Bulgarians were forced to have and spell Bulgarian names in the 1980s.

Adequate curriculum development and teacher training
In mother-tongue - should have a sufficient number of teachers and sufficient funds to deliver an identical curriculum, only in the mother-tongue. The Group raised the issue of GCSE RE and Language classes in NI.

Key Issues

Consensus was reached upon the necessity of inclusion of language rights, cultural rights and minority rights in NI's Bill of Rights:

- Under International law, those in non-dominant positions must express their needs. It was queried whether states are/should be obligated to assess need to remove the burden of the obligation to prove their need;

- There must be provision of interpreters to ensure equal access to services, justice etc;

- Link between culture and language – eg the right to learn one's mother-tongue: how far should it be brought into the Bill of Rights in recognition of identity in language and culture?

- Examples of good practice in education include allowing children to take their mother-tongue as a GCSE – but should it be looked at by the Bill of Rights?
    - would be good for all Education and Library Boards (ELBs) to have guidelines/ requirement of provision for principals
    - discussions around numbers in schools v. resources
    - mainstreaming/co-operation would give value.
    - Language provision in schools for mother-tongue teaching
    - FE colleges currently have the option to decide whether to offer such provision.
    - Key to decision-making is the articulation of need and the requirements of numbers.
    - How does mainstream education adapt to accommodation of language required?
    - Sign language is not explicitly included in the legal instruments discussed. Is it contained within the UN Convention on the Rights of Persons with Disabilities Consider Articles 21[4] and 24[5] etc.
    - Braille provision as a language rights issue?
    - How best should appropriate protection of minority languages, sign language and Braille be provided in the Bill of Rights to meet the needs of NI's population?

Consensus was obtained on the need for:

- Protection in the Bill of Rights;

- Specific protection of language rights in identity and culture in addition to the right to an interpreter;

- Education and right to learn one's mother-tongue whilst balanced against the need for community integration and retaining one's identity. Is there a

4 Countries are to promote access to information by providing information intended for the general public in accessible formats and technologies, by facilitating the use of Braille, sign language and other forms of communication and by encouraging the media and Internet providers to make on-line information available in accessible formats (Article 21).

5 States are to ensure equal access to primary and secondary education, vocational training, adult education and lifelong learning. Education is to employ the appropriate materials, techniques and forms of communication. Pupils with support needs are to receive support measures, and pupils who are blind, deaf and deaf-blind are to receive their education in the most appropriate modes of communication from teachers who are fluent in sign language and Braille. Education of persons with disabilities must foster their participation in society, their sense of dignity and self worth and the development of their personality, abilities and creativity (Article 24).

duty upon the state to identify need? No positive statistics exist to show whose obligation it is to check the level of need is accurately reflected;

Need for inter-cultural education, eg Polish children in NI – do they learn about Poland or it's development value to NI? Is ones point of reference affected by the stage of development? and
Issue of inter-state co-operation.

NOTED: Discussion of how to ensure protection of minority rights in language and culture should continue at the Roundtable Forum in December 2007.

AGREED:

- that questions raised should be debated by the Forum;
- need for wide inclusion within the debate; and
- a need exists to restart and advance the debate on minority protection in any Bill of Rights argument.

Ms Hutchinson thanked both the Group and the Speaker.

Annex

NICEM Conference Migration

Wilf Sullivan

Introduction

- Contradiction needed for economy but unwelcome in terms of domestic politics (Seen and not heard)
- Political Discourse & Public Debates consistent over last 30 years

UK Migration Reform - Three areas

- Managed Migration on Economic Objectives
- Low Skilled Labour demands met by EEA Nationals – Introduction of Guest Workers Concept
- Reintroduction of Fortress Europe
- Need for a system of enforceable employment rights

Challenges facing the TUC

To build support for migrant workers - among them some of the most vulnerable in Britain - both in our workplaces and in our communities.

- In a global economy, we support freedom of movement for workers.

We believe the only way to prevent terms and conditions from being undercut, and to prevent exploitation of migrant labour is through stronger rights, better enforcement of the law, and trade union organisation.

simple principle - but one that should inform our work at every step of the way.

Experience in the Labour Market

While some have a positive experience the day-to-day reality many face is exploitation, dangerous working conditions, and employment far below their skill level.

Like the two Filipino women being paid £75 for an 80-hour week at Norfolk care home.
The Portuguese man and his pregnant wife working on a farm in Lancashire, sharing a house with 17 others, and left with just £6 a week to live on after deductions.
The Polish and Lithuanian flower pickers in Cornwall, packed eight to a caravan and
charged £50 a week for the privilege, some working for 70 hours a week.
When police raided the site, they found some of the workers were left with just 21
pence a week after expenses.

Practical terms

What do we need to do to build support for migrant workers? Three areas.

Firstly

Building union support.

Need for consistent response across the movement Norm not the exception – take it to a new level where it is embedded in mainstream union activity –

Examples of good practise

- Across the UK, many unions are doing really innovative work to reach out to Migrant workers.
- Unison's Overseas Nurses Network in Scotland.
- -GMB's "Reaching out to new communities" project in the Eastern Counties.
- USDAW's scheme in the Midlands to provide ESOL courses to distribution workers.
- UCATT's ground breaking work with Polish building workers in the North East.
- -T&G's work with migrant workers right across England, the fruit pickers in Hereford, the meat

packers in Exeter, and the baggage handlers in Luton.

Second - building public support.

Need to Counter myths in the media and exploitation of the issue by the far right

- migrant workers make a net contribution to our economy of £2.5 billion.
- migrant workers have increased our economic growth rate by as much as one
- per cent.
- migrant workers have not caused unemployment to rise in the areas where
- they are concentrated.
- migrant workers are vital not just to our economic competitiveness, but to the
- delivery of our public services.
- One in three doctors, one in six dentists and one in 10 nurses were trained
- overseas.
- A quarter of academics are non-British.
- Almost 3,000 workers in care homes have come from the new EU member states.

Building policy support.
Welcome measures such as the Gangmasters' Licensing Act and past decisions to allow workers from the accession states to work in the UK with minimal transitional arrangements

However, the TUC was disappointed by the recent decision to impose restrictions
on the rights of Bulgarians and Romanians to come to the UK when their countries
join the EU.

- much more – remains to be done on the legal front.
- Better protections for temporary workers and posted workers.
- Action against bogus self-employment.
- Employment rights from day one, for all workers.
- Enforceable rights irrespective of residential status
- And much more rigorous enforcement regime, so that bad bosses

Ratification of the UN Convention on Migrant Workers and their Families
Progress on the Agency workers directive and registration and regulation of employment agencies

Put simply, open access to our labour market must be accompanied by a stronger framework of rights.

Finally

- The TUC is concerned at the Government's recent decision to limit access to ESOL Courses. We are worried that limiting access simply to those on benefits and tax credits will cause real problems for vulnerable workers. Applying for benefits requires an understanding of English, but this is exactly what many people living and working in the UK do not yet have. A fairer way would be to give free language training to anyone who can show they are on a low wage or un-waged rather than making someone prove they are in receipt of benefits.

- If free language courses are to end, then the Government must do more to make employers meet the cost of training their employees. Sensible employers already realise the business benefits of having an English-speaking workforce.

- Need to take a lead in the issue as future of the TU movement depends on being able to organise new workers coming into the labour market.

Workshop 1: "Protection of Rights and Dignity of Migrant Workers"

Mr. Peter Bunting
Asst. General Secretary
Irish Congress of Trade Union

Today, we have been hearing about the laws and regulations that exist or ought to exist to protect the rights of minorities and migrant workers. We have heard about how things are done across the regions and nations of the European Union and those parts of the world that observe ILO standards.

You will also have heard about the situation in Northern Ireland, the so-called 'race hate capital of Europe', and you will hear some more about this region before I am finished with this presentation.

Las month, the Irish Congress of Trade Unions launched a new report based on qualitative research into the experience of Migrant workers in Northern Ireland. The research was carried out by Dr Robbie McVeigh, and there are copies available here for anyone who wants one. It is an instructive and surprising read.

We found, for example, patterns of misinformation from employment agencies, such as this story:

> The recruitment agency tried to charge me for x-rays. They said if you are working in the factory you have to have the x-rays. I said I won't pay because I can go and get those done for nothing. They sent me a letter threatening all the things they would do – I would lose my job. My friends went and paid because they didn't want to lose their jobs.

Or this:

> In [named agency] we had to pay £15 every year for P60 and they had to pay £15 for doing pay slips. They said they had to send them to some office to do the payslips.

Or this:

> They provided accommodation. They took money out of my pay for accommodation but our house was unfurnished. When I asked, can we not even have a washing machine? They said, 'we gave you a house – now it's your problem'.

The report concludes with a series of recommendations for the Trade Union Movement, including:

- Recognition of our moral duty and our unique capacity to organize migrant workers
- establishment of a *Unit for Migrant Workers Rights* and a properly resourced *welfare/employment rights team*
- a campaign for an ECNI formal investigation into the activities of recruitment agencies recruiting Migrant Workers to Northern Ireland.
- should be *specific courses for migrant worker members* interested in becoming active in their unions
- and that ICTU should take a lead in policy development grounded in a rights based approach

Across the border, the ICTU was in the forefront of ensuring that the rights of migrant workers would be recognized and protected in the recently sighned social partnership agreement, Towards 2016. In it, there are specific sections regulating the activities of employment agencies and licensing them. Also, there are measures to protect those many migrants employed in other people's homes, a frequent place of exploitation.

There is to be a new system of employment permits which will ensure that proper wages are paid, that families may remain united and that a migrant worker can leave for another job in cases of unfair treatment.

In the UK, three decades of the Race Relations Act and many steps since then have transformed the way in which people relate to one another across cultural and ethnic markings. The main difference is that more and more

people do not see those markers – skin, faith, accent, dress, - as divisions.

In fact, more and more are so intrigued or are just comfortable with difference to see it as a bridge. Last week the Daily Mail published a picture of 192 Londoners, each from one of all of the member states of the United Nations. It celebrated the fact of global citizenship. Then it went back to scaring the wits out of its readers with the latest scaremongering pseudo-economics by right-wing fruitbats like Sir Andrew Green, Grand Imperial Wizard of Migrationwatch UK.

The latest spew from this boogey man was a bizarre measurement that migrants only benefited the UK by a few pounds each. Well, so what?

Is a few pence to the exchequer the total sum of how we measure a human contribution? Even if we play mathematical games such as point out that most migrant workers actually work and pay taxes, and that a handful claim child benefit, we are playing on a queered pitch with an outdated rulebook.

Every child born here of Polish or Nigerian parents is as much a gift as any so-called 'native' baby. We do not examine the motives of parenthood of our family or friends, and there is something obscene about assuming that anything but love is the driving factor for any new life.

We need to look again at regulation with the mirror of our selves and our behavior, our decency and our good manners.

> A century ago, Jim Larkin observed of his adapted Ireland that "Intolerance has been the curse of our country." He urged the trade union movement of his day that "It is for us to preach the gospel of tolerance and comradeship for all women and men."

At the start of his campaign for civil rights in the US half a century ago, Dr Martin Luther King told a reporter that he wanted "to be the white man's brother, not his brother-in-law."

Dr King was an inspiration to many around the world, not least here in Northern Ireland, but sometimes we miss the subtlety of his thoughts amidst the brilliance of his actions.

What did he mean by 'brother-in-law'?

A relationship of kin without choice? It is true, after all, that if you cannot choose your own family, then you can't do much about the siblings of your spouse. I don't think that is what he meant.

I think that he was talking about what was then called 'the backlash'. That sullen feeling you get when people feel that a change is being imposed upon them. I think that what Dr King was saying was this: By all means change the law to outlaw racist acts and expressions of discrimination, but a deeper change is needed. Relations need to be deepened, not enforced. Make that move from being a colleague to being a mate. Make friends, not laws. Be a brother, sisters, not an in-law.

Last year, the NI Life & Times survey asked about attitudes towards ethnic minorities. The findings made disturbing reading, especially when compared with a similar survey held in 1994. Almost 70% agreed that there was more prejudice around than five years ago, and 25% admitted to being "very prejudiced" or a "little prejudiced". The survey found no difference in levels of prejudice along the lines of education, gender or occupation.

It did find a difference along sectarian lines and it also found that people who had regular contact with ethnic minorities were substantially less likely to express prejudice. Those with the least contact were more prejudiced.

As for workplace relations, the latter finding is especially significant, and is backed by a series of questions asked by the Life & Times surveyors about that hierarchy of relationships, that which moves from seeing an alien

group to knowing the individual. We all like tourists, we like our colleagues, we get on with our neighbours, but when do we become comrades?

We, as trade unionists believe in the brotherhood of man and the sisterhood of solidarity. As Eugene Pottier wrote, a century and a half ago:

> "We are the party of all labour.
>
> The whole earth shall be ours to share
>
> And every race and craft our neighbour
>
> No idle class shall linger there."

This is not an optional add-on. This is at the core of our being as trade unionists. We preach internationalism. We advocate global solidarity. Very well. Let us practice these virtues at home.

Let us reject the myth of displacement. People are being paid lousy wages by irresponsible and malignant employers not because they need less to live upon, but because those employers that carry that sweatshop mentality think that they can get away with it.

No-one craves exploitation, save the exploiter.

The one thing that they like more is a divided workforce. If there is one thing that a century of grappling with the opium of sectarianism has taught us, it is that when prejudice creeps onto the shopfloor, we always lose it. There is a Belfast term for a mild dose of madness – "Your man's distracted."

We cannot afford the irrelevant distraction of loathing our neighbour. Racism isn't only wrong, it is counterproductive even for the racist. Trotsky once referred to anti-Semitism as the "socialism of fools" – the idiotic belief that all Jews were rich, therefore an attack on poor Jews was a blow for poor workers.

It would be laughable if it wasn't so tragic that paramilitary goons, embroiled in drug-dealing, protection rackets and other shakedowns, justify their attack on the homes of migrant workers as tackling "anti-social behavior."

There is a third pillar to trade union thinking on this issue, and it is the most self-interested one. We have internationalism as one pillar, and solidarity as another. But the strongest pillar, the one that cannot ever shake or start to crumble is anti-fascism.

That anti-fascism, as far as I can see, is the primary duty and capacity of the trade union movement. All else follows from that.

The relationship between migrant workers and the trade union movement cuts across all aspects of our work from education to advice and campaigning. Migration is a fact, and it is a permanent fact. This is not a temporary phenomenon.

We have free movement of labour as well as capital. Despite concerns about climate change and what passes for ethics in Ryanair, cheap travel means that working for a few months or a few years on the other side of the continent of Europe is in real terms cheaper and easier than the cattle-boat to Liverpool or Stranraer for an earlier generation of economic migrants.

We in the Trade Union Movement can prepare ourselves for the electric charge of change and expect to be changed ourselves. This is a challenge that can only make us stronger.
This then, is the colour and accent of the trade union movement in the 21st century, to play our part in building a society that reflects diversity without the pitfalls of division, that our little region can adapt and thrive in a changed global environment. We can aspire to, and meet, the ideals that drove the most diverse society on earth, in the famous first draft of a beautiful document of the Enlightenment much admired in Belfast at the time: "All men are created equal and independent, that from that equal creation they derive rights inherent and inalienable, among which are life, liberty and the pursuit of happiness."

Debating the constitution, Thomas Jefferson, author of

the just quoted poetry, agreed that "there is a natural aristocracy among men. The grounds of this are virtue and talents."

Or, as Martin Luther King said, almost two centuries later:
"I have a dream that my four little children will one day live in a nation where they will not be judged by the colour of their skin but by the content of their character."

Let us aspire to that, and with hand and brain, virtue and talents, and the character of our comrades and friends, let us build together.

International Labour Office

International Migration, Globalization and the Bill of Rights: Ensuring Protection under the Rule of Law

A presentation for the 9th ANNUAL HUMAN RIGHTS AND EQUALITY CONFERENCE

"Minority Rights and Protection: international standards and the Bill of Rights for Northern Ireland"

Organized by the Northern Ireland Council for Ethnic Minorities

Belfast, 12 January 2007

It is an honour to be invited to share my experience regarding the protection of migrants. I draw on my 30 years of professional experience in the field of migration, as well as the vast institutional knowledge of the ILO where I have worked over the last six years.

I focus on three main points:

1. Migration and immigration are now integral features of European economic and social dynamics, and will be more so in the future.
2. As with other complex social phenomena, migration requires regulation by government to ensure benefits for stakeholders, avoid abuse of individuals, and ensure social cohesion.
3. Existing legal norms need to be implemented to ensure protection of migrants; in the current climate, considerable advocacy is required to bring this about, including in this country.

Migration key to Europe's future

In general, it is understood that labour mobility –its freedom to move—is required to ensure that labour is available where needed and to ensure its most productive use.

In globalized capital markets and liberalized trade regimes, migration plays an important role in redistribution of both costs and earnings; migration remittances provide some compensation –albeit small-- for widening inequalities between countries and regions.

Migration in Europe and elsewhere has become a key feature in meeting economic, labour market and productivity challenges in a globalized economy. What I say about Europe certainly applies to the UK and Northern Ireland.

To give some idea how important migration may be, let me cite a projection. The International Labour Office conducted a simulation a couple of years ago with the methodology its actuarial section has used over the last ten years to predict –reasonably accurately-- future performance of social security systems. This simulation carried forward economic performance calculations to the year 2050 based on a presumed continuity of current trends. The trends considered were the basic indicators of population growth or decline, retirement age, female workforce participation rates, immigration numbers, and evolution of economic growth and productivity rates. Carried forward to 2050, the simulation estimated that the continuation of current trends would result in a standard of living for Western Europe, as measured by per capita income of gross national product, of some 78% of what it is today. That is to say, 22% lower.[1]

Immigration is clearly one of the components –one among a number of measures—that need to be adjusted to ensure a reasonably stable future assuring general welfare for Europe and its peoples.

1 ILO. Towards a Fair Deal for Migrant Workers in the Global Economy. International Labour Conference 92nd Session June 2004. Report VI. P. 37-38. Available on line at: http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf

Migration today serves as an instrument to adjust the skills, age and sectoral composition of national labour markets, and of regional labour markets. Migration provides responses to fast-changing needs for skills and personnel resulting from technological advances, changes in market conditions and industrial transformations. In countries of aging populations, migration offers a potential role in replenishing declining work forces, as well as in injecting younger workers, potentially increasing dynamism, innovation and mobility in work forces.

By contrast, restrictions on labour mobility serve to enhance inefficiencies and widen inequalities. When combined with measures or lack of measures that effectively inhibit protection of migrant workers rights, the consequence is rampant exploitation and abuse of individuals, and sooner or later, breakdowns in social cohesion.

The exploitability of migrant labour, particularly when it is legally unprotected, renders it an attractive instrument for maintaining competitiveness. This is, however, at the expense of formal protection of workplace safety, health, minimum wage and other standards. While no official estimates exist, it can be asserted that migrants would figure prominently among the 6,500 workers who die every day from work-related accidents or diseases (ILO, 2005a/ 1). The high proportion of migrants in dangerous sectors such as construction and agriculture, often in irregular and unprotected situation, would support that claim.

As the International Confederation of Free Trade Unions (ICFTU) highlights, organizing migrants and immigrants into unions or organizations to defend their interests and rights is often extremely difficult (Linard, 1998). When it is not considered illegal under national laws, organizing - especially of those without legal authorization for employment – is difficult because migrants are easily intimidated into joining unions, or the organizing work is disrupted by the threat or actual practice of deportation.

In some countries, migration appears to be simultaneously encouraged and combated. The gap between policy pronouncements and de facto arrangements reflects a major contemporary contradiction in States' practice. Despite all the political rhetoric about unauthorized migration, some governments seem to informally tolerate the presence of irregular migrants, particularly those working in sectors where native labour is absent or unwilling to work. Simultaneously, controls against unauthorized entry and detection against "illegal" migrants are officially reinforced. The effects are, on the one hand, a continued supply of cheap labour, while on the other hand, a significant number of workers unable to organize in the workplace to defend their dignity and decent work conditions, and also stigmatised and isolated from allies and support.

Regulatory Foundation

The long experience of the ILO in this and other fields has clearly demonstrated that a basic foundation of regulation is required to manage capital-labour relations in general and specific features such as labour migration. Governance of phenomena that affect economic performance, industrial relations and social cohesion require a foundation in the rule of law to ensure credibility, accountability and enforceability.

The current experience with migration in Europe—and evidence of widespread abuses of migrant workers--reinforces the notions that firstly, this arena of economic and social relations can neither be left solely to market forces to regulate, and secondly, existing legal regulation is inadequate to the task in a number of countries.

A broad and extensive body of international law already exists applying to international migration. The existing normative basis for governance of migration and protection of non-nationals is more than adequate. The challenge is one of implementation, not elaboration.

Three fundamental notions characterize the protections in international law for migrant workers and members of their families.

4. Equality of treatment between regular migrant/ immigrant workers and nationals in the realm of employment and work.

5. The broad array of international standards providing protection in treatment and conditions at work –safety, health, maximum hours, minimum remuneration, non-discrimination, freedom of association, maternity, etc.—apply to all workers.
6. Core universal human rights apply to all migrants, regardless of status. This was established implicitly and unrestrictedly in ILO Convention 143 of 1975 and later delineated explicitly in the 1990 Convention.

An international charter on migration

Three complementary and sequential international standards provide core definitions of rights of non-nationals, as well as establishing basic principles for coherent migration policies. These are the ILO Migration for Employment Convention, 1949 (No. 97), the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.2 ILO Convention 97 –which the UK ratified in the 1950s-- provides the foundations for equal treatment between nationals and regular migrants in areas such as recruitment procedures, living and working conditions, access to justice, tax and social security regulations. The two main objectives of ILO Convention 143 are to regulate migration flows including by preventing clandestine migration; and to facilitate integration of migrants in host societies. This instrument provides specific guidance regarding treatment of irregular migration.

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families extended the legal framework for migration, treatment of migrants, and prevention of exploitation and irregular migration. The content of ILO Conventions 97 and 143 formed the basis for drafting the UN Convention, which expanded and extended recognition of economic, social, cultural and civil rights of migrant workers rights. This Convention has been characterized as one of the seven fundamental human rights instruments that define basic, universal human rights and ensure their explicit extension to vulnerable groups world-wide.3

These three instruments are complementary. Together, they comprise an international charter on migration. Six points summarize the importance of this normative framework:

1 The three Conventions establish a comprehensive "values-based" legal foundation for national policy and practice regarding non-national migrant workers and their family members. They serve as tools to encourage States to establish or improve national legislation in harmony with international standards.

2 They lay out a comprehensive agenda not only for national policy, but also a framework for consultation and cooperation among States on labour migration policy formulation, exchange of information, providing information to migrants, orderly return and reintegration, etc.

3 They establish that migrant workers are more than labourers or economic entities; they are social entities with families and accordingly have rights. These norms reinforce equality of treatment with nationals in states of employment in a number of legal, political, economic, social and cultural areas.

4. The Conventions resolve the lacuna of protection for non-national migrant workers and members of their families in irregular status and in informal work by providing minimum protection norms for national legislation.

5 The extensive and detailed text in these conventions

2 Texts and related information available respectively on the ILO website, at www.ilo.org/ilolex and on that of the Office of the UN High Commissioner for Human Rights, www.unhchr.ch.

3 Noted in the Report of the (UN) Secretary General on the Status of the UN Convention on migrants rights for the 55th Session of the UN General Assembly. Doc. A/55/205. July 2000. The other six are the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention for the Elimination of Racism and Racial Discrimination (CERD), Convention Against Torture (CAT), Convention for the Elimination of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC). Texts and status of these conventions available on the website of the Office of the UN High Commissioner for Human Rights: www.unhchr.ch

provides specific normative language that can be directly incorporated into national legislation, reducing ambiguities in interpretation and implementation across diverse political, legal and cultural contexts.

Certainly the basic principles elaborated in these instruments provide a framework for relevant sections of the emerging Bill of Rights for Northern Ireland. As this legislative proposal moves forward, a highly useful exercise will be to review the draft Bill alongside these instruments to determine where the legislation can be strengthened and to ensure that Northern Ireland's legislation is in conformity with agreed minimum international standards.

For reference, a total of 76 different States have now ratified one or more of these three instruments. ILO Convention 97 is ratified by 45 countries, ILO Convention 143 is ratified by 21 countries, and the 1990 International Convention is ratified by 34 countries and signed by 16 others. Some countries have ratified at least one ILO Convention and the UN instrument.

I emphasize two aspects of this record. Eleven member States of the EU have ratified one or both of these ILO instruments. That is to say that in a considerable number of EU countries, national law and practice on migration are based at least in part on relevant international standards.

Furthermore, recent studies in several EU countries --Belgium, Italy and Spain for example-- ascertained that current national legislation is already in conformity with the broader standards contained in the 1990 UN Convention, based in part upon earlier ratification of ILO standards.

In this context, it is certainly appropriate to call on those EU member States that have not done so to ratify ILO Conventions. Here I think particularly of the Republic of Ireland, where I have discussed this with the Equality Authority, trade union organizations and civil society partners.

It would also be appropriate to pursue renewed consideration of Convention 143 by the UK.

And certainly, slowly advancing advocacy for ratification of the 1990 International Convention on protection of migrant workers is to be encouraged.

I emphasize, the standards for a "rights-based approach" to protecting migrants exist, the unmet challenge is to ensure their full implementation and national law and practice. The elaboration of a Bill of Rights for Northern Ireland provides a unique opportunity to put internationally defined principles into practice.

Assertive action needed

But experience shows it will not happen as a matter of course. This is especially so regarding protection and decent treatment of non-nationals, non-citizens whose legal protections are usually far inferior to those of citizens.

Furthermore, there are strong economic interests in maintaining foreign workers in a relatively vulnerable situation. Small- and medium-sized companies and labor-intensive economic sectors do not have the option of relocating operations abroad. Responses include downgrading of manufacturing processes, deregulation, and flexibilisation of employment, with increased emphasis on cost-cutting measures and subcontracting. Demand for foreign labour reflects a long term trend of informalisation of low skilled and poorly paid jobs, where migrants with relatively limited protection –particularly those in irregular situations-- are preferred because they are obliged to work for inferior salaries, for short periods in production peaks, or to take physically demanding and dirty jobs.

Trade unions together with other civil society organisations have a fundamental role to play in providing moral, political, and practical leadership in assuring a rights-based approach to national law and governance. This is as true for assuring protection and equality of treatment for non-nationals as it is for other minorities. This role is necessarily expressed through a profile of solidarity and advocacy built on work with minorities in explicit reference to international standards. This

role requires active promotion of legal and practical mechanisms to implement a rights-based approach.

Indeed, elsewhere, local, national and regional non-governmental civil society organizations (CSOs) have long been involved in providing concrete assistance to migrants including irregular migrants and in promoting the defence of migrants' rights. Civil society activity around a rights-based approach to migration has grown exponentially since the early 1990s. Most NGOs providing services to migrants avoid distinguishing between regular and irregular categories, except where they offer legal assistance and other support specifically in response to the needs of irregular migrants denied recognition and basic services.

Work in local communities is undeniably the necessary operational focus for constituent-based organizations. However, generally, efforts and organizations defending human rights of migrants and combating xenophobia remain scattered, fragmented and relatively limited in impact. The lack of coordination and concerted actions denies these efforts the visibility and effectiveness required to wrest the political initiative from government and other interests for whom protection of migrants represents economic costs and political constraints they are reluctant to assume.

Key starting points

Experience suggests several lines of action are key. These include:

1) Advocacy for adherence to basic international human rights standards, for elaboration of anti-discrimination legislation and for appropriate practices. Elaboration of the Bill of Rights for Northern Ireland provides an ideal opportunity to do so here and now.

2) The establishment of national committees or coalitions – where they don't already exist – are essential mechanisms for effective advocacy, obtaining public visibility and achieving political impact.

3) Concerted action to get politicians and political parties, parliamentarians, trade union leaders, as well as and other personalities to speak out publicly, take leadership and promote initiatives to put in place a Bill of Rights and other legislation which provides adequate protections in line with international standards.

4) Elaboration of a national strategy and action program to explicitly prevent racism, discrimination and xenophobia can set a key symbolic as well as practical commitment for national action. The 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance provides a detailed model. And the Republic of Ireland is one of the first countries in the world to have defined, adopted and implemented a comprehensive national plan of action.

5) Provision of direct services, attention to and support for migrants by trade unions and CSOs remain an essential manifestation and component of solidarity

Conclusion

Protection of all workers in an age of international labour mobility imposes attention to protection of migrant workers –non-nationals—as an urgent priority in the broader agenda of ensuring protection for all minorities and vulnerable groups. Principles and legal norms in international Conventions provide the relevant framework for elaboration of national legislation, and particularly so for elaboration of a national Bill of Rights.

Achieving an inclusive content to the Bill of Rights will require concerted advocacy, based on committed alliances among civil society organizations, and particularly across the common interests of those defending particular minority groups, as well as trade unions, human rights advocates, religious communities and others.

Promotion of human rights, labour standards, humanitarian principles and respect for diversity are the guarantors of democracy and social peace in increasingly diverse societies. These are shared responsibilities among government, legislative bodies, social partners, civil society and migrants themselves. Trade unions and civil society organizations have key leadership roles to play in generating common approaches, strategies, coordination,

and in mobilizing societies to ensure implementation of such a framework.

* * *

Presented by:
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Sofi Taylor

Thank you for inviting me to your meeting. I must say that I did not realise the amount of work that went into making me feel welcome. The rain and the cold reminded me of Glasgow but the wind is a nice touch. There is a lot of similarly between Scotland and Ireland; we were both massive "sending" countries in the past and in Scotland at the 2001 Census the prediction is that the population will fall below 5 millions and that has been the driving force behind the 'Fresh Talent' by the Scottish Executive. If the population falls below 5 million, it will be unlikely that we can sustain our economy.

In today's society we expect fair, transparent and just laws that are applicable to all, accessible to all with equality for all, in the heart of it all, coupled wit the right of self organisation, the freedom of association and collective bargaining. These are pillars of our society, part of our fundamental rights and our expectation of our law makers.

At the same time in a world of contemporary globalisation, it is the workers who are told to work for less so that they can compete with the East, expect to be more flexible and have fewer rights, while employers need to be paid more to compete more globally with many privates companies becoming more powerful than states and nations.

Such contradictions are common in the world of migration, with governments playing a significant role in contributing to ever growing challenges. Some of our own contradictions e.g. we have an ethnic recruitment agreement with South Africa not to recruit nurses yet this agreement does not cover the private sectors and nurses are recruited into these sectors and private agencies where the most explorative employers can be found.

On one hand we are told that the migrants contribute £2.5 billions to our economy and next the migration watch put out that each migrants contribute 4pence each. What are we to believe, a choice in fact that only cost confusion and permit some to be in collusion with the far right.

For the migrant workers, they pay income tax and national insurance yet they cannot access public funding, benefits ranging from housing benefit, sickness benefits to child tax credit, they have difficulty opening a bank account and many are on and below national minimum wages. For the EU migrants this period is 12 months, for the migrants coming from outside the EU this period can be as long as 5 years. Some are not allow to bring their families with them or even to join them.

The burden of integration lies more heavily at the door of the migrants than Governments or indigenous population. A good example is the ESOL is now only offered to people with low income and on benefits excluding migrants regardless of situations. At the same time the migrants are expected to cope with the ever-increasing barriers that are being created daily to stop integration. "A step too far?"

And at our doorsteps, the discussion of the liberating to GATs mode 4 and the implementation of the service directive, hundreds if not thousand of workers are moving across Europe and the world with little or no protection at all. Yet our government refused to ratify the ILO convention 143, UN 1990 and closer to home, the temporary workers directive that can give equal treatment to all workers.

The greatest challenge today is the issue of undocumented workers; they have no access to fundamental rights, national minimum wages and even Heath and Safety is doubtful.

Contradiction is the world we live, work and function in. We live in this world of contradiction, our children will live in an even more challenging world, and however migrants are living in this ever more challenging world today.

If we were to compare what the GB government is doing and saying (which are two separate issues) it is doubtful that the govt has met ILO convention 97. We are in the mid of new immigration rules, that appeared to increase the requirement to enter and work in this country. The new points systems are being consulted and I believe that

the first tier was finished, however the second tier is on going. It was complicated enough with the work permit system however at first sight the point system will be even more complication.

The trade unions movement can contribute a great deal to the lives of migrants, being part of the trade unions movement give them opportunities that society, as a whole, cannot offer. The opportunity to have a collective voice, the opportunity to be part of an election process, to hold trade union positions and represent themselves and others in the collective process

However what are the trade unions doing today. I would like to focus on Unison, my own trade union. Unison is the largest public sector trade union in the UK and lending on this issue. I would like to highlight some projects that we are part of, doing instead of just talking.

Last year at our National Delegate Conference (Unison) and Trade Union Congress, migration and migrants were at the top of the agenda.

What is Unison doing? Or are Trade Unions engaged in the migration debate, better still are we doing anything to reduced explorative employers. We all know that workers in a unionist work place are better paid and enjoy rights.

1) **Practical information giving, organising and recruitment** in the Overseas Nurses Network (Scotland), Overseas Health Workers Network in Oxford and Migrants Forum in Wales. There is translated information in EU and community languages on Unison.

2) **Migrants Rights Network**. Joint working with other migrant's organisations, NGOs and Religious based organisations to influence and be part of the work within the UK. MRN is also part of Migrants Rights International. Our aims are to engage the migrants' organisations, to be part of the fluency of the debate, to influence their agenda and to be part of the regularisation debate. The most recent debate within this group is the Sustainable Regularisation Program for undocumented workers.

3) **Commission for vulnerable workers (TUC),** this commission that consisted of trade unions, representatives from religious groups, government, media and non-governmental organisations. Migrants are at the heart of the work at this commission at TUC. Our own General Secretary, Dave Pentis is very much a part of this commission. The aims are to collect information and evidence to give government, the first meeting in Feb 2007 and an expected interim report for Congress this year and a final report in June 2008 and it is believed that it will take 6 months to disseminate this information to key bodies.

4) **PSI**, Unison is working with Public Service International's project on women health workers and migration across 16 countries. This project is about giving information to support women, mainly, to make informed decision about migration.

5) **International** with the ILO at the International Labour Conference and with other Global unions. In Brussels, Dec 2006, at the **Trade Unions Confederation (ITUC**) workshop on migration, an Action Plan was formulated. It starts with a world conference on migration to form a coherent and coordinated perspective on migration.

The question posed, today, "is the trade union movement doing enough and are the trade union movement part of the migration debate?" The basic truth is that no and no. We are behind, felt caught up in the rush. But the Trade Unions agenda is the membership's agenda. The challenges are how do we, as trade union members influence the mainstreaming of migration into parts of our everyday work or do we ignore it and hope that it will go away. In the amidst of the public discussion on pension, equal pay and trade unions freedom, it is easy to forget that the debate on migration must be won. We forget that we are fighting for all our futures. A future that will have a major impact not only our lives but also our children's lives, and losing is not on my agenda. Because if you are not a migrant today, your children and grandchildren will be migrants. Providing migrants with protection, today, will mean that we are providing protection for the future generations.

There are so many levels that we can work in, so many levels that we can influence and so many rights that need to be won. Historically that was the roles, the functions and aim of the trade unions, however in this debate have we lost our way? I think that we have allowed ourselves to be sidelined into tunnels and we need a clear vision ahead. And how do we pull all the work together, by trade unions, by NGOs and others to form a consistent, cohesion and coherent view of migration that is positive and beneficial to all.

What can members of trade unions do? What do you need in your Bill of Rights?

We still have a long way to go in the migration debate, and it is important to remember that it is very important to remain within the debate.

- Mandate your trade unions to support ratification of the ILO 143 and UN 1990.You must engage in the decent work agenda debate in both sending and receiving countries, and take part in the debate.
- Set up a tripartite body that is responsible for this debate.
- Get involved and be informed.
- Campaign for regularisation.
- Campaign for the disengagement of access to rights been linked to residential status.
- Be a trade union member, if you are not, sign up today.

Sofi Taylor
12th Jan 07

The human rights situation of Roma and their protection against discrimination

by Ivan Ivanov

It is widely recognized that Europe's largest minority - the Roma face persistent discrimination in all spheres of life, social exclusion and segregation and high level of anti-Gypsism from majority populations. While considerably more attention has been paid to the ongoing human rights violations experienced by Roma in Central and Eastern Europe, Roma living in Western Europe face similar violations of their basic civil political, economic, social an d cultural rights.

Despite the commitments undertaken and the resources committed, the situation of Roma hasn't change much. Research indicates that there has been a rise in anti-Roma sentiments in some countries, fuelled by concerns about migration patterns in genera and large scale immigration of Roma in particular.

Legislative developments in the EU have stimulated considerable legislative activity at the national level, with EU member states and candidate countries bolstering legal protection against racial and ethnic discrimination. A Framework Directives into their legal systems and now face the even grater challenge of transforming these formal guarantees into concrete reality.

One of the key elements for protection the rights of Roma, Gypsy and Travelers and ensure equal treatment is data collection.
The difficulty of developing, implementing, and evaluating policies without quality data is highlighted in the European Commission against Racism and intolerance's (ECRI) General Policy Recommendation No 1 on Combating racism, xenophobia, anti-Semitism and intolerance.

Further in its country monitoring, the ECRI systematically inquires into availability of data on different minority groups and recommends that such data be gathered, In particular it points to the importance of data revealing discrimination.

The Advisory Committee on the Framework Convention for the Protection of National Minorities likewise systematically inquires into availability of accurate statistical data and has remarked on numerous occasions that discrepancies in estimates as to numbers of persons belonging to national minorities can seriously hamper the availability of the state to target, implement and monitor measures to ensure the full and effective equality of persons belonging to national minorities.

Furthermore, such data provides individuals with key instrument in the defense of their own rights – the ability to demonstrate that they fall into the class of persons threatened with racial or related discrimination. In judiciary data can be used to support claims if indirect discrimination, by revealing the disparate impact of apparently neutral laws, policies or measures upon certain protected categories of persons.

It is widely recognized that in order to make sustainable progress in improving the human rights situation of Roma, it is necessary to take action to combat the dramatic levels of anti-Gypsism across Europe. At present reports indicate that anti-Gypsism pervades all segments of European societies. Racist stereotypes too often serve to justify ongoing and past discrimination – for instance legitimizing abusive police raids on Roma settlements by the supposed "criminal nature" of Roma).

Anti-Gypsism also serves to obstruct the implementation of measures aimed at improving the situation of Roma. For instance, measures developed at national level often remain empty promises with local officials taking no action to implement these measures, fearing the political costs of challenging the anti-Gypsism attitudes of local populations.

In its General Recommendation No: 3 on Combating

racism and intolerance against Roma, the ECRI recommends that media professionals be sensitized to the particular responsibility they bear in not transmitting prejudices when practicing their profession.

The historical discrimination and racism experienced by Roma has had dramatic impacts in terms of disadvantage, marginalization, and segregation.

Any strategy aimed at securing the equal treatment today needs to not only address present conditions, but also to seek remedy the impact of past discrimination. This will require that desegregation measures be taken in all areas in which Roma today experience segregation, most notably in housing and education.

In many European countries Roma are cut off from the rest of the population. Providing for the equal treatment of Roma in these sectors requires targeted measures aimed at braking these patterns of segregation and brining about the inclusion of Roma in mainstream society, It is also important that desegregation measures do not Violate the principles of equality and non-discrimination by promoting the assimilation of Roma.

The Council of Europe Parliamentary Assembly clearly articulated this point in its 2002 Legal Situation of Roma in Europe report:"Governmental programs aimed to improve the situation of Roma must be based on the principle of integration without assimilation… This approach entails two criteria:
1) the emancipation and social integration of the Roma ; 2) the safeguarding of their Roma identity"An essential strategy in redressing past discrimination is through positive measures. Contrary to the popular perception that positive measures are illegal or discriminatory, they are in certain circumstances, actually required by the principle of non-discrimination in order to bring about de facto equality.

A considerable amount of confusion and misrepresentation surrounds the notion of positive measures designed to compensate for disadvantage. There is no generally accepted legal definition of the term " positive measures". Legal scholars continue to debate its meaning and scope.

In public discussions " positive measures" are commonly and falsely portrayed only as measures aiming at "equality of results" such as quotas or reserved places for members of target groups in employment or higher education establishments.

Article 2 (2) of the International Convention on the Elimination of All Forms of Racial Discrimination, to which all EU member states are party, provides an explicit articulation of the obligation to implement positive measures. It stipulates that "States Parties shall, when the circumstances so warrant , take in the social, economic cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoinment of human rights and fundamental freedoms.

Similarly Article 4 (2) of the COE Framework Convention for Protection of national Minorities provides that : the Parties undertake to adopt where necessary, adequate measures in order to promote, in all areas of economic, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

Positive measures must not themselves result in segregation and should only continue until such time as the objectives for which they were developed have been achieved, In addition the European context, these measures must respect the proportionality principle. As enunciated in the Belgian Linguistic Case, this means that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

In order to ensure respect of the rights of the roman ad their equal treatment a comprehensive anti-discrimination legislation is necessary. The persistence of widespread discrimination and limited political will to tackle these problems vividly demonstrates that legal measures need to address not only individual complaints, but also

proactively promote broader institutional change. The EU Race Equality Directive provides states with firm bases for developing the necessary legislative framework. For guidance in establishing a legal framework that effectively implement the principle of equal treatment, states should make use of the ECRI's General Policy Recommendation No: 7 , which complements the Race Equality Directive by enumerating key substantive components and procedural mechanisms.

While all of the components set out in the Race Equality Directive and ECRI's recommendations are vital to establish a legal framework that promotes the equal treatment of Roma, certain components of this framework bear singling out in the context of this paper. They are: covering all areas of life - It is important that states review their legislation in order to ensure that it covers all the areas of life in which Roma experience discrimination and all forms of discrimination that they experience. This means that their legislation should not only cover the areas of life enumerated in the Directive, but also other key sectors required by the standards set out in the ECHR, the ICERD and ECRI recommendation No:7 including nationality as a form of prohibited discrimination - Excluding nationality from the list of grounds of discrimination leaves open possibility for blatant racial discrimination against Roma to be justified as based on nationality. This problem applies both to Roma citizens and non-citizens who are frequently wrongly perceived by local populations as foreigners. Listing segregation as a form of discrimination – since segregation is a key element in the fight for equality for Roma, listing segregation as a form of discrimination with the legislative framework is essential.

While it is clear that segregation is a form of unfavorable treatment, it is also clear as pointed out by the ECRI, that in practice it is often overlooked or excluded from the scope of such legislation. Therefore segregation needs to be explicitly listed as a form of discrimination in legislation, imposing equality duties on public authorities – Another ECRI recommendation relates to including within the legislation a duty on public authorities to promote equality and prevent discrimination in carrying out their functions. The examples of UK and Northern Ireland where specialize bodies are involved in enforcement , provide models that states cam adapt to their contexts.

using statistics and situational tests as means of proof – given the difficulties that victims of discrimination generally face in proving discrimination, states should strive to put tools at their disposal that make possible for them to support their case. The shifting of the burden of proof provided for in the Race Equality Directive is a vital tool. However the alleged victim still needs to put forward enough factual evidences for there to be presumption of direct or indirect discrimination. allowing non-governmental organizations to bring complaints – it is vital that non-governmental organizations are able to lodge complaints on their behalf.

Workshop 3

Les Allamby, Director of Law Centre

Protection of Rights and Dignity of Asylum Seekers

Protection of Rights and Dignity of Asylum Seekers

NICEM ANNUAL CONFERENCE

Law Centre (NI) 2007

1

Twin pressures on asylum seekers over the past ten years

reduced welfare support

diminished legal rights

2

Immigration and Asylum Act 1999

- removed asylum seekers from mainstream welfare provision
- introduced National Asylum Support Service
- reduced payments, introduced vouchers
- dispersal of asylum seekers around the country
- tougher provision for asylum seeker claims which failed

3

Nationality, Immigration and Asylum Act 2002

- reduced eligibility for support – S55 excluded single people, couples without children from support unless claimed asylum 'as soon as reasonably practical'

4

Asylum Immigration (Treatment of claimants etc) Act 2004

- restricted right of failed asylum seekers with dependant children to receive asylum support unless they left the UK

5

Decision-making procedures and other issues

- greater use of 'white list' countries ie countries where assumption is that there is no basis for asylum
- fast track procedures for those where initial assessment claim is unfounded

6

Decision-making procedures and other issues

- time limits for appeals have been significantly reduced
- access to legal aid diminished (particularly in England and Wales)
- criminalisation of those arriving without valid travel documents

7

Growing concerns

<u>Lack of material support</u>
for example:
Destitution trap, research into destitution among refused asylum seekers in the UK (Refugee Action, Nov 2006) – policies inhumane but, also ineffective.

8

Growing concerns

Studies in London
- [Amnesty International (2006)]

Newcastle
- (Open Door 2006)

Trafficked/separated children
- (Garden Court Chambers 2006)

Lack of healthcare
- Refugee Council and Oxfam 2006)

9

Forthcoming work

Joint Committee on Human Rights inquiry into treatment of asylum Seekers

JRCT inquiry into destitution among asylum seekers and refugees in Leeds.

10

Quality of decision-making

get it right: How Home Office decision-making fails refugees (2004)

Quality of decision-making, training, information on individual countries, monitoring and feedback of decisions all leave a great deal to be desired

11

Impact beyond

- material deprivation
- access to justice

by driving people underground
creating intemperate climate

fuelling prejudice

12

Human Rights Act

Series of challenges to S55 under Article 3 of ECHR
for example:

- R(Q and others) (2003)
- R (S D and T) (2003)
- Limbuela (2005)

13

Human Rights Act

threshold to reach inhumane and degrading treatment is quite high but, application of S55 met it in practice

other challenges particular around Article 8, right to family life

14

Northern Ireland specific issues

<u>Detention of asylum seekers</u>
until 2006, detained in prison in NI [Magilligan, Maghaberry, Crumlin Road working out centre, Hydebank]

now removed to Dungavel (Scotland) or other detention centres

15

Northern Ireland specific issues

- raises issues around family support, access to legal advice, manner of removal
- enforcement office to be opened shortly (as well as public enquiry office) with provision for temporary detention facilities

16

Northern Ireland specific issues

- research underway from Human Rights Commission and later this year Refugee Action Group

17

Irish born children

- nationality laws traditionally more generous in the Republic than UK – children born on the island of Ireland were Irish citizens

18

Irish born children

- Chen and Zhon case (daughter born in Belfast (Irish citizen) moved to Wales applied for a right to residence document as a self sufficient person (freedom of movement rights under EC Law)

19

Irish born children

ECJ held entitled to reside in UK. UK amended immigration rules further legal challenges.

- restriction on entitlement to Irish citizenship by birth in Ireland from 1 January 2005 – challenges to new legislation

20

Cross-border issues

- crossing the border and detention (Dublin Convention)
- questions of racial profiling

21

Bill of Rights

<u>Scope</u>

- define rights supplementary to those in the Convention
- reflect the particular circumstances of Northern Ireland
- draw on international instruments and experiences

22

Bill of Rights

Additional rights to reflect principles of mutual respect for identity and ethos of both communities and parity of esteem to constitute Bill of Rights for Northern Ireland

23

Bill of Rights issues

Will the Bill of Rights deal solely with two communities? Composition of society changed significantly since 1998.
What are the particular circumstances of Northern Ireland re asylum and immigration?
What international instruments should we draw on in a Bill of Rights?

24

Workshop 4

M.Anne Brown

Education for All: English as an Additional Language

The purpose of my input to this workshop is to consider the protection of minority education rights in relation to the provision of English as an Additional Language (EAL) in Northern Ireland.

Using the directions given in the Belfast Agreement to the Northern Ireland Human Rights Commission I will first describe briefly the particular circumstances of the development of EAL in Northern Ireland. Secondly, we will consider what education rights are given by the European Convention on Human Rights 1950 and incorporated into our domestic law by the Human Rights Act 1998 as interpreted through case law. Finally, taking into consideration other human rights declarations and conventions and international experience, we will look at the question of what rights additional to those in the European Convention, if any, are required to protect ethnic minority children's rights to education in the context of EAL.

1. The particular circumstances of EAL in Northern Ireland

Let us look first at the particular circumstances of EAL in Northern Ireland. Since the early 1990s, the delivery of EAL has evolved province-wide as an ad hoc practical response to the needs of ethnic minority children and the schools they attended. In the 1990s the numbers of pupils requiring EAL support were small but by October 2005 almost 2,700 pupils were identified in the school census as having EAL needs. With the rapidly changing demographics in NI the numbers are still rising.
Until 2004 the Boards provided for the assessment and teaching of EAL learners by specialised EAL teachers on a peripatetic basis within the schools, appropriate resources were developed and central support was given to non-EAL trained teachers. The system was generally accepted as working well.
By the mid 1990s recognition was growing that ethnic minority communities formed a group of people in Northern Ireland whose needs and civil and human rights had been broadly overlooked, largely as a result of "the Troubles". In 1997 the Race Relations (NI) Order was enacted to outlaw many forms of racial discrimination and to provide ethnic minority people with specifically enforceable rights.

Articles 18 – 20 of the 1997 Order apply to education and to discrimination by ELBs and governing bodies of schools.

Article 20 imposes a general duty on a public authority in the sector of education

> "to secure that facilities for education provided by it, and any ancillary benefits or services, are provided without racial discrimination."

Article 18(c)(i) provides that, as far as the governing authority of a school is concerned, it must not discriminate against a pupil

> "in the way it affords him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them;"

It is important therefore that governing bodies and ELBs ensure that their treatment of ethnic minority pupils does not contravene this legislation. It has been argued that to require children to be educated in a language with which they are not fully conversant is unfavourable to them and could be a form of indirect discrimination although this point has not been tested.
It is clear that the inability to access the full opportunities afforded by the education system because of language problems has a profound effect not only on children's education per se but also on their employment prospects. The whole question of the provision of access to education in English and, thus, to the curriculum is germane to the debate on the Bill of Rights and will be considered further. However, the 1997 Order provides the basis in

national legislation for treating EAL as a rights-based issue rather than as a needs or service based one.

The enactment of section 75 of the Northern Ireland Act 1998 on foot of the Belfast Agreement, with the duties it imposes on public authorities to promote equality of opportunity, has provided fertile grounds for debate about the problems which have arisen over the past two years in the provision of EAL and the process by which the changes have been brought in. Unlike the Race Relations legislation, the section 75 obligations apply to the Department of Education and the ELBs but do not as yet apply to governing bodies of schools although this is under review at present.

It was not until 2000 that EAL learners became fully identified as a discrete group for consideration on a Province wide basis. The Equality Commission published the Good Practice Guide to Racial Equality in Education which emphasises the importance of language support and, in 2001, a conference on Racial Equality in Education again highlighted this. Although not cast in the terms of human rights, two particular aspects of language support for ethnic minority children were identified which have recently been highlighted in the Education and Training Inspectorate's 2006 report on the provision of EAL in Northern Ireland.

First, it was recognised that initial English language support is needed to facilitate access to the curriculum and ongoing support is required to ensure the development of a pupil's full potential and afford true equality of opportunity.

Secondly, the importance of maintenance of the pupil's mother tongue was acknowledged for a number of reasons. It is broadly accepted that provision of bilingual classroom support for EAL learners at initial stages is one way to help a child acquire a greater proficiency in English and that there are long term educational benefits for pupils in supporting their bilingualism. In addition, the importance of children maintaining command of their mother tongue for their own self-esteem and personal identity and to sustain intergenerational relationships and communication within families is now well documented. To this extent issues relating to education rights and language rights overlap.

As those involved in the delivery of EAL will be only too aware, the introduction of the new Common Funding Scheme in April 2005 without due consideration having been given to the effect of changes in the funding of EAL on its delivery and on the infrastructure built up across the Province caused severe difficulties, some would even say chaos, for those involved at the coal face. The situation was all the more unfortunate, or indeed, inexcusable, given that work was underway to produce a formal EAL policy for Northern Ireland. Rapid changes occurred in the system as peripatetic teachers were withdrawn, schools became responsible for teaching English to EAL pupils and the ELBs' input tended to be support for and training of the teachers in the schools. In this connection, it should be reiterated that acquiring competence in English is not only relevant to ethnic minority children accessing the education system but also to their continuing to progress in order for them to have access to real equality of opportunity. The importance of supporting these children's overall educational achievement has been recognised in Northern Ireland and a new Ethnic Minority Achievement Service starts work in April 2007. It will be a province wide service operating under the lead of the NEELB. Being at an embryonic stage it will be important that **the rights** as well as **the needs** of the ethnic minority children are at the heart of the new service. They must also be taken into consideration by those in charge of teacher training at ELB and University level to ensure that new and in-service teachers know how to deal with EAL pupils in their classes.

It is also vitally important that school governing bodies who are responsible for the management of school budgets including funds allocated on the basis of EAL pupil numbers are now properly trained on their statutory obligations under the Race Relations Order and the Bill of Rights when enacted.

So it is clear that, in domestic law, ethnic minority children currently have no specific rights regarding the learning of English or their mother tongue although they

do have the right under the Race Relations Order not to be discriminated against in their education. Furthermore, public education authorities have an obligation under section 75 to afford them the right to equality of opportunity in the provision of educational services. The Human Rights Act 1998 also has a part to play which we will consider shortly.

2. The European Convention of Human Rights 1950 and the Human Rights Act 1998

Let us now look at education rights in the context of the European Convention on Human Rights 1950 and other international human rights instruments. The right to education is long established and widely recognised in international declarations and conventions.

Article 26 of The Universal Declaration on Human Rights 1948 states that

"1. Everyone has the right to education…

This is re-iterated in Article 14 of the Charter of Fundamental Rights of the European Union proclaimed in 2000.

The relevant section of the European Convention is found in Article 2 of the First Protocol which provides

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

It must be noted that the effect of Article 2 of the First Protocol is limited to the extent that the United Kingdom government entered the Reservation restricting this right "so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure". However, it is important to note that this relates only to the **second** sentence of the Article regarding parental rights. It would therefore appear that the fundamental right of the individual pupil not to be denied education is not limited by the terms of the Reservation.

This right is one of those incorporated into domestic UK law by the Human Rights Act 1998 which came into force on 2nd October 2000 and so can be relied on in our local courts.

To assist in the debate on what supplemental education rights are required in Northern Ireland we will look briefly at how the Convention right to education has been interpreted in the European Court of Human Rights and in UK courts since October 2000.

The potential value of the Convention right to education has been tested in a number of European Court cases and, more recently, in the UK courts which are required by the Human Rights Act 1998 to take account of European Court judgments, decisions, declaration or advisory opinions.

Laura Lundy (2000) in her authoritative book on Education Law in Northern Ireland comments that "the ECHR has not been in the vanguard of parental or children's rights in education". In similar tone Neville Harris (2005) in reviewing the decisions of cases in which the ECHR education right was relied on points out that the provisions relating to education "are expressed in open-textured language that fails to set clear standards beyond bare minima". He concludes that "few lessons have been handed down to ministers by the courts".

These two assessments appear to be vindicated by the very recent decision of the House of Lords in Ali (FC) v. Headteacher and Governors of Lord Grey School (HL)(2006) which indicated that the right of access to education will be interpreted conservatively. Although this case related to the suspension of a child from school it is the first case in the United Kingdom which required the House of Lords to determine whether a pupil's rights under article 2 of the First Protocol to the European Convention had been infringed. In his judgment Lord Bingham of Cornhill stated

> "the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so".

More recently, in Shabina Begum's case against the Headteacher and Governors of Denbigh High School (HL)(2006) the House of Lords continued its conservative approach in Ali and ruled that her Article 2 right to education had not been violated.

Of more direct relevance than the Ali or Begum cases is The Belgian Linguistic Case (No.2)(1968), which came before the European Court of Human Rights in 1968 and is acknowledged and extensively quoted in Ali as the leading authority on Article 2 of the First Protocol. This case is relied on to show the limited nature of the Convention rights. The relevant issue in this case is that French-speaking parents of a child who was going to school in a Flemish-speaking area claimed that their and their child's Convention rights had been violated because education for their child in French was not available. The Court decided that the Convention, whilst it guaranteed the right of everyone to be educated, did not guarantee the right to everyone to be educated in the language of their choice. The state's responsibility is not absolute according to parental demands but is to be regulated in a way "which may vary in time and place according to the needs and resources of the community and of individuals".

Of particular significance to the EAL debate is the judge's view that Article 2 **does** imply "the right to be educated in the national language" and that it "guarantees, in the first place, a right of access to educational institutions existing at a given time".

3. Other Declarations, Conventions and International Experience

Given that it appears that the Convention right not to be denied education is not expansive, it is instructive to look at other international instruments which provide for minority education rights.

The United Nations Convention on the Rights of the Child 1989 recognises in Article 28 the right of the child to education and of the importance of moving progressively and on the basis of equal opportunity to making such education available and accessible to all. Article 29 emphasises the importance, amongst other things, of the development of respect for the child's cultural identity and language and the 1992 European Charter for Regional or Minority Languages reinforces the importance of facilitating the maintenance of a child's mother tongue.

In 1995 the Council of Europe produced the European Framework Convention for the Protection of National Minorities Article 12 of which provides that

> "The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities".

Article 14 declares that "Parties undertake to recognise that every person belonging to a nation minority has the right learn his or her minority language" and that where a child has the right to be educated in a minority language this shall be "without prejudice to the learning of the official language".

Section 3 of the Proposed Bill of Rights for NI Act 2004 provides that Northern Ireland law shall guarantee the rights conferred by the Framework Convention. This initially appears supportive of ethnic minority rights but the Framework Convention only applies to "national minorities", a term which is not defined in the document and so the value of its incorporation in the Bill of Rights may be limited.

With regards to the European Union, as long ago as 1977 the Council Directive on the Education of the Children of Migrant Workers provides in Articles 2 and 3 that Member States shall, "in accordance with their national circumstances and legal systems" take appropriate measures to ensure that provision is made for

1. the teaching of the official language of the host State and
2. teaching of a child's mother tongue and the culture of the child's country of origin .

Conclusion

Having the right to education is therefore well established but it is meaningless without safeguards being put in place to ensure that minority ethic children's right of access to the education system is guaranteed. Furthermore, in order to ensure that their entitlement to equality of opportunity throughout their school careers is not hindered by language issues, English language support may need to be available to them for a considerable period. Rather than having to take a test case to determine the extent of a ethnic minority child's right to education in the national language and equality of opportunity, how much better to address the issue now in the context of a Bill of Rights than for the matter to be the subject of litigation?

The changing demographics and increasing recognition of the problems faced by the ethnic minority communities in Northern Ireland, the imminent publication for consultation of a formal EAL policy and the advent of the new Ethnic Minority Achievement Service make it appropriate that to-day we consider the debate on what education rights for ethnic minority pupils should be included in a Bill of Rights. Such rights should form the backdrop against which the operation and progress of the new developments in the education of our ethnic minority children will be judged.

I therefore leave four questions for consideration

- How do we safeguard ethnic minority children's right of access to the education system if their command of English is limited?

- How do we ensure real equality of opportunity for these children which is unhindered by language issues?

- Given that its personal identity and educative value is recognised, how do we provide for maintenance of the mother tongue/bilingualism of EAL pupils?

- Recognising that any education system is dependent on resources both human and financial, what limitation of education rights for ethnic minority children in this connection is acceptable?

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NICEM 9TH Annual Human Rights & Equality Conference

English for All: English as an Additional Language

Mrs M A Brown LLB BCL (Oxon)

English as an Additional Language (EAL) and Minority Education Rights

- reflect the particular circumstances of Northern Ireland
- rights supplemental to those protected by ECHR 1950 and Human Rights Act 1998
- take account of international instruments and experience

EAL in Northern Ireland to 2004

- developed as practical response to needs of minority ethnic pupils
- changing demographics leading to increased numbers of EAL pupils
- different EAL policy in each Education and Library Board (ELB)
- peripatetic EAL teachers, development of resources, central support for non-EAL teachers

The Race Relations (NI) Order 1997 (RRO)

- recognition of the rights of minority ethnic communities
- racial discrimination in education unlawful

EAL – A rights-based issue

- **Article 20 RRO** - general duty on the public sector in education
  " to secure that facilities for education provided by it, and any ancillary benefits or services, are provided without racial discrimination"
- **Article 18 RRO** – unlawful for an establishment to discriminate against a person
  "in the way it affords him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them"

EAL and section 75 Northern Ireland Act 1998

- due regard to need to promote equality of opportunity between persons of different racial groups
- applies to Department of Education and ELBs but not school governors
- RRO applies to governing bodies of schools and ELBs

EAL – good practice

- Equality Commission Good Practice Guide to Racial Equality 2000
- Report of Conference on Racial Equality in Education 2001
- Education and Training Inspectorate Report on EAL 2006

Provision of EAL

- initial English language support – to facilitate access to the curriculum
- ongoing support – to ensure development of full potential
- mother tongue maintenance
  - bilingual classroom assistance helps child acquire proficiency in English
  - long-term educational benefits of bilingualism
  - maintenance of identity and of intergenerational relationships

EAL 2004-2007

- introduction of Common Funding Scheme 2004
- chaotic effect of change in funding of EAL on its delivery
- move from peripatetic teachers service to ELB support and training of teachers with EAL pupils

Current issues

- imminent release for consultation of formal EAL policy
- new Ethnic Minority Achievement Service starting 1st April 2007
- initial and in-service teacher training
- training of Boards of Governors

Pupils' rights

- right of minority ethnic pupils not to be discriminated against in the provision of education (RRO)
- entitled to equality of opportunity (S 75)
- right not to be denied education (ECHR and HRA)
- no statutory rights specifically relating to EAL

Universal Declaration of Human Rights 1948

Article 26

1. Everyone has the right to education…
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms...

Charter of Fundamental Rights of the European Union 2000

Article 14

1. Everyone has the right to education and to have access to vocational and continuing training.

European Convention on Human Rights 1950

Article 2 Protocol 1

RIGHT TO EDUCATION

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Schedule 3 Part II

RESERVATION

... the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

- Reservation relates to **second** sentence of Article 2 Protocol 1

European Convention on Human Rights 1950

- Article 2 Protocol 1 incorporated into domestic UK law by the Human Rights Act 1998
- "the ECHR has not been in the vanguard of parental or children's rights in education" (Lundy, 2000)
- "are expressed in open-textured language that fails to set clear standards beyond bare minima" and
- "few lessons have been handed down to ministers by the courts" (Harris, 2005)

Recent House of Lords' decisions

Ali (FC) v. *Headteacher and Governors of Lord Grey School* (HL)(2006)

"the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so"

Lord Bingham of Cornhill

R (on the application of Begum by her litigation friend, Rahman) **v.** *Headteacher and Governors of Denbigh High School (HL)(2006)*

The Belgian Linguistic case (No.2)(1968)

- Recognised in *Ali* as the leading ECtHR authority on Article 2 Protocol 1
- Shows limited nature of the right to education
- Confirmed "the right to be educated in the national language"
- "guarantees, in the first place, a right of access to educational institutions existing at a given time"

International Instruments

- United Nations Convention on the Rights of the Child 1989
- European Charter for Regional or Minority Languages 1992
- European Framework for the Protection of National Minorities 1995

European Framework for the Protection of National Minorities 1995

- **Article 12**

  "The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities"

- **Article 14**

  "The Parties undertake to recognise that every person belonging to a nation minority has the right learn his or her minority language"

- **The proposed Bill of Rights for NI Act 2004 section 3**

  "The law of Northern Ireland shall guarantee the rights conferred on minorities… by the Framework Convention…"

European Union Council Directive on the Education of Children of Migrant Workers 1977

Member States shall "*in accordance with their national circumstances and legal systems*" take appropriate measures to ensure that provision is made for

1. the teaching- adapted to the specific needs of such children – of the official language of the host State (Article 2) and

2. teaching of a child's mother tongue and the culture of the child's country of origin (Article 3)

EAL and Minority Education Rights

- How do we safeguard minority ethnic children's right of access to the education system?
- How do we ensure they have real equality of opportunity unhindered by language issues?
- How do we provide for maintenance of the mother tongue/bilingualism of EAL pupils?
- What limitation of education rights is acceptable?

PRESS STATEMENT FOR THE SUDDEN DEATH OF DAVID ERVINE

LEADER OF PUP

9 January 2007

The sudden sad news of the death of David Ervine, Leader of the Progress Unionist Party, is a big blow to the ethnic minority communities in Northern Ireland.

Ethnic minorities lost a great friend and a comrade who fought for social justice and social inclusion for loyalist working class and other people. He worked tirelessly to support ethnic minorities who experiences vicious attacks and diffused tension between the loyalist community and ethnic minorities.

When the time people made condemnations on racist attacks, he worked behind the scene with his colleagues to provide enormous support and in a pragmatic way to resolve the problem in south Belfast and beyond (both inside and outside Belfast).

His pragmatic, practical, down to earth character and his passion to help and support others shall be remembered.

NICEM pays tribute to David and family. We will have a minute silent at our Annual Human Rights & Equality Conference this Friday at Wellington Park Hotel.

Grief will pass and memories will last! Your passion and great character will remain with us.

Patrick Yu,
Executive Director of NICEM

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"Minority Rights and Protection: International Standards & The Bill of Rights for Northern Ireland"

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