Falkland Islands Constitutional Review - 2023

Thinking about Fundamental Rights and Freedoms

Supplementary guidance notes

These notes supplement the general guidance on Chapter 1 of the Constitution – Fundamental Rights and Freedoms – issued on 20 June 2023 for the 2023 Constitutional Review

Restriction of Fundamental Rights and Freedoms to certain persons within the Falkland Islands

Background

1. There are issues of public concern around the actual and/or perceived behaviour of some visitors to the Islands, particularly some visiting from Argentina, which are of huge significance and importance to some individuals.

2. Some of those responding to the Constitutional Review have suggested that, if the Constitution is considered a barrier to taking action in relation to such behaviour, then consideration should be given to whether the protections afforded by certain of the Fundamental Rights and Freedoms in Chapter 1 of the Constitution could be restricted in relation to certain persons.

3. This note seeks to consider this issue, and focuses for illustrative purposes on the protection of freedom of expression, and the context of some behaviour which has been reported to cause offence. It also considers potentially relevant provisions of the criminal law. It highlights the difficulties in even proposing that changes should be made to the criminal or other laws of the Falkland Islands in order to restrain the permissible activities of certain groups of persons only.

The Constitution

4. The Constitution contains a number of relevant provisions. The fundamental rights and freedoms guaranteed by the Constitution are rights and freedoms for all those present in the Falkland Islands. This is stated in Section 1 (c) of the Constitution (set out below), and reflects the provisions of Article 1 of the European Convention on Human Rights, which provides *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".* The key rights, including the right to freedom of expression, are and

must be available to all – residents and visitors alike. Section 1 of the Constitution provides as follows:

Fundamental rights and freedoms of the individual

1. *Whereas—*

(a) *all peoples have the right to self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development and may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co- operation, based upon the principle of mutual benefit and international law;*

(b) *the realisation of the right of self-determination must be promoted and respected in conformity with the provisions of the Charter of the United Nations;*

(c) *every person in the Falkland Islands is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, without distinction of any kind, such as sex, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—*

(i) *life, liberty, security of the person, the enjoyment of property and the protection of the law;*

(ii) *freedom of conscience, of expression (including freedom of the press), of movement and of peaceful assembly and association;*

(iii) *protection for his or her family, his or her personal privacy, the privacy of his or her home and other property and from deprivation of property save in the public interest and on payment of fair compensation,*

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid individual rights and freedoms, and to related rights and freedoms, subject to such limitations on that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

5. Section 13 of the Constitution deals with the protection of freedom of expression. It says:

Protection of freedom of expression

13.*—(1) Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of expression.*

(2) For the purposes of this section, a person's freedom of expression includes his or her freedom to hold opinions without interference, his or her freedom to receive information and ideas without interference, his or her freedom to disseminate information and ideas without interference (whether the dissemination be to the public generally or to any person or class of persons) and his or her freedom from interference with his or her correspondence or other means of communication.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required—

(i) in the interests of defence, internal security, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings and proceedings before statutory tribunals, preventing the disclosure of information received in confidence, maintaining the authority and independence of the Legislative Assembly and the courts, or regulating telecommunications, post, broadcasting or public shows; or

(b) that imposes restrictions on public officers that are reasonably required for the proper performance of their functions,

except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society.

6. Repeatedly, courts have decided that rights to free speech include the right to express ideas that offend, shock or disturb the state, or any sector of the population. In the case of Redmond-Bate v DPP (1999), Lord Justice Sedley said that "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having."

7. It seems very likely that a person would have the right to express the view that the sovereignty of the Falkland Islands lies with the Republic of Argentina, however much we would fundamentally disagree with that view.

8. Precisely what view is expressed, when, where and how, will be critical in deciding whether it could, for example, constitute a breach of the peace, or be contrary to some other provision of the current criminal law, as discussed below. Equally, others would have the right to express a contrary view.

Criminal law in the Falkland Islands

9. The right to freedom of expression is, as described above, not an unlimited right.

10. There are a number of "public order" offences contrary to the law of the Falkland Islands where conduct involving "expression" might not be protected. For example, see sections 512 513 and 523 of the Crimes Ordinance 2014, as set out below:

512. Intentionally abusive conduct
(1) A person ('A') who, with intent to cause another person ('B') harassment, alarm or distress—
(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour; or
(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
and thereby causes B or any other person harassment, alarm or distress, commits an offence.
Penalty: Imprisonment for 6 months or a fine at level 5 on the standard scale, or both.

513. Disorderly conduct
(1) A person who —
(a) uses threatening or abusive words or behaviour, or disorderly behaviour; or
(b) displays any writing, sign or other visible representation which is threatening or abusive,
within the hearing or sight of a person likely to be caused harassment, alarm or distress by such words, behaviour or representation, commits an offence.
Penalty: A fine at level 3 on the standard scale.

523. Behaviour likely to cause a breach of the peace
A person who in any public place behaves in such a manner that a breach of the peace is likely to be caused by the behaviour commits an offence.
Penalty: (i) Binding over with a recognisance to keep the peace; or

(ii) if the person refuses to be so bound over - imprisonment for 6 months or a fine at level 5 on the standard scale, or both.

11. The above offences can, in certain circumstances, serve to curtail expression, including expression which might at other times be protected. The specific circumstances and the evidence which is available are key in assessing whether an offence may have been committed. The prosecution service apply a two-stage test to determine whether charges should be authorised. The first stage is the evidential stage – the prosecution should be satisfied that there is sufficient evidence to provide a reasonable prospect of conviction. If this test is not met, no charge will be authorised. If the evidential test is met, then there will be consideration of a public interest test – to determine whether a prosecution is required in the public interest.

12. The offences available in the Falkland Islands are very similar to the offences available in England. An example of a case in England when an offence was found to have been committed which was equivalent to the Falkland Islands offence under section 513, involved a protest by members of a group known as "Muslims Against Crusaders". Their protest took place at 11am on 11 November 2010, in Kensington Gore, bordering Hyde Park in London, near the Albert memorial, and near where a "March for Heroes" was expected to end. A protest by the English Defence League was being held nearby. As the two-minutes silence began, the MAC demonstrators proceeded to chant loudly and repetitively "British soldiers burn in hell", and continued to do this throughout the time when the two-minutes silence was being observed by other members of the public. After almost exactly two minutes, what appeared to be two large plastic poppies were placed to the centre front of the MAC demonstration and set on fire. The court found that the behaviour was bound to be seen as insulting, and that it was likely to cause distress. It was found that it was intended to have that effect. The issue was whether the defence was made out that the conduct was "reasonable". In analysing this question, the court considered whether the conduct of the defendant was exercising his freedom of expression in circumstances in which an interference with those rights would not be justified. Case law indicates that there can be no universal test for resolving when speech goes beyond legitimate protest, so attracting the sanction of the criminal law. It was said that a justification for invoking the criminal law is the threat to public order. The court found that invoking the criminal law in the circumstances to interfere with freedom of expression was proportionate. The defence of reasonableness did not prevail and the defendant was found guilty of the charge.

13. If the line between legitimate freedom of expression and a threat to public order has truly been crossed, freedom of expression will not have been impaired by ruling out threatening or abusive expression. The criminal law of the Falkland Islands already

provides for this. There appears, however, to be very limited evidence to suggest that the line has been crossed, and certainly not that it has been crossed often.

Decisions of the European Court of Human Rights

14. There is a substantial body of caselaw around restrictions on freedom of expression. It is clear that even expressions which might be regarded by some as deeply offensive are protected. Restrictions can be placed on "hate speech" and speech which incites violence – careful examination of the actual expression is required in order to ascertain what might not be protected expression and what clearly is.

15. Cases essentially adopt a three part test when considering restrictions on human rights. Firstly, the interference with those rights must be prescribed by law. Second, the aim of the restriction must be legitimate. Thirdly, the limitation must be necessary in a democratic society.

16. The test of "necessity in a democratic society" would lead a court to consider, for example, whether the interference corresponds to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued". In a particular case, there would need to be consideration of the content and context of the expression in light of the circumstances of the case as a whole. The protection of the rights of others is a legitimate aim.

17. The duties placed on individuals when expressing views might legitimately be restricted where they could be said to be gratuitously offensive, such that they do not contribute to any form of public debate capable of furthering progress in human affairs. The scope for restriction is particularly narrow in the field of "political debate" – in other words restrictions in this area are very difficult to sustain.

18. The European Court of Human Rights has said that attempted use of particular provisions within the convention to restrain the possibility for "aliens" to exercise their right to freedom of expression ran counter to the Court's rulings in cases in which aliens have been found entitled to exercise this right – the court has specifically noted that no distinction could be drawn between the exercise of freedom of expression by nationals of a country and by foreigners.

19. There are a number of European Court of Human Rights decisions involving Turkey and issues in relation to Kurdish separatists. Restrictions which have been upheld include instances where the protagonists clearly called for or incited violence. By contrast, merely referring to "Kurdistan" by name, or stating or implying that it should be or is separate from the territory of Turkey, and claims by individuals to exercise authority on behalf of Kurdistan, whilst highly provocative, were protected expressions. There was a right for individuals to give the public insight into alternative views, irrespective of how unpalatable that perspective might be for

some sections of the public. In one such case it was said the offending texts did not incite violence, but rather reflected the resolve on the opposing side to pursue its goals and the implacable attitudes of its leaders in that regard. The reasons given for restricting freedom of expression were not sufficient.

20. A case was brought against Hungary. In Hungary, there was a law restricting the exhibition of certain symbols, including certain Nazi symbols as well as the hammer & sickle and red star. A man was convicted, having attended a demonstration at which he wore in his lapel a red star 5cm in diameter. A policeman asked him to remove it, which he did. Subsequently he was prosecuted and convicted. His case was ultimately considered by ECHR. It was argued by Hungary that the display of the symbol, identified with the actions of the oppressive totalitarian regime, and violated the rights of others. Hungary were unsuccessful. The court accepted that the restriction was prescribed by law, and that it was aimed at a legitimate goal (protection of public order and protection of the rights of others). However, the court felt that a total ban of the sort imposed was too broad, restricting expression of protected opinions. It was considered that there was no real and present danger of the restoration of the offending dictatorial regime and that (at the time) two decades had passed since Hungary's democratic transition. The court took account of the fact that public use of the symbol concerned would be offensive, especially to victims and sufferers of the previous regime (which had lasted for forty years and caused wounds which would never heal); it might evoke bad feelings in them and might appear to disregard their suffering. However, even if the injury caused can be understandable, this in itself cannot provide justification for the limitation on freedom of expression. That required more pressing reasons – even the propagation of totalitarian communist ideology would not be sufficient, if it did not result in another specific violation of other rights.

Current proposals for change in the Falkland Islands

21. To propose to amend the Constitution now in a way which seeks to restrict the protections for fundamental rights and freedoms for some persons within the Falkland Islands, based only on their national origin would seem very clearly to be in breach of the obligations under the European Convention on Human Rights. It is suggested that the criminal law is already capable of dealing with circumstances where purported expression would not be protected.

22. Cases elsewhere highlight the very real risk that action to restrict the rights of some visitors, or even seeking to take proceeding against visitors would not necessarily have the desired effect, but could actually provide a platform for substantial additional publicity for the very actions which cause offence to the local population. It might be reasonably considered by some that any attempt to restrict fundamental rights and freedoms could:

- Tarnish our hard won freedoms;
- Lead to more, not fewer, attempts by visitors to provoke;
- Play into the hands of those very persons who wish to provoke a disproportionate response.

23. Factors such of these are potentially relevant to the question of whether a prosecution is in the public interest, so regardless of any change to the law (even if that were considered to be legitimate); that might not result in what is wanted, if that is to see relevant persons brought before a court.

Summary

24. In summary, it is suggested that it would be difficult to justify seeking to amend the Constitution in order to restrict the rights and freedoms of some persons when in the Falkland Islands, that existing laws are capable of addressing offending behaviour, and that further action could have unintended consequences. At the very least, further analysis would be required of any specific proposals in this area.