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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **14/03/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (JUDICIAL REVIEW)

Between:

No. 21/18686/01

JAMES HUGH ALLISTER, BENYAMIN NAEEM HABIB, STEVE AIKEN, THE RT HON. ARLENE ISOBEL FOSTER, BARONESS CATHARINE HOEY OF LYLEHILL AND RATHLIN and WILLIAM DAVID, THE RT HON. BARON TRIMBLE OF LISNAGARVEY

Appellants

and

SECRETARY OF STATE FOR NORTHERN IRELAND

Respondent

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No. 21/015249/01

Between:

CLIFFORD PEEPLES

Appellant

and

(1) THE PRIME MINISTER
(2) SECRETARY OF STATE FOR NORTHERN IRELAND
(3) CHANCELLOR OF THE DUCHY OF LANCASTER

Respondents

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Mr John Larkin QC and Ms Denise Kiley (instructed by Nelson Singleton Solicitors) for James Allister and others
Mr Ronan Lavery QC and Mr Conan Fegan (instructed by McIvor Farrell Solicitors) for Clifford Peeples
Mr Tony McGleenan QC with Mr Philip McAteer (instructed by the Crown Solicitor's Office) for the Respondents

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Before: Keegan LCJ, Treacy LJ and McCloskey LJ

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Glossary of terms used in this judgment

CFR	**Charter of Fundamental Rights of the European Union**
CJEU	**Court of Justice of the European Union**
CTA	**Common Travel Area**
ECA 1972	**European Communities Act 1972**
ECHR	**European Convention on Human Rights**
EUWA 2018	**European Union (Withdrawal) Act 2018**
EUWAA 2020	**European Union (Withdrawal Agreement) Act 2020**
EU	**European Union**
GB	**Great Britain**
JC	**Withdrawal Agreement Joint Committee**
JCWG	**Joint Consultative Working Group**
NI	**Northern Ireland**
NIA 1998	**The Northern Ireland Act 1998**
SOSNI	**The Secretary of State for Northern Ireland**
TCA	**Trade and Co-operation Agreement**
TEU	**Treaty on European Union**
TFEU	**Treaty on the Functioning of the European Union**
The Protocol	**The Ireland – Northern Ireland Protocol to the Withdrawal Agreement**
The Joint Declaration	**The UK Government's Political Declaration setting out the framework for the future relationship between the EU and the UK, dated 19 October 2019**
The Unilateral Declaration	**The "Declaration by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the 'Democratic Consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland", dated 19 October 2019.**
The 1998 Agreement	**The Belfast/Good Friday Agreement**
The 2020 Regulations	**The Protocol on Ireland/Northern Ireland (Democratic Consent Process) EU Exit Regulations 2020**
UK	**The United Kingdom of Great Britain and Northern Ireland**
WA	**Withdrawal Agreement**

KEEGAN LCJ (with whom Treacy LJ agrees)

Introduction

[1] These two cases have been heard together and remain conjoined on appeal. The first appellants are the six named persons in the title hereof who are referred to as "the Allister group." The second appellant is Mr Clifford Peeples who is the sole challenging party in the second judicial review application.

[2] Both appeals are from the decision of Mr Justice Colton ("the trial judge") delivered on 30 June 2021 wherein he dismissed the respective applications for judicial review. The Notices of Appeal are dated 6 July 2021 and 9 July 2021. In addition, a respondents' notice dated 23 September 2021 raises a cross appeal.

[3] The substance of both appeals coincides in large measure and can therefore be captured in the following core heads of challenge:

(i) Incompatibility of the Protocol and the 2020 Regulations with Article VI of the Act of Union 1800.

(ii) Incompatibility of the Protocol with section 1(1) of the Northern Ireland Act 1998.

(iii) Unlawful elimination of the constitutional safeguard enshrined in section 42 of the Northern Ireland Act 1998.

(iv) Breach of article 3 of Protocol 1 of the European Convention on Human Rights and article 14 of the European Convention on Human Rights.

(v) Legal invalidity of the Protocol being in conflict with Articles 10 and 50 of the Treaty of the European Union.

[4] The respondents' cross-appeal has three elements, namely:

(i) The court erred in finding that citizens of Northern Ireland are not on an equal footing in relation to trade with those in Great Britain (para [62] of the first instance judgment).

(ii) Insofar as it did so, the court erred in law in categorising each relevant enactment as being a "constitutional" or "ordinary" statute and/or in concluding that statutes categorised as constitutional statutes have a hierarchical status that displaces the usual rules of construction.

(iii) The court erred in law in not dismissing the appellant's application on the basis that the negotiation and agreement of the Withdrawal Agreement is non-justiciable or that any such challenge was out of time and in the absence of an application to extend time, the court should not entertain such a challenge.

[5] This case has proceeded on an expedited basis. This court paused the listing initially to enquire as to the wider context of this case. The court did this as inevitably when this appeal was first listed there were reports of further consideration of the Protocol in the political sphere. Of course, those reports continue and highlight the fact that this case arises in a highly political context and that the situation is fluid. The court invited position papers on this issue and after

consideration of those the court was satisfied that it should proceed to hear the appeal given the questions of law of constitutional importance that arise.

[6] In taking this course the court reiterated the requirement for candour in judicial review proceedings. The court has proceeded on the basis that it has been provided with all appropriate evidence in this case. The court also recognises that the wider context is characterised by fast moving, high level political discussions between various parties and can therefore understand if some points are developing even as this judgment is written and delivered.

[7] We also mention two further items which have been provided to the court as a result of preliminary case management. First, as a result of the court's interventions an additional affidavit was provided by the appellant, Mr Peeples, to deal with an issue raised by the court, namely the delay in applying for judicial review. We will return to that matter in due course in the substantive part of this judgment. Second, as a result of probing, the court received some additional evidence which indicated that in February 2019 one of the Allister group appellants Lord Trimble via a different set of solicitors had issued pre-action protocol correspondence in relation to the same subject matter. We will also return to this in the substance of the judgment.

[8] We record that with the exceptional co-operation of counsel there has been no repetition of arguments among the two appellants' legal teams in relation to the judicial review challenges.

[9] The parties collectively provided the following brief summation of facts to which we have made some additions at xii-xvii below.

i.	**A UK referendum on EU Membership took place on 23 June 2016.**
ii.	**A majority of the people of the UK voted to leave the EU.**
iii.	**On 29 March 2017 the UK Prime Minister gave notification under Article 50 of the TEU of the UK's intention to leave the EU.**
iv.	**Negotiations commenced between Her Majesty's Government ("HMG") and the EU in June 2017.**
v.	**A draft WA was first published on 25 November 2018. The UK Parliament rejected the draft WA.**
vi.	**Prime Minister Theresa May resigned on 23 May 2019.**
vii.	**On 24 July 2019 Boris Johnson assumed office as UK Prime Minister. HMG undertook further negotiations with the EU.**
viii.	**On 17 October 2019 the UK and EU reached agreement on the text of a new WA (containing the Protocol) and the Political Declaration setting out the framework for the future relationship between the EU and the UK (the "Joint Declaration") (published on 19 October 2019)**
ix.	**On 19 October 2019, HMG also published the Declaration by HMG's of the UK concerning the operation of the 'Democratic Consent in Northern Ireland' provision of the Protocol (the "Unilateral**

	Declaration").
x	**Beginning of the transition period: 1 January 2020**
xi	**The EUWA 2018 received Royal Assent on 23 January 2020. It provided for the withdrawal of the UK from the EU on 1 January 2021 after a transition period.**
xii	**The WA was signed on 24 January 2020.**
xiii	**The WA was ratified on 29 January 2020.**
xiv	**The 2020 Regulations came into force on 10 December 2020.**
xv	**End of the transition period: 31 December 2020.**
xvi	**Exit day: 1 January 2021.**
xvii	**1 January 2025: the Protocol's four year watershed date.**

[10] As this is a lengthy judgment we have summarised the various topics discussed by reference to paragraph numbers as follows:

Factual matrix amplified

[11] This case clearly arises as a result of the law put in place following a decision of the people of the United Kingdom of Great Britain and Northern Ireland ("UK") to withdraw from the European Union ("EU"). The EU had been a feature of the life of the UK since 1 January 1973 when the UK became a member of the EU in

accordance with the European Communities Act 1972 ("the ECA 1972"). This was a significant constitutional change for the UK illustrated by the terms of the ECA 1972. This primary legislation when enacted by Parliament gave powers to the EU to make laws that were directly applicable in the UK.

[12] Section 2(1) of the ECA 1972 encapsulated this change in law and was framed in the following terms:

> "2(1) All such rights, powers, liabilities, obligations, and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties, are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies."

[13] The above provision meant that EU law which was directly applicable or of direct effect was automatically "without further enactment" incorporated and binding in national law without the need for a further Act of Parliament.

[14] Membership of the EU has always been a controversial issue in the UK. In recent times divisions in opinion led to the UK Parliament in December 2015 passing the European Union Referendum Act thereby allowing the people of the UK to decide whether or not to remain part of the EU. As is well-known the ensuing Referendum on 23 June 2016 resulted in a majority across the UK deciding to leave the EU. This became known as "Brexit."

[15] Withdrawal from the EU was given effect in domestic law by virtue of a series of legislative steps. First, the UK Parliament passed the European Union Notification of Withdrawal Act 2017. Then, the European Union Withdrawal Act 2018 ("EUWA 2018") was passed which repealed the ECA 1972. Subsequently, the European Union Withdrawal Agreement Act 2020 ("EUWAA 2020") was passed amending the EUWA 2018 and providing for formal execution and ratification of the Withdrawal Agreement ("WA") including the Northern Ireland Protocol ("The Protocol"). The WA came into operation on 1 February 2020, the Protocol came into operation on 10 December 2020. The transition period ended on 31 December 2020 with the result that final withdrawal from the EU took effect from 1 January 2021.

[16] The precursor to the enactment of domestic law which effected withdrawal from the EU was an intense process of international negotiation resulting in a treaty between the UK and EU to effect withdrawal. The content of these negotiations are conveniently found in a document known as the Joint Report dated 8 December

2017. We refer to this document here as it set the tone for what was to follow in relation to arrangements for Northern Ireland.

[17] Paragraph 2 of the Joint Report records that both parties had reached agreement in principle across three areas under consideration in the first phase of negotiations namely:

(a) Protecting the rights of Union citizens in the UK and UK citizens in the Union;

(b) The framework for addressing the unique circumstances in Northern Ireland; and

(c) The financial settlement.

[18] The report addressed each of the topics "agreed in principle" one of which is contained in the chapter entitled "Ireland and Northern Ireland."

[19] The section of the Joint Report on "Ireland and Northern Ireland" found in paras [42]-[52] is of most significance for this case. A few of these paragraphs bear reproduction as follows:

> "43. The United Kingdom's withdrawal from the European Union presents a significant and unique challenge in relation to the island of Ireland. The United Kingdom recalls its commitment to protecting the operation of the 1998 Agreement, including its subsequent implementation agreements and arrangements, and to the effective operation of each of the institutions and bodies established under them. The United Kingdom also recalls its commitment to the avoidance of a hard border, including any physical infrastructure or related checks and controls.
>
> 44. Both Parties recognise the need to respect the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent. The commitments set out in this joint report are and must remain fully consistent with these provisions. The United Kingdom continues to respect and support fully Northern Ireland's position as an integral part of the United Kingdom, consistent with the principle of consent.
>
> 45. The United Kingdom respects Ireland's ongoing membership of the European Union and all of the corresponding rights and obligations that entails, in

> particular Ireland's place in the Internal Market and the Customs Union. The United Kingdom also recalls its commitment to preserving the integrity of its internal market and Northern Ireland's place within it, as the United Kingdom leaves the European Union's Internal Market and Customs Union.
>
> 50. In the absence of agreed solutions, as set out in the previous paragraph, the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market."

[20] Following from the negotiations, a draft Withdrawal Agreement ("WA") was first published on 25 November 2018. However this was rejected by Parliament. Thereafter, a WA was finally agreed on 17 October 2019 between the EU and the UK. This included the Protocol, which provided the framework for post withdrawal arrangements in NI. Alongside the WA the Protocol subsequently became part of domestic law in the UK.

[21] The profound effect of these changes for Northern Ireland is highlighted by Professor Christopher McCrudden, editor of a text "*The Law and Practice of the Ireland-Northern Ireland Protocol* "Cambridge University Press 2022. In the foreword, he comments as follows:

> "Brexit is one of the most constitutionally challenging events to occur in the United Kingdom of Great Britain and Northern Ireland in a generation. The outworking of it on the small jurisdiction of Northern Ireland is potentially very significant, set against the important background of the Good Friday Agreement and its framework for peace and reconciliation in a society emerging from conflict …
>
> Northern Ireland's position was unique. It was the only part of the United Kingdom to acquire a land border with the European Union as a result of Brexit. Its framework for peace and reconciliation was underwritten by the governments of the United Kingdom and Ireland. Those factors were significant in securing an agreement on the

withdrawal of the United Kingdom from the European Union with both parties signing up to a Northern Ireland Protocol to the Withdrawal Agreement."

[22] Three core points emerge from the foregoing. First, Northern Ireland clearly presented a unique challenge which required a bespoke arrangement post the UK's withdrawal from the EU. Second, when considering Northern Ireland within the withdrawal framework there was express emphasis placed upon protecting the 1998 Agreement, and the avoidance of a hard border. Third, there was by necessity a need to formulate specific trading arrangements to ensure unfettered access for NI Businesses in the UK market and protection of the single market given that post Brexit the island of Ireland would comprise one Member State of the EU and one outside the EU.

[23] The Protocol was the arrangement designed to meet the challenge presented by NI. This is not a simple or straight forward document. However, in summary, the import of the agreement that was reached was that NI remained part of the internal market. However, it also remained aligned to some EU rules, while protecting the single market. NI exited the EU Customs Union, but the EU Customs code and other customs legislation apply to all goods entering NI. Articles 5-10 encompass the core provisions dealing with:

- Customs and movement of goods
- Protection of the UK internal market
- Technical regulations
- VAT and Excise
- The Single electricity market
- State Aid

[24] These aims are reflected in two UK Government Command Papers of May 2020 and December 2020. Also, the *New Decade, New Approach* Agreement in NI, recognised the need to implement the NI Protocol in a way that worked for the restored Executive and NI businesses.

[25] In addition to trade provisions, the Protocol committed to no diminution of rights, safeguards and equality of opportunity as set out in the 1998 Agreement. Also the Common Travel Area ("CTA") was to continue and there is specific provision for cross border cooperation in specific areas including a single electricity market. In terms of governance arrangements, the Court of Justice of the European Union ("CJEU") retains a role in relation to some disputes and further specialised bodies were established to monitor arrangements namely the Specialised Committee and a Joint Consultative Working Group. There is provision for a democratic consent mechanism to establish whether NI continues the arrangements, first applicable in 2024 and at intervals thereafter. Finally, there is provision for suspension of the Protocol in certain circumstances of unworkability.

[26] The Trade and Cooperation Agreement, ("TCA") and the European Union (Future Relationship) Act 2020 are also part of the post Brexit landscape. The TCA does not replace or amend the Protocol however it may significantly affect how it will operate in practice. The Internal Markets Act 2020 was also enacted to address market access principles of mutual recognition and non-discrimination in an effort to prevent harmful trade barriers to goods, services and professional qualifications within the UK. These latter pieces of legislation are not the concern of this case.

[27] The political backdrop is obvious, however, this court is concerned with the legality of the domestic law which has given effect to the Protocol. Whilst various grounds of challenge have been raised which we will discuss, two headline points predominated in argument namely that the Protocol may offend principles enshrined in the Acts of Union and that it may offend the devolution arrangements in NI found in the NIA 1998. In assessing all of the arguments the court reiterates the obvious fact that this is a court of law. It is neither mandated nor equipped to deal with political issues. It is not the function of the court to pronounce upon the merits of the Protocol or the Regulations.

Trajectory of the judicial review applications

[28] Judicial review proceedings were first initiated by Mr Clifford Peeples by application dated 23 February 2021. There followed an application by "the Allister group" dated 5 March 2021. Leave to apply for judicial review was granted on 30 March 2021 on the papers.

[29] The judgment of Colton J confirms that delay was raised at first instance.

[30] A question also arises in relation to the true target of these challenges. In this appeal the appellants made the case that the challenge was directed at the Northern Ireland (Democratic Consent Process) EU Exit Regulations 2020, ("the 2020 Regulations"), as they gave effect to the previous pieces of legislation forming the Withdrawal Acts. The contrary argument is that in effect this challenge is primarily directed to the terms of the Withdrawal Acts which includes the Protocol and that it is therefore well out of time. We will deal with this matter in a somewhat different order from the trial judge as it frames the substance of the appeals before us and it has received greater attention and argument on appeal. As the respondent now raises justiciability in a more robust way by way of cross appeal we will also deal with that issue at the outset as both this and delay are essentially preliminary matters.

Justiciability

[31] There is a live argument as to what exactly is open to challenge in this case given its nature. This is because exit from the EU was effected by way of an international treaty negotiated between the UK and the EU. International relations

are framed by obligations of good faith which are made express in the Vienna Convention on the Law of Treaties, 1969.

[32] The well-known dictum of Lord Roskill in the "*GCHQ*" case *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 provides as follows:

> "But I do not think that the right of the Executive to do a lawful act affecting the rights of a citizen can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another."

[33] As the above quotation highlights, the making of international treaties is in exercise of a prerogative power. In *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Everett* [1975] 1 QB 811 at 820 Taylor J explained:

> "At the top of the scale of executive functions under the Prerogative are matters of high policy … making treaties … Clearly those matters and no doubt a number of others are not justiciable."

[34] *De Smith's, Principles of Judicial Review*, 8th edition, also refers to justiciability at para 3.041 as follows:

> "Despite the general shift away from jurisdiction to justiciability marked by the GCHQ case, there will still be some areas where the supervisory jurisdiction of the court will still not run. First, some prerogative powers are exercised in the sphere of international relations and the courts of England & Wales do not consider questions of pure international law as these are not for the purposes of the national legal system "law at all." See *R v Secretary of State for Commonwealth & Foreign Affairs ex p Rees Mogg*

> [1994] QB 552 regarding treaty making, *ex p Molyneuax* [1986] 1WLR 331, regarding the Anglo Irish Agreement which was deemed akin to a treaty and *R v HM Treasury ex p Smedley* [1985] QB 657 which involved a draft Order in Council that sought to bring treaty provision into national law."

[35] The above principles have not been seriously disputed in this case. Application of the principles has a particular consequence in relation to aspects of this challenge which relate to treaty making powers. In particular, an argument has been made that EUWA 2018 as amended offends a clause in Article VI of the Acts of Union, which reads as follows:

> "….and that in all treaties made by his Majesty, his heirs, and successors, with any foreign power, his Majesty's subjects of Ireland shall have same the privileges, and be on the same footing as his Majesty's subjects of Great Britain."

[36] The appellants maintain that the above so called "prohibitory clause" means that the WA itself is unlawful. If is fair to say that this submission was not made with as much vigour as others however it was maintained. We are not attracted to the argument. Quite apart from the delay in advancing it, there are other insurmountable impediments which arise as follows.

[37] First, this aspect of the challenge conflicts with the well-known limits imposed upon review of prerogative powers exercised in the conduct of foreign affairs previously discussed. The WA was reached via a high level process of international treaty making undertaken by the government in exercise of prerogative powers. The general rule in relation to the court's power to review the exercise of the prerogative in respect of the making or unmaking of treaties is clear and expressed at paras [55]-[56] of *Miller No. 2* by the Supreme Court as follows:

> "55. Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts—see *Civil Service Unions* case cited above, at pp 397–398. Lord Coleridge CJ said that the Queen acts "throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority"— *Rustomjee v The Queen* (1876) 2 QBD 69, 74. This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The

> prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state. As Lord Kingsdown expressed it in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PC 22, 75, treaties are "governed by other laws than those which municipal courts administer." The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.
>
> 56. It is only on the basis of these two propositions that the exercise of the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter UK domestic law."

[38] Recently, this court, differently constituted, dismissed an appeal challenging prerogative powers in *Raymond McCord, JR83, Jamie Waring's Application* [2019] NICA 49. Morgan LCJ delivering the judgment of the court stated at para [97]:

> "[97] It is common case that the starting point in this exercise is to examine the exercise of the Royal Prerogative ("the prerogative"). There is again no dispute that the general rule in relation to the use of the prerogative is captured at paragraphs [47]-[48] of *Miller*.
>
> > "47. The Royal Prerogative encompasses the residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation. In *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate [1965] AC 75*, 101, Lord Reid explained that the Royal Prerogative is a source of power which is "only available for a case not covered by statute." Professor HWR Wade summarised the position in his introduction to the first edition of what is now *Wade & Forsyth, Administrative Law* (1961), p 13:
> >
> > > 'the residual prerogative is now confined to such matters as summoning and dissolving Parliament, declaring war and peace,

> regulating the armed forces in some respects, governing certain colonial territories, making treaties (though as such they cannot affect the rights of subjects), and conferring honours. The one drastic internal power of an administrative kind is the power to intern enemy aliens in time of war.'
>
> 48. Thus, consistently with Parliamentary sovereignty, a prerogative power however well-established may be curtailed or abrogated by statute. Indeed, as Professor Wade explained, most of the powers which made up the Royal Prerogative have been curtailed or abrogated in this way. The statutory curtailment or abrogation may be by express words or, as has been more common, by necessary implication. It is inherent in its residual nature that a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute."

[39] Second, this was a distinctly political process which is not amenable to judicial review. Finally, we do not consider that the language of Article VI purported to bind the successors of the Parliament of Great Britain which enacted the Act of Union. Overall, there can be no argument in relation to the making of the treaty itself on an international plane between the UK and the EU some considerable time ago.

[40] There are undoubtedly some heavily blurred lines as to what this challenge is actually about. However, this conclusion on justiciability does not prevent a full consideration of the legality of provisions which enacted the WA including the Protocol. That permissible focus is upon domestic statutes, namely the Acts of Union, The Withdrawals Acts, the Northern Ireland Act 1998 and the 2020 Regulations.

Delay/target of the challenge

[41] The next preliminary matter is delay. This is related to the justiciability argument. The trial judge analysed the issue in paras [324]-[326] of his judgment and concluded that he did not have to decide upon the point in substance given the outcome he reached. It is clear, however, that if the judge had found in favour of the appellants on any of the grounds of challenge a determination of the delay issue would have followed.

[42] Of specific interest to the court is the way the challenge was presented which the judge records at para [323] wherein he describes the appellant's arguments in this way:

> "The Appellants did not seek leave to extend time but rather argued that the Regulations which are challenged in the Order 53 Statement are unlawful because of the unlawfulness of the Agreement and the 2018 Act under which the Regulations were made. They argue that because the Protocol itself was unlawful any attempt to give effect to it is equally unlawful."

[43] In other places within his judgment the trial judge articulates his belief that the true target of this challenge is the Protocol. In truth no other view is sustainable given the contours of this challenge whatever gloss is applied. We will not recite the entire evidential canvas in support of our conclusion. The following glimpse of the affidavit evidence is sufficient to illustrate the point. First we refer to Mr Allister's two affidavits which exhibit a series of documentary materials. The first exhibit to his first affidavit is the Protocol. Many of the exhibits to the two affidavits are Protocol-related. These include Mr Allister's letter of 8 February 2021 to the Attorney General the subject matter whereof is "the constitutional implications of the Ireland/Northern Ireland Protocol." Also exhibited is the pre-action Protocol letter, dated 19 February 2021. This letter asserts that the 2020 Regulations are the "matter being challenged." However, the following passage then appears:

> "The Regulations give effect to Article 18 of the Ireland/Northern Ireland Protocol of the Withdrawal Agreement between the European Union and the United Kingdom …. Article 18, the Unilateral Declaration of the United Kingdom giving effect to it and the Protocol generally are unlawful as a matter of the constitutional law of the United Kingdom and the Secretary of State acted unlawfully in purporting to give domestic effect to any provisions of them by the Regulations."

Therefore, the observation is made that of the documents exhibited to Mr Allister's affidavits most were generated in 2019.

[44] In keeping with this observation, the affidavits sworn by the other litigants highlight a similar approach. By way of example the following is noted:

(i) Mr Habib, a former MEP, avers that from 2019 the focus of vigorous campaigning on his part was "… the Protocol and … other terms in the Withdrawal Agreement and its associated Political Declaration …" There are

repeated references to the Protocol and Protocol-related issues in Mr Habib's remaining averments.

(ii) The operative averments in the affidavit of Mr Aiken, MLA relate solely to the Protocol.

(iii) The affidavit of Mrs Foster, former First Minister of Northern Ireland, devotes substantial space to the removal of trade barriers between Northern Ireland and Great Britain effected by the Act of Union and, in particular, Article VI. This is followed by:

> "Contrary to that Article the Protocol, in its entirety, places Her Majesty's subjects of Northern Ireland on a different footing to Her Majesty's subjects of Great Britain in relation to the European Union and the Protocol accordingly lacks legal effect in the United Kingdom …
>
> Articles 5, 6, 7, 8, 9, 10, 12 and 13 [of the Protocol] are incompatible with that obligation and lack legal effect in the United Kingdom accordingly …
>
> Indeed, the Protocol and subsequent connected measures have the opposite effect to what was guaranteed and negotiated as the conditions on which this Union was freely entered into by both Parliaments."

That this is the central theme of this affidavit, namely the contention that the Protocol is unlawful, is confirmed by the averments which follow. The final paragraph of the affidavit makes this abundantly clear:

> "There is no doubt in my mind that such a position forced on the people of Northern Ireland by this Protocol and related measures, without their consent, is of huge constitutional significance and fundamentally breaches the guarantees and protections which are the foundation of the Union and of the constitutional guarantees set out in the Belfast Agreement and enshrined within the Northern Ireland Act 1998."

(iv) The affidavit of Lord Trimble, having drawn attention to the cross-community voting and consent principle provisions of the 1998 Agreement, continues:

> "Our primary objection to the Protocol is that it fundamentally changes the constitutional relationship between Northern Ireland and the rest of the United Kingdom."

This, the central theme of the affidavit, is reflected in further averments such as:

> "This amounts to a seismic and undemocratic change in the constitutional position of Northern Ireland and runs contrary to the most fundamental premise in the Belfast Agreement and section 1 of the Northern Ireland Act 1998."

In other averments Lord Trimble elaborates on "the problem that the Protocol represents …"

(v) Beth Lunney, a horticulturist, explains that the purpose of her affidavit is:

> "… to assist the court with some of the economic and business consequences of the Protocol ... [adding] the Protocol has already had a significant adverse impact on our business."

The deponent elaborates on this by providing certain concrete illustrations.

(vi) Mr Peeples also refers to the Protocol and its effects in detail in his affidavits.

[45] The target of each of the challenges is clearly discernible from the Order 53 statements filed by both Appellants. The grounds upon which the Appellants have advanced their respective legal challenges from the outset as set out at para [3] above (i)-(vi) are also instructive.

[46] This court considers that the analysis of Colton J at [40] – [41] of his judgment is irreproachable. Any attempt to formulate these cases as a challenge exclusively, or even primarily, to the 2020 Regulations, is unsustainable. The ultimate goal of these proceedings for all of the appellants is an outcome establishing that the Protocol is unlawful.

[47] This conclusion is bolstered by the fact that one appellant issued pre-proceedings correspondence in 2019 challenging the Protocol. It is clear that there was a consideration of the points in relation to compliance with the Acts of Union in 2019. The question therefore arises whether or not, a challenge should have been pursued at an earlier stage and whether it is sufficient simply to have this case addressed on the basis of regulations which come 18 months down the line.

[48] The terms of the rules governing delay in this jurisdiction are clear. They are contained in Order 53, rule 4 of the Rules of the Court of Judicature (Northern Ireland) 1980 which reads as follows:

> "**Delay in applying for relief**
>
> 4.-(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

[49] It follows that the court must first determine on what date was the application for leave to apply for judicial review "made"? Having regard to the Order 53 model in its totality, this date is the date upon which the relevant papers are filed in court. Then the second question for the court is: was the leave application made within three months from the date when grounds for it first arose? If outside that time the court may be asked to determine a third question if the application is to proceed namely is there good reason to extend time.

[50] The appellants' applications for leave to apply for judicial review were made on 23 February 2021 and 5 March 2021 respectively. At [322] of his judgment Colton J focused on the dates pertaining to the WA (which enshrines the Protocol) namely when it was made at the international level, when it received Parliamentary approval and when it was ratified. These dates all belong to the period October 2019 to January 2020. The latest of these dates is 29 January 2020, when the WA was ratified. The judge, while noting the arguability of the contention that the Order 53, rule 4 trigger occurred on 19 October 2019, stated:

> "At the latest [any challenge] should be three months post-29 January 2020."

This court agrees with that analysis. It follows that for the purposes of Order 53, rule 4, the three month period expired on 30 April 2020.

[51] This court therefore focuses on whether there is good reason to extend time. The court granted an amendment to Mr Peeples who unlike the other appellants, has formally applied for an extension of time under Order 53, rule 4 if required. It is not a given that the court will extend time as recently observed in the case of *OV* [2021] NICA 58. There, in an educational setting relating to school admissions, the court was critical of a failure at first instance to properly substantiate a claim to extend time. However, the court did extend time as there was good reason on the basis of a discrimination claim. In doing so the court observed that the requirements of Order 53 (4) are framed in broad terms.

[52] In principle, "good reason" could encompass inexhaustively the following considerations, whether singly or in combination: the extent of the delay; any explanation proffered by an appellant for the delay; the respondent's stance on the issue; the importance of the issues raised by the legal challenge; any indications of obvious error in the first instance decision; the professional qualifications of an

appellant; the adverse impact on legal certainty of extending time; disruption of good administration; the public interest; and the broader repercussions of extending time – in particular encouraging belated judicial review applications and undermining the overriding objective. As the foregoing makes clear, there can be no exhaustive definition of "good reason."

[53] In this jurisdiction long standing guidance on the correct approach to extending time under Order 53, rule 4 is contained in two first instance decisions. The first of these is *Re Shearer's Application* [1993] 2 NIJB where Carswell J stated as follows:

> "Appellants should not assume that they have three months in any event in which to bring an application. Where a major project may be held up because an application for judicial review is pending, it may be quite unwarranted to take three months to launch the application."

[54] *Re McCabe* [1994] NIJB 27 at [28]-[29] Kerr J reiterated this point. From these decisions and others, including *Re Aitken's Application* [1995] NI 49 and *Re Bailie's Application* [1995] NIJB 124, there emerges a clear and consistent line of jurisprudence in this jurisdiction establishing with some clarity the principle that in judicial review proceedings an appellant's affidavit should ordinarily and proactively address the date when he first knew of the impugned act or decision, the reasons for delay, steps taken to obtain legal advice where applicable, the chronology of public funding applications, an explanation of gaps and periods of inertia, any relevant personal circumstances and the issue of alternative remedy, where applicable. While the immediate context in which affidavit evidence of this kind is normally required is provided by Order 53, rule 4, there is a further dimension namely the appellant's duty of candour to the court.

[55] In the case management phase of these appeals the court proactively brought to the attention of the parties the issue of delay and, further, adverted to the possibility of an application to adduce fresh evidence. The court further highlighted the parties' duty of candour to the court. As noted above no such application materialised as regards the first group of appellants. These appellants have provided the court with no evidence bearing on extending time under Order 53, rule 4.

[56] Mr Peeples in contrast with the other appellants, adopted the revised stance that in the event of the court concluding that he had not observed the three month time limit, he would wish to apply for an extension of time. He was wise to do so. As appears from the foregoing analysis, the contention that either judicial review application was initiated within the requisite period was doomed to failure from the outset. The net result is that in the case of Mr Peeples there is affidavit evidence

deposing to his state of mind, his beliefs and his expectations at the time when his legal challenge should properly have been initiated and subsequently.

[57] Where does this leave the court in terms of an extension of time which is required? The response is guided by the nature of this case. The stand out feature of these proceedings is that they raise issues of constitutional importance. The Protocol has generated much public debate and reaction. While a mechanistic, arithmetical approach would justifiably point to a refusal to extend time this court must adopt a broader perspective. Therefore, the conclusion reached is that it is in the public interest that these issues be considered and determined by the highest court in this devolved administration. This single factor tips the balance in favour of extending time.

[58] Whilst this court in very many cases would in these circumstances refuse an application to extend time this is not one of those cases. This is a unique set of circumstances which should not form the basis for argument regarding extension of time in other cases where in judicial review challenges have to be made in a more expeditious fashion given the issues at stake and in the interests of certainty. The court has also had the benefit of some affidavit evidence received from Mr Peeples in relation to this issue. Similar evidence has not been provided by the first set of appellants. However, as the appeals are being heard together the court will extend time for both appellants.

The findings of the Trial Judge in relation to the grounds of appeal

[59] The first instance judgment has been prepared with conspicuous care and diligence by the trial judge and has been of great assistance to this court. For ease of reference some of the core conclusions are reproduced as follows:

[60] The trial judge's focus in relation to the first ground of appeal relating to the alleged conflict between the Acts of Union's and the Protocol is found in para [94] of his judgment. There the judge asks this question- faced with two conflicting statutes of a constitutional character which is to prevail? He then provides the following analysis and answer to the question at para [95] as follows:

> "[95] As a starting point, based on fundamental principles, the most recent constitutional statute is to be preferred to the older one.
>
> …
>
> [101] There is no legal precedent whereby the Act of Union 1800 has operated to nullify a subsequent Act of Parliament.
>
> …

[108] At the end of the day the Earl of Antrim case is not determinative but it is a clear authority from the House of Lords of the capacity for a "*constitutional statute*", in that case the Act of Union 1800, to be impliedly repealed.

…

[110] In this regard it will be seen that the text of Article VI is open textured. This is to be contrasted with the specificity of section 7A [of the EUWA 2018 as amended] which expressly refers to the terms of the Withdrawal Agreement. The Withdrawal Agreement is a detailed specific and complex agreement making provision for the withdrawal of the United Kingdom from the European Union, the repeal of the 1972 EC Act and the details for the implementation of the Agreement. These specific details are in marked contrast to the general provisions of Article VI and give further weight to the proposition that in recognising the principle of the supremacy of primary legislation and the importance of "*constitutional*" statutes that section 7A should be given effect. These bespoke provisions are further support for giving them interpretative supremacy over the Act of 1800. To paraphrase Laws LJ they are sufficiently specific that the inference of an actual determination to effect the result contended for is irresistible. The more general words of the Act of Union 1800 written 200 plus years ago in an entirely different economic and political era could not override the clear specific will of Parliament, as expressed through the Withdrawal Agreement and Protocol, in the context of the modern constitutional arrangements for Northern Ireland.

[111] This matter must also be considered in light of the fact that every provision and clause of the Withdrawal Acts, the Protocol and associated documents were fully considered by Parliament. Parliament did so in the context of the three previous rejections of the Withdrawal Agreement which had a different arrangement for Northern Ireland. The views supported by the appellants in this case that the Protocol was contrary to the constitutional arrangements for Northern Ireland were known to the legislature. The Acts were passed by a legislature which was fully sighted of the terms and consequences of the Withdrawal Act. The Acts have been

> approved and implemented pursuant to the express will of Parliament and any tension with Article VI of the Act of Union should be resolved in favour of the Agreement Acts of 2018 and 2020.
>
> [112] This is entirely consistent with the "flexible polity" referred to by Dicey and quoted with approval by the Supreme Court in *Miller (No.1)*.
>
> …
>
> [114] The court therefore concludes that the Withdrawal Acts and, in particular, section 7A of the 2018 Act override Article VI of the Act of Union and insofar as there is any conflict between them section 7A is to be preferred and given legal effect. Judicial review on this ground is refused."

[61] The trial judge's analysis of the second ground of appeal, which engages section 1(1) NIA 1998, is found at para [136] and [137] of his ruling as follows:

> "[136] The plain words of the statute together with a reading of the agreements underpinning the statute make it clear that Section 1 [of the NIA 1998] does not regulate, in the words of the Supreme Court, "any other change in the constitutional status of Northern Ireland" other than the right to determine whether to remain part of the UK or to become part of a united Ireland. Section 1 of the 1998 Act does not regulate the changes implemented in the Withdrawal Agreements. The focus of all the relevant sections in the Agreement and in the statute is the choice between remaining part of the UK or becoming part of a united Ireland. Indeed, the Agreements were designed to reconcile the acknowledged conflicting wishes of the people of Northern Ireland on this issue.
>
> [137] The court therefore concludes that section 1(1) of the Northern Ireland Act 1998 has no impact on the legality of the changes effected by the Withdrawal Agreements and the Protocol. Judicial review on this ground is refused."

[62] Moving to the third ground of appeal which relates to section 42 of the NIA 1998 the 2020 Regulations and democratic consent the judge's conclusions are found at para [190] as follows:

"[190] The court concludes that the consent mechanism or procedure is not a transferred or devolved matter within the meaning of the Northern Ireland 1998 Act. It is a bespoke arrangement facilitating a vote by the Assembly under the control of the Secretary of State. It does not involve an Act of the Assembly which is observing or implementing an international obligation within its legislative competence.

[191] Even if the court is wrong on this point for the reasons set out below it is not determinative of its consideration of this issue.

[192] Insofar as a legal issue arises, the essential concern of the court is whether or not it is appropriate to in effect amend primary legislation of a constitutional character such as the Northern Ireland Act 1998 by way of Regulations.

…

[200] Turning to the Regulations in question under challenge here, the Protocol which includes the Unilateral Declaration has been implemented in domestic law pursuant to the explicit will of Parliament by the 2018 Act which as I have said in the discussion relating to potential conflict with the Act of Union and the Northern Ireland Act is itself a statute of a constitutional character.

[201] Under this primary legislation of a constitutional character, compliance with the Act requires implementation of the consent mechanism process outlined in Article 18(2) of the Protocol and the Unilateral Declaration.

[202] In order to carry out this obligation the Minister was given the broad powers set out in section 8C [of the EUWA 2018] which included the power to make provision equivalent to that which could be made under an Act of Parliament.

…
[207] Ultimately, this is an answer to any of the arguments concerning the protection provided by section 10(1)(a) or whether in fact the matter in question is a transferred/devolved or excepted matter. In the context

> of devolution in Scotland the Supreme Court emphasised again that the legal sovereignty of the Westminster Parliament remains central to the UK constitution.
>
> …
>
> [212] The court concludes that the 2020 Regulations are lawful and made intra vires the powers conferred by the 2018 Act. Judicial review on this ground is refused."

[63] As regards the article 3 protocol 1 ("A3P1") ECHR challenge the court found at para [266] as follows:

> "[266] As a result of the UK's departure from the EU residents in Northern Ireland will be unable to elect members to the European Parliament. This gives rise to a potential breach of A3P1 given the potential for that legislature to make laws applicable to Northern Ireland in the future. In the court's view, the limitations arising from the Protocol can be justified as within the margin of appreciation available to the state. Any restrictions arising are in pursuit of a legitimate aim, namely the objectives of the Protocol and the obligation of the UK legislature to implement the referendum result for the United Kingdom to withdraw from the European Union. In light of the democratic protections provided in the Protocol the means adopted by the UK are not disproportionate. From the analysis above it will be seen that residents in Northern Ireland have the right to vote for two legislatures, namely the Northern Ireland Assembly (of which three of the appellants are currently members) and the UK Parliament, who between them have the ongoing ability to influence, consent to or bring an end to existing and future EU laws arising from the safeguards and protections that have been built into the Protocol. This opportunity was not available to the appellant in the *Matthews* case. In this way the A3P1 rights of residents in Northern Ireland have been protected. They have not been curtailed to an extent so as to impair their very essence or to deprive them of effectiveness.
>
> [267] The court concludes that there has been no breach of the appellants' A3P1 rights. Judicial review on this ground is refused."

[64] In determining the associated article 14 discrimination argument the judge concluded at para [278]:

> "[278] In conclusion on this issue the court determines that the appellants have not identified any relevant differential treatment for the purposes of an Article 14 argument in support of a breach of A3P1, they have failed to identify anyone in an analogous situation and, in any event, the respondent can justify any alleged discrimination."

[65] In relation to the alleged breach of EU law the judge's conclusions are found at paras [296] and [297] as follows:

> "[296] This issue resonates with the discussion earlier in the judgment in relation to A3P1. Adopting that analysis, the fact that the Protocol and any existing EU law has been incorporated into domestic law by a statute of a constitutional character together with the protections provided for in the Protocol to include a democratic consent procedure and the infrastructure provided by way of the Joint Committee is consistent with the principles of the Rule of Law and democracy.
>
> [297] On this issue, consistent with the court's analysis of the appellants' challenge the principle of Parliamentary sovereignty ultimately defeats this argument as well. The court should not interfere with or ignore the clearly expressed will of Parliament in passing primary legislation to implement a valid agreement between contracting parties, both of which endorsed that Agreement through their respective constitutional orders."

[66] Finally, in dealing with some other points pertaining to the Belfast Agreement raised by Mr Peeples the judge concluded at para [319] as follows:

> "[319] The court does not consider that the Good Friday/Belfast Agreement has been incorporated into domestic law. Article 1 sets out the objectives of the Protocol which are "without prejudice" to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent and it sets out arrangements which are necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions of the north/south

> co-operation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions. Thus, the Article sets out the objectives of the Protocol but does not have the effect of incorporating the Agreements into domestic law. Rather the Protocol is the outworking of the political compromises designed to preserve and protect the Belfast/Good Friday Agreement."

The affidavits filed by the appellants and respondent

[67] In addition to the averments touching on delay which are referenced above some other extracts of the affidavits that have been filed are worthy of mention. The first affidavit from Mr Allister is dated 5 March 2021. The essence of the averments made in the affidavit are found in para [8] as follows:

> "I believe that the Act of Union 1800 cannot be repealed or amended and certainly not repealed or amended without such a course being supported by the outcome of a referendum held in accordance with section 1 of the Northern Ireland Act 1998."

[68] At para [10] Mr Allister also refers to the fact that:

> "The government had no power to make any agreement, whether as found in the Protocol or otherwise, they treated the Acts of Union as if they did not exist or as if those statutes lacked force."

[69] The argument that the Acts of Union have been subverted found at para [11] of the affidavit is purported to be on the basis that:

> "By reason of the possession by the EU (through the Protocol) of Executive control, law making and other powers associated with sovereignty, including judicature, in respect of Northern Ireland and by Northern Ireland being retained within a foreign single market for goods, subject to a foreign customs code and VAT regime, with all associated laws made not in Belfast or London but in Brussels, subject to the jurisdiction of the Court of Justice of the EU the Acts of Union have been subverted not only contrary to those statutes but also contrary to section 1 of the Northern Ireland Act 1998 which prevents such constitutional change without the consent of the people of Northern Ireland."

[70] In his affidavit evidence Mr Allister accepts that an Act of Parliament could lawfully give effect to the Protocol. However, he avers that this can only occur by "clear words." Mr Allister also relies on section 42 of the NIA 1998 and at para [17] says:

> "Of course I accept that the Queen and Parliament could enact a provision or provisions in an Act of Parliament which explicitly repeals or amends section 42 of the Northern Ireland Act 1998 so as to remove the possibility of a petition of concern leading to a cross-community vote. That has not occurred however and the regulations cannot achieve what amounts to that effect."

[71] Paragraph [15] of this affidavit refers to the recital of the Protocol that the Good Friday/Belfast Agreement should be protected in all parts.

[72] The next affidavit to reference is that from Mr Habib. He states at para [3] that:

> "I offered my support to the Brexit Party in 2019 solely in order to do what I could to ensure that the democratic will of the people of the United Kingdom was upheld."

[73] Mr Habib explains that he stood for election and was returned an MEP for London. He refers to the Withdrawal Agreement and says at para [7] of his affidavit:

> "It was immediately obvious that Northern Ireland would be significantly left behind."

[74] With some obvious inconsistency of position at para [11] he says:

> "When the EU Parliament voted on the Withdrawal Agreement, I voted for its approval because of the democratic mandate afforded to the Conservative government and because of the promises that the government had made."

[75] Mr Habib also avers that he subsequently called for a repudiation. On this theme at para [14] of the affidavit he also states:

> "It was only apparent that an attempt was made by the government to unpick certain aspects of the Protocol in September 2020 when the government launched the Internal Market Bill in circumstances where the Secretary of State for Northern Ireland described the import of the

> legislation and the need to 'break international law in a specific and limited way.'"

[76] In subsequent paragraphs, Mr Habib avers that these provisions in the Internal Market Bill were dropped notwithstanding the Prime Minister stating that it was also necessary to protect "the very fabric of the UK."

[77] The third affidavit emanates from Mr Steve Aiken and is dated 3 March 2021. He was then the leader of the Ulster Unionist Party in Northern Ireland. He explains in this affidavit at paragraph 5 that the UUP felt that the UK was best served remaining within the EU. However, he states at para [8] in support of his position as follows:

> "However, the imposition of the Protocol in Northern Ireland, creating barriers in the UK Single Market between GB and NI has damaged relationships because it has been imposed without any democratic consent at all from the people in Northern Ireland and has unilaterally changed Northern Ireland's status within the UK Single Market. The imposition is in direct contradiction to the Belfast Agreement, the effect given to that Agreement by the Northern Ireland Act 1998 and the Acts of Union 1800."

[78] At para [9] Mr Aiken reiterates:

> "The genuine and legitimate concerns of all unionists have been side-lined by the imposition of the Protocol."

[79] The next affidavit is sworn by The Right Honourable Arlene Foster and is dated 3 March 2021. She was then leader of the Democratic Unionist Party ("DUP"). Ms Foster's position is crystallised in para [21] in the following terms:

> "Quite simply key guarantees in relation to the constitutional position of Northern Ireland have been disregarded."

[80] At para [33] of her affidavit Ms Foster also acknowledges that:

> "There are a range of views on the Protocol in related matters, and many of these are firmly in the political sphere, however as I have outlined the impact of the Protocol on the constitutional position of Northern Ireland is significant. The people of Northern Ireland are in a wholly different position to fellow UK citizens across the rest of the UK in respect of

> customs arrangements, access to goods and ability to operate within the Internal Market of our own constitutional state."

[81] The next affidavit is from Lord David Trimble and is dated 3 March 2021. Mr Trimble draws on his experience in negotiating the Belfast Agreement at paras [5], [6] and [9] of this affidavit. In particular, at para [9] he says that he negotiated the Agreement and the community he represented accepted "unpalatable compromises" in order to reach an end to the terrorist campaign. He also stresses that "they did so because I was able to argue that their position as citizens of the UK was safeguarded by the commitment that they would have a direct say in any change in the status of Northern Ireland as part of the UK."

[82] An affidavit has also been filed by Ms Beth Lunney of 3 March 2021. She is described as a horticulturist. She sets out the changes that are apparent as a result of the Protocol concluding in the affidavit:

> "That it is almost impossible to have plants sent to Northern Ireland from GB due to EU rules that are being imposed on us."

[83] The replying affidavit evidence filed on behalf of the respondents is authored by Mr Colin Perry dated 11 May 2021. Mr Perry is a Director in the Northern Ireland Office and is authorised to make the affidavit on behalf of the respondents. This affidavit, in particular, sets out the issue of how the consent mechanism was addressed by government at para [4] as follows:

> "Prime Minister Johnson approached the issue of future arrangements for Northern Ireland with a new negotiating mandate following the rejection by Parliament of the November 2018 draft Withdrawal Agreement. This also underlined the necessity of any resolution being compatible with the constitutional arrangements of Northern Ireland and faithful to the terms of the Belfast (Good Friday) Agreement. This included stressing the importance of providing the opportunity for the people of Northern Ireland to provide or withhold their consent to any specific arrangements applied in Northern Ireland. This sought to address the democratic deficit of arrangements being applied without the opportunity for input from the people of Northern Ireland and their institutions. The negotiations with the EU resulted in the final version of the Withdrawal Agreement which sought to address those objectives. In all subsequent work in developing and seeking Parliamentary approval to the detailed operation

> of the consent mechanism, there was focus on ensuring that the arrangements were fully compliant with the Northern Ireland Act 1998 and the Agreement."

[84] This affidavit then refers to the principles underpinning UK/EU negotiations on the Protocol. At para [14] the affidavit expands on what exactly the Protocol and Unilateral Declaration were designed to do. This is as follows:

> "14. The provisions of the Protocol which require alignment with Union Law were not codified to be a permanent solution; it is designed to solve a particular set of problems and it can only do this in practice as long as it has the consent of the people of Northern Ireland. That is why the government made provision for the elected institutions in Northern Ireland to decide what happens to the Protocol alignment provisions in a consent vote that can take place every four years, with the first vote taking place in 2024."

[85] Para [15] of the affidavit dilates upon the Unilateral Declaration which was also signed on the same day that the deal was concluded. The import of this declaration is described by Mr Perry as follows:

> "The Unilateral Declaration affirmed that the objective of the democratic consent process should be to seek to achieve agreement that is as broad as possible in Northern Ireland and, where practicable, through a process taken forward and supported by a power sharing Northern Ireland Executive which has conducted a thorough process of public consultation. This, the Unilateral Declaration stated, should include cross-community consultation, upholding the delicate balance of the 1998 Agreement, with the aim of achieving broad consensus across all communities to the extent possible. The declaration further assured that the UK government would provide support as appropriate to the Northern Ireland Executive in consulting with businesses, civil society groups, representative organisations and trade unions on the democratic consent decision and that the process for affording or withholding consent would not have any bearing on or implications for the constitutional status of Northern Ireland."

[86] In para [16] of the affidavit Mr Perry avers that:

> "The democratic consent mechanism constitutes an exceptional step; providing a legally binding role for Northern Ireland's institutions when exercising its functions with respect of international relations on a question of alignment with a body of EU law."

[87] The affidavit then describes the debate in both Houses of Parliament in relation to this and then comes to the issue of compatibility of the consent mechanism in the 1998 Agreement. At para [26] of the affidavit the following averment is found:

> "The 1998 Agreement made no provision for any cross-community procedural safeguards for non-devolved matters or international relations, as such matters were outside the Assembly's remit. The baseline position for the exercise of legislative authority for matters that were within the remit of the Assembly was the requirement for a simple majority of Assembly members voting. The 1998 Agreement also made provision for cross-community voting, where appropriate, in respect of certain matters which would be designated in advance. International relations and the EU were never intended to be subject to such advance designation because they fell outside the legislative competence of the Assembly. The legislative process at Westminster on such matters is not subject to any procedural or cross-community safeguards."

[88] Mr Allister filed a reply to this affidavit dated 11 May 2021. In that he deals with the issue of democratic consent at para [5] as follows:

> "I acknowledge that in any negotiation a party or parties will often not conclude with all that had been hoped for. But the principle of prior democratic consent that was required before Northern Ireland could be governed, in part, by the EU as the Protocol provides, was fundamentally breached, contrary to all democratic principles. The full consequences of this breach will be developed in legal argument."

[89] Affidavits were also provided in support of the second case by Mr Clifford Peeples starting with an affidavit of 22 February 2021. In that Mr Peeples describes himself as a Pastor and a Unionist and says at para [5]:

> "I am firmly of the view that Northern Ireland must exit the EU on the same constitutional terms as the rest of the United Kingdom."

[90] He describes the current arrangements as major constitutional change and says that Parliament should have expressly permitted such a change.

[91] In response to queries raised by the court which have been referred to at the outset of this judgment an affidavit was filed by Mr Mark Davis dated 18 November 2021. This affidavit exhibits previous pre-action Protocol correspondence from 2019 which we will briefly refer to as follows. The pre-action letter of 8 February 2019 was sent on behalf of the Rt Honourable Lord Trimble by a different firm of solicitors from those instructed in the present case, Griffin Law. This pre-action letter made the following claims:

(i) That the defendants are in breach of Article 6 of the Union with Ireland Act 1800 in that according to the Attorney General – Northern Ireland is being treated differently from Great Britain.

(ii) The defendants are in breach of provisions in the NIA 1998, providing for the interlocking government of Northern Ireland, in that no hard border has been put into the British Irish Governmental Conference for bi-lateral negotiation; and

(iii) Subject to considerations of justiciability Article 32 of the 1969 Vienna Convention on the Law of Treaties provides that the Belfast Agreement prevails, on the question of no hard border, even while the UK is negotiating with the EU regarding withdrawal.

[92] The reply to the pre-action Protocol letter is dated 22 February 2019. It primarily highlights that the correspondence failed to identify the decision or acts of the defendants, namely the Secretary of State, the Prime Minister, the Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster. The letter then refers to the context which is that at that stage the government continued to negotiate with the EU. In relation to the grounds of challenge the answers are given in summary as follows.

[93] In relation to the specific challenge based upon contravention of the Act of Union the response at para [17] refers as follows:

> "If this ground is intended to mean that Northern Ireland is currently being treated differently, this is inexplicable. The ongoing negotiations with the EU are taking place against the context of a recognised need to protect the constitutional position of Northern Ireland under the devolution settlement and the Belfast/Good Friday

> Agreement, and to address the particular issues arising from withdrawal of the UK as a whole for the EU which relate to the geographical circumstances of Northern Ireland. There can be no legal or constitutional justification for ignoring either of these matters, or for interpreting the 1800 Act without any regard to the longstanding recognition and application of devolution in Northern Ireland."

The response also maintained that the other grounds of potential challenge were hypothetical and academic.

Consideration

Setting the context

[94] The withdrawal of the UK from the EU has obviously had profound effects. Legal issues arising have been adjudicated upon by the Supreme Court in two seminal cases which we will discuss further namely *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 known as "*Miller 1*" which dealt with the triggering of Article 50 and *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 known as "*Miller 2*" which dealt with the prorogation of Parliament. This case relates to another issue, post withdrawal and focusses on the settlement reached for Northern Ireland contained in the Protocol. The Protocol creates a customs and regulatory border between NI and GB in those specified areas of trade to which it applies. It positions NI primarily within the EU internal market rather than that of the UK. The Protocol subjects NI to a uniquely regulated trading regime until the beginning of 2025.

[95] It is apparent from examination of the affidavits filed that the appellants are fundamentally concerned about loss of status and the absence of democratic consent by the devolved institutions for the arrangements that have been put in place by virtue of the Protocol.

[96] At this point reference is made to the constitutional arrangements in NI including devolution. This has occurred over a period of time and deserves some brief mention. The Acts of Union were effected in 1800 to bring together the kingdoms of Great Britain and Ireland. One Act was made in the Westminster Parliament in London and one Act in the Dublin Parliament. It has inevitably been affected by the changing constitutional status of Northern Ireland. This started by virtue of partition.

[97] The Government of Ireland Act 1920 set out the realities of a partitioned Ireland but preserved the Kingdom created by the Act of Union. However, following treaty negotiations in 1922 the Free State Act established the new Republic of Ireland to which the Act of Unions no longer applied.

[98] The Northern Ireland Parliament persisted until the Northern Ireland (Temporary Provisions) Act 1972 which introduced direct rule. Thereafter, the Sunningdale Agreement resulted in the Northern Ireland Constitutional Act 1973 and the Northern Ireland Assembly Act 1973 which led to a brief period of devolution in Northern Ireland. Direct rule was introduced and remained in place until 1998 when the current devolution settlement which remains in Northern Ireland was put in place. This Northern Ireland constitutional settlement is comprised in the NIA 1998. It followed from the 1998 Agreement of the same date which established a new devolved government for Northern Ireland by way of a power sharing Executive.

[99] The 1998 Agreement is made up of two inter-related documents. The first is an agreement known as the Multi-Party Agreement which was signed on behalf of the British and Irish governments and eight political parties or groupings in Northern Ireland. In particular, this Multi-Party Agreement dealt with constitutional issues which were reflected in the new British/Irish Agreement replacing the Anglo/Irish Agreement. The statements made in that agreement:

> "(i) Recognise the legitimacy of whatever choice is freely expressed by the majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the union with Great Britain or a sovereign united Ireland.
>
> (ii) Recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given north and south, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland."

[100] The above is clearly expressed in the opening paragraphs of the NIA 1998 in section 1(1) which refers to the requirement of democratic consent following a border poll if there is to be a change of status of Northern Ireland from being a member of the United Kingdom to being a part of a united Ireland. Also a British-Irish Agreement was concluded which is an international treaty between the two governments. As part of it the British government agreed to repeal the Government of Northern Ireland Act 1920 which had established Northern Ireland, partitioned Ireland and asserted a territorial claim over all of Ireland. The 1998 Agreement was approved by voters across the island of Ireland by referenda held on 22 May 1998.

[101] The devolution settlement became law by virtue of the NIA 1998. This statute has been described as a constitutional type statute most clearly in the case of *Robinson v Secretary of State for Northern Ireland and others* [2002] NI 390. There Lord Bingham reflected on the constitutional nature of this Act.

[102] In this court most recently in *JR80's Application* [2019] NICA 58 at para [58] the court said:

> "[58] Lord Bingham in *Robinson v Secretary of State for Northern Ireland and others* [2002] NI 390 categorised the NIA 1998 as in effect a constitution whilst recognising that it did not set out all the constitutional provisions applicable to Northern Ireland. He continued at paragraph [11] by stating that:
>
> > '(so) to categorise the 1998 Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue.'
>
> He added that:
>
> > 'the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.'"

The court also observed:

> "It can be seen that the generous and purposeful interpretation has to bear in mind the values which the constitutional provisions are intended to embody."

[103] In another significant constitutional case in Northern Ireland *Re Buick's Application for Judicial Review* [2018] NICA 26 the above analysis was also applied.

[104] Flowing from the above, there is no doubt in our mind that the statutes at issue in this case namely the EUWA 2018 amended by the EUWAA 2020 and the Acts of Union and the NIA 1998 are all of a constitutional character. The issue is therefore the interplay between them and how they should be interpreted.

[105] Before examining the first limb of this challenge which is the compatibility of the Acts of Union with the EUWA 2018 as amended the court reiterates the importance of the NIA 1998 in terms of settling the constitutional arrangements in Northern Ireland. As we have said this Act was the product of intense political negotiation and was agreed on the basis of compromise. What is clear, as articulated

in the affidavit of Lord Trimble is that the satisfactory configuration of constitutional arrangements was a crucial requirement for the unionist parties' buy in to the Belfast Agreement. That principle is embodied in the principle of consent which guided any change to the constitutional status.

[106] Beyond the local issues acknowledgement is made of the fact that the ECA 1972 changed the UK's constitution radically. The Withdrawal Acts have changed the constitutional status back from a position of membership of the EU and represent a significant change after 50 years.

[107] Into the mix is another statute of a constitutional character namely the NIA 1998 which settles the devolution arrangements for Northern Ireland. It follows, in my view, that the real issue here is whether there is a tension between these statues of a constitutional character. The first ground of appeal postulates a tension between the Acts of Union and the Withdrawal Acts and, if that is established the question is, how is the tension to be reconciled? Similar questions arise in the light of the constitutional arrangements in Northern Ireland and those arguments form other discrete grounds of appeal.

[108] In the case of *Thoburn v Sunderland City Council* [2003] QB 151 Laws LJ presiding in a Divisional Court discussed statutes of a constitutional nature and implications in relation to repeal. His comments are *obiter* as on the facts of that case he did not find any inconsistency in the statutes he had to deal with. However, he was of the view repeal of "constitutional statutes" was subject to some particular requirements as follows:

> "Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's *actual* – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. I should add that in my judgment general words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute, by reference to what was said in Parliament by the minister promoting the Bill pursuant to *Pepper v Hart* [1993] AC 593. A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the

> relation between citizen and State, by unambiguous words on the face of the later statute."

[109] *Thoburn* has been discussed in subsequent cases for instance *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, *AXA General Insurance v Lord Advocate* [2011] UKSC 46 and *Imperial Tobacco v Lord Advocate* [2012] UKSC 61. Whilst some commentators have expressed doubts about the validity of the classification of constitutional legislation we do not detect any substantial retreat from the principles expressed in *Thoburn* in these cases.

[110] In the Supreme Court in *R (HS2) Action Alliance Limited v Secretary of State for Transport* [2014] UKSC 3 reference is also made to the principle in supporting terms. This was a case pre withdrawal which dealt with an alleged conflict between EU and domestic law in relation to Parliamentary procedure. The case involved action groups' challenge to the Parliamentary Bill procedure by way of hybrid bill that was being used for facilitation of the high speed rail network on the grounds that it contravened EU law. The Supreme Court found that there was no contravention of EU law and so wider constitutional issues were not determined.

[111] However at paras [206]-[208] of *HS2* some points were raised of general significance which are summarised in the following quotation:

> "It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation."

[112] This passage raises the issue of fundamental principles within our unwritten constitution which the Supreme Court thought Parliament may not have intended to abrogate when passing the ECA 1972. That was the particular context of the *HS2* case.

[113] *Craies on Legislation*, 12th edition at 14.4.6 comments on the implied repeal of constitutional statutes as follows:

> "Certain statutes alter the constitutional arrangements of the United Kingdom in such a way as create a new framework within which later legislation is to be construed and applied. That does not of course preclude a later statute from expressly repealing or amending these new arrangements for it is of the essence of the notion of Parliament's sovereign supremacy that no one Parliament can fetter the scope of action of a later Parliament. But it does mean that the courts will assume-in accordance with

> the wish of the Parliament enacting the constitutional statute- that no future Parliament intends to depart or contravene any aspect of the new constitutional arrangements unless it does so in clear and unambiguous words."

[114] The same text at 1.5.3 also sets out the consequences of the doctrine as follows:

(i) That members of the class will be assumed not to be substantively amended or repealed only be reason of inconsistency with later enactments; and

(ii) That the members of the class will be more carefully protected by the judges from interference by various kinds (such as amendment under statutory powers expressly permitting amendment of legislation in general) than will other statutes.

[115] The Supreme Court has examined constitutional issues in a number of important decisions including the two *Miller* rulings which dealt with withdrawal from the EU. The decision of the Supreme Court in *Miller 1* contains a strong affirmation of the sovereignty of Parliament. At para [40] of the judgment the court reiterated the constitutional framework in the United Kingdom as follows:

> "40. Unlike most countries, the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions. Reflecting its development and its contents, the UK constitution was described by the constitutional scholar, Professor AV Dicey, as "the most flexible polity in existence" - Introduction to the Study of the Law of the Constitution (8th ed, 1915), p 87."

[116] Lord Neuberger then provides a history of this and, in particular, he examines prerogative powers. At para [43] he states:

> "43. This is because Parliamentary sovereignty is a fundamental principle of the UK constitution, as was conclusively established in the statutes referred to in para 41 above. It was famously summarised by Professor Dicey as meaning that Parliament has "the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law of England as having a

> right to override or set aside the legislation of Parliament" page 38. The legislative power of the crown is today exercisable only through Parliament. This power is initiated by the laying of a Bill containing a proposed law before Parliament, and the Bill can only become a statute if it is passed (often with amendments) by Parliament (which normally but not always means both Houses of Parliament) and is then formally assented to by HM The Queen. Thus, Parliament, or more precisely the Crown in Parliament, lays down the law through statutes - or primary legislation as it is also known - and not in any other way."

[117] In relation to the law making powers of ministers the court also stated at para [46] of the judgment as follows:

> "46. It is true that ministers can make laws by issuing regulations and the like, often known as secondary or delegated legislation, but (save in limited areas where a prerogative power survives domestically, as exemplified by the cases mentioned in paras 52 and 53 below) they can do so only if authorised by statute. So, if the regulations are not so authorised, they will be invalid, even if they have been approved by resolutions of both Houses under the provisions of the relevant enabling Act - for a recent example see R (The Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening) [2016] AC 1531."

[118] In *Miller No 1* the Supreme Court also dealt with a Northern Ireland reference as to whether withdrawal from the EU offended section 1(1) of the NIA 1998. The answer provided by the Supreme Court is found at para [135] of the judgment which specifically deals with the Northern Ireland issue as follows:

> "135. In my view, this important provision [section 1(1)of NIA 1998], which arose out of the Belfast Agreement, gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland. It neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union. Contrary to the submission of Mr Lavery QC for Mr McCord, this section cannot support any legitimate expectation to that effect."

[119] Parliamentary sovereignty has also arisen in the context of devolution settlements. A recent case in this area is *Reference by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) Scotland Bill and European Charter of Local Self Government (Incorporation) (Scotland) Bill* case reported at [2021] UKSC 42. This case concerned the provisions of the Scotland Act and whether or not the Scottish legislature were empowered to make legislation enacting in domestic law the UN Convention on the Rights of the Child.

[120] At para [50] of that judgment, Lord Reed states as follows:

> "50. The ordinary principle is that the courts cannot question or impugn an Act of Parliament. As Lord Hope observed in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868, para 49:
>
> > "[a] sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty."
>
> Parliament can itself qualify its own sovereignty, as it did when it conferred on the courts the power to make declarations of incompatibility with rights guaranteed by the ECHR, under section 4 of the Human Rights Act. The Scottish Parliament, on the other hand, cannot qualify the sovereignty of Parliament, which is protected by a number of provisions of the Scotland Act, including, as counsel for the Lord Advocate acknowledged in his written submissions, section 28(7)."

[121] Further in para [75] Lord Reed also refers to the wider aspect of the constitutional settlement effected by the Scotland Act as follows:

> "75. In the *AXA* case, Lord Hope observed at para 49 that "the dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy." He went on to conclude at paras 51-52 that judicial review would be available if legislation enacted by the Scottish Parliament was incompatible with the rule of law. I added at para 153, in relation to the Scotland Act:
>
> > 'Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on

> particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.'"

[122] Lord Reed continues at para [76] as follows:

> "76. One aspect of the rule of law - indeed, the first characteristic identified by Lord Bingham in The Rule of Law (2010), p 37 - is that "the law must be accessible and so far as possible intelligible, clear and predictable." That principle is fundamental to liberal democracies. As Lord Diplock observed in *Fothergill v Monarch Airlines Ltd* [1981] 1 AC 251, 279:
>
> > 'Elementary justice or, to use the concept often cited by the European Court [of Justice], the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.'"

[123] It is apparent from the above that Parliament may place limits upon its own sovereignty by virtue of some Acts of Parliament such as the ECA 1972, the Human Rights Act 1998. However, there has not been a court case where judges in the UK have ruled that an Act of Parliament is contrary to the rule of law and therefore unconstitutional. The possibility was debated in the case of *R (Jackson) v Attorney General* [2005] UKHL 56 which dealt with the legality of the Hunting Bill. In this case at para [102], Lord Steyn said:

> "The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of my constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism."

[124] Lord Steyn suggested that the new legal order of the UK in the early 21st century - including as it did devolution settlements, EU law and the Human Rights

Act 1998 – could lead, in certain exceptional circumstances, to the courts qualifying the principle of Parliamentary supremacy (for example, if Parliament abolished judicial review, which he regarded as a "constitutional fundamental"). He seemed to be envisaging a potential struggle between the doctrine of Parliamentary sovereignty and the rule of law, rather than between Westminster and the devolved legislatures. However, he reiterated that the supremacy of Parliament was still the general principle of the UK constitution.

[125] In a subsequent case of *AXA General Insurance v HM Advocate* [2012] 1 AC 868 at [46], Lord Hope referred to this issue as follows:

> "The United Kingdom Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence. It is nevertheless a body to which decision making powers have been delegated. And it does not enjoy the sovereignty of the Crown in Parliament that, as Lord Bingham of Cornhill said in Jackson, para 9, is the bedrock of the British constitution. Sovereignty remains with the United Kingdom Parliament. The Scottish Parliament's power to legislate is not unconstrained. It cannot make or unmake any law it wishes."

[126] In *AXA* Lord Hope also emphasised the fact that devolved parliaments have delegated powers, which are not untrammelled. The devolved settlements do not enjoy the parliamentary sovereignty of Westminster. At para [50] Lord Hope observed that the question of whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances is "still under discussion." In that regard, Lord Hope noted various different judicial viewpoints. He noted at para [51] that it was not necessary to resolve the question of how these conflicting views about the relationship between the rule of law and the sovereignty of the United Kingdom Parliament may be reconciled because, in the case in question, the court was dealing with a legislature that is not sovereign, thereby relieving the court of that responsibility.

[127] The significance of parliamentary sovereignty within the structure of devolved legislatures is also referred to *In Re Recovery of Medical Costs (etc)* [2015] AC 1016 at [118]–[122]. It was underlined in *R v UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] AC 1022. At [41], the court stated:

> "Section 28(1) of the Scotland Act confers on the Scottish Parliament the power to make laws known as Acts of the Scottish Parliament, subject to section 29. Section 28(7) provides:

> '(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.'
>
> That provision makes it clear that, notwithstanding the conferral of legislative authority on the Scottish Parliament, the UK Parliament remains sovereign, and its legislative power in relation to Scotland is undiminished. It reflects the essence of devolution: in contrast to a federal model, a devolved system preserves the powers of the central legislature of the state in relation to all matters, whether devolved or reserved."

[128] In that case the Supreme Court emphasised that the legal sovereignty of the Westminster Parliament remains central to the UK constitution and that the Scottish institutions are constrained by the terms of the Scotland Act 1998, including Schedule 4, which lists the EUWA 2018 as an "enactment protected from modification." Similarly, section 7 of NIA 1998 classifies the EUWA 2018 as an entrenched enactment that shall not be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department.

[129] Section 28(7) of the Scotland Act was described as a recognition of the UK Parliament's "unqualified legislative power." NIA 1998 has a similar, though not identical, provision, namely s 5(6):

> "This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland."

[130] The NIA 1998 therefore, permits the Assembly to modify provisions made by Westminster if they relate to Northern Ireland. However, the fact remains that the UK Parliament retains the power to make laws in relation to all matters, whether devolved or reserved.

[131] In addition to the principle of parliamentary sovereignty and its application to devolved legislatures, we are cognisant of the rule of law and the separation of powers in this case. In particular, it is important to emphasise that the courts are independent of the executive and Parliament and must operate according to the rule of law.

[132] The principle of legality also operates as an aid to statutory interpretation. *Bennion on Statutory Interpretation* 8th edition at para 27.1 states that:

> "1. It is a principle of legal policy any interference with established rights and principles recognised by the common law should be expressed in clear terms. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account.
>
> 2. This gives rise to a more specific presumption that "fundamental" common law rights cannot be overridden by general words but only by express words or necessary implication."

[133] This is explained in *R v Secretary of State ex parte Simms* [2000] AC 15 at [131]:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

[134] The above formulation from *Simms* refers to fundamental rights already recognised in domestic law. The principle of legality is naturally invoked against the potential use of executive power to restrict fundamental rights such as access to the courts, judicial review of administrative decisions and liberty. In *Belhaj v Director of Public Prosecutions* [2018] UKSC 33 the Supreme Court said that the principle of legality does not come into play where it is clear from a legislative scheme that the legislature intended to curtail fundamental common law rights and has made an assessment of where the appropriate balance lies.

[135] Cognisant of these principles the court must examine the core legislative provisions and conduct an exercise in statutory interpretation in this case. The text

of the WA which includes the Protocol was agreed on 17 October 2019 and published on 19 October 2019. The WA was approved and implemented by Parliament on 23 January 2020 when it was passed into law in the EUWAA 2020. It was then signed on 24 January 2020 and ratified thereafter on 29 January 2020. The Protocol forms part of the Withdrawal Act and is one of three, the others relate to Cyprus and Gibraltar. Article 182 states that all three shall form an integral part of this Agreement. It is part of domestic law.

The Protocol

[136] The Protocol is a dense and complicated instrument. This court does not purport to offer a comprehensive analysis covering all contingencies not least because the technical terms of the Protocol are clearly subject to ongoing debate and analysis. However, it is worth looking at main provisions which affect this challenge as follows. First some of the Protocol's main recitals are instructive and read as follows:

> "The Union and the United Kingdom,
>
> HAVING REGARD to the historic ties and enduring nature of the bilateral relationship between Ireland and the United Kingdom,
>
> RECALLING that the United Kingdom's withdrawal from the Union presents a significant and unique challenge to the island of Ireland, and reaffirming that the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation there,
>
> …
>
> RECOGNISING that co-operation between Northern Ireland and Ireland is a central part of the 1998 Agreement and is essential for achieving reconciliation and the normalisation of relationships on the island of Ireland, and recalling the roles, functions and safeguards of the Northern Ireland Executive, the Northern Ireland Assembly and the North-South Ministerial Council (including cross-community provisions), as set out in the 1998 Agreement,
>
> NOTING that Union law has provided a supporting framework for the provisions on Rights, Safeguards and Equality of Opportunity of the 1998 Agreement,

…

EMPHASISING that in order to achieve democratic legitimacy, there should be a process to ensure democratic consent in Northern Ireland to the application of Union law under this Protocol,

RECALLING the commitment of the United Kingdom to protect North-South co-operation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls,

NOTING that nothing in this Protocol prevents the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom's internal market,

UNDERLINING the Unions and the United Kingdom's shared aim of avoiding controls at the ports and airports of Northern Ireland, to the extent possible in accordance with applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof,

…

RECALLING that the Union and the United Kingdom have carried out a mapping exercise which shows that North-South co-operation relies to a significant extent on a common Union legal and policy framework,

NOTING that therefore the United Kingdom's withdrawal from the Union gives rise to substantial challenges in the maintenance and development of North-South co-operation

….

RECALLING that Northern Ireland is part of the customs territory of the United Kingdom and will benefit from participation in the United Kingdom's independent trade policy,

HAVING REGARD to the importance of maintaining the integral place of Northern Ireland in the United Kingdom's internal market,

> MINDFUL that the rights and obligations of Ireland under the rules of the Union's internal market and customs union must be fully respected,
>
> HAVE AGREED UPON the following provisions, which shall be annexed to the Withdrawal Agreement: …."

[137] The exercise of interpreting the Protocol, one of the issues arising in these appeals, requires consideration of the foregoing recitals, together with the following provisions of the WA:

Article 4(3):

> "The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law."

Article 4(4):

> "The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period."

Article 4(5):

> "In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period."

[138] Any non-EU law provisions of the WA (which incorporates the Protocol) will be interpreted according to the default rules of treaty interpretation in the Vienna Convention on the Law of Treaties (Article 31 especially) and the principles of public international law, especially those pertaining to customary international law.

[139] Turning to the main provisions, Article 1 is entitled "objectives" and states as follows:

> "1. This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional

status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.

2. This Protocol respects the essential State functions and territorial integrity of the United Kingdom.

3. This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions."

[140] Article 4 is entitled "Customs Territory of the United Kingdom" and reads:

"Northern Ireland is part of the customs territory of the United Kingdom.

Accordingly, nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of any agreements it may conclude with third countries, provided that those agreements do not prejudice the application of this Protocol.

In particular, nothing in this Protocol shall prevent the United Kingdom from concluding agreements with a third country that grant goods produced in Northern Ireland preferential access to that country's market on the same terms as goods produced in other parts of the United Kingdom.

Nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of its Schedules of Concessions annexed to the General Agreement on Tariffs and Trade 1994."

[141] Article 5 considers 'Customs, movement of goods' as follows:

"1. No customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport, notwithstanding paragraph 3, unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing.

The customs duties in respect of a good being moved by direct transport to Northern Ireland other than from the Union or from another part of the United Kingdom shall be the duties applicable in the United Kingdom, notwithstanding paragraph 3, unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing. No duties shall be payable by, as relief shall be granted to, residents of the United Kingdom for personal property, as defined in point (c) of Article 2(1) of Council Regulation 1186/20091, brought into Northern Ireland from another part of the United Kingdom.

2. For the purposes of the first and second subparagraph of paragraph 1, a good brought into Northern Ireland from outside the Union shall be considered to be at risk of subsequently being moved into the Union unless it is established that that good:

(a) will not be subject to commercial processing in Northern Ireland; and

(b) fulfils the criteria established by the Joint Committee in accordance with the fourth subparagraph of this paragraph.

For the purposes of this paragraph, 'processing' means any alteration of goods, any transformation of goods in any way, or any subjecting of goods to operations other than for the purpose of preserving them in good condition or for adding or affixing marks, labels, seals or any other documentation to ensure compliance with any specific requirements.

Before the end of the transition period, the Joint Committee shall by decision establish the conditions under which processing is to be considered not to fall within point (a) of the first sub-paragraph, taking into account in particular the nature, scale and result of the processing.

Before the end of the transition period, the Joint Committee shall by decision establish the criteria for considering that a good brought into Northern Ireland from outside the Union is not at risk of subsequently

being moved into the Union. The Joint Committee shall take into consideration, inter alia:

(a) the final destination and use of the good;

(b) the nature and value of the good;

(c) the nature of the movement; and

(d) the incentive for undeclared onward-movement into the Union, in particular incentives resulting from the duties payable pursuant to paragraph 1.

The Joint Committee may amend at any time its decisions adopted pursuant to this paragraph.

In taking any decision pursuant to this paragraph, the Joint Committee shall have regard to the specific circumstances in Northern Ireland.

3. Legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013 shall apply to and in the United Kingdom in respect of Northern Ireland (not including the territorial waters of the United Kingdom). However, the Joint Committee shall establish the conditions, including in quantitative terms, under which certain fishery and aquaculture products, as set out in Annex I to Regulation (EU) 1379/2013 of the European Parliament and of the Council, brought into the customs territory of the Union defined in Article 4 of Regulation (EU) No 952/2013 by vessels flying the flag of the United Kingdom and having their port of registration in Northern Ireland are exempted from duties."

[142] Article 6 is entitled 'Protection of the UK Internal Market':

"1. Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market. Provisions of Union law made applicable by this Protocol which prohibit or restrict the exportation of goods shall only be applied to trade between Northern Ireland and other parts of the United Kingdom to the extent strictly required by any international obligations of the Union. The United Kingdom shall ensure full protection under

> international requirements and commitments that are relevant to the prohibitions and restrictions on the exportation of goods from the Union to third countries as set out in Union law."

[143] Article 7 deals with 'Technical regulations, assessments, registrations, certificates, approvals and authorisations.' Article 8 deals with 'VAT and excise.' Article 9 deals with the 'Single Electricity Market.' Article 10 deals with 'State Aid.' Article 11 deals with 'Other areas of North-South co-operation.' Article 12 deals with 'Implementation, application, supervision and enforcement' it states:

> "1. Without prejudice to paragraph 4, the authorities of the United Kingdom shall be responsible for implementing and applying the provisions of Union law made applicable by this Protocol to and in the United Kingdom in respect of Northern Ireland."

[144] Article 13(2) defines common provisions:

> "2. Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union."

[145] Article 14 refers to the Specialised Committee as follows:

> "The Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland established by Article 165 of the Withdrawal Agreement ('Specialised Committee') shall:
>
> (a) facilitate the implementation and application of this Protocol;
>
> (b) examine proposals concerning the implementation and application of this Protocol from the North-South Ministerial Council and North-South Implementation bodies set up under the 1998 Agreement;
>
> (c) consider any matter of relevance to Article 2 of this Protocol brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and

the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland;

(d) discuss any point raised by the Union or the United Kingdom that is of relevance to this Protocol and gives rise to a difficulty; and

(e) make recommendations to the Joint Committee as regards the functioning of this Protocol."

[146] The specialised committee is one of six under the terms of Article 165 of the WA. All of these committees are co-chaired by a Member of the European Commission and a UK Government Minister and all decisions shall be taken "by mutual consent."

[147] Article 15 refers to the working of the Joint Consultative Working Group:

"1. A joint consultative working group on the implementation of this Protocol ('working group') is hereby established. It shall serve as a forum for the exchange of information and mutual consultation.

2. The working group shall be composed of representatives of the Union and the United Kingdom and shall carry out its functions under the supervision of the Specialised Committee, to which it shall report. The working group shall have no power to take binding decisions other than the power to adopt its own rules of procedure referred to in paragraph 6.

3. Within the working group:

(a) the Union and the United Kingdom shall, in a timely manner, exchange information about planned, ongoing and final relevant implementation measures in relation to the Union acts listed in the Annexes to this Protocol;

(b) the Union shall inform the United Kingdom about planned Union acts within the scope of this Protocol, including Union acts that amend or replace the Union acts listed in the Annexes to this Protocol;

(c) the Union shall provide to the United Kingdom all information the Union considers relevant to allow

the United Kingdom to fully comply with its obligations under the Protocol; and

(d) the United Kingdom shall provide to the Union all information that Member States are required to provide to one another or to the institutions, bodies, offices or agencies of the Union pursuant to the Union acts listed in the Annexes to this Protocol.

4. The working group shall be co-chaired by the Union and the United Kingdom.

5. The working group shall meet at least once a month, unless otherwise decided by the Union and the United Kingdom by mutual consent. Where necessary, the Union and the United Kingdom may exchange information referred to in points (c) and (d) of paragraph 3 between meetings.

6. The working group shall adopt its own rules of procedure by mutual consent.

7. The Union shall ensure that all views expressed by the United Kingdom in the working group and all information provided by the United Kingdom in the working group, including technical and scientific data, are communicated to the relevant institutions, bodies, offices and agencies of the Union without undue delay."

[148] Article 16 is then entitled 'Safeguards' and is an important provision as it allows for steps to be taken should the Protocol become unworkable. The mechanism for this is as follows:

"1. If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.

2. If a safeguard measure taken by the Union or the United Kingdom, as the case may be, in accordance with paragraph 1 creates an imbalance between the rights and

> obligations under this Protocol, the Union or the United Kingdom, as the case may be, may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of this Protocol.
>
> 3. Safeguard and rebalancing measures taken in accordance with paragraphs 1 and 2 shall be governed by the procedures set out in Annex 7 to this Protocol."

[149] Article 17 deals with the Protection of financial interests.

[150] The final Article which is of high significance in the context of this case is Article 18, entitled 'Democratic Consent in Northern Ireland." This Article means that the continuance of the Protocol after a stipulated period is dependent upon the democratic consent of the people of Northern Ireland. The mechanism for this is provided as follows:

> "1. Within 2 months before the end of both the initial period and any subsequent period, the United Kingdom shall provide the opportunity for democratic consent in Northern Ireland to the continued application of Articles 5 to 10.
>
> 2. For the purposes of paragraph 1, the United Kingdom shall seek democratic consent in Northern Ireland in a manner consistent with the 1998 Agreement. A decision expressing democratic consent shall be reached strictly in accordance with the Unilateral Declaration made by the United Kingdom, including with respect to the roles of the Northern Ireland Executive and Assembly.
>
> 3. The United Kingdom shall notify the Union before the end of the relevant period referred to in paragraph 5 of the outcome of the process referred to in paragraph 1.
>
> 4. Where the process referred to in paragraph 1 has been undertaken and a decision has been reached in accordance with paragraph 2, and the United Kingdom notifies the Union that the outcome of the process referred to in paragraph 1 is not a decision that the Articles of this Protocol referred to in that paragraph should continue to apply in Northern Ireland, then those Articles and other provisions of this Protocol, to the

extent that those provisions depend on those Articles for their application, shall cease to apply 2 years after the end of the relevant period referred to in paragraph 5. In such a case the Joint Committee shall address recommendations to the Union and to the United Kingdom on the necessary measures, taking into account the obligations of the parties to the 1998 Agreement. Before doing so, the Joint Committee may seek an opinion from institutions created by the 1998 Agreement.

5. For the purposes of this Article, the initial period is the period ending 4 years after the end of the transition period. Where the decision reached in a given period was on the basis of a majority of Members of the Northern Ireland Assembly, present and voting, the subsequent period is the 4 year period following that period, for as long as Articles 5 to 10 continue to apply. Where the decision reached in a given period had cross-community support, the subsequent period is the 8-year period following that period, for as long as Articles 5 to 10 continue to apply.

6. For the purposes of paragraph 5, cross-community support means:

(a) a majority of those Members of the Legislative Assembly present and voting, including a majority of the unionist and nationalist designations present and voting; or

(b) a weighted majority (60%) of Members of the Legislative Assembly present and voting, including at least 40% of each of the nationalist and unionist designations present and voting."

[151] The "Declaration" mentioned in Article 18(2) of the Protocol is the Declaration by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the 'Democratic Consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland." It is dated 19 October 2019. This, in accordance with section 13 of EUWA 2018, was presented by the Government to Parliament.

[152] For present purposes para 3 entitled by the section "Democratic Consent Process" is worthy of replication:

"**Democratic Consent Process**

3. The United Kingdom undertakes to provide for a Northern Ireland democratic consent process that consists of:

a. A vote to be held in the Northern Ireland Assembly on a motion, in line with Article 18 of the Protocol, that Articles 5 – 10 of the Protocol shall continue to apply in Northern Ireland.

b. Consent to be provided by the Northern Ireland Assembly if the majority of the Members of the Assembly, present and voting, vote in favour of the motion.

c. The Northern Ireland Assembly notifying the United Kingdom Government of the outcome of the consent process no less than 5 days before the date on which the United Kingdom is due to provide notification of the consent process to the European Union."

And at paras [7–[9]:

"**Independent review**

7. In the event that any vote in favour of the continued application of Articles 5 to 10 of the Protocol, held as part of the democratic consent process or alternative democratic consent process, is passed by a simple majority in line with paragraph 3b rather than with cross community support, the United Kingdom Government will commission an independent review into the functioning of the Northern Ireland Protocol and the implications of any decision to continue or terminate alignment on social, economic and political life in Northern Ireland.

8. The independent review will make recommendations to the Government of the United Kingdom, including with regard to any new arrangements it believes could command cross-community support.

9. The independent review will include close consultation with the Northern Ireland political parties, businesses, civil society groups, representative

> organisations (including of the agricultural sector) and trade unions. It will conclude within two years of the vote referred to in paragraph 7 above."

[153] The Protocol and the accompanying Unilateral Declaration were debated in Parliament on 19 October 2019. It received its second reading stage on 21 October 2019 and was finally approved on 6 November 2019. Thereafter, the EUWAA 2020, was passed by a significant majority of the House of Commons and received Royal Assent on 23 January 2020. This piece of legislation made amendments to EUWA 2018 and formally provided for the withdrawal of the United Kingdom from the European Union on 1 January 2021 after a transition period.

[154] The effect of the Protocol is to maintain NI in the UK internal market. Article 4 specifically states that NI is part of the customs territory of the UK, a point reinforced by the terms of Article 6 which asserts that trade from NI to GB shall be unfettered. However, Article 6(2) states that best endeavours to achieve this aim shall be applied "in accordance with applicable legislation and taking into account [GB and EU] regulatory regimes as well as implementation thereof." Article 5 creates a single regulatory zone for goods on the island of Ireland. This raises the prospect of regulatory divergence in relation to goods produced on the island of Ireland and goods produced in GB. The terms of Article 5 also apply the entirety of EU customs legislation including the Union Customs Code to NI. Annex 2 to the Protocol also contains an extensive body of EU rules governing manufacturing and agricultural products which continue to apply.

[155] In the aforementioned text on the Protocol referred to *supra* at para [21] herein at page 119 Professor Gordon Anthony also comments on the nature of the obligations that arise under and outside the Protocol as follows:

> "In the first instance, this is a point about the ongoing application of aspects of EU law in Northern Ireland, where Article 4(1) of the Withdrawal Agreement reads:
>
> > 'The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States…. The United Kingdom shall ensure… is judicial and administrative authorities [have powers] to disapply inconsistent or incompatible domestic provisions.
> >
> > While the corpus of EU law that has effect in this way does so by reason of an international

> Treaty, Article 4 appears as a reformulation of the supremacy doctrine that was developed in case law as such as *Costa v Enel* case 6/64 [1964] ECR 585and case 106/77 and *Simmenthal* [1978]ECR 629. This is where the legal hybridity of the Protocol takes form, as, to the extent that Northern Ireland's institutions are bound by norms of EU law under the Protocol, they must follow different rules when engaged in decision making outside it.'"

[156] The "legal hybridity" of the Protocol identified by Professor Anthony permeates some of the appeal points raised.

[157] In practical terms the Protocol also means that the treatment of NI products differs from that of GB products due to the need for border checks and regulation and the application of customs duty. Hence, the claim made by the appellants that NI is treated differently within the UK and that in avoiding a hard border on the island of Ireland an effective border has been created in the Irish Sea between Ireland and Britain.

[158] Article 18 is the provision of the Protocol which addresses the democratic consent of the people of NI. This is triggered after the Protocol is in place. The method by which democratic consent to the continuance of the Protocol also differs from the devolution arrangements in the NIA 1998 as section 42 is dis-applied which provided for cross community support upon a petition of concern being presented by 30 members.

Legislative Provisions

[i] EUWA 2018 as amended by EUWAA 2020

[159] The EUWA 2018 specifically and by express words repeals the ECA 1972 effective from "exit day." It provides for the implementation of the WA into domestic law as follows. In addition, EUWA 2018 is now designated as an enactment which cannot be modified by the Assembly by virtue of an amendment to section 7(1) of the NIA 1998 effected by Schedule 3, paragraph 51(2) of EUWA 2108. Of particular importance in this appeal is section 7A of EUWA 2018 as amended by EUWAA 2020. The new section 7A reads as follows under the headline 'Further aspects of Withdrawal':

"7A General Implementation of remainder of Withdrawal Agreement

7A(1) Subsection (2) applies to–

(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and

(b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,

as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.

7A(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be–

(a) recognised and available in domestic law, and

(b) enforced, allowed and followed accordingly.

7A(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).

7A(4) This section does not apply in relation to Part 4 of the withdrawal agreement so far as section 2(1) of the European Communities Act 1972 applies in relation to that Part."

[160] Further amendment provided by section 21 of EUWAA 2020 resulted in a new section 8C power in EUWA 2018:

"**21 Main power in connection with Ireland/Northern Ireland Protocol**

After section 8B of the European Union (Withdrawal) Act 2018 (power in connection with certain other separation issues) (for which see section 18 above) insert—

"**8C Power in connection with Ireland/Northern Ireland Protocol in withdrawal agreement**

(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate—

(a) to implement the Protocol on Ireland/Northern Ireland in the withdrawal agreement,

(b) to supplement the effect of section 7A in relation to the Protocol, or

(c) otherwise for the purposes of dealing with matters arising out of, or related to, the Protocol (including matters arising by virtue of section 7A and the Protocol).

(2) Regulations under subsection (1) may make any provision that could be made by an Act of Parliament (including modifying this Act).

(3) Regulations under subsection (1) may (among other things) make provision facilitating the access to the market within Great Britain of qualifying Northern Ireland goods.

(4) Such provision may (among other things) include provision about the recognition within Great Britain of technical regulations, assessments, registrations, certificates, approvals and authorisations issued by—

(a) the authorities of a member State, or

(b) bodies established in a member State,

in respect of qualifying Northern Ireland goods.

(5) Regulations under subsection (1) may (among other things) restate, for the purposes of making the law clearer or more accessible, anything that forms part of domestic law by virtue of section 7A and the Protocol.

(6) A Minister of the Crown may by regulations define "qualifying Northern Ireland goods" for the purposes of this Act.

(7) In this section any reference to the Protocol on Ireland/Northern Ireland includes a reference to—

(a) any other provision of the withdrawal agreement so far as applying to the Protocol, and

(b) any provision of EU law which is applied by, or referred to in, the Protocol (to the extent of the application or reference),

but does not include the second sentence of Article 11(1) of the Protocol (which provides that the United Kingdom and the Republic of Ireland may continue to make new arrangements that build on the provisions of the Belfast Agreement in other areas of North-South cooperation on the island of Ireland)."

[161] Also of relevance are two other sections of EUWAA 2020 found in Part 5 under general and final provisions. First, section 38 which reads as follows:

"**38 Parliamentary sovereignty**

(1) It is recognised that the Parliament of the United Kingdom is sovereign.

(2) In particular, its sovereignty subsists notwithstanding—

(a) directly applicable or directly effective EU law continuing to be recognised and available in domestic law by virtue of section 1A or 1B of the European Union (Withdrawal) Act 2018 (savings of existing law for the implementation period),

(b) section 7A of that Act (other directly applicable or directly effective aspects of the withdrawal agreement),

(c) section 7B of that Act (deemed direct applicability or direct effect in relation to the EEA EFTA separation agreement and the Swiss citizens' rights agreement), and

(d) section 7C of that Act (interpretation of law relating to the withdrawal agreement (other than the implementation period), the EEA EFTA separation agreement and the Swiss citizens' rights agreement).

(3) Accordingly, nothing in this Act derogates from the sovereignty of the Parliament of the United Kingdom."

[162] Section 39(1) which is the interpretation section provides as follows:

"(1) In this Act—

"devolved authority" means—

(c) a Northern Ireland department;

"enactment" means an enactment whenever passed or made and includes—

an enactment contained in any Order in Council, order, rules, regulations, scheme, warrant, byelaw or other instrument made under an Act of Parliament."

[ii] The 2020 Regulations

[163] The 2020 Regulations were made by the Secretary of State for Northern Ireland by virtue of section 8C (1) and (2) of EUWA 2018. The effect of the 2020 Regulations is to insert a new provision, section 56A, into NIA 1998 which, in turn, inserts a new Schedule 6A. Paragraph 1(2) and (3) of this reads as follows:

"(2) Part 3 of this Schedule establishes, for the purposes of Article 18 of the Protocol as read with the unilateral Declaration, the default democratic consent process referred to in paragraphs 3 and 4 of the unilateral Declaration.

(3) Part 4 of this Schedule establishes, for the purposes of Article 18 of the Protocol as read with the unilateral Declaration, the alternative democratic consent process referred to in paragraphs 5 and 6 of the unilateral Declaration."

[164] Paragraph 18(5) of Schedule 6A is found in Part 5 under the title "Procedural Matters and Outcome." Paragraph 18(5) provides:

"Section 42 does not apply in relation to a motion for a consent resolution."

[iii] The Northern Ireland Act 1998

[165] Section 1 of the NIA 1998 contains the core provisions regarding the status of Northern Ireland expressed in two parts, the first dealing with the present status by way of declaration, section 1(1), the second a forward looking provision governing the procedure prior to any change of status, section 1(2). These provisions read as follows:

Section 1: Status of Northern Ireland

> "(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.
>
> (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

[166] Section 42 NIA 1998 also contains a special voting provision which ensures cross community support in certain circumstances:

Section 42: Petitions of concern

> (2) If 30 members petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, the vote on that matter shall require cross-community support.
>
> (3) Standing orders shall make provision with respect to the procedure to be followed in petitioning the Assembly under this section, including provision with respect to the period of notice required.
>
> (4) Standing orders shall provide that the matter to which a petition under this section relates may be referred, in accordance with paragraphs 11 and 13 of Strand One of the Belfast Agreement, to the committee established under section 13(3)(a).

[167] The relevant statutory provision is section 4(1) of NIA 1998 and paragraph 3 of Schedule 2 respectively which read as follows:

Section 4(1)

> "In this Act:
>
> "excepted matter" means any matter falling within a description specified in Schedule 2
>
> "reserved matter" means any matter falling within a description specified in Schedule 3
>
> "transferred matter" means any matter which is not an excepted or served matter."

Paragraph 3 of Schedule 2 refers to specified excepted matters as

> "international relations, including relations with territories outside the United Kingdom…but not-
>
> (c) observing and implementing international obligations and obligations under the Human Rights Convention."

[168] Transferred matters are therefore defined as "any matter which is not an excepted or reserved matter." The excepted matters are defined at Schedule 2 to the Act and refers specifically international relations. The latter categorisation is obviously of particular relevance to this case.

[169] The law making structure in NI is circumscribed by virtue of the NIA 1998. Laws can clearly be made in relation to devolved matters. The Assembly can also legislate for excepted and reserved matters but only with the consent of the Secretary of State of State and any provision dealing with an excepted matter must be ancillary to other provisions (whether in the Bill or previously enacted) dealing with reserved or transferred matters by virtue of section 8(a) NIA 1998 which reads as follows:

> "**Section 8 Consent of Secretary of State required in certain cases**
>
> The consent of the Secretary of State shall be required in relation to a Bill which contains—
>
> (a) a provision which deals with an excepted matter and is ancillary to other provisions (whether in the Bill or previously enacted) dealing with reserved or transferred matters; or **a provision which deals with a reserved matter."**

[170] Legislative competence is governed by section 6 NIA 1998 which has itself been amended to refer to the Protocol in section 6(ca):

> "6(1) A provision of an Act is not law if it is outside the legislative competence of the Assembly.
>
> (2) A provision is outside that competence if any of the following paragraphs apply—
>
> (a) it would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland;
>
> (b) it deals with an excepted matter and is not ancillary to other provisions (whether in the Act or previously enacted) dealing with reserved or transferred matters;
>
> (c) it is incompatible with any of the Convention rights;
>
> (ca) it is incompatible with Article 2(1) of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement (rights of individuals);
>
> (d) it is in breach of the restriction in section 6A(1);
>
> (e) it discriminates against any person or class of person on the ground of religious belief or political opinion;
>
> (f) it modifies an enactment in breach of section 7.
>
> (3) For the purposes of this Act, a provision is ancillary to other provisions if it is a provision—
>
> which provides for the enforcement of those other provisions or is otherwise necessary or expedient for making those other provisions effective; or
>
> (a) which is otherwise incidental to, or consequential on, those provisions;

> and references in this Act to provisions previously enacted are references to provisions contained in, or in any instrument made under, other Northern Ireland legislation or an Act of Parliament.
>
> (4) Her Majesty may by Order in Council specify functions which are to be treated, for such purposes of this Act as may be specified, as being, or as not being, functions which are exercisable in or as regards Northern Ireland.
>
> (5) No recommendation shall be made to Her Majesty to make an Order in Council under subsection (4) unless a draft of the Order has been laid before and approved by resolution of each House of Parliament."

Conclusion - Ground 1 of appeal: The Protocol and the Acts of Union

[171] This ground of appeal involves consideration of terms of a statute from 1800 namely the Acts of Union and section 7A of EUWA 2018 which gave effect to the WA. The essence of the point is that there is an inconsistency between the "same footing" guarantee of Article VI of the Acts of Union and the Protocol terms and that the earlier statute should have interpretative supremacy. The trial judge did not agree with this analysis and essentially found that section 7A of the 2018 Act overrides Article VI of the Act of Union and insofar as there is any conflict between them section 7A is to be preferred and given legal effect.

[172] The legal argument that has been put before us by the appellants was to the effect that the outcome reached by the trial judge offended constitutional principles in that it validates implied repeal of a constitutional statute. Against that the respondent contests whether there is any real inconsistency between the statutes and maintains that if there is the later statute should clearly prevail. These are two Acts of a sovereign Parliament.

[173] We distil four core questions from the arguments put before us as follows:

(i) Is there an inconsistency between the two statutes?

(ii) If so, what is the effect of the later statute on the earlier statute?

(iii) What was Parliament's intention in enacting the later statute?

(iv) Does the later statute so offend fundamental principles to be rendered unlawful?

To answer these questions we must first turn to the terms of the two statutes and the specific provisions at issue. This is an exercise in statutory interpretation.

[174] In *R (on the application of O & Others) v Secretary of State for the Home Department* [2022] UKSC 3 in the context of an exercise in statutory interpretation the Supreme Court stated that:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated: "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] AC 349, 396).
>
> Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."

[175] As we are also being asked to consider repeal of one statute by another it is apt to consider the meaning of repeal. *Bennion on Statutory Interpretation*, 8th edition section 8.7 references repeal and provides the following by way of definition:

> "8.7 Legislation will often contain repeals.
>
> (1) To 'repeal' an Act is to cause it to cease to be a part of the corpus juris or the body of law.
>
> (2) To repeal an enactment is to be cause it to case to be in law a part of the Act containing it."

> "A repeal revokes or abrogates an Act or part of an Act. For delegated legislation the term revoke is used instead, to like effect."

Question (i): inconsistency

[176] The two statutes at issue were made at very different times in history by two different Parliaments. It is also clear that changes have occurred to the Union created between Great Britain and Ireland in 1800 brought about by the partition of Ireland in 1922 and devolution in Northern Ireland. The Acts of Union 1800 were parallel acts of the Parliament of Great Britain and the Parliament of Ireland which came into force on 1 January 1800. As a result of them the nations of Great Britain and Ireland were united politically and constitutionally. This was a change of constitutional significance. Under the terms of the union, the Irish Parliament was abolished; Ireland was given 100 MPs at Westminster whilst the Irish peerage were represented in the House of Lords by 28 who served for life.

[177] The case of *Earl of Antrim and others* [1967] 1 AC 691 illustrates the point that the effect of the Acts of Union have changed over time. This case involved a petition by 12 Irish peers seeking a declaration that the peerage of Ireland had a right under the 1800 Act to be represented in the House of Lords by 28 Lords Temporal of Ireland. The court rejected the petition holding that the provisions of the Union with Ireland Act 1800 ceased to be effective on the passing of the Irish Free State (Agreement) Act 1922, and that accordingly, the right to elect Irish representative peers no longer existed.

[178] Although the House of Lords decision was unanimous there was disagreement about the basis for the rejection with speeches by Lord Reid and Viscount Dilhorne constituting the majority reasoning and a minority view provided by Lord Wilberforce. The majority view was that the strict terms of the Acts of Union had become obsolete due to the changed landscape within Ireland. Viscount Dilhorne concluded (at 719E - EA):

> "When the Free State and Northern Ireland were created, Ireland as an entity ceased to be part of the United Kingdom. It necessarily follows that there was no territory called Ireland to be represented in United Kingdom Parliament and thereafter it was, in my opinion, no longer possible to elect an Irish peer to sit and vote in the House of Lords on the part of Ireland. For to do so would have meant the election of peers to represent a territory which had ceased to exist as a political entity and as part of the United Kingdom.

> For these reasons, in my opinion, that part of the Union with Ireland Act which provided for the election of Irish peers to the House of Lords must be regarded as having become spent or obsolete or impliedly repealed in 1922."

[179] Lord Wilberforce expressed his position in the following way:

> "… I confess to some reluctance to holding that an act of such constitutional significance as the Union with Ireland Act is subject to the doctrine of implied repeal or of obsolescence - all the more when these effects are claimed to result from later legislation which could have brought them about by specific enactment."

[180] All of that said the Acts of Union remain of constitutional significance. Article 1 of the Acts of Union contains the core provision which declares the Union and reads that Great Britain and Ireland "to be united for ever from 1 Jan 1801." This provision has obviously been modified by virtue of the partition of Ireland. However, this provision is not under scrutiny at all in this case. The reason for that is unsurprising as the EUWA 2018 as amended does not speak to the Union at all. Rather that statute and section 7A with which we are primarily concerned simply gives effect to the WA which set out terms for exit from the EU for the United Kingdom as a whole.

[181] The focus of the appellant's argument is on one phrase within the terms of Article VI of the Acts of Union 1800 entitled: "Subjects of Great Britain and Ireland to be on same footing from 1 Jan 1801." Article VI of the Act of Union (Ireland) Act 1800, i.e. the act passed by the Parliament of Ireland, reads as follows:

> "That it be the Sixth Article of Union, that his Majesty's subjects of Great Britain and Ireland shall, from and after the first day of January, one thousand eight hundred and one, be entitled to the same privileges and be on the same footing, as to encouragements and bounties on the like articles, being the growth, produce or manufacture of either country respectively, and generally in respect of trade and navigation in all ports and places in the United Kingdom and its dependencies; and that in all treaties made by his Majesty, his heirs and successors, with any foreign power, his Majesty's subjects of Ireland shall have the same privileges, and be on the same footing as his Majesty's subjects of Great Britain."

Little court time was taken in examining this ancient language as all parties agreed that this provision is directed towards trade arrangements. By virtue of Article VI all

citizens of the United Kingdom were to be on the "same footing" when the Acts of Union were made and in future.

[182] However, the historical context cannot be ignored. The respondent makes a good point at para [39] of the written argument which states that:

> "… it cannot be the case that an overly literal interpretation of the text from the 1800 Act of Union requires complete parity on every regulatory aspect of trade between Great Britain and Northern Ireland. This was not the position applied prior to the enactment of the Protocol and it is not the position that applies now. As the judge acknowledged at 60 of his judgment "prior to coming into force of the Withdrawal Agreement and Protocol there was a system of sanitary and phytosanitary checks operated by the Department of Agriculture, Environment and Rural Affairs at points of entry in Northern Ireland reflecting the longstanding operational position of the island of Ireland as a single epidemiological unit."

[183] To our mind the clause relied upon is clear and unambiguous *i.e.* all citizens by this provisions were to have the same rights in terms of trade. However, the context in which this enactment was made is very different from present day and application of the "same footing" trade guarantee has adapted over time. The court is sympathetic to the argument made by the respondent that too literal an approach may be inappropriate.

[184] On one view the 'same footing' provision in Article VI refers to 'encouragements and bounties.' The Protocol checks are designed to separate out all GB products being traded to NI to identify those subject to the UK internal market and those that may be subject to Single Market rules. The purpose of the checks is to ensure no unfavourable tariffs are imposed on internal UK trade and to preserve the 'same footing' principle for such goods. The additional checks imposed on GB origin goods sent to NI are intended to identify those items which may proceed through NI and make their way to the EU internal market. The query is whether disruption to trade caused by provisions to preserve the UK internal market throughout the UK and protect the EU single market offends the same footing providing which relates to "encouragements and bounties."

[185] However, the respondent did not offer much resistance to the argument that changes have been effected to trading arrangements by EUWA 2018. In our view there is also a valid argument that the EUWA 2018 as amended conflicts with the same footing provision in Article VI because the citizens of Northern Ireland remain subject to some EU regulation and rules as part of the withdrawal framework which

does not apply to other citizens of the United Kingdom. These are the provisions in Article 5-10 of the Protocol which are discussed in foregoing paragraphs.

[186] The exact outworking of this arrangement is not clearly defined and is subject to change within the Protocol architecture. However, it appears clear that in some respects the EUWA 2018 does bring about a difference in footing between the citizens of Northern Ireland and those in the remaining part of the United Kingdom in terms of trade. Therefore, the court is prepared to accept the proposition that there is some inconsistency between the terms of the two statutes in relation to trade in agreement with the trial judge. In doing so we stress that this conclusion relates to one specific part of the Acts of Union regarding trade and not the entire statute. That is our answer to the first question.

Question (ii): the effect of EUWA 2018 as amended

[187] Next the terms of the EUWA 2018 require examination. Whilst this argument is focussed on section 7A we mention other provisions which set the context. Section 1 of the 2018 Act expressly repeals the ECA 1972 and section 13 provides 'that a Withdrawal Agreement may only be ratified if '… (d) An Act of Parliament has been passed which contains provision for the implementation of the Withdrawal Agreement.' As to the implementation of the WA section 7A(3) of the 2018 Act as amended provides that "every enactment … is to be read and has effect subject to subsection (2).' Section 13 enshrines, *inter alia*, Article 4 of the WA that "the UK shall ensure compliance at paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions through domestic primary legislation."

[188] Next we turn to the new section 7A inserted by the EUWAA 2020. The official description given to section 7A is significant as it denotes the purpose of the amendment was for the "general implementation of remainder of the Withdrawal Agreement." Section 7A(1) provides that all rights, powers, liabilities, obligations, restrictions, remedies and procedures are "without further enactment to be given legal effect or used in the United Kingdom." The phrase "without further enactment" tells us that this is automatic and so the WA terms become part of domestic law. This is confirmed by subsection 2 which states that the said rights, powers, liabilities, obligations, remedies and procedures concerned are specifically to be "recognised and available in domestic law" per 7A(2) and "enforced, allowed and followed accordingly as per 7A(2).

[189] The terms of section 7A(3) define scope in a broad way as "every enactment" '… is to be read and has effect subject to subsection 2.' "Enactment" is defined in section 39(1) of the interpretation provisions as "an enactment whenever passed or made and includes *inter alia* an Act of Parliament. It follows that any Act of Parliament must be read and has effect subject to the WA. The WA has been made law by the EUWA 2018 as amended. Therefore, any other Act must be read subject to the terms of this statute.

[190] This is unsurprising given the context. The ECA 1972 became law upon accession to the EU. Upon exit a new arrangement has been agreed by way of international treaty which was then made part of domestic law and which must logically apply to any previous enactment to effect its terms. The Protocol is part of this arrangement and must take precedence over previous law.

[191] We agree with the respondent's argument that the language of section 7A is clear and unambiguous and provides a complete answer to the second question that the later statute takes precedence. This aligns with the core tenets of parliamentary sovereignty, affirmed by recent authority, including the principle that Parliament cannot bind its successors.

[192] Mr McGleenan suggested that the true effect of section 7A was suspension of the specific provision of Article VI relied upon. We are not overly attracted to that description as the term suspension is apt to confuse and does not correlate with the actual terms of the statute which uses the phrase "subject to."

[193] Section 7A does not purport to repeal. Rather, it states that any enactment pre dating the EUWA 2018 must be read "subject to" its terms. However, the question arises whether this is in effect a repeal of Article VI of the Acts of Union. We cannot see that it is in strict terms. That is due to the fact that the Protocol is not codified as a permanent solution and is drafted in flexible terms. Specifically, reference is made to the Article 16 mechanism and the democratic consent mechanism provided for in Article 18. The terms of Article V1 are subject to the Protocol and so are clearly modified to the extent and for the period during which the Protocol applies.

[194] To our mind the express characteristic of section 7A accords with modern drafting referenced by *Craies on Legislation* at paragraph 14.4.5.1. "As a result of the greater particularity of modern drafting and the new entrenched practice of making consequential amendments and repeals expressly, the courts have weakened the presumption against implied repeal very considerably." The EUWA 2018 is a modern statute which utilises clear language to achieve its purpose which is essentially subjugation in the event of any conflict with a previous enactment. This does not offend any constitutional principle and is in truth reflective of changing constitutional arrangements brought about by democratic will.

[195] It follows that we find no conflict with the principles enunciated by Laws LJ in *Thoburn.* This is not a case about implied repeal. As the two statutes under scrutiny are of constitutional stature, no issue of hierarchy arises, contrary to the submission of Mr Lavery QC. If there is any concern about the effect of the EUWA 2018 as amended which we have described above, it is alleviated when the actions of Parliament are considered.

Question (iii): The will of Parliament

[196] In this case there are two Acts of a sovereign Parliament with constitutional characteristics. It is the sovereign right of Parliament to make laws and it reflects the changing nature of our constitution in the United Kingdom that it would do so. The question is can one statute lawfully change the other when constitutional principles are engaged. The answer depends on the intention of Parliament and the fundamentality of the change.

[197] The first part of the question is easily answered in our view. The words in section 7A are clear as we have said but even if there is a doubt they are "so specific that the inference of an actual determination to effect the result contended for [is] irresistible" to use Laws LJ's formula in *Thoburn*. The purpose of the EUWA 2018 was to effect implementation of the Protocol. Parliament was clearly sighted on the Protocol. This was the end result of a protracted, transparent, debated, informed and fully democratic process which decided arrangements for Northern Ireland post Brexit. The terms were settled and made law after a long parliamentary process. It cannot seriously be suggested that Parliament was unaware of the changes that may be brought. Therefore, there can be no doubt in relation to Parliamentary intention in this case as the result contended for is "irresistible." In our view the answer to the third question is clear and bolsters our conclusion that the application of section 7A EUWA 2018 has legal effect.

Question (iv): Legality

[198] That is not the end of the discussion of this ground of appeal because the fourth question we have identified concerns the fundamentality of any change in the law and engages the principle of legality. The principle of legality is an aid to interpretation which can justify a restrictive construction on the words used by Parliament where words are unclear and fundamental human rights are concerned see *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115. The principle of legality means that "Parliament must squarely confront what it is doing and accept the political cost." The principle can also be utilised to examine adherence to constitutional principles.

[199] In our view the principle of legality is not engaged in this case. There is no basis for saying that Parliament has interfered with a fundamental human right. No definition was brought to bear on this suggestion in anything other than the vaguest terms. In any event we cannot see that this line of argument has any application to the facts of this case as the subject matter is far removed from the concept of fundamental rights found in the Convention or common law.

[200] In truth, we think that this claim was really directed at constitutional principles. However, it too must fail. The constitutional status of Northern Ireland remains unchanged by virtue of the statutes which effected withdrawal from the EU. Article 1 of the Protocol could not be clearer in relation to its objective where it states

that "this Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland…"

[201] In addition, the Protocol is not expressed as final or in rigid terms. It is subject to review and monitoring by various specialist bodies. It is subject to the safeguard in Article 16 which may be invoked at any time. It is subject to democratic consent within the terms of Article 18. Any interference is with trade for a defined period with safeguards and arises given the unique position of Northern Ireland post withdrawal from the EU.

[202] Parliament has made itself clear and expressly determined that all previous Acts of Parliament will be read "subject to" the EUWA 2018 as amended. This means that the terms of the Protocol take precedence. What has happened is that some provisions of the Acts of Union found in Article VI in relation to trade are now, in accordance with the sovereign will of Parliament, to be read and have effect subject to the terms of the later Act, the EUWA 2018, which was necessary to effect the United Kingdom's exit from the EU. This subjugation has been expressly provided for in the words of the EUWA 2018 itself. The statute does not change the constitutional underpinning of Northern Ireland as part of the Union. Therefore, this case is very far from one where a court would even begin to contemplate whether it could intervene as the appellants suggest to quash or declare unlawful an Act of a sovereign Parliament.

[203] There is no apparent tension with the rule of law in the circumstances of this case. In fact, it is quite clear to us that adherence to the rule of law required Parliament to observe international obligations which arose as a result of withdrawal from the EU and the treaty terms. That was the purpose of the EUWA 2018 as amended.

[204] We reiterate the point that the later statute in this case, namely the EUWA 2018, was passed by Parliament after a lengthy Parliamentary process. The purpose of section 7A was to implement the Protocol. If such implementation is inconsistent with Article V1 and if that Article has interpretative supremacy, a primary Act has no effect. Such an outcome is not sound given the sovereign right of Parliament to enact legislation through the democratic process provided for.

[205] Arriving back to first principles, we agree that the general propositions helpfully articulated by the respondent in para [49] of the written argument apply namely that:

(i) Parliament cannot bind is successors such that a later Act cannot amend or repeal any earlier Act.

(ii) The question of whether a later Act amends an earlier Act is determined by construing the later Act (an earlier statute yields to the later).

(iii) Any inconsistency between Acts of Parliament must be reconciled by determining whether the later Act of Parliament was intended to modify the former - this intention can be found in express provision (whether free standing or textual amendment) or by implication.

(iv) The constitutional importance of an earlier provision will be relevant in context when determining whether the later provision is intended to amend it, but the overriding question will always be one of determining Parliamentary intent.

[206] Accordingly, there is no reason to doubt that a sovereign Parliament having enacted the law contained in section 7A of EUWA 2018 as amended knew what the legislation involved, particularly the arrangements on Northern Ireland and acted lawfully. That is our conclusion on the fourth question we posed. It follows that we dismiss this ground of appeal.

Conclusion: Ground 2: Section 1(1) of the NI Act

[207] The next ground of challenge raises only one question which is:

(i) Whether the Protocol conflicts with section 1(1) of the NIA 1998 and is therefore unlawful.

[208] In answering this question we bear in mind that the Supreme Court have considered the same issue in *Miller No. 1* and decided that section 1(1) refers to a change in constitutional status from the United Kingdom to a United Ireland and nothing else. Notwithstanding this view, the point developed by the appellants in this appeal is that a customs border within the UK has in effect changed the constitutional status and is unlawful as it was enacted without consent in contravention of section 1(1).

[209] Section 1(1) has a number of aspects. First, it contains a statutory declaration as to the constitutional stature of Northern Ireland within the United Kingdom. This declaration was previously provided in section 1(2) of the Ireland Act 1949 which is framed in similar terms that "It is hereby declared that Northern Ireland remains part of His Majesty's dominions and of the United Kingdom" and that this cannot change without "the consent of the Parliament of Northern Ireland."

[210] That provision was replaced after the 1949 Act was repealed. A declaration as to the status of Northern Ireland was then comprised in section 1 of the Northern Ireland Act 1973 (now also repealed by the NIA 1998). That legislation provided that any change to status was only capable with the consent of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1 to the Act.

[211] These precursor statutes reflect the ongoing recognition of the status of Northern Ireland post partition. Section 1(1) of the NIA 1998 reflects the current position. There the same declaration is found. In addition, in section 1(2) a new mechanism to effect any change in constitutional status was included, namely the requirement for a "border poll." A border poll is currently the only way a change to the constitutional status of Northern Ireland within the United Kingdom can occur and must be by majority vote across both sides of the border.

[212] The argument on behalf of the appellants postulates that section 1(1) of the NIA 1998 is open to two interpretive possibilities: the first is that the protection contained in this section extends only to a final, formal severing of the last tie that keeps Northern Ireland part of the United Kingdom; the second is that any diminution of status requires the imprimatur of a majority as per the terms of section 1(2).

[213] At para [55] of his argument Mr Larkin maintains that under the first interpretation:

> "So long as Northern Ireland was formally or nominally part of the United Kingdom, it would be possible for laws to be made for Northern Ireland by the EU or the Oireachtas, or for the Irish Government to have or share executive responsibility for Northern Ireland without offending the requirement to hold a referendum in Section 1. Not only does this interpretation make section 1 a deceptive snare for the unwary rather than a protection, it cannot be reconciled with the interpretive context provided by the section 'Constitutional Issues' in the Belfast Agreement."

[214] We do not consider that this analysis is a reflection of political reality. It is better to consider the wording of the section in the interpretative context without any gloss.

[215] In construing section 1(1) the interpretive context is provided by the 1998 Agreement although not itself part of the domestic law. The heading of the section "Constitutional issues" signposts the issue and by way of preamble states:

> "1. The participants endorse the commitment made by the British and Irish Government that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will, inter alia:
>
> (i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether

they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

(iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;

(iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;

(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;

(vi) recognise the birth right of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

2. The participants also note that the two Governments have accordingly undertaken in the context of this comprehensive political agreement, to propose and support changes in, respectively, the Constitution of Ireland and in British legislation relating to the constitutional status of Northern Ireland."

[216] Annex A then includes the draft clause which finds expression in section 1(1) as part of the British legislation. Annex B includes the Irish Government's draft legislation to amend the Constitution in that state.

[217] Reference is also made to the British-Irish Agreement made between the two Governments. The appellants specifically reference Article 1(iii) which is set out in para [187] and which reads that the two Governments "acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a United Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and maintained legitimate, is to maintain the Union, and accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies on that wish, and that it would be wrong to make any change in the status of Northern Ireland save with the consent of the majority of its people."

[218] Drawing on these interpretive aids the appellants say that NIA 1998 provisions in section 1(1) are designed to protect against any substantial change to the Union. This it is argued applies intra UK in terms of the relationship of Northern Ireland with the rest of the UK rather than as regards wider relationships. Therefore, it is argued that a referendum was required to make the changes which are part and parcel of the EUWA 2018 as amended and the associated Protocol.

[219] In our view the ordinary and natural meaning of the words of the section are tolerably clear for two main reasons. First, section 1(1) is a declaration of intent. Second, section 1(2) refers to the choice reflected in the 1998 Agreement which may or may not be made between Northern Ireland remaining part of the United Kingdom or becoming part of a United Ireland.

[220] When the NIA 1998 was enacted the whole of the UK was part of the EU and it was not contemplated that would change. Therefore, we cannot see how this unexpected exit is truly catered for within section 1(1). We agree that this had no real relevance to Article 50 being triggered. The question is whether it is applicable to a change in intra-UK arrangements brought about by withdrawal from the EU.

[221] We are not satisfied that this should be the case. We understand that the Supreme Court in *Miller No 1* was only asked this question in relation to withdrawal from the EU. The appellants now accept that could have no application to section 1(1). However, section 1(1) was not in any event designed to go beyond establishing the parameters and mechanism before there would be any change in constitutional status dismantling the Union. This is clear from the ordinary and natural meaning of the words in the provision particularly section 1(2) which is framed in terms of a choice.

[222] It is clear that section 1(1) only relates to a change in the formal constitutional status of Northern Ireland. As such it does not apply to this circumstance. A purposive approach results in the same outcome given the terms of the 1998 Agreement which framed the NIA 1998. We agree with the trial judge that section 1(1) of the NIA 1998 has no impact on the legality of the changes enacted by the EUWA 2018 as amended and the Protocol. Therefore, this argument cannot succeed and this ground of appeal is dismissed.

Conclusion: Ground 3: Section 42 of the NI Act 1998 as amended by the 2020 Regulations

[223] The next ground of challenge relates to section 42 of the NIA 1998 and the repeal of this provided by the 2020 Regulations. The 2020 Regulations at Part 5 paragraph 18 sub-paragraph (vi) provide:

> "Section 42 does not apply in relation to a motion for a consent resolution."

This provision is intimately related to Article 18 of the Protocol which provides for democratic consent to the ongoing operation of Articles 5-10 of the Protocol. That Article removes the specific requirement for the cross community vote process contained in section 42(1) of the NIA 1998.

[224] There is one question namely:

(i) Whether the amendment of section 42 by the 2020 Regulations was lawful.

[225] First we look to the terms of Article 18 as follows. Article 18.1 contains a declaration that the United Kingdom; "shall provide the opportunity for democratic consent in Northern Ireland to the continued application of Articles 5-10."

[226] Article 18.2 states that this democratic consent shall be sought in a manner consistent with the 1998 Agreement and in accordance with the Universal Declaration.

[227] Article 18.5 sets out the specific voting requirements which can be majority decision or cross community support. These mean that the continuation of the Protocol can be mandated by simple majority.

[228] The appellants contend that the UK government acted incompatibly with the constitutional safeguards enshrined in section 42 of the NIA 1998 in making an agreement which included the particular democratic consent mechanism in Article 18 of the Protocol. Further, it is argued that the Regulations implementing Article 18 are ultra vires and specifically that the Secretary of State acted incompatibly with section 10(1)(a) of the 2018 Act. Finally, it is argued that the Regulations are inconsistent, or do not comply, with the 1998 Agreement.

[229] Following from the above there are a number of points to consider. The first point returns to the WA as the appellants argue that it is incompatible with the constitutional safeguards in Northern Ireland found in the 1998 Agreement and NIA 1998. There are similarities between this argument and ground 1 of challenge. The second limb of the argument questions the *vires* of the enacting Regulations. If the Regulations which enacted Article 18 are ultra vires the entire process is invalidated. We will start there.

[230] First, the issue is whether the Secretary of State had power to make the Regulations at all. This depends upon whether he was lawfully mandated by Parliament. A simple answer is found as follows. The 2020 Regulations were made by the Secretary of State under powers conferred by section 8C (1) and (2) of the EUWA 2018. The wording of section 8C is broad in scope and clear in that its terms mandate by section 8C(1) a minister of the Crown to make regulations:

> "(a) To implement the Protocol in Ireland/Northern Ireland in the Withdrawal Agreement,
>
> (a) To supplement the effect of section 7A in relation to the Protocol, or
>
> (b) Otherwise for the purposes of dealing with matters arising out of, or related to, the Protocol (including matters arising by virtue of section 7A in the Protocol)."

[231] Section 8C(2) also mandates the amendment of primary legislation in that it states that:

> "Regulation under sub-section (1) may make provision that could be made by an Act of Parliament (including modifying this Act)." [the NIA 1998]

[232] It follows that the Regulations were made lawfully by the Secretary of State empowered by an Act of Parliament, namely section 8C(1) and (2) of the EUWA 2018.

[233] The 2020 Regulations give effect to Article 18 of the Protocol. Article 18 allows for certain provisions of the Protocol, namely Articles 5-10 to be dis-applied if by a simple majority there is a vote to that effect. This is different to the cross-community voting system which applies in the NIA 1998. However, the 2020 Regulations at Part 5 paragraph 18 sub-paragraph (vi) provide clearly that section 42 does not apply in relation to a motion for a consent resolution. Therefore, the question is whether these 2020 Regulations which are subordinate legislation lawfully amend the NIA 1998, which is primary legislation.

[234] A "Henry VIII" clause provided for the delegation of authority to modify an act of Parliament. Therefore, Mr Lavery argued that this provision should be interpreted restrictedly invoking *R (Public Law Project) v Lord Chancellor* [2016] AC 1531.

[235] The application of this principle of statutory construction depends upon the relevant statutory context. This is illustrated by some authority where it has had a successful application. In *Public Law Project* the Lord Chancellor was obliged to make legal aid available for civil legal services described in Schedule 1 to the governing Act but he proposed to amend Schedule 1 by statutory instrument so as to provide that those who failed a residence test, would, subject to exceptions be removed from the scope of Part 1 and therefore not be eligible for civil legal aid.

[236] In *Regina (Rights of Women) v Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91 the Lord Chancellor exceeded the scope of the power vested in him in relation to legal aid when restricting eligibility for victims of domestic violence, by way of an imposed 24 month requirement and exclusion of financial abuse.

[237] In *Regina (Unison) v Lord Chancellor (Equality and Human Rights Commission and another intervening) [*2017] UKSC 51. This is another case where the court decided that the Lord Chancellor had overstepped his power in relation to the setting of fees for employment tribunal cases, thereby preventing effective access to the courts and discrimination.

[238] All of the above authorities differ markedly from this case. In this case, by Act of Parliament, power was conferred on the Secretary of State in clear and unambiguous terms. This was a deliberate choice. There is no competing argument as to the construction to be applied. Therefore, the lawfulness of the delegation of

power cannot sustainably be questioned for the simple reason that it was clearly mandated by Parliament as part of implementation of the WA.

[239] The broader constitutional point flows from the terms of section 10(1)(a) of the EUWA 2018 which provides:

> "(1) In exercising any of the powers under this Act, a Minister of the Crown or devolved authority must—
>
> (a) act in a way that is compatible with the terms of the Northern Ireland Act 1998."

Therefore, it is argued that the constitutional underpinning of Northern Ireland found in the NIA 1998 is brought into play. The central claim made by the appellants is that the issue of democratic consent which is central to the devolution settlement has been impugned and that the 2020 Regulations offend the 1998 Agreement. We are not attracted to either argument for the following reasons.

[240] First, as we have said Parliament provided the legal authority in section 8C to the Secretary of State to take the course that he did. The power provided is wide mandated by an Act of Parliament. Second, the WA and the Unilateral Declaration are not devolved matters. Schedule 2 to the NIA 1998 sets out the definition of excepted matters. Under paragraph 3 of Schedule 2 excepted Matters include:

> "International relations, including relations with the territories outside the United Kingdom [the European Union] (and their institutions) … but not –
>
> …
>
> (c) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under [EU] law."

[241] International relations is clearly an excepted matter. That is sufficient to deal with the point. Paragraph 3's exclusion of matters including "observing and implementing international obligations (and obligations under the Human Rights Convention)" is more open we agree but that is for another day.

[242] Therefore, we find that the act of the Secretary of State in making the 2020 Regulations was lawful as it fell squarely within "international relations" in that these 2020 Regulations implemented the Protocol, part of the WA in satisfaction of international obligations. We are much more attracted to the argument that the Article 18 Protocol fall back mechanism is truly a method concerned with implementing international obligations – *i.e.* withdrawal from the EU. The

alternative argument that section 42 extends beyond transferred matters is also erroneous and in contravention of the NIA 1998.

[243] Second, we consider it clear that the petition of concern was not intended for anything other than devolved matters. There cannot be a valid argument that this provision was intended to apply to excepted matters. This conclusion flows from the purpose of section 42 which was designed to protect the rights of all by way of cross community voting in devolved matters.

[244] Third, we find no basis for an argument based upon the 1998 Agreement. True it is that section 10(1)(a) of the EUWA 2018 refers to the need to protect the 1998 Agreement, however there is a difference between a declaration to that effect and justiciable rights under the 1998 Agreement which is not part of domestic law. We have considered the constitutional arguments by reference to the following. We acknowledge the strong emphasis upon maintenance of the 1998 Agreement encapsulated in Article 1(3) of the Protocol which specifically states that:

> "This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions."

[245] In Strand 1 of the 1998 Agreement provision is made for the democratic institutions in Northern Ireland. Strand 1 contains the following, in particular:

(i) The Assembly was intended to exercise legislative authority in relation to devolved matters by virtue of paragraph 3 and 4.

(ii) The Assembly was not intended to have legislative or executive responsibility for exceptional matters such as international relations in the EU.

(iii) The 1998 Agreement specifically provided that the Westminster Parliament would legislate for such excepted matters and would legislate, if necessary, to ensure that the United Kingdom's international obligations are met.

(iv) The 1998 Agreement made no provision for any cross-community procedural safeguards for excepted non-devolved matters or international matters as such matters were outwith the remit of the Assembly.

(v) The baseline position for the exercise of legislative authority for matters that were within the remit of the Assembly was the requirement for a simple majority of Assembly members voting.

[246] The 1998 Agreement also made provision for cross-community voting, where appropriate, in respect of certain matters which would be designated in advance.

We agree with the proposition advanced by the respondent that international relations in the EU were never intended to be subject to such advance designation because they fell outside the legislative competence of the Assembly. Obviously, the legislative process at Westminster is not subject to a procedural or cross-community safeguard. The petition of concern is provided in the 1998 Agreement but was, we agree with the respondent, only ever intended to be deployed in respect of devolved matters and was not intended to have any application to excepted matters.

[247] It is apparent that the government recognised the importance of ensuring a process for democratic consent in Northern Ireland in relation to the Protocol. The appellants essentially argue that consent is too late when provided for by Article 18. However, that was a compromise which came about as a result of considerable political negotiation and a transparent Parliamentary process. All of this evidence is set out in the affidavit evidence of Mr Perry and was examined by the trial judge in some detail which we will not repeat. Therein rests a solid impediment to the appellants' argument.

[248] The importance of consent for the Protocol was reflected by the step the government took in providing an opportunity for the Assembly to consent to the continuation of Articles 5-10 of the Protocol. The Unilateral Declaration makes provision for a democratic consent process that is now in place. There is therefore no conflict. As Mr Perry explains in his affidavit, a unique process in the highly unusual circumstances of this case was put in place. We adopt the trial judge's overall analysis of this argument which reads as follows:

> "Because it was not a devolved matter or a matter within the legislative competence of the Assembly as a matter of principle it did not require cross-community support. Consistent with the approach to the referendum concerning exit from the EU itself it was felt that that a simple majority would be sufficient, albeit that cross-community support would be encouraged and achieved if possible. In accordance with this principle therefore the Minister made the Regulations in question which faithfully replicated the provisions of Article 18 of the Protocol including the Unilateral Declaration which set out the method for the consent process."

[249] Finally, in dealing with this ground of challenge we recognise the tension that can arise between devolved legislatures and the Westminster Parliament in relation to the parameters of law making as discussed in *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] AC 1022. The Assembly retains the power to modify a provision "so far as it is part of the law of Northern Ireland." Section 6 provides that "part of the law of Northern Ireland" means that the Act must be within the legislative competence of the Assembly. This issue does not arise at present as the conduct of international affairs is not a

devolved matter as we have said. A subsidiary point which supports this outcome flows from the fact that the UK has obligations flowing from the WA to act in good faith and perform the terms of a treaty in accordance with the Vienna Convention on the Law on Treaties, Article 26. Therefore, this aspect of the appeal cannot succeed.

[250] We also reject Mr Lavery's arguments that the 2020 Regulations conflict with Article 1 of the Protocol. This claim is unsustainable when the language of Article 1 is examined. That provision is firmly declaratory in nature and relates to section 1(1) of the NIA Act 1998. The 2020 Regulations do not offend that provision. Therefore, this ground of challenge must also fail.

Conclusion: Ground 4: Article 3 Protocol 1 of the ECHR

[251] As at first instance, this aspect of the appeal was not advanced at all in oral argument. Therefore, the court has relied upon the written arguments. There are two related claims which breakdown into these questions:

(i) Whether by virtue of NI citizens remaining subject to some EU law, and not being able to vote in the European Parliament, that A3P1 of the ECHR is breached.

(ii) Whether the difference in treatment of NI citizens amounts to discrimination pursuant to article 14 of the ECHR.

[252] In the written argument filed by the Allister group of appellants the case is made that Northern Ireland suffers a democratic deficit due to the Protocol arrangements. That it is said arises because Northern Ireland is in a unique and unprecedented position by virtue of the framework provided by the Withdrawal Acts. We accept that general proposition. As the UK is no longer a member state of the EU, the citizens of Northern Ireland are not entitled to vote in EU elections or to have representation in the EU Parliament.

[253] However, pursuant to Articles 5-10 of the Protocol, Northern Ireland continues to be subject to some EU law at present. The future position is contingent upon operation of the consent mechanism contained in Article 18 which essentially means that the people of Northern Ireland have an opportunity to vote for the continuation of the Protocol of otherwise four years after the end of the transition period and at intervals thereafter.

[254] In effect, the consent mechanism provides a means by which Northern Ireland citizens, through their elected representatives can express their opinion on the continued operation of EU law under the terms of Articles 5-10 of the Protocol. Also, the Joint Committee and the Joint Consultative Working Group provide a means by which developments in EU law are overseen.

[255] Whatever the outworking of the consent mechanism may be, this ground of appeal is directed at current circumstances. It is asserted that there is a breach of the Convention by virtue of the fact that EU law applies to Northern Ireland citizens with no concomitant right to vote for representatives to law making institutions of the EU. Naturally, the first question is whether the circumstances we have described some within the ambit of A3P1. As we have said no substantial basis for this was advanced. Nevertheless, we must make some comment upon this argument given that it concerns a Convention right.

Question (i): Article 3 Protocol 1

[256] A3P1 is included in Schedule 1 to the HRA 1998 and is a justiciable right. It concerns the right to free elections and provides as follows:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

[257] As it enshrines a principle of democracy, A3P1 is of prime importance in the Convention structure. In terms of scope, A3P1 only concerns the choice of the legislature. The constitutional structure of the State in question will dictate whether the Article is engaged. (*Timke v Germany*, Commission decision, 1995). We also note the consistent decisions of the ECtHR which establish that the scope of A3P1 does not cover local elections, whether municipal or regional. The ECtHR has explained that in principle a referendum does not fall within the scope of A3P1 which was the point in *Moohan and Gillon v the United Kingdom* 2017 which involved a claim in relation to the Scottish independence referendum.

[258] The ECtHR has taken the view that the European Parliament forms part of the "legislature" with the meaning of A3P1 as expressed in *Matthews v UK* [1998] 28 EHRR 361. This case featured heavily in the written arguments and the judgment of the trial judge. *Matthews* concerned citizens of Gibraltar not being able to vote in European elections whilst the UK was a member of the EU. The Court found that this prohibition offended democratic protections and breached A3P1. The court stated at para [64]:

> "64. The legislation which emanates from the European community forms part of the legislation in Gibraltar, and the appellant is directly affected by it. In the circumstances of the present case, the very essence of the appellant's right to vote, is guaranteed by Article 3 of Protocol No.1, was denied."

[259] The *Matthews* case also highlights the distinctive architecture of A3P1. A3P1 differs from other substantive provisions of the Convention as it is framed by

reference to the obligation of a Member State to provide free elections. There are two elements namely the right to vote which is engaged here and which is described as an "active" right and the right to stand for election, described as "passive."

[260] The seminal Grand Chamber decision in *Hirst v UK* (No 2) [2005] ECHR 681 provides a substantive statement of the general principles in play at paras [56]-[62] which we set out in full as follows:

> "56. Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom.
>
> 57. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, pp. 22-23, §§ 46-51). Indeed, it was considered that the unique phrasing was intended to give greater solemnity to the Contracting States' commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference (ibid., § 50).
>
> 58. The Court has had frequent occasion to highlight the importance of democratic principles underlying the interpretation and application of the Convention (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, pp. 21-22, § 45), and it would take this opportunity to emphasise that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see also the importance of these rights as recognised internationally in "Relevant international materials", paragraphs 26-39 above).
>
> 59. As pointed out by the appellant, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of

inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power. Universal suffrage has become the basic principle (see *Mathieu-Mohin and Clerfayt*, cited above, p. 23, § 51, citing *X v. Germany*, no.2728/66, Commission decision of 6 October 1967, Collection 25, pp. 38-41).

60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere.

61. There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide (see *Mathieu-Mohin and Clerfayt*, cited above, p. 23, § 52, and, more recently, *Matthews v. the United Kingdom* [GC], no.24833/94, § 63, ECHR 1999-I; see also *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV, and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II). There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.

62. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, p. 23, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. For example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some

> circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned (see *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI, and *Melnychenko v. Ukraine*, no. 17707/02, § 56, ECHR 2004-X). Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis*, *Aziz v. Cyprus*, no. 69949/01, § 28, ECHR 2004-V)."

[261] The most recent case we have been referred to is *Strobye and Rosenlind v Denmark*, Apps 25802/18 & 27338/18, 2 February 2021. This case involved the declaring of certain citizens as incompetent to vote. It is immediately apparent that the *Stroybe* case has an entirely different focus concerned as it was with the disenfranchisement of a certain class of citizen in established elections. The court also stressed the margin of appreciation afforded to states in the regulation of elections. Para [93] of that decision highlights the following:

> "93. Another factor which has impact on this concept of the margin of appreciation is the Courts fundamentally subsidiary role in the Convention protection system. The Contracting parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. Through their democratic legitimation, the national authorities are, as the Court has held on many occasions, in principle, better placed than an international court to evaluate local needs and conditions."

[262] Two particular points of principle emerge from the statements of law we have referenced above. First A3P1 is only engaged in relation to voting in parliamentary elections. Second, it is subject to limitations and the State has a wide margin of appreciation.

[263] The facts of this appeal represent a unique and highly fact specific circumstance which we venture to say was probably not contemplated by the drafters of the Convention. The appellants are effectively arguing that NI citizens are deprived of the right to vote in the European Parliament which makes EU laws which will apply in NI for so long as the Protocol is operational. When analysing

this argument the specific terms of the Protocol governing future arrangements come into sharp focus.

[264] Of importance is the mechanism provided for in Article 18 of the Protocol which requires democratic consent for ongoing arrangements. This means that from 2025 and at intervals thereafter the NI people may vote for continuation of the Protocol or otherwise. In addition, there are the collection of mitigations and safeguards which are designed to monitor the operation of the Protocol on an ongoing basis.

[265] Article 165 WA establishes the Specialised Committee which must report on issues related to the implementation of the Protocol. The mechanics of this are contained in Article 14 of the Protocol. Article 13(4) provides a post enactment information requirement and provides any new act to be regulated via the Joint Committee. Article 15 refers to the Joint Consultative Working Group. Article 15(3)(b) provides that the EU is required to inform the UK about planned EU Acts and to regulate that via the joint consultative working group. Article 16 is entitled "safeguards" and specifically provides for steps which may be taken in the event that the Protocol becomes unworkable by either the Union or the UK.

[266] It must also be remembered that in parallel to the Protocol the citizens of Northern Ireland remain franchised to vote in UK Parliamentary elections which choose the Northern Ireland representatives in the Westminster Parliament and Assembly elections and which chose members of the legislative assembly of Northern Ireland.

[267] Taking into account the above factors we cannot discern a valid argument as to how the UK obligation to offer elections to the European Parliament is breached upon withdrawal from the EU. On the basis of the written arguments and in the absence of any oral amplification we are not convinced that A3P1 is actually engaged in this case. This article concerns the provision of free and fair elections by the Member State. What is at issue here is the outworking of a bespoke arrangement for NI to effect EU withdrawal, which was mandated by Parliament and which is subject to the safeguards and contingencies we have mentioned above.

[268] In any event, if A3P1 is engaged, the issue of justification arises within the wide margin of appreciation afforded to a Member State in this area. Again the nature of the Protocol as part of the WA comes into focus. We will not repeat what we have already discussed in the foregoing paragraphs which describe the Protocol. Suffice to say that we consider that if A3P1 is engaged that justification for any interference is established within the State's margin of appreciation. That is because the Protocol is part of domestic law and gives effect to an international agreement and satisfies the UK's treaty obligations. The Protocol was a bespoke arrangement due to the particular challenge posed by NI. The Protocol also contains the safeguards we have discussed at para [263] not least the democratic consent mechanism in Article 18. Therefore, we consider that clearly a justification is

established for any interference that arises and any interference is proportionate. Therefore, we dismiss the Convention argument grounded upon A3P1.

Question (ii): Article 14

[269] As part of this ground of appeal article 14 of the Convention has also been relied upon. Again, we repeat that the court did not receive any oral argument on this point. This leaves the court to assume that less reliance is placed upon this ground of challenge. It is a complicated area of law and in the absence of argument we do not propose to offer an academic overview. However, we will concentrate on some of the core arguments made in the written arguments and relate them to the facts and the decision of the trial judge.

[270] Article 14 is the non-discrimination provision in the ECHR which provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such a sex, race, colour, language, religion political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[271] Some authority has been cited to the effect that there is no need to deal separately with the article 14 claim in circumstances where A3P1 is not engaged. Mr McGleenan has for instance referenced para [87] of the judgment in *Hirst No.2* where the Grand Chamber having determined that there had been a violation of A3P1, concluded:

> "Having regard to the conclusion above under Article 3 of Protocol No.1 to the Convention, the court, like the Chamber, considers that no separate issue arises."

[272] A similar position appears to have arisen in *Matthews* and *Maureaux*. A slightly different approach pertained in *Strobye* as no violation was found of article 14 read in conjunction with A3P1. There is strength in the argument that if a violation of A3P1 is established there is no need to consider article 14. However, for the sake of completeness we will not leave article 14 point without adjudication. That said, we reiterate the point that no oral argument was made by the appellants in support of a discrimination claim and so we only have the benefit of written argument. We observe that at para [268] of his judgment the trial judge made a similar observation.

[273] Since the decision of the trial judge the Supreme Court has provided the authoritative judgments in *SC* [2021] UKSC 21 and *R (On the Application of Elan Cane) v Secretary of State for Home Department* [2021] UKSC 56. In this jurisdiction we also

have the benefit of the decision *The Department for Communities v Cox [2021] NICA 45* in which the Morgan LCJ applied the principles which were established in *SC*. It is to the decision in *SC* that we now turn.

[274] At para [37] of *SC* Lord Reed set out the approach adopted to article 14 by the European Court of Human Rights ("ECtHR") applying *Carson v UK* [2010] 51 EHRR 13. At para [37] of the judgment Lord Reed explains how an article 14 claim should be addressed as follows:

> "37. The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of Carson v United Kingdom 51 EHRR 13, para 61 ("Carson"). For the sake of clarity, it is worth breaking down that paragraph into four propositions:
>
> (1) The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14.
>
> (2) Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.
>
> (3) Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> (4) The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background."

[275] At para [39] of the ruling Lord Reed also says that:

> "According to the case law of the European court, the alleged discrimination must relate to a matter which falls within the "ambit" of one of the substantive articles. This is a wider concept than that of interference with the rights

> guaranteed by those articles, as Judge Bratza explained in his concurring judgment in *Adami v Malta* (2006) 44 EHRR 3, para 17."

[276] The trial judge determined that the appellants came within the ambit of article 14. This provision has a wide scope and so we can see how this part of the fourfold test has not caused much trouble or occasioned judicial time. We note that the respondent has conceded this point in written argument. We have many reservations about that. However, as the court has not heard any oral argument on the point we will proceed on the basis that ambit is achieved.

[277] The next step is to establish 'other status' given that the appellants do not come within a protected category in Convention terms. The trial judge found that this ingredient was established applying a generous interpretation on the basis of status based on residency in Northern Ireland. This is not explained anywhere in the arguments of the appellants further than this description.

[278] Establishment of a precisely defined status is essential in order to determine how discrimination arises, direct or indirect, by reference to an analogous group who are treated differently. The status which the trial judge ascribed by inference rather than any robust argument is it seems a status as a Northern Ireland resident. In our view this is problematic as the appellants cannot purport to speak for all Northern Ireland residents and do not profess to do so. We agree with the respondents that there is a real issue here as to whether the status relied on is an "other status" at all for the purposes of article 14, as it does not obviously bear a relationship to the core protected characteristics of article 14.

[279] In *R(Clift) v SSHD* [2007] 1 AC 484, Lord Bingham sitting in the House of Lords observed that a prisoner serving a determinate sentence of 15 years or more did not satisfy the "other status" test. The court debated this issue and found that whilst the term should be given a generous meaning, that it is not unlimited and that it should be examined carefully. This case proceeded to the ECtHR where the appellant was successful in establishing "other status." Para [59] of the judgment of the ECtHR states as follows:

> "The Court therefore considers it clear that while it has consistently referred to the need for a distinction based on a personal characteristic in order to engage Article 14, as the above review of the case law demonstrates, the protection conferred by the Article is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent."

[280] Following from this decision, further cases that we have been referred to have developed the law. In *Al (Serbia) v SSHD* [2018] 1 WLR 1434 Baroness Hale also said at para 26 that:

> "In general, the list concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to changes."

[281] In *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 the Supreme Court held that a severely disabled child in need of hospital treatment was another status by comparison to a severely disabled child who did not need such treatment.

[282] The issue of whether the other status is distinct and can be defined separately from the alleged discrimination has been discussed in *R (Stott) v Secretary of State for Justice* [2020] AC51. This was the decision upon which the trial judge principally relied. Lady Black expressed doubt that other status needs to have an independent meaning from the alleged discrimination. However, Baroness Hale said that examining the text of article 14 the status must have its own meaning. To satisfy the test she said that status does not have to derive from innate qualities but can include acquired qualities.

[283] As we have said the appellants have not provided any substantial argument as to how "other status" is established on the facts of this case. We are not convinced by the argument that residence alone establishes the test and we have been provided with no authority which supports this proposition. In our view this veers too far from the core tenets of the Convention to be valid.

[284] Then there is the second requirement of "analogous situation." This requires a comparative examination of the circumstances pertaining to the affected group and others. In *Re McLaughlin* at paras [24] and [26] Lady Hale described the parameters of the test as follows:

> "[24] Unlike domestic anti–discrimination law, Article 14 does not require the identification of an exact comparator, real or hypothetical, with whom the complainant has been treated less favourably. Instead, it requires a difference in treatment between the persons in an analogous situation…there are few Strasbourg cases which have been decided on the basis that the situations are not analogous, rather than one the basis that the difference was justifiable. Often the two cannot be disentangled."
>
> [26] It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the two persons that they are not in an analogous situation."

[285] It appears that the appellants are seeking to compare themselves with all other residents of the UK. Again, this argument is not developed in the written argument. In any event we do not consider that this proposition can satisfy the test. We prefer the respondent's argument that there is no differential treatment among UK citizens because no one can exercise a vote other than under the terms of Article 18 of the Protocol no matter where they reside. They are all treated in the same way save that in the future NI citizens are actually favoured with a mandate by virtue of Article 18. The latter point highlights the fact that analogy is not apt given the bespoke arrangements for NI needed to effect withdrawal. Therefore, this aspect of the article 14 argument must fail.

[286] We also agree with the trial judge that the third and fourth tests are not met for a claim under article 14. In *SC,* Lord Reed, observed that the ECtHR generally proceeds to consider whether a person in an analogous situation has been treated differently and whether there is an objective justification for that. In summary, it is not clear what the group against which the differential treatment is to be contrasted with is. We do not propose to add further to that assessment in this case. Applying the principles set out in *SC* there must be justification objectively provided for. Ultimately, in the circumstances of this case, the justification falls within choices made in a highly visible, political process which to our mind is firmly within the margin of appreciation. Therefore, this ground of appeal must fail.

Conclusion: Ground 5: Breaches of EU law

[287] We turn to the arguments in relation to EU law. We can deal with this appeal ground in short compass as we do not consider there to be any strength in the arguments that have been made in support of this aspect of the appeal. Counsel for the appellants did not make any oral arguments in relation to these claims and relied only on the written arguments filed. From those we discern two questions: alleged breaches of EU law from two Articles of the TEU, Articles 10 and 50:

(i) Whether there has been a breach of Article 50.

(ii) Whether there has been a breach of Article 10.

Question (i): Article 50

[288] The Article 50 argument takes us right back to the process of withdrawal itself. Article 50 is the now well-known provision that allows a Member State to withdraw from the Union. The United Kingdom is the first EU Member to do so. The process by which withdrawal may be effected is governed by Article 50(2) which reads as follows:

> "2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light

> of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament."

[289] Article 50(3) also defines the consequence of withdrawal as follows:

> "3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

[290] The UK acted in accordance with Article 50(2) in notifying withdrawal. Thereafter a period of negotiation took place until an agreement was reached. The WA was then published on 19 October 2019 and came into force on 31 January 2000.

[291] Reading the ordinary and natural meaning of the terms of Article 50(2) it applies to "setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. This does not preclude the withdrawing Member State and the remaining Member States then settling specific terms after a process of negotiation and ratification. In the case of the EU, ratification of terms had to be by the European Parliament as per Article 50. In the case of the UK ratification of Parliament was required. This legitimate process is in keeping with the terms of Article 50 and so it cannot be argued that there has been a breach of EU law as the appellants suggest.

Question (ii): Article 10

[292] In the written arguments the appellants also draw in aid Article 10 of the TEU to argue that the agreement is in breach of the general principles of EU law. Article 10 provides that "The functioning of the Union shall be founded on representative democracy." Article 10(2) provides that "Citizens are represented at Union level in the European Parliament." Clearly, this provision deals with the functioning of the EU of which the UK is no longer a part. Therefore, this grounds of challenge is not sustainable. We find that these arguments add nothing to the other grounds of appeal we have examined.

[293] If there was some valid argument about breach of the terms of Article 50 it is highly surprising to us that it has not been raised before given the focus on that provision in previous litigation. We are not at all attracted to such a late argument focussed on the withdrawal process itself which was effected on an international plane by the EU and the UK through painstaking negotiations. This falls squarely within a class of non-justiciable matters. Clearly Article 50 deals with the process of withdrawal and Article 10 applies to Member States who are part of the EU. In our view these grounds of appeal were correctly dismissed by the trial judge.

Other Associated Issues

[294] Much ground has been covered in the foregoing discussion however for completeness sake we mention some subsidiary points in brief. In addition to the arguments covered above, Mr Peeples initially made the case that the 2020 Regulations breached section 10(1)(b) of the EUWA 2018 by failing to protect the 1998 Agreement as set out in paragraph 48 of the negotiators' Joint Report. That section requires that there is reference to the report. The affidavit of Mr Perry answers the point comprehensively and as a result it was sensibly conceded during this hearing and is no longer live.

[295] Mr Peeples also focussed his case on the 1998 Agreement which we have already observed is not part of domestic law. An argument was also advanced that the 2020 Regulations removed the principle of cross-community support from the process of deciding on the continuation of the Protocol. This is not consistent with the requirement made by section 7A(3) of the EUWA 2018 that every enactment is to be read and has effect subject to the liabilities and obligations of the Protocol which include Strand 1. The difficulty with this argument is that the multi-party agreement has not been given effect in domestic law and so cannot be justiciable in this way. Therefore, we do not find any merit in any of the additional arguments raised by Mr Peeples.

Overall Conclusion

[296] We have determined this case solely in accordance with law. Having applied settled legal principles, we have determined that none of the legal arguments presented by the appellants prevail. Accordingly, the appeal must be dismissed and the decision of the trial judge affirmed for reasons which have been explained, including where we take a somewhat different view to reach the same outcome.

[297] The cross appeal is dealt with in the following way. It is dismissed as regards contravention of the 'same footing' guarantee. Ground (ii) is dismissed as we consider that the trial judge did not set any principles of general application in relation to constitutional statutes and as this appeal has not been determined on the basis of implied repeal. The argument in ground (iii) has found favour insofar as the court has determined that any challenge to the WA itself is non justiciable.

However, given the overall outcome, the court considers that it should make no formal order other than one dismissing the appeals.

[298] The overall conclusions reached are as follows:

(i) Any arguments based upon the government negotiation of the WA are non-justiciable as that is an international treaty.

(ii) The judicial review applications are out of time however given the unique circumstances and the constitutional issues raised the court has accepted that there is good reason to extend time.

(iii) The same footing trade provision in Article VI of the Acts of Union has not been impliedly repealed. Rather it has been modified by section 7A(3) of the EUWA 2018. This conflicts with no legal rule or principle.

(iv) Article VI of the Acts of Union 1800 must be read "subject to" the EUWA 2018 in relation to trade arrangements by virtue of section 7A(3) of the EUWA 2018 as amended by EUWAA 2020 which was lawfully enacted by a sovereign parliament and applies to all previous enactments. This means that while the Acts of Union are not repealed the same footing clause in Article VI must be read subject to the NI Protocol.

(v) There is no conflict with section 1(1) of the NIA 1998 as the constitutional status of NI within the United Kingdom has not changed and cannot change other than by virtue of the mechanism provided by section 1(1) of the NIA 1998 by way of democratic consent.

(vi) The 2020 Regulations made by the Secretary of State were lawful and do not conflict with the NIA 1998 as they bear upon international relations namely giving effect to the WA.

(vii) There is no breach of A3P1. In addition, no valid argument has been made to establish discrimination under article 14 of the ECHR.

(viii) There is no breach of the EU law contained in Article 50 and Article 10 of the TFEU which no longer applies.

[REF: McC1169]

<u>McCloskey LJ</u> (concurring)

<u>INDEX</u>

Subject **Paragraph No**

Appendix

Re JR 80's Application **[2019] NIQB 43, paras [28] – [35]**

Introduction

[299] This judgment, which concurs with the conclusion of the Lady Chief Justice ("LCJ") dismissing these conjoined appeals on all grounds, will employ the nomenclature set forth in the glossary. While I concur with the overarching conclusions (a joint exercise) above, there are certain differences of reasoning and emphasis in my approach.

The Conjoined Challenges

[300] The appellants consist of, firstly, the so-called "Allister group", the six persons identified in the title hereof who combined to bring the first of these two closely related judicial review challenges and, secondly, Mr Clifford Peeples, who is the sole challenging party in the second case. The mischiefs of duplication and overlap were avoided by scrupulous judicial case management and cooperation with the court from all parties.

[301] The trial judge held that these are, in substance, challenges to three of the pillars of the EU withdrawal legal architecture: the European Union (Withdrawal) Act 2018 ("EUWA 2018"), the European Union (Withdrawal Agreement) Act 2020 ("EUWAA 2020") and the Protocol. Thus, he rejected the attempt of the Allister group of appellants to portray their challenge as a (mere) attack on the 2020 Regulations (*supra*).

[302] The issues for this court to determine are:

(i) Incompatibility of the Protocol and the Protocol on Ireland/Northern Ireland (Democratic Consent Process) EU Exit Regulations 2020 (the "2020 Regulations") with Article VI of the Act of Union (Ireland) 1800 (the "Act of Union").

(ii) Incompatibility of the Protocol with section 1(1) of the Northern Ireland Act 1998 ("NIA 1998").

(iii) Unlawful elimination of the constitutional safeguard enshrined in section 42 NIA 1998.

(iv) Breach of article 3 of protocol 1 ("A3P1") of the European Convention on Human Rights (the "ECHR") and article 14 ECHR.

(v) Conflict with Articles 10 and 50 of the Treaty on European Union (the "TEU").

Factual Matrix

[303] This is set forth in the judgment of the LCJ. In brief compass, the UK membership of the EU ended on 31 January 2020, the so-called "exit day." The events of juridical significance preceding this momentous occurrence included the following: the WA, encompassing the Protocol, was concluded on 17 October 2019; on 23 January 2020 the Withdrawal Agreement ("WA") and Protocol were approved by Parliament and the EUWAA 2020 received Royal Assent; the acts of formally executing and ratifying the WA occurred on 24 and 29 January 2020; the WA came into operation on 1 February 2020; the Protocol came into operation on 10 December 2020; the transition period ended on 31 December 2020; and the final, formal, legally binding withdrawal of the UK from the EU took effect on 1 January 2021.

The Initial Brexit Retreat

[304] The UK's retreat from the EU post-referendum has been effected in two main stages, which are now complete. These stages have featured a mixture of primary legislation, subordinate legislation, international treaty and so-called political declarations. In this way solemn and legally binding arrangements between the UK and the 27 EU Member States have been concluded. The two stages were completed

on 01 January 2021. While the juridical events and measures belonging to the second stage are to the forefront of the appellant's challenges, events during the first stage must not be overlooked, albeit a brief overview will suffice.

[305] The first stage of the post-referendum retreat from the EU was effected by EUWA 2018 which, in very brief compass, repealed the European Communities Act 1972 (the "ECA 1972"); substantially modified (but did not abolish entirely) the principle of supremacy of EU law; ended referrals by UK courts to the Court of Justice of the European Union (the "CJEU") under Article 267 of the Treaty on the Functioning of the European Union (the "TFEU"); expressly removed the Charter of Fundamental Rights of the EU (the "CFR") from domestic law; maintained much of EU law on the statute book as "retained EU law"; empowered NI and the other devolved administrations to modify retained EU law in areas within their competence; and heavily reduced the effect and reach of general principles of EU law.

The Second Stage of the Retreat

[306] The Protocol did not follow until some two years later. It owes its initial existence to an international treaty, the WA, of which it forms part. The WA subsequently became domestic UK law via a new measure of primary legislation, namely the EUWAA 2020, which *inter alia* amended the EUWA 2018. The Protocol, therefore, possesses the dual juridical character of international treaty provision and domestic statute. The statutory choreography had another important element, namely the 2020 Regulations (*infra*).

[307] In the context of these appeals it suffices to mention, without developing, the other main aspects of the final arrangements agreed between the UK and the 27 EU Member States, namely the Trade and Co-operation Agreement (the "TCA") and the European Union (Future Relationship) Act 2020.

Section 7A EUWA 2018

[308] The critical nexus between EUWA 2018 and the Protocol is forged by section 7A, described by Professor Catherine Barnard in these terms:

> "The striking feature of section 7A is how far it draws on the controversial language of section 2(1) European Communities Act 1972 (ECA 1972), which had been read to give direct effect and supremacy to EU law, and was viewed in UK law as constituting a 'constitutional statute.'"
>
> *(McCrudden ed, The Law and Practice of the Ireland-Northern Ireland Protocol, p 109.)*

Section 7A must be juxtaposed particularly with Article 4(1) WA and Articles 12(4) and 13(2) – (4) of the Protocol. Professor Gordon Anthony observes:

> "While the corpus of EU law that has effect in this way does so by reason of an international Treaty, Article 4 appears as a reformulation of the supremacy doctrine that was developed in case law such as Costa v Enel and Simmenthal. This is where the legal hybridity of the Protocol takes form, as, to the extent that Northern Ireland's institutions are bound by norms of EU law under the Protocol, they must follow different rules when engaged in decision-making outside it."
>
> (*McCrudden op cit*, p 119.)

All of the foregoing provisions, in tandem, embed EU law, including its general principles and remedies, in the law of NI. These provisions, *inter alia*, establish a continuing role for the CJEU in Article 267 TFEU referrals. It is section 7A which creates the distinct cohort of rules which must be followed by the citizens, institutions and courts of NI. Section 7A will be examined in depth in considering the first ground of challenge *infra.*

The 1998 Agreement

[309] It is both logically and chronologically appropriate to consider the Belfast/Good Friday Agreement (the "1998 Agreement") prior to turning to the Protocol. The interplay between these two instruments was one of the more prominent issues in the aftermath of the 2016 referendum and the fluctuating withdrawal arrangements which ensued and were ultimately concluded. Debate about this issue continues and, in the context of these appeals, it features in the second and third of the five grounds of challenge summarised in para [6] above. The previous governance of NI, dating from partition of the island in 1922, is outlined in *In the Matter of an Application by JR80 for Judicial Review v SOSNI and The Executive Office* [2019] NIQB 43 at paras [28] – [35] (reproduced in Appendix 1).

[310] The 1998 Agreement comprises three "Strands", each containing in–built and interlocking provisions. Strand 1 is directed to the need to establish and maintain stable political institutions within Northern Ireland. Strand 2 is devoted to the relationship between NI and the Republic of Ireland, the so-called "North-South dimension." Strand 3 is concerned with the relationship between Ireland and Britain the *soi-disant* East-West. There are discrete sections on many of the thitherto highly contentious issues in NI society including prisoners, the decommissioning of terrorist weapons, rights, safeguards and equality of opportunity, policing and justice, security and "constitutional issues." In its appendices one finds draft legislation which the British and Irish governments respectively were committed to

advance. There is, also, a separate international agreement between Britain and Ireland. Crucially, most of the NI political parties subscribed to the agreement.

[311] The 1998 Agreement was signed on 10 April 1998. It was followed by a referendum in both parts of the island of Ireland on 22 May 1998, when a substantial majority of the two populations endorsed it. In the context of continuing political turbulence, further associated agreements have followed. The 1998 Agreement has been described by Professor Harvey as –

> "… a foundational constitutional document that reflects the complex political reality of a deeply divided transitional society, with solutions offered that acknowledge the origins of conflict in the fraught relationships across 'these islands.'"
>
> (*McCrudden, op cit*, p 22.)

[312] The 1998 Agreement was the prelude to a constitutional settlement. This required a major instrument of primary legislation and the Northern Ireland Act 1998 ("NIA 1998") followed. As observed by Lord Bingham in *Robinson v Secretary of State for Northern Ireland and others* [2002] UKHL 32, at para [10]:

> "The 1998 Act, as already noted, was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the unionist and nationalist communities in shared political institutions, without precluding (see section 1 of the Act) a popular decision at some time in the future on the ultimate political status of Northern Ireland. If these shared institutions were to deliver the benefits which their progenitors intended, they had to have time to operate and take root."

See also to like effect Lord Hoffman at para [25].

[313] Professor Harvey further observes (*op cit p 23*) that certain aspects of the 1998 Agreement must be noted for the purpose of understanding its relationship with the Protocol: in particular the participating parties' commitment to a range of overarching principles including partnership, equality and mutual respect, reconciliation, tolerance and mutual trust, the protection and vindication of the human rights of all, the use of exclusively democratic and peaceful means, opposition to any use or threat of force for any political purpose and the recognition of legitimate political aspirations. In this context other features of the 1998 Agreement, which will be highlighted *infra*, include the provision made for the right of self-determination, the principle of consent, the unique arrangements for

the sharing of power between the Nationalist and Unionist communities and, of importance for present purposes, the connection to the EU.

[314] Professor McCrudden, author of the aforementioned work, offers the following perspective (Foreword, p xi):

> "Brexit is one of the most constitutionally challenging events to occur in the United Kingdom of Great Britain and Northern Ireland in a generation. The outworking of it on the small jurisdiction of Northern Ireland is potentially very significant, set against the important background of the Good Friday Agreement and its framework for peace and reconciliation in a society emerging from conflict …
>
> Northern Ireland's position was unique. It was the only part of the United Kingdom to acquire a land border with the European Union as a result of Brexit. Its framework for peace and reconciliation was underwritten by the governments of the United Kingdom and Ireland. Those factors were significant in securing an agreement on the withdrawal of the United Kingdom from the European Union with both parties signing up to a Northern Ireland Protocol to the Withdrawal Agreement."

Professor McCrudden adds the following context (*p 1*):

> "The Protocol is most appropriately seen in the context of the desire to preserve the Belfast-Good Friday Agreement (1998 Agreement), the changing politics of the UK Parliament and government over the relevant period, and the subsequently negotiated Trade and Co-operation Agreement (TCA)."

The Protocol's Recitals

[315] It is trite that recourse to the recitals is a legitimate, frequently indispensable, device in construing the substantive content of this species of instrument. The recitals express the main aims and objectives of the black letter law which follows. The Protocol's main recitals illuminate all that follows in the ensuing text. They are reproduced in the judgment of the Chief Justice. Any non-EU law provisions of the WA (which incorporates the Protocol) will be interpreted according to the default rules of treaty interpretation in the Vienna Convention on the Law of Treaties (Article 31 especially) and the principles of public international law, especially those pertaining to customary international law.

A Synopsis of the Protocol

[316] In addition to the extensive recital of the provisions of the Protocol in the judgment of the LCJ, I would highlight certain of its provisions. Article 6(1) is one of those provisions of the Protocol which appears to speak with forked tongue. While it purports to proclaim unfettered trade between NI and UK, on closer scrutiny this is clearly subject to those provisions of Union law "… made applicable by this Protocol which prohibit or restrict the exportation of goods …" The effect of what follows is that in the matter of the exportation of goods from NI to UK, the UK undertakes to ensure fulfilment of the Union's international obligations and compliance with the applicable Union law prohibitions and restrictions on the exportation of goods from the Union to third countries.

[317] Articles 13(3) and (4) are especially controversial provisions. They make clear that future Union laws amending or replacing any of the existing measures listed in the Protocol's Annexes, effectively altering the terms of the Protocol, are permitted. NI institutions have no role in this discrete process. This issue lies at the heart of the fourth of the five grounds of challenge.

[318] Article 18 of the Protocol is a self-evidently critical element of the legal framework giving rise to the third ground of challenge, namely the suggested unlawful elimination of the constitutional safeguard enshrined in section 42 NIA 1998. Section 42 and related statutory provisions will be considered in appropriate depth in the examination of the third ground of challenge *infra*.

[319] At this point it suffices to note that, as originally enacted, section 42(1) provided that a matter on which the Assembly was to vote would require so-called "cross-community support" if 30 members subscribed to the mechanism of, what is colloquially known as, a "petition of concern." Section 42 was amended by a provision of subordinate legislation introduced on the date when the Protocol came into operation (10 December 2020): see para [332] *infra.* The alignment between section 42 as amended and Article 18 of the Protocol is unmistakable.

[320] The Protocol forms part of the WA. The parties to the WA are the European Union/European Atomic Energy Community (the "EU") and the United Kingdom of Great Britain and Northern Ireland (the "UK"). There are three Protocols in total (the others relating to Cyprus and Gibraltar). Article 182 provides that all three "… shall form an integral part of this Agreement." There are mutual good faith and mutual co-operation duties: Articles 5 and 167. The bodies which have specific duties and functions in *(inter alia)* the matter of dispute resolution are the Withdrawal Agreement Joint Committee (the "JC") and the Joint Consultative Working Group (the "JCWG").

[321] The WA took effect at 11.00pm on 31 January 2020 (per SI 2020/75, regulation 4(c)). It is the instrument which provides for the withdrawal of the UK from the EU (see Article 50 TEU). The legal status of the WA is crucial. In contrast with many

international agreements, it is not an unincorporated treaty. Rather, by section 7A of EUWAA 2020 it forms part of domestic UK law. Therefore, the Protocol, belonging as it does to the WA and thus operating on the plane of international law, also forms part of domestic UK law. The TCA followed some 12 months later, on 31 December 2020. It was the final link in the elaborate and carefully choreographed withdrawal chain.

[322] The function of the WA was to bring about, bilaterally, the orderly withdrawal of the UK from the EU. It aspired to establish legal certainty for both contracting parties. It enshrined the hotly contested financial settlement, regulated citizens' rights and created a transition period ending on 31 December 2020. The WA further devised extensive governance arrangements - in particular the JC, the JCWG and an international arbitration body - to resolve disputes. The common provisions at the outset of the WA incorporate general principles relating to the construction and operation of the instrument, including of course the Protocol. These provisions apply throughout the whole of the UK.

[323] The architecture of this wholesale reconfiguration of EU/UK relations was completed by the TCA – which, notably, did not amend the Protocol. The TCA is a trade agreement comparable to the EU/Canada model. Its provisions regulate matters other than trade – extending to environmental issues and public procurement among others. Economic commentators are agreed that the TCA involves a classic trade-off between contracting parties: in short, the UK exchanged access to EU markets for increased freedom to depart from EU rules in a broad range of areas. The TCA does not feature directly in these appeals, but forms an important part of the withdrawal juridical matrix.

[324] The Protocol extends beyond the controversial "Irish sea border" effect. It also safeguards certain aspects of individual rights to equal treatment (Article 2) and the preservation of the UK/Ireland Common Travel Area ("CTA"), a post – partition arrangement of longstanding. These discrete elements are not controversial in these proceedings.

[325] The effect of the Protocol is that NI on its own, without GB, is in regulatory alignment with an extensive body of EU rules governing manufactured and agricultural goods: per Article 5(4) and Annex 2. This is conveniently summarised by Professor Stephen Weatherill in *McCrudden (op cit*), pp 71 – 72. Annex 2 to the Protocol lists 287 EU legislative instruments: a non-static list which is subject to amendment and enlargement. The NI/EU alignment also embraces EU customs regime trade rules, VAT and excise rules, the single electricity market and specific state aid rules: Protocol, Articles 5 to 10. All of this means that the treatment of NI products differs from that of GB products. By virtue of these divergent regulatory regimes there is a customs and regulatory border between NI and GB. In consequence, NI belongs more to the EU internal market than the UK internal market. Resulting alterations in trade patterns are inevitable. The trial judge, Colton

J, commented that the evidence of this impact is vague, adding that the advantages of NI's access to the EU internal market must not be overlooked.

[326] By way of resume, the Protocol has the following characteristics and effects. First, it represents an attempt to preserve the soft texture, or invisibility, of the NI/ROI border pre-Brexit. This is both economically and politically significant. Second, the *de facto* external border between NI and GB is located within the territory of, and policed by, a non-Member State (the UK). Third, the economic freedoms and internal market rules affecting NI are divided. Fourth, the border between NI and GB is of the trade variety and is not an international one. The effect of all of the foregoing is that the NI/GB geographical border has become hardened, in contrast with the arrangements of the preceding three centuries. In overarching terms, the Protocol and its associated arrangements were driven by the EU's need to preserve the integrity of its heavily regulated internal market which, in turn, required protection by an external border. In basic terms, the international deal, ultimately, struck between the UK and the Union sacrificed the long standing soft border between NI and GB (dating from the Act of Union) and altered internal trading arrangements, while simultaneously perpetuating the application of a discrete and potentially evolving corpus of EU laws in NI.

[327] In a nutshell, the Protocol creates a customs and regulatory border between NI and GB in those specified areas of trade to which it applies. It positions NI primarily within the EU internal market rather than that of the UK. With hindsight, there is general agreement that in the aftermath of the Brexit referendum vote there were only three choices: (i) no hard border between NI and GB; (ii) no hard border between NI and ROI; and (iii) regulatory autonomy for the whole of the UK. Only two of these outcomes were achievable (see *McCrudden, op cit*, pp 5, 71 and 72). The solution effected by the Protocol enshrines a classic compromise, the effect whereof is to subject NI to a uniquely regulated trading regime.

[328] Outwith the provisions of the Protocol and the transition period having elapsed, the continuing impact of EU law in NI (and, indeed, the UK as a whole) is probably through the "retained" EU law & case law provisions of the withdrawal statutes. However, in those areas to which Articles 5 – 10 of the Protocol apply, specified provisions of EU law govern with unabated force. This means that <u>in those areas</u> the courts must apply the principle of the supremacy of EU law, make Article 267 TFEU referrals in relation to issues arising under Articles 5, 7 – 10 and 12(2) of the Protocol, apply the general principles of EU law, give effect to the CJEU jurisprudence in specified respects, observe the CFR and finally, it would seem, adjudicate in *Francovich* claims for damages. See McCrudden (*op cit*), p 127, per Professor Anthony.)

The "Declarations"

[329] The "Declaration" mentioned in Article 18(2) of the Protocol is the Declaration by Her Majesty's Government of the United Kingdom of Great Britain and

Northern Ireland concerning the operation of the "Democratic Consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland. It is dated 19 October 2019. This, in accordance with section 13 of EUWA 2018, was presented by the Government to Parliament. It is an elaborate text, one section whereof is entitled "Democratic Consent Process." This states at para 3:

> "**Democratic Consent Process**
>
> 3. The United Kingdom undertakes to provide for a Northern Ireland democratic consent process that consists of:
>
> a. A vote to be held in the Northern Ireland Assembly on a motion, in line with Article 18 of the Protocol, that Articles 5 – 10 of the Protocol shall continue to apply in Northern Ireland.
>
> b. Consent to be provided by the Northern Ireland Assembly if the majority of the Members of the Assembly, present and voting, vote in favour of the motion.
>
> c. The Northern Ireland Assembly notifying the United Kingdom Government of the outcome of the consent process no less than 5 days before the date on which the United Kingdom is due to provide notification of the consent process to the European Union."

And at paras 7 – 9:

> "**Independent review**
>
> 7. In the event that any vote in favour of the continued application of Articles 5 to 10 of the Protocol, held as part of the democratic consent process or alternative democratic consent process, is passed by a simple majority in line with paragraph 3b rather than with cross community support, the United Kingdom Government will commission an independent review into the functioning of the Northern Ireland Protocol and the implications of any decision to continue or terminate alignment on social, economic and political life in Northern Ireland.
>
> 8. The independent review will make recommendations to the Government of the United

> Kingdom, including with regard to any new arrangements it believes could command cross-community support.
>
> 9. The independent review will include close consultation with the Northern Ireland political parties, businesses, civil society groups, representative organisations (including of the agricultural sector) and trade unions. It will conclude within two years of the vote referred to in paragraph 7 above."

[330] Choreography was a key feature of events at this time. Chronologically, it is necessary to consider next yet another text, namely the "Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom", dated 19 October 2019 (the "Joint Declaration"). This was the method chosen by the Government to make a formal statement to Parliament in accordance with section 13(7) and (8) EUWA 2018. As appears from the first paragraph, this text was agreed between the UK and the Union. The document *inter alia* identifies individual topics – such as "Goods" and "Transport" - and recites an individual set of "Objectives and Principles" relating to each. It contains a single passage relating to NI, in paragraph 139:

> "Both Parties affirm that the achievements, benefits and commitments of the peace process in Northern Ireland will remain of paramount importance to peace, stability and reconciliation. They agree that the Good Friday or Belfast Agreement reached on 10 April 1998 by the United Kingdom Government, the Irish Government and the other participants in the multi-party negotiations (the '1998 Agreement') must be protected in all its parts and that this extends to the practical application of the 1998 Agreement on the island of Ireland and to the totality of the relationships set out in the 1998 Agreement."

The 2020 Regulations

[331] The effect of Article 18 of the Protocol must be considered here. In summary:

(i) The crystallisation of the "four year" Assembly vote on the continued application of Articles 5 to 10 of the Protocol on 1 January 2025.

(ii) The vote being undertaken "in a manner consistent with the 1998 Agreement" and "… strictly in accordance with the unilateral declaration …" (see below).

(iii) Where the vote is "anti-Protocol", the disapplication of Articles 5 to 10 on 31 December 2026.

(iv) Where the Assembly vote is "pro-Protocol", extension of the Protocol's life by (a) four years if the vote is carried by a simple majority or (b) eight years if the vote has cross-community support, each period measured from the end of the transition period (31 December 2020).

The definition of "Cross-community support" (adopting the NIA 1998 definition) is:

> "(a) A majority of those Members of the Legislative Assembly present and voting, including a majority of the unionist and nationalist designations present and voting; or
>
> (b) A weighted majority (60%) of Members of the Legislative Assembly present and voting, including at least 40% of each of the nationalist and unionist designations present and voting."

[332] The next element of the moderately complex EU withdrawal statutory arrangements to be considered is The Protocol on Ireland/Northern Ireland (Democratic Consent Process) EU Exit Regulations 2020 (the "2020 Regulations"). It is necessary to begin with section 42(1) of NIA 1998 the subject matter whereof is "Petitions of Concern." This provides:

> " … **Petitions of concern**.
>
> (1) If 30 members petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, the vote on that matter shall require cross-community support.
>
> (2) Standing orders shall make provision with respect to the procedure to be followed in petitioning the Assembly under this section, including provision with respect to the period of notice required.
>
> (3) Standing orders shall provide that the matter to which a petition under this section relates may be referred, in accordance with paragraphs 11 and 13 of Strand One of the Belfast Agreement, to the committee established under section 13(3)(a)."

"Cross-community support" is defined in section 4(5) as:

> "(a) the support of a majority of the members voting, a majority of the designated Nationalists voting and a

majority of the designated Unionists voting; or (b) the support of 60 per cent of the members voting, 40 per cent of the designated Nationalists voting and 40 per cent of the designated Unionists voting."

The nexus between section 42 and Strand 1 in paragraph 5(d) of the 1998 Agreement is unmistakable. This states:

> "(d) arrangements to ensure key decisions are taken on a cross-community basis;
>
> (i) either parallel consent, i.e. a majority of those members present and voting, including a majority of the unionist and nationalist designations present and voting;
>
> (ii) or a weighted majority (60%) of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting.
>
> Key decisions requiring cross-community support will be designated in advance, including election of the Chair of the Assembly, the First Minister and Deputy First Minister, standing orders and budget allocations. In other cases such decisions could be triggered by a petition of concern brought by a significant minority of Assembly members (30/108)."

Section 42 could not coexist in unmodified form with Article 18 of the Protocol, in particular paragraph (2). The 2020 Regulations were the mechanism chosen in order to bring about the necessary alignment. They constitute a measure of subordinate legislation made on 09 December 2020 and coming into operation the following day.

[333] The 2020 Regulations were made by the Secretary of State for Northern Ireland ("SOSNI"). The enabling powers invoked were section 8C(1) and (2) of EUWA 2018. The effect of the 2020 Regulations is to insert a new provision, section 56A, into NIA 1998 which, in turn, inserts a new Schedule 6A. The latter is an elaborate model, the central purpose whereof is ascertainable from paragraph 1(2) and (3):

> "(2) Part 3 of this Schedule establishes, for the purposes of Article 18 of the Protocol as read with the unilateral Declaration, the default democratic consent process referred to in paragraphs 3 and 4 of the unilateral Declaration.

> (3) Part 4 of this Schedule establishes, for the purposes of Article 18 of the Protocol as read with the unilateral Declaration, the alternative democratic consent process referred to in paragraphs 5 and 6 of the unilateral Declaration."

All of the provisions of Schedule 6A are readily recognisable as the detailed out-workings of Article 18 of the Protocol and the associated unilateral Declaration.

[334] The key provision is paragraph 18(5) of Schedule 6A. This is one of several provisions arranged in Part 5 under the title "Procedural Matters and Outcome." Paragraph 18(5) provides:

> "Section 42 does not apply in relation to a motion for a consent resolution."

The discrete legal framework outlined above bears on the third of the appellants' grounds of challenge. It will be examined in further depth *infra*.

Constitutional Statutes

[335] This discrete subject permeates more than one of the grounds of challenge. Just what is a "constitutional statute"? Or, for that matter, a statutory constitution? These are judge made constructs of the common law of comparatively recent vintage. The common law being nothing if not dynamic it would appear unwise to offer any exhaustive definition of either term. Individual cases will provide the answers deemed necessary as and when the issue arises. As we shall see, a definition has been offered by Laws LJ.

[336] In the context of this appeal, the starting point is that NI, constitutionally part of the UK, has no written constitution. Nor has the UK. Notwithstanding, during the last two decades it has become increasingly commonplace to describe NIA 1998 as akin to a constitution. In *Robinson v SOSNI and others* [2002] UKHL 32, Lord Bingham of Cornhill described NIA 1998 as a statute of constitutional stature, at para [11]:

> "The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody…"

Lord Hoffman added, emphatically, at para [25]:

> "…The 1998 Act is a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast."

[337] The categorisation of NIA 1998 as a constitutional statute, or statutory constitution, has not been the subject of any different or competing decision binding as a matter of precedent on this court. Post–*Robinson* it has become commonplace for the High Court and this court to take as their starting point both the 1998 Agreement and the *Robinson* analysis in deciding a range of difficult questions arising under NIA 1998. See, for example, *In the Matter of an Application by JR80 for Judicial Review* [2019] NICA 58, para [9] and *In the Matter of an Application by Raymond McCord for Judicial Review* [2020] NICA 23, para [48].

[338] What are the consequences of Lord Bingham's analysis? The first consequence was identified by Lord Bingham himself in the passage quoted, namely, the correct approach to interpreting a statute of this stature. A generous and purposive approach is appropriate. As the following passages from a recent decision of the Privy Council, *Commissioner of Prisons and another (Respondents) v Seepersad and another (Appellants) (Trinidad and Tobago)* [2021] UKPC 13, make clear, Lord Bingham has made a significant jurisprudential contribution to this topic. The relevant principles were considered at paras [21] – [22]:

> "21. The two live issues require the Board to construe the two provisions of the Constitution of Trinidad and Tobago noted above. The most comprehensive guidance on how this exercise is to be conducted is found in the judgment of Lord Bingham in Reyes v The Queen [2002] 2 AC 235 in a passage which bears repetition in full, at para 26:
>
> > 'When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not. Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation: see, among many

other cases, *Weems v United States* (1909) 217 US 349, 373; *Trop v Dulles* (1958) 356 US 86, 100-101; *Minister of Home Affairs v Fisher* [1980] AC 319, 328; *Union of Campement Site Owners and Lessees v Government of Mauritius* [1984] MR 100, 107; *Attorney General of The Gambia v Momodou Jobe* [1984] AC 689, 700-701; *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 331; *State v Zuma* 1995 (2) SA 642; *State v Makwanyane* 1995 (3) SA 391 and *Matadeen v Pointu* [1999] 1 AC 98, 108. It is unnecessary to cite these authorities at length because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society: see *Trop v Dulles* 356 US 86, 101. In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion.'

Lord Bingham added, at para 28, that it is appropriate to take into account international instruments incorporating relevant norms to which the state in question has subscribed. The Board will elaborate on this in considering the section 4(b) ground of appeal.

22. One of the main reasons for the generous and purposive approach advocated by Lord Bingham is readily ascertainable. The terms in which individual rights and guarantees are formulated in constitutional instruments are typically broad and open textured, unaccompanied by definition or particularity. Thus while the exercise of construing a statute has certain similarities,

> a court engaged in the construction of constitutional provisions must adopt a somewhat broader perspective. The analogy with construing a legal instrument such as a contract or a will is, as Lord Bingham makes clear, inappropriate. Furthermore, the Board considers that the court engaged in the interpretation exercise must be alert to the historical context of the constitutional instrument in question. It is trite to add that the constitutional provision under scrutiny must be construed by reference to the whole of the instrument in which it is contained.'"

[339] Is there any other consequence of note? The answer is affirmative. In *Thoburn v Sunderland City Council* [2003] QB 151 a divisional court of the English High Court, in categorising the ECA 1972 a constitutional statute, held that, as a result, section 2(2) could not be impliedly repealed by a later enactment. Laws LJ, delivering the judgment of the court, addressed the topic of constitutional statutes in some depth, at paras [62] – [63]. He formulated his starting point in the following terms, at [62]:

> "…In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental …"

Following the citation of supporting authority, Laws LJ continued:

> "And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights: (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows from the special status of constitutional rights…"

[340] Laws LJ then offered the following illustrations of constitutional statutes: Magna Carta 1297, the Bill of Rights 1689, the Union with Scotland Act 1706, the Reform Acts, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. He continued:

> "The 1972 Act clearly belongs in this family. It incorporated the whole corpus of substantive Community

> rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The 1972 Act is, by force of the common law, a constitutional statute."

In the context of these appeals, what emerges most importantly from the analysis of Laws LJ is the powerful endorsement of a common law principle that the provisions of constitutional statutes can be repealed only by express words: thus the rules of implied repeal do not apply. He stated in uncompromising language at para [63]:

> "Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test."

Laws LJ added that a general earlier statute would always prevail over a specific later one, observing further at para [50]:

> "…Generally, there is no inconsistency between a provision conferring a Henry VIII power to amend future legislation and the terms of any such future legislation."

[341] It seems uncontroversial to suggest that the hierarchy of statutes doctrine is a developing one. Some commentators are not persuaded by the validity of a freestanding class of constitutional statutes. See for example *Statute Law Review*, Vol 28, Number 2 (2007) pp iii - v. In *Wade and Forsyth Administrative Law* (10th Edition), page 738 this doctrine is described as "*not without difficulty*." The authors offer the view that by reason of *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, at 575, necessary implication may suffice to displace a constitutional right. They further highlight that there is no Parliamentary warrant for distinguishing between certain statutes in classification terms.

[342] Furthermore, this doctrine has not yet been examined in depth at the highest judicial level. That is not to say that *Thoburn* has escaped attention in the Supreme Court. It has been noted in *R (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport and other appeals* [2014] UKSC 3, at [207] – [208]; *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*

(Birnie and others intervening); in Re McCord (Lord Advocate and others intervening); in Re Agnew and another (Lord Advocate and others intervening) ("Miller No. 1") [2017] UKSC 5 at [67]; and *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22 at [120]. Of particular note is the nexus between this doctrine and the rule of law made by Lord Carnwath JSC in *Privacy International* at paras [120] – [121].

[343] The constitutional/ordinary statutes dichotomy featured particularly in the decision of the Supreme Court in *HS2*. In this decision there are, arguably, indications of a subtly evolving constitutional landscape. It confirms that there is potential for recognising within the category of constitutional statutes a hierarchy of, essentially, more fundamental and less fundamental measures. There are suggestions in this decision of some weakening of the classic Diceyan doctrine of parliamentary sovereignty via constraints imposed by fundamental constitutional norms, to be contrasted with primary legislation. Notably, a possible conflict between two statutes of constitutional stature was one of the features of that case. Furthermore, the views expressed by certain Supreme Court Justices in *HS2* are not necessarily without divergence and there are also elements of *obiter dictum*.

[344] The penetrating analysis of Professor Craig in *Constitutionalising constitutional Law: HS2* (P.L. 2014, Jul, 373 - 392) includes the following overarching suggestion:

> "… the rule of recognition has been modified such that Parliament's power to repeal or amend any law either expressly or impliedly, is now subject to an exception not only in relation to EU law, but also in relation to constitutional instruments, such that implied repeal or amendment will only be recognised where it is irresistible."
>
> (At p 391-392.)

In this way some of the most foundational common law norms, albeit not incorporated in statutes of constitutional stature, could qualify for elevated protection. One would expect these to include the right of access to a court, fair hearing rights and the right to equality of treatment. Notably, Lord Neuberger, writing extra-judicially, has opined that the emergence of the *Thoburn* decision three years after *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 was "no coincidence" (*Craies on Legislation,* 12th ed, Foreword at page VI). It is evident that the interplay between this doctrine and the common law principle of legality will also have to be addressed in some appropriate future case.

[345] In *Craies*, para 1.5.3, it is suggested that the effect of recognising a discrete category of constitutional statutes is twofold:

(i) members of the class will be assumed not to be substantively amended or repealed by reason only of inconsistency with later enactments; and

(ii) members of the class will be more carefully protected by the judges from interference of various kinds, such as amendment under statutory powers expressly permitting amendment of legislation in general, than will other statutes.

This being a common law construct, other effects or characteristics could of course be developed.

[346] There is yet another *caveat*, namely that the relevant passages in the judgment of Laws LJ may be strictly *obiter* given the primary reason for his decision (dismissing the appeals) namely that the doctrine of implied repeal was not engaged as there was no conflict of subject matter between the two competing statutes. Furthermore, *Thoburn* is not binding on this court as a matter of precedent: *Stepanoviciene v One of the Coroners of for Northern Ireland* [2018] NIQB 90 at paras [21] – [26] and [74].

[347] Some consideration of the stature of EUWA 2018 is appropriate at this juncture. Just as the accession of the UK to the EU in 1972 had constitutional implications of a momentous nature, so too has the departure of the UK from this international organisation of states almost half a century later. The elaborate statutory architecture whereby this has been effected is outlined above. EUWA 2018 is the first of the measures of primary legislation at the heart of this edifice.

[348] It is unnecessary to rehearse exhaustively the myriad issues and topics which EUWA 2018 regulates. Its provisions include the express incorporation of "EU-derived domestic legislation" and "direct EU legislation" in domestic law (per sections 2 and 3); the creation of novel concepts such as "retained EU law" and "retained general principles of EU law" (per section 6); the empowerment of the Supreme Court to disapply retained EU law (*ditto*); the abolition of the CFR (per section 5(4)); regulation of the status of retained EU law (per section 7); the special prescription relating to specified provisions of another constitutional statute, namely NIA 1998 (section 10) and the mechanisms for the executive accounting to Parliament in the withdrawal process, which were a post–*Miller No. 1* addition, contained in section 13A EUWA 2018.

[349] The parallels between section 2 ECA 1972 and section 7A EUWA 2018 are unmistakable. Furthermore, ECA 1972 was previously an "entrenched enactment" under section 7 NIA 1998 and EUWA 2018 now occupies its place. The effect of this is that the NI institutions are disempowered from altering EUWA 2018 in any way, yet another indication of the constitutional prowess of the latter.

[350] Most important of all, EUWA 2018 is the vehicle by which ECA 1972 was repealed, per section 1:

> "The European Communities Act 1972 is repealed on exit day."

Properly analysed, EUWA 2018 effectively occupies the constitutional space in which ECA 1972 previously reigned. The conclusion that EUWA 2018 is a statute of constitutional stature seems incontestable. It must be equally uncontentious to suggest that EUWAA 2020 has the same prowess. (See Professor Anthony's analysis in *McCrudden*, *op cit*, page 125.)

[351] It is appropriate to note another of the impacts on NIA 1998 effected by EUWA 2018. One of the discrete features of NIA 1998 (in common with the other UK devolution statutes) is the provision made for so-called "entrenched enactments." Per section 7(1):

> "… the following enactments shall not be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland Department …."

There follows a short list, one member whereof is the Human Rights Act 1998. By paragraph 51 (2) of Schedule 3, to the EUWA 2018, section 7 was amended so as to include EUWA 2018 in this list: see the new section 7(1)(e) NIA 1998.

[352] I return to *Thoburn*. These appeals have been argued both at first instance and before this court on the footing that there is no controversy about the "no implied repeal" principle expressed by Laws LJ. This is an orthodox, uncontroversial principle of statutory construction: see, for example, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed), section 8.9 (of Chapter 8 in Part 3). This principle is applied with facility to contexts where a later "ordinary" Act of Parliament is in play. However, the present context is rather more complex and nuanced. Here, the later statute, EUWA 2018, is, like the Act of Union, one of constitutional pedigree. It is the statute which the appellants juxtapose with the Act of Union. This must inform the interplay between the two. Were it necessary to decide the issue, I would hold that these two statutes are of equal stature, neither being hierarchically superior to the other. No legal principle favouring a different approach was identified in argument. But the first and fundamental question must be whether the principle of no implied repeal of constitutional statutory provisions has any application in these appeals. This question arises directly in the first of the five grounds of challenge (*infra).*

Devolution

[353] Some consideration of this topic is appropriate, given the trajectory of aspects of the parties' arguments in response to a specific direction from the court

and the issues which arise in respect of the second ground of challenge in particular. By way of preamble, there have been fundamental changes in the constitutional arrangements of the UK during the past quarter of a century. Notably, primary legislation has been the vehicle for these. One effect has been to confer on the courts a constitutional function which previously they did not exercise. In this context one may compare the constitutional settlement statutes with ECA 1972 and the Human Rights Act 1998.

[354] The UK's highest court has been required to consider, and determine, a range of issues relating to the devolution statutes. This has stimulated reflection and debate on some of the fundamental tenets of UK constitutional law. The Diceyan doctrine of the supremacy of Parliament was expressed in uncompromising terms: only the UK Parliament has –

> "… the right to make or unmake any law whatsoever …. [and] … no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament."
>
> (*Dicey*, *The Law of the Constitution,* PP40 – 1.)

Debate about the enduring potency of this formulation continues. It is exemplified by a short excerpt from a recent work of three leading constitutional scholars (well buried in what Laws LJ described in *Thoburn* as "a library's worth of authority" generated by the parties' impressive industry):

> "So, is parliament sovereign? For the reasons explored in this chapter, no definitive answer can be given to that question. However, intellectually frustrating though that might be, it is in fact relatively unimportant. What is more important is that to view the authority of parliament through an exclusively legal lens inevitably yields an incomplete and misleading constitutional picture. The reality of the contemporary UK constitution is that parliament's legislative authority falls to be exercised against the back drop of a normatively right constitutional order and in the light of the restraining influences of multi layered and common law constitutionalism."
>
> (*The Changing Constitution (8th Edition), ED Jowell, Oliver and O'Cinneide, p 65.)*

[355] Pre-Brexit the House of Lords and, subsequently, the UKSC laid emphasis on the importance of the devolution settlement throughout the UK, enshrined in the three separate enactments relating to NI, Scotland and Wales and its localised democratic basis. Post-Brexit, has there been a shift in the UKSC jurisprudence? Is

there an emphasis on the more absolutist view of the powers of the Westminster Parliament and a fortification of the Diceyan doctrine of Parliamentary sovereignty?

[356] In her judgment the Chief Justice has touched on some of the leading decisions of the UKSC belonging to this territory: *Miller No 1*; *R (Jackson and others) v Attorney General* [2006] 1 AC 262 at [102] especially (perLord Steyn); *AXA General Insurance Ltd and others v HM Advocate and others* [2012] 1 AC 868, per Lord Hope at paras [46], [50] and [146] especially; and *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016.

[357] The central theme emerging is, to borrow Lord Hope's language, that devolved Parliaments have delegated powers which are not untrammelled and do not enjoy the Parliamentary sovereignty of Westminster. The devolved powers are correctly described as "delegated" because they reflect a partial relinquishment by the constitutionally dominant Parliament of its sovereign power. In short, within clearly demarcated areas, the devolved administrations exercise legislative powers which would otherwise be exercised by the constitutionally supreme Westminster Parliament.

[358] Post-Brexit, in the context of profound changes in the constitutional landscape of the UK, the UK Supreme Court has had to grapple with a series of novel and thorny constitutional issues. These have not included the difficult question of how to resolve tensions between competing constitutional statutes and doctrines, something thrown into sharp focus following the UK's departure from the EU. In *Miller No.1* [2018] AC 61, the Supreme Court took the opportunity to emphasise, and restate, the doctrine of Parliamentary sovereignty as a "fundamental principle" of the unwritten UK constitution, at para [43] of the majority judgment:

> "It was famously summarised by Professor Dicey as meaning that Parliament has:
>
> > "the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."

[359] In the same year, the significance of the doctrine of Parliamentary sovereignty within the context of devolved legislatures was underlined in Re *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] AC 1022. The court, at para [41], reaffirmed the "central theme" noted above. Emerging from this decision it is appropriate to compare section 28(7) of the Scotland Act with a similar, though not identical NI counterpart namely section 5(6) of NIA 1998.

[360] The approach in the *Continuity Bill* case was endorsed recently by the Supreme Court in *Reference by the Attorney General and the Advocate General for*

Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill v Reference by the Attorney General and the Advocate General for Scotland - European Charter of Local Self-Government (Incorporation) (Scotland) Bill [2021] UKSC 42. In the introduction to the court's decision, one finds at para [7] the main principles relating to the law governing the Scottish Parliament, as summarised in the *Continuity Bill* case. The Supreme Court reiterated that Parliament has an unlimited power to make laws for Scotland, a power which the legislation of the Scottish Parliament cannot affect. The difference between the powers of the devolved legislatures and Westminster was encapsulated at para [50]:

> "…Parliament can itself qualify its own sovereignty, as it did when it conferred on the courts the power to make declarations of incompatibility with rights guaranteed by the ECHR, under section 4 of the Human Rights Act. The Scottish Parliament, on the other hand, cannot qualify the sovereignty of Parliament, which is protected by a number of provisions of the Scotland Act, including, as counsel for the Lord Advocate acknowledged in his written submissions, section 28(7)."

The Supreme Court concluded that certain provisions of the Bills in question would affect the power of the UK Parliament to make laws for Scotland, thereby modifying the Scotland Act 1998 s.28(7), which was in breach of the limitation on the Scottish Parliament's competence imposed by s.29(2)(c) and Schedule 4 paragraph 4(1) to the Act. In short, an orthodox analysis.

[361] In a nutshell, NIA 1998 permits the Assembly to modify provisions made by Westminster if they relate to NI: but subject to legislative competence and, thus, excluding all reserved and excepted matters. In other words, the legislative activity of the Assembly is strictly confined to its devolved powers. Furthermore, section 7 of NIA 1998 classifies EUWA 2018 as an entrenched enactment that shall not be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or NI department. The constitutional reality remains that the sovereign UK Parliament retains the power to make laws in relation to all matters, whether devolved or reserved: devolution comes with no warranty of permanence.

[362] Summarising, as Professor Anthony has observed (*McCrudden,* op cit, p 127), the Westminister Parliament remains central to the UK constitution. In another academic commentary *The Supreme Court and devolution: the Scottish Continuity Bill reference* (Jur.Rev. 2019, 2, 190 – 197), Aileen McHarg and Chris McCorkindale espouse what might be condidered an orthodox view (at 196 and 197):

> "The approach to devolved competence which must be regarded as having been firmly cemented by the Scottish Continuity Bill reference is one which simultaneously

> confirms the strength and weakness of the devolved legislatures. By insisting upon adherence to the reserved powers model now contained in all three devolution statutes, the Supreme Court has emphasised the breadth of the legislative powers that they enjoy within the limits of their competence. However, the Continuity Bill case and its wider political backdrop also vividly illustrate the constitutional vulnerability of devolved institutions which owe their existence and powers to nothing more than statute."

The overarching principle of the supreme parent Parliament at Westminister is what emerges.

[363] Arising from the above analysis, I would offer the following conclusion. This review of recent UKSC jurisprudence demonstrates a greater emphasis than ever on the sovereignty of the Westminister Parliament. This has unfolded in the context of an examination of the relationship between the constitutionally sovereign and supreme legislature, situated at the apex of the UK constitutional arrangements, and the devolved legislative assemblies, with the added ingredient of the constitutional impact of Brexit. The UKSC has adopted the unambiguous, in effect absolutist, position that the sovereignty of the Westminister Parliament is reinforced and protected by the devolution statutes, which both dictate and ensure that the devolved institutions must operate within the limits of their competence. The theme of a constitutionally dominant legislature and subservient devolved legislatures emerges with some clarity. That said, the admittedly limited authority on the principle of legality (considered in the judgment of the Chief Justice) seems to emerge unscathed, to be more fully tested in a situation of apparent conflict with primary legislation in some future case.

The First Ground: Act of Union Conflict

[364] The essence of this ground is that the Protocol and one of its sister instruments, namely the 2020 Regulations, are incompatible with Article VI of the Act of Union. The argument on this ground was led by Mr Larkin QC and Ms Kiley on behalf of the Allister group. In their written submissions they formulated their core proposition in the compass of the following two sentences:

(i) The Protocol breaches the equal footing guarantee in the first clause of Article VI of the Act of Union.

(ii) The second clause of Article VI of the Act of Union prevented Her Majesty's Government from concluding the Protocol.

[365] The analysis of constitutional statutes and the impact of the devolution settlements in the UK above combine to provide the legal context for consideration

of the first two of the appellants' five grounds of challenge. It is convenient to emphasise that the issues relating to the Act of Union in these proceedings, in common with those raised by the other grounds of challenge, are pure questions of law to be determined by a judiciary independent of any legislature or executive. The function of this court is firmly and incontrovertibly rooted in the rule of law. As Lady Hale stated in *R (Miller) v Prime Minister v Lord Advocate and others Cherry and others v Advocate General for Scotland v Lord Advocate and others ("Miller (No 2)")* [2020] AC 373 at para [31]:

> "…[A]lthough the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicans, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it … almost all important decisions made by the executive have a political hew to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense."

[366] The Act of Union ground is based on the sixth Article. This provides, under the rubric "Subjects of Great Britain and Ireland to be on same footing from 1 Jan. 1801":

> "That it be the sixth article of union, that his Majesty's subjects of Great Britain and Ireland shall, from and after the first day of January, [1801], be entitled to the same privileges, and be on the same footing as to encouragements and bounties on the like articles, being the growth, produce, or manufacture of either country respectively, and generally in respect of trade and navigation in all ports and places in the united kingdom and its dependencies; and that in all treaties made by his Majesty, his heirs, and successors, with any foreign power, his Majesty's subjects of Ireland shall have same the privileges, and be on the same footing as his Majesty's subjects of Great Britain."

The next (second) clause of Article VI, labelled "No duty or bounty on exportation of produce of one country to the other", states:

> "That from the first day of January, [1801], all prohibitions and bounties on the export of articles the growth, produce or manufacture of either country to the other, shall cease and determine; and that the said articles shall thenceforth

> be exported from one country to the other, without duty or bounty on each export."

[367] The substance of the argument presented to this court (and indeed the trial judge), is the following. Based on the premise that the Act of Union is a constitutional statute, it is contended that the Protocol is incompatible with the first clause of Article VI; second, Article VI involves "interpretive supremacy" over any provision of domestic law purporting to give effect to the Protocol; third, the second clause of Article VI prevented her Majesty's Government from agreeing the Protocol with the EU; and, fourth, no provision of domestic law purporting to give effect to the Protocol "cures" the asserted breach of Article VI with the result that no provision of domestic law succeeds in giving effect to the Protocol. A thoughtful and elaborate argument indeed.

[368] The Act of Union is an indelible, and fundamental, part of the vexed history of the island of Ireland. In enviably uncluttered language, it united the two kingdoms of GB and Ireland, creating a single kingdom. Uniquely, its contents were agreed by two separate legislatures. For some 122 years of its existence the populations of the previously two separate kingdoms were the subjects of the Sovereign. This new constitutional order was radically altered a century ago as regards the inhabitants of the Republic of Ireland. However, it endures for the population of NI. For many this altered constitutional order is no less contentious today than it was upon its inception. This has been exhibited in, *inter alia*, the devisive debates encircling both Brexit and the Protocol among the 1.5 million inhabitants of NI.

[369] The first element of the contrary argument of Mr McGleenan QC and Mr McAteer on behalf of the respondents prays in aid the following passage in *Miller No. 1* [2017] UKSC 5 at para [55]:

> "Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts ..."

This passage forms part of an elaborate treatise by the majority of the subject, "The Royal Prerogative and Treaties":

> "It is a fundamental principle of the unwritten constitution of the UK that the power of the executive in the realm of conducting this sovereign state's foreign affairs, including the making of treaties, reposes in the Royal Prerogative. This must be viewed in its full constitutional context. The history of the UK legal system has been one of the progressive attenuation of the

> prerogative by legislation. In this way Parliament asserts its law making supremacy in a constitutional democracy. Thus, the phenomenon of the curtailment or abrogation of prerogative powers has been long exercised. It features, for example, in the first edition of what has become the renowned text Wade and Forsythe, Administrative Law, in 1961 (see in particular page 13). This doctrine has been a common place of leading UK jurisprudence for over a century, as the decision in *Attorney General v De Keyser's Royal Hotel* [1920] AC 508 demonstrates. Thus, where the executive purports to act in a manner which alters primary legislation, whether by repealed or otherwise, the power to do so must be conferred by primary legislation itself."

[370] Examination of the first two of the six clearly formulated submissions of counsel in promoting this discrete ground of challenge confirms a clear dependence on the executive act of making the international treaty (the WA) under scrutiny. However, in the constitutional and legal order of the UK, the WA is not a mere international treaty which, by virtue of such status, attracts the long established dualist principle or theory. Rather the WA in its entirety forms part of UK domestic law. This is the incontestable effect of section 7A(2) of EUWA 2018. The WA is, of course, both the source and the *raison d'etre* of section 7A(2). But this simply explains and illuminates the genesis of this statutory provision. It does not alter the analysis that by dint of section 7A(2), the WA has been incorporated by statute thereby attaining the status of UK domestic law.

[371] I consider that these aspects of the first ground of appeal are unsustainable as they fail to engage with the juridical reality that the WA forms part of UK domestic law. It does so by the will of the legislature expressed in a provision of primary legislation. In a sentence, the relevant international treaty was transformed into domestic primary legislation. From this it follows that the heavy focus on the prerogative power of Her Majesty's Government to make international treaties is misconceived. It provides no sustenance to this ground of challenge.

[372] If, contrary to the foregoing analysis, the attention of the court were properly focused on government conduct preceding the legislative event just noted, the discrete submission of Mr McGleenan and Mr McAteer would in my view prevail. They argue that such conduct is not justiciable, not only on the ground that it involved the negotiation and execution of an international treaty and the conduct of foreign affairs but on the further basis that it was intrinsically political in nature. Conduct of this kind is not amenable to judicial superintendence by reason of its nature and subject matter.

[373] This argument rests on judicial pronouncements of high authority. The pedigree of the principle in play is not in issue, being expressed most clearly in the

speech of Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 418 a-c. The enduring potency and effect of this principle, foreshadowed in *Gibson v Lord Advocate* [1975] SC 136 at 144, per Lord Keith, are illustrated in, for example, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811 at 817A/B and 820 B/D and *A v Secretary of State for the Home Department* [2005] 1 AC 68, per Lord Bingham at [29]. To like effect are more recent decisions of the Supreme Court in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697 and *Shergill v Khaira* [2015] AC 359 at paras [37] – [43], where the judgment of the court states at [40]:

> "The issue was non-justiciable because it was political. It was political for two reasons. One was that it trespassed on the proper province of the executive, as the organ of the state charged with the conduct of foreign relations. The lack of judicial or manageable standards was the other reason why it was political."

This is echoed in the reasoning of the majority in *Miller No. 1*, at para [146]:

[374] In *Miller No 2*, this principle was endorsed resoundingly at paras [55] – [56] (reproduced in the judgment of the Chief Justice). I consider that this hallowed principle provides a second, or alternative, basis for rejecting the first element of the appellants' argument in support of the first ground of challenge.

[375] Given the immediately preceding analysis and conclusion the conduct of the UK Government, both nationally and internationally, during the period between the referendum and the execution of the WA is legally irrelevant. The legally significant events were all legislative in nature. They occurred on 23 January 2020 when EUWAA 2020 received Royal Consent. In this way, by the hand of the UK legislature, the WA was adopted in UK law. In the language of section 7A(1)(b) of EUWAA 2018 this occurred "without further enactment." The effect of this was to endow the WA with the status of UK primary legislation.

[376] The foregoing analysis and conclusions are not dispositive of this ground of challenge. This is so because in determining its full scope the exercise of construing Article VI of the Act of Union is unavoidable. As the arguments on both sides recognise, this ground is constructed on two of the individual clauses in Article VI. Each is concerned with, *inter alia*, the subject of trade. The scope of the first clause, the "same privileges/same footing" provision, is of demonstrably greater breadth than the second. The first clause divides into two parts, separated by a semicolon. While the focus of the first part is mainly trade, it extends specifically to the trade-related issue of "navigation in all ports and places in the United Kingdom and its dependencies." The subject matter of the second part is "all treaties made by his Majesty his heirs and successors, with any foreign power." The language which connects the two parts is that of "the same privileges" and "the same footing."

[377] I consider the underlying intention to be unmistakable: from 1 January 1801 all subjects of this newly unified single state were to be treated equally in the respects specified. While the more expansive language of the second part of the first clause invites the argument that its scope and operation are not confined to trade or trade-related matters, this issue does not arise for determination in these appeals. I consider that the second clause is to be viewed as one specific outworking of the first part of the first clause.

[378] The trial judge construed the first part of the first clause of Article VI in the manner urged by the appellants. See para [58]:

> "The net effect of Articles 5-10 has been to require customs checks at ports in Northern Ireland in respect of goods coming from GB to Northern Ireland. The implementation of the Protocol has the potential to result in significant disruption in goods moving between GB and Northern Ireland. The difficulties arising from the implementation are the subject matter of ongoing high level discussions between the UK government and the EU."

While the trial judge expressed himself in inconclusive terms in para [61], the language of the conclusion made at para [62] is uncompromising:

> "Although the final outworkings of the Protocol in relation to trade between GB and Northern Ireland are unclear and the subject matter of ongoing discussions it cannot be said that the two jurisdictions are on "equal footing" in relation to trade. Compliance with certain EU standards; the bureaucracy and associated costs of complying with customs documentation and checks; the payment of tariffs for goods "at risk" and the unfettered access enjoyed by Northern Ireland businesses to the EU internal market conflict with the "equal footing" described in Article VI."

[379] On behalf of the respondents it is submitted that Article VI of the Act of Union cannot have been intended to require absolute parity on every regulatory aspect of trade between GB and NI. This is an appeal to practicality and common sense, each of which has a role in the statutory construction exercise. This submission is not without merit. However, and bearing in mind that there is no cross appeal on this discrete issue, I am disposed to assume without more that the construction espoused by the trial judge, favourable to the appellants, is correct.

[380] The second part of the first clause of Article VI, ultimately, rather faded from the debate. I consider that it does not advance the appellants' case for two reasons.

First, properly analysed and exposed, the appellants' challenge is to certain provisions of domestic statute law which, plainly, are not embraced by the language of "… treaties made by His Majesty his heirs and successors, with any foreign power…" Second, by its terms, this provision does not purport to bind the successors of the Parliament of GB which enacted the Act of Union; and in any event it could not lawfully do so by virtue of the entrenched principle of the common law precluding any such attempt.

[381] This leads to the issue which in both oral and written argument emerged as arguably the most important aspect of the debate, namely the effect of section 7A(3) of EUWA 2018. Section 7A, which must be considered as a whole, provides:

> "**General implementation of remainder of withdrawal agreement**
>
> (1) Subsection (2) applies to—
>
> (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and
>
> (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,
>
> as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.
>
> (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—
>
> (a) recognised and available in domestic law, and
>
> (b) enforced, allowed and followed accordingly.
>
> (3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).
>
> (4) This section does not apply in relation to Part 4 of the withdrawal agreement so far as section 2(1) of the European Communities Act 1972 applies in relation to that Part.

(5) See also (among other things)—

(a) Part 3 of the European Union (Withdrawal Agreement) Act 2020 (further provision about citizens' rights),

(b) section 20 of that Act (financial provision),

(c) section 7C of this Act (interpretation of law relating to withdrawal agreement etc.),

(d) section 8B of this Act (power in connection with certain other separation issues),

(e) section 8C of this Act (power in connection with the Protocol on Ireland/Northern Ireland in withdrawal agreement), and

(f) Parts 1B and 1C of Schedule 2 to this Act (powers involving devolved authorities in connection with certain other separation issues and the Ireland/Northern Ireland Protocol)."

The Respondents' essential contention is that any conflict between Article VI of the Act of Union and the relevant provisions of the Protocol is authorised by section 7A(3).

[382] At this juncture it is necessary to recognise the principle of statutory interpretation noted above, which was not in dispute between the parties. It is expressed in *Bennion (op cit),* at section 8.9 (of Chapter 8 in Part 3), in the following terms:

"(1) Where the provisions of an Act are inconsistent with the provisions of an earlier Act, the earlier provisions may be impliedly repealed by the later …

(2) The doctrine of implied repeal is subject to the following qualifications:

(a) There is a general presumption against implied repeal, the strength of which varies according to the context;

(b) the implied repeal of a constitutional statute would require such an exceptionally clear implication that it is unlikely to arise in practice."

The decision in *Thoburn* (*supra*) is quoted as authority for this latter principle.

[383] Next it is necessary to examine the concept of statutory repeal. The word "repeal" is a familiar, unsophisticated member of the legal lexicon. It denotes the extinguishment of an earlier statute or part thereof by a later statute. Subject to the possibility of future re-enactment, statutory repeal savours of the irrevocable, the permanent. Its essential characteristics are captured in the following passages in *Bennion*, at section 8.7 (of Chapter 8 in Part 3):

> "A repeal revokes or abrogates an Act or part of an Act ….
>
> The position at common law is that 'when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed.' Anything purportedly done under a statutory provision after it has been repealed is a nullity … "

The authors observe that in modern practice the orthodox mechanism is the simple statement within the later statute that specified earlier statutes or provisions thereof "are repealed" (section 8.8 (of Chapter 8 in Part 3)).

[384] The appellants' contention is that the impugned provisions of the WA/Protocol cannot effect an implied repeal of Article VI of the Act of Union, a statute of constitutional stature. They contend that the Government had no power to agree a treaty (the WA) which in specified respects is incompatible with Article VI; section 7A of EUWA 2018 can give effect only to those provisions of the WA which the Government could agree compatibly with the Act of Union; and section 7A must be construed accordingly.

[385] The essence of this argument is that Article VI of the Act of Union has not been expressly repealed; nor has it been impliedly repealed because this possibility is excluded by fundamental legal principle; it is an enactment of constitutional stature; hence it survives, continuing to apply with unabated force; and anything in conflict with it in the EU statutory withdrawal arrangements must yield.

[386] The first two ingredients of the immediately preceding digest are common case. The issue which separates the two sides is the interplay between section 7A(3) of EUWA 2018 and Article VI of the Act of Union. There is no dispute that the impugned provisions of the Protocol are embraced by the sweeping language of section 7A(1)(a), "all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement." These are, by section 7A(2)(b), to be "enforced, allowed and followed [in domestic law]." The final link in the section 7A chain is that every enactment (which includes the Act of Union) "... is to be read and has effect subject to subsection (2)." This latter provision

purports to subjugate the Act of Union to the section 7A regime: in effect the statutory withdrawal arrangements.

[387] Thus, the critical question becomes: what effect does section 7A(3) of EUWA 2018 have on Article VI of the Act of Union? The case made on behalf of the respondents prays in aid the doctrine of Parliamentary sovereignty. It is contended that any incompatibility between Article VI of the Act of Union and the WA/Protocol arises as a result of the express will of Parliament, as expressed in section 7A(3) of EUWA 2018, in a context where the consequences of ratification and implementation of these instruments were directly in contemplation.

[388] In this context it is important to recall that the executive act of ratifying the WA required the prior approval of Parliament by virtue of a specific provision of primary legislation, namely section 13 of EUWA 2018 (later repealed by the EUWAA 2020, section 31). The essence of this procedurally bulky provision is discernible from a brief extract:

> "**Parliamentary approval of the outcome of negotiations with the EU**
>
> (1) The withdrawal agreement may be ratified only if—
>
> (a) a Minister of the Crown has laid before each House of Parliament—
>
> (i) a statement that political agreement has been reached,
>
> (ii) a copy of the negotiated withdrawal agreement, and
>
> (iii) a copy of the framework for the future relationship,
>
> (b) the negotiated withdrawal agreement and the framework for the future relationship have been approved by a resolution of the House of Commons on a motion moved by a Minister of the Crown,
>
> (c) a motion for the House of Lords to take note of the negotiated withdrawal agreement and the framework for the future relationship has been tabled in the House of Lords by a Minister of the Crown and—

(i) the House of Lords has debated the motion, or

(ii) the House of Lords has not concluded a debate on the motion before the end of the period of five Lords sitting days beginning with the first Lords sitting day after the day on which the House of Commons passes the resolution mentioned in paragraph (b), and

(d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

…"

The requirement of new primary legislation (in the event, the EUWAA 2020) containing "provision for the implementation of the withdrawal agreement" must also be noted.

[389] By this route one arrives at a submission to the forefront of the respondents' case, which I reduce to the following terms: section 7A(3) of EUWA 2018 has the effect of suspending the operation of the first two clauses of Article VI of the Act of Union and, in so doing, is legally irreproachable.

[390] In my view, the analysis required to resolve this ground of challenge is relatively straightforward. It is as follows. The relevant clauses of Article VI of the Act of Union have not been expressly repealed by any provision of the withdrawal statutes. So much is uncontentious. Furthermore, for so long as the principle precluding the implied repeal of statutory provisions of constitutional stature remains good law, they have not been repealed in this indirect fashion either.

[391] But the analysis cannot rest there. Rather it must continue since the choices available to the legislature vis-à-vis Article VI were not confined to the binary option of repeal or no repeal. Parliament has, rather, opted for two mechanisms. First, by section 7A(1) of EUWA 2018 it has given full effect in domestic law to the WA/Protocol in their entirety. In this way Parliament has modified the effect of the relevant provision of Article VI for a finite period. Where two provisions of primary legislation cannot coexist harmoniously, the later provision prevails: see for example *Craies* (*op cit*), para 14.4.4.

[392] I consider modification to be the correct analysis. This follows ineluctably from section 7A(1) of EUWA 2018 considered in conjunction with the new NI trade and customs regime established by Articles 5–10 of the Protocol and the review mechanism enshrined in Article 18. Modification is to be contrasted with repeal of whatever species. It is a less intrusive interference. The modification of a provision of a statute of constitutional stature by a later statute of the same stature does not

seem to me to violate any legal principle. In particular, it does not abrade with any of the principles expounded by Laws LJ in *Thoburn*. No authority binding on this court was cited in support of the submission of Mr Lavery QC which was, in substance, that within this discrete category of constitutional statutes it is doctrinally legitimate to establish a sub-category based on a <u>further</u> hierarchy. I offer no further comment other than tht these seem to me treacherous waters indeed having regard to the separation of powers.

[393] Independently, the evidence does not establish that the trading regime to which NI is subjected by Articles 5 – 10 of the Protocol encompasses the entirety of trading between NI and GB. Article VI of the Act of Union continues to apply fully to all aspects of NI/GB trading and vice versa lying outwith this discrete regime.

[394] I turn to the second of the two legislative mechanisms adumbrated above. If the preceding analysis does not suffice on its own to establish the proposition that the material provisions of Article VI of the Act of Union were lawfully modified by the Protocol, via the EUWA 2018 as amended, any lingering doubt is in mny view conclusively dispelled by section 7A(3). The terms of this provision are explicit and unequivocal. They have a subjugating impact on the relevant parts of Article VI of the Act of Union. They require Article VI to yield to the Protocol in a specified manner for a measured period. Given that Article VI in its full scope could not co-exist harmoniously with the 2020 withdrawal statutory arrangements, specifically Articles 5 – 10 of the Protocol, an appropriate mechanism requiring it to submit to the latter was essential. Both the mechanism and the terms of section 7A(3) accord fully in my view with the principle that the relevant statutory provision should be free of ambiguity, so fully expresed by Lord Neuberger of Abbotsbury in *Public Law Project* at paras [26] – [28]:

> "The interpretation of the statutory provision conferring a power to make secondary legislation is, of course, to be effected in accordance with normal principles of statutory construction. However, in the case of an "amendment that is permitted under a Henry VIII power", to quote again from *Craies*, para 1.3.11:
>
> > "As with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. Although Henry VIII powers are often cast in very wide terms, the more general the words used by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation."

In two cases, *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 WLR198, 204 and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 382, the House of Lords has cited with approval the following observations of *Lord Donaldson of Lymington MR in McKiernon v Secretary of State for Social Security* (1989) 2 Admin LR 133, 140, which are to much the same effect:

> "Whether subject to the negative or affirmative resolution procedure, [subordinate legislation] is subject to much briefer, if any, examination by Parliament and cannot be amended. The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach."

Lord Neuberger continues*:*

> "Immediately after quoting this passage in the *Spath Holme* case, Lord Bingham of Cornhill went on to say "Recognition of Parliament's primary law-making role in my view requires such an approach." He went on to add that, where there is "little room for doubt about the scope of the power" in the statute concerned, it is not for the courts to cut down that scope by some artificial reading of the power."

[395] There is nothing surprising, much less absurd, about this outcome. One of the central themes of the EU statutory withdrawal arrangements is the uniqueness and complexity – geographical, political, historical and otherwise – of the island of Ireland and the post-referendum NI situation. The challenges posed thereby are well charted in the post-referendum story. How to solve the NI problem was a recurring conundrum throughout most of this period, as outlined above. Ultimately, a unique solution for a unique problem was devised, bespoke and tailor made. This solution, set out above, received the democratic imprimatur of the Westminister Parliament, constitutionally the parent legislature, by the most powerful means available namely the enactment of primary legislation. To accede to this ground of challenge would be tantamount to overriding the hallowed common law principle, itself of constitutional stature, that no parliament can bind its successors and the related entrenched principle of legislative supremacy.

[396] In this context, the trial judge stated at para [110]:

> "In this regard it will be seen that the text of Article VI is open textured. This is to be contrasted with the specificity of section 7A which expressly refers to the terms of the Withdrawal Agreement. The Withdrawal Agreement is a detailed specific and complex agreement making provision for the withdrawal of the United Kingdom from the European Union, the repeal of the 1972 EC Act and the details for the implementation of the Agreement. These specific details are in marked contrast to the general provisions of Article VI and give further weight to the proposition that in recognising the principle of the supremacy of primary legislation and the importance of "constitutional" statutes that section 7A should be given effect..."

And at para [111]:

> "This matter must also be considered in light of the fact that every provision and clause of the Withdrawal Acts, the Protocol and associated documents were fully considered by Parliament. Parliament did so in the context of the three previous rejections of the Withdrawal Agreement which had a different arrangement for Northern Ireland. The views supported by the applicants in this case that the Protocol was contrary to the constitutional arrangements for Northern Ireland were known to the legislature. The Acts were passed by a legislature which was fully sighted of the terms and consequences of the Withdrawal Act. The Acts have been approved and implemented pursuant to the express will of Parliament and any tension with Article VI of the Act of Union should be resolved in favour of the Agreement Acts of 2018 and 2020."

I agree with both passages. In another passage, at para [110], the judge expressed the view that the relevant provisions of the withdrawal statutes should be accorded "interpretive supremacy over the Act of 1800." This is reflected in one of the discrete submissions advanced on behalf of the Allister group. For the reasons given above, I do not, with respect, endorse this aspect of the judge's reasoning. I would add two further reasons. First, I do not consider that any real question of statutory interpretation arises. Second, the "interpretive supremacy" label, though superficially appealing, suffers from opacity.

[397] On behalf of the appellants, neither Mr Larkin nor Mr Lavery invited this court to conclude that the 1800 and 2018/2020 enactments under scrutiny should be viewed in hierarchical terms. In particular, it was not contended that the Act of Union enjoyed statutory hierarchical supremacy. It is, therefore, unnecessary to decide whether the *Thoburn* dichotomy of "constitutional" statutes and "ordinary" statutes is doctrinally sound, beyond the narrow ambit of the uncontentious 'no implied repeal' principle.

[398] If this issue did require determination I would observe that while Laws LJ specifically deployed the language of "hierarchy of Acts of Parliament" in para [62] of his judgment, he did so for the specific, and limited, purpose of giving emphasis to the common law principle that the provisions of a statute of constitutional stature are not susceptible to repeal by implication. This I consider clear from a reading of paras [62] – [64] as a whole. If and insofar as Laws LJ is to be understood as proclaiming a hierarchy of statutes in some more expansive way, particularly within the discrete class of constitutional statutes, difficult questions which this court does not require to confront arise. I confine myself to the observations at para [352] above and concur with para [195] of the judgment of the Chief Justice.

[399] Mindful of the doctrine of precedent, it is of course correct that the Supreme Court, in certain isolated passages, has posed the rhetorical question of whether that court could ever lawfully refuse to give effect to provisions of primary legislation. This debate has not been confined to one side of the Irish Sea. Some of these decisions have arisen for consideration in this jurisdiction, for example in *Re JR80's Application for Judicial Review* [2019] NIQB 43 at [72] – [80] which considered, in particular, the dicta *Jackson and* and *AXA General Insurance (*above). The following view was expressed, at para [87] of *Re JR80*:

> "I consider it far from clear that this court is competent to declare that any of the provisions of the 2018 Act are not law in any event. Confirmation of a judicial power to this effect would, in my judgement, require a clearly worded constitutional provision in a typical constitution or Bill of Rights or kindred legal instrument, an unambiguous provision of primary legislation or a supporting decision of the highest court, the Supreme Court (which, for such a momentous purpose, would presumably convene as a panel of nine Justices)."

[400] In advance of the hearing of these appeals the court invited the parties to expand their respective skeleton arguments by addressing the impact of the aforementioned decisions together with those noted in paras [338] and [442] above.

[401] Ultimately, as the core propositions of counsel confirm, the appellants do not advance the contention that the impugned provisions of the withdrawal statutes infringe the principle of legality. Had they done so, I consider that they would have

experienced difficulty, (a) in identifying the kind of fundamental rights to which the principle of legality is directed, (b) subject to (a), establishing that the rights created by the relevant clauses of Article VI of the Act of Union have been abrogated and (c) subject to (a) and (b), securing any remedy in any event, having regard to my analysis above.

[402] In resisting this ground of challenge, Mr McGleenan drew to the attention of the court a series of provisions of primary legislation which affect (or affected) the NIA 1998 in what might be described as a hierarchical way. These include section 2(1), (2) and (4) of ECA 1972, section 3 of the Human Rights Act 1998, section 3(7) of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, section 13 of EUWA 2018, Article 4(2) WA and sections 22(1), 26(2) and 29(1) of the European Union (Future Relationship) Act 2020. These are all clear illustrations of the subordination of NIA 1998 to other statutory provisions. The alignment with section 7A(3) is evident.

[403] The proposition which emerges from all of the foregoing is the following: the Act of Union, notwithstanding its constitutional stature, is not immune from modification by primary legislation. As stated by Professor Craig (*op cit*) at p 385 – 386:

> "If the earlier statute is of real constitutional significance then a later Parliament may still choose to amend or repeal it expressly and unequivocally, thereby reflecting that Parliament's current democratic legitimacy. If however there is mere inconsistency, with no express repeal, and nothing to indicate that Parliament intended for the earlier constitutional statute to be amended or repealed, then there is good reason to conclude that implied repeal is not applicable in this instance because of the normative importance of the earlier statute. This qualifies the continuing sovereignty of the current parliament to a limited extent, but the recognition of constitutional statutes entails a judgment that this qualification is warranted. This is in part because of the very normative importance of the statute adjudged to be constitutional. It is also in part because although each Parliament partakes of sovereignty based on its democratic credentials, it operates in a line of successive legislatures that collectively embody the values and culture of the United Kingdom. When viewed from this perspective it is surely legitimate to work on the assumption that successive holders of this legislative sovereignty respect prior statutes that reflect the values and culture of the nation, such as to demand that they are not readily overturned by mere inconsistency with a later enactment."

I consider the preceding proposition to be in harmony with this analysis. To summarise, there has been no implied repeal of Article VI of the Act of Union and it has been lawfully modified by primary legislation. For the reasons given I would reject the first of the appellants' grounds of challenge.

The Second Ground: Conflict with section 1 NIA 1998

[404] Section 1 of NIA 1998, under the rubric of "Status of Northern Ireland", provides:

> "(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.
>
> (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland."

There is nothing casual or inadvertent about the insertion of this provision at the apex of NIA 1998. Its roots are traceable to the first section of the 1998 Agreement, the title deeds of NIA 1998, which features with some prominence in the challenge of Mr Peeples and the submissions of his counsel, Mr Ronan Lavery QC and Mr Conan Fegan

[405] It is unnecessary to reproduce the relevant section of the 1998 Agreement. Its flavour and thrust can be ascertained from paragraph 1(iii) of the section entitled "Constitutional Issues" (noted in the judgment of the Chief Justice*:* see also Article 1 of the Agreement).

[406] The ground of challenge based on section 1 of NIA 1998 is framed in the core propositions of the Allister group in these terms:

> "Section 1 of the Northern Ireland Act 1998 protects the status of Northern Ireland under the Acts of Union 1800 and any diminution in it can only lawfully occur if approved in advance by a referendum in accordance with Schedule 1 to the 1998 Act. HMG could not lawfully agree the Protocol which deprives section 1 of its full effect."

On behalf of Mr Peeples this ground is framed by counsel as follows:

> "The creation of a customs border within the UK by the Protocol is a breach of the constitutional principle of consent pursuant to Article 1(iii) of the British Irish Agreement ('BIA') and 'constitutional issues' para 1(iii) of the Multi-Party Agreement and section 1 of the Northern Ireland Act 1998 ('NIA') …
>
> Article 1(iii) (only) of the BIA has been incorporated by section 1 NIA, not the entire BIA or the rest [of the] Belfast Agreement."

Mr Lavery advanced the alternative submission that the aforementioned provisions of the British Irish Agreement can be deployed in the interpretation of section 1 (and section 42 – *infra*) of NIA 1998, given their incontestable nexus. However, the statutory language is dominant.

[407] The main focus of the submissions in support of this ground was section 7A of EUWA 2018. This provision, it was argued, is in breach of section 1 of NIA 1998. The suggested breach arises because the statutory withdrawal arrangements, specifically the WA/Protocol, confer powers on the EU over NI in a manner incompatible with section 1 of NIA 1998.

[408] The incontestable effect of Articles 5 – 10 of the Protocol, considered in conjunction with Article 13(3) and (4) in particular, is to subject NI to specific aspects of EU law, as these may evolve from time to time and the associated governance and oversight of the EU institutions, in the areas specified, for a minimum period of four years ending on 31 December 2024. This is subject only to (a) the possible invocation of Article 16 of the Protocol or (b) the consensual renegotiation of the WA in part. In the exercise of determining this ground, disregard of the unfinished, continuing political negotiations between the UK Government and the EU is appropriate.

[409] Thus, the question becomes: does the new trading and customs regime to which NI (alone in GB) is subject pursuant to the Protocol conflict with section 1 of NIA 1998? While section 1 has featured in certain judicial review challenges in this jurisdiction, there is but limited authoritative guidance on its meaning and reach. This issue has however been addressed by the Supreme Court only once, in *Miller No. 1* in the judgment of the majority at para [135]. As the formulation of the questions preceding that passage, at para [126], makes clear, it forms part of the *ratio decidendi* of the decision of the majority. Against this background, section 1 was construed in these terms:

> "135. In our view, this important provision, which arose out of the Belfast Agreement, gave the people of

> Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland. It neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union. Contrary to the submissions of Mr Lavery QC … this section cannot support any legitimate expectation to that effect."

[410] It was argued, in substance, by Mr Larkin and Mr Lavery that this passage does not preclude a more expansive view of section 1 of NIA 1998. Counsel's attempts to circumvent this passage included the contention that its consideration of section 1 is tangential only and an invitation to focus on the following passage in one of the minority judgments, at para [242] in *Miller No. 1*:

> "Given my disagreement with the decision of the majority of the court as to the necessity for an Act of Parliament before art 50 can be invoked, it follows that I would also have dealt with the devolution issues raised in the Northern Irish cases differently. So far as those cases raise issues which are distinct from those arising in the *Miller* appeal, however, I agree with the way in which the majority have dealt with them. Nothing in the Northern Ireland Act bears on the question whether the giving of notification under art 50 can be effected under the prerogative or requires authorisation by an Act of Parliament. More specifically, neither s 1 nor s 75 of the Northern Ireland Act has any relevance in the present context…"

I am unable to identify any merit in this submission. Plainly, a minority judicial view cannot take precedence over part of a majority judgment belonging to the *ratio decidendi* of the majority's decision. Secondly, and in any event, I consider that there is nothing in this passage giving rise to any disharmony with para [135] in *Miller No.1*. Thirdly, the majority view, binding on this court, is couched in unambiguous terms.

[411] I consider that there are two incurable frailties in this ground. First, neither the 1998 Agreement when concluded nor section 1 of NIA 1998 when enacted addressed, or purported to regulate in any way, the then unforeseen Brexit events. Both the 1998 Agreement and NIA 1998 were focused exclusively on the geographical territory of the island of Ireland and the narrowly framed issue of whether, constitutionally, NI should remain part of the UK or unify with the Republic of Ireland - in the language of section 1(2) of NIA 1998: "… should cease to be part of the United Kingdom and form part of a united Ireland …" in the future.

[412] Second, the suggestion that the statutory arrangements for the withdrawal of the UK from the EU, specifically the new NI trading and customs regime enshrined in Articles 5 – 10 of the Protocol, are in conflict with section 1 of NIA 1998 is in my view forlorn. The fundamental thrust of the Act of Union remains unchanged. NI, constitutionally, remains part of the UK. The statutory EU withdrawal arrangements have not altered this any more than the ECA 1972 did. In a sentence, the impugned provisions of the statutory withdrawal arrangements do not impinge on section 1 of NIA 1998. The scope and operation of this provision, focusing exclusively on the NI/ROI and NI/GB constitutional relationships, are entirely unaffected.

[413] For the reasons given, I conclude that this ground of challenge must fail.

The Third Ground: Conflict with section 42 NIA 1998

[414] The substance of this ground is that a provision of subordinate legislation has impermissibly purported to make a significant alteration to section 42 of NIA 1998. The latter provision, together with the other provisions of the legislative framework to which this ground belongs, is set out at [331] – [333] above. In short, if the Protocol survives the four year period measured from the end of the transition period – a political *incognito* – section 42 will not apply to the vote in the NI Assembly on whether Articles 5 – 10 of the Protocol, in short the new trading and customs regime devised for NI by the statutory withdrawal arrangements, should be retained. The petition of concern mechanism will not be available, with the result that the vote will not require "cross-community support." This squares with the simple majority mechanism enshrined in Article 18(5) of the Protocol.

[415] Certain further statutory provisions must be considered. Section 10(1)(a) of EUWA 2018 provides:

> "(1) In exercising any of the powers under this Act, a Minister of the Crown or devolved authority must –
>
> (a) act in a way that is compatible with the terms of the Northern Ireland Act 1998 …"

Section 8C of EUWA 2018 was inserted by section 21 of EUWAA 2020. It provides, in material part:

> "(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate –
>
> (a) to implement the Protocol on Ireland/Northern Ireland in the withdrawal agreement,

(b) to supplement the effect of section 7A in relation to the Protocol, or

(c) otherwise for the purposes of dealing with matters arising out of, or related to, the Protocol (including matters arising by virtue of section 7A and the Protocol)."

Section 8C(2) continues:

> "Regulations under subsection (1) may make any provision that could be made by an Act of Parliament (including modifying this Act)."

Paragraph 21 in Part 3 of Schedule 7 to the EUWA 2018 provides:

> "Any power to make regulations under this Act –
>
> (a) may be exercised so as to –
>
> (i) modify … any retained EU law, or
>
> (ii) make different provision for different cases or descriptions of case, different circumstances, different purposes or different areas, and
>
> (b) includes power to make supplementary, incidental consequential, transitional, transitory or saving provision (including provision re-stating… any retained EU law in a clearer or more accessible way)."

Pausing, section 8C(1) and (2) and paragraph 21 of Schedule 7 are the enabling powers invoked in the 2020 Regulations.

[416] The dichotomy of transferred (ie devolved) matters and excepted matters also features in this ground. In this respect, section 4(1) of NIA 1998 contains the following material definitions:

> "In this Act-
>
> "excepted matter" means any matter falling within a description specified in Schedule 2;

> "reserved matter" means any matter falling within a description specified in Schedule 3;
>
> "transferred matter" means any matter which is not an excepted or reserved matter."

By paragraph 3 of Schedule 2, one of the specified excepted matters is:

> *"International relations, including relations with territories outside the United Kingdom … but not –*
>
> *…*
>
> *(c) observing and implementing international obligations, and obligations under the Human Rights Convention."*

[417] The core propositions formulated on behalf of the Allister group are these:

(i) In making the 2020 Regulations, the SOSNI acted in breach of section 10(1)(a) of EUWA 2018.

(ii) Section 42 of NIA 1998 is not confined to matters within the legislative competence of the Assembly.

(iii) The Assembly vote to be held in 2024 falls within the compass of a transferred matter (thereby invalidating the 2020 Regulations – my addition).

[418] The submissions of Mr Lavery, as noted, have a particular focus on the 1998 Agreement, specifically paragraph 5(d) of Strand One, the subject matter whereof is "Democratic Institutions in Northern Ireland." Paragraph 5(d) is in these terms:

> "There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including: ….
>
> (d) arrangements to ensure key decisions are taken on a cross-community basis…"

Mr Lavery further argues that section 42 of NIA 1998 enshrines "fundamental constitutional rights, principles or arrangements of the UK", with the result that it cannot be repealed, abrogated or amended by the exercise of "a delegated, Henry VIII power."

[419] The effect of the 2020 Regulations must be understood. Contrary to one of the submissions of Mr Lavery, they do not impliedly repeal section 42 NIA 1998. Rather, they simply disapply section 42 with regard to the 2024 vote on the retention of Articles 5 – 10 of the Protocol which, subject to intervening events, the Assembly will be obliged to carry out. This is the sole effect of the 2020 Regulations. The operation of section 42 NIA 1998 is otherwise undiminished. In a sentence, section 42 has been modified.

[420] This is a pure *vires* ground of challenge. It engages one of the fundamental principles of the common law, namely that the subordinate legislating powers conferred on the donee by the relevant primary legislation must be exercised strictly within the scope of what is authorised by the latter. This, in a sentence, is the doctrine of *ultra vires*. The interplay between primary legislation and subordinate legislation was examined by the Supreme Court in *R (Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening)* [2016] AC 1531. This case concerned a challenge to the proposal by the Lord Chancellor, in purported exercise of a power conferred on him by primary legislation, to introduce by statutory instrument an attenuated civil legal aid regime. The Court of Appeal held that the Lord Chancellor had acted *intra vires*. This was reversed on further appeal.

[421] In giving the unanimous decision of the Supreme Court, Lord Neuberger began by formulating a principle of overarching importance, at para [20]:

> "… In our system of parliamentary supremacy (subject to arguable extreme exceptions, which I hope and expect will never have to be tested in practice), it is not open to a court to challenge or refuse to apply a statute, save to the extent that Parliament authorises or requires a court to do so."

Subordinate legislation, in contrast, is subject to challenge by judicial review. Where the challenge is *vires* based, the court must determine the meaning and scope of the enabling power in the relevant primary legislation. Lord Neuberger, continuing, observed that primary legislation is capable of conferring expansive subordinate law making powers, including a power to amend the parent statute concerned, or indeed another statute, by addition, deletion or variation: see para [24] of *Public Law Project*. This is another established principle constituting one of the touchstones by reference to which this ground of appeal falls to be determined.

[422] Next, the "restrictive approach"passage from the judgment of Lord Donaldson MR in *McKiernon v Secretary of State for Social Security*, quoted at para [394] above, was cited with approval. However, where there is little doubt about the scope of the enabling power, a restrictive approach is not warranted: see paras [27] – [28] of *Public Law Project*. To like effect is the formulation of Lord Bingham of Cornhill in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, quoted in para [28] of *Public Law Project:*

> "Immediately after quoting this passage in the Spath Holme case, Lord Bingham of Cornhill went on to say "Recognition of Parliament's primary law-making role in my view requires such an approach." He went on to add that, where there is "little room for doubt about the scope of the power" in the statute concerned, it is not for the courts to cut down that scope by some artificial reading of the power."

[423] In rejecting this ground of challenge the judge made three conclusions. First, in making the 2020 Regulations, the SOSNI was acting within the realm of "international relations", an excepted matter. Second, section 8C of EUWA 2018 empowered the SOSNI to thus act. Third, the SOSNI was acting consistently with the principle of the sovereignty of the UK Parliament in relation to NI. I shall consider each in turn.

[424] Section 8C of EUWA 2018 is undoubtedly framed in expansive terms, as the judge found. However, this ground of challenge is not about section 8C as a whole. Rather, it concerns section 8C(1)(a) only. This is the discrete provision of section 8C which is really engaged in this context. While there is a recitation in the 2020 Regulations of section 8C(1)(b) also, presumably motivated by caution, I do not consider this provision to be operative.

[425] Thus the focus is on the Ministerial power, by the vehicle of subordinate legislation, to implement the Protocol. There cannot be any realistic doubt about the meaning of section 8C(1)(a). Implementation is a specific, circumscribed concept. The word "implement" is a familiar, unsophisticated member of both the English language and the UK legal lexicon, to be accorded its ordinary and natural meaning. Implementation clearly does not extend to variation, repeal, modification or amplification. Thus, the scope of section 8C(1)(a) is narrow and specific. This is the first consideration of significance.

[426] The second consideration of significance is that the instrument to be implemented, the Protocol, is also circumscribed. It is a self-contained, discrete part of a much larger collection of interlocking measures and provisions which, together and in their totality, constitute the EU statutory withdrawal arrangements

[427] Thirdly, it is appropriate to examine which aspects of the Protocol required implementing, bearing in mind the status of primary legislation conferred on it by section 7A of EUWA 2018. Section 8C(1)(a) empowers only subordinate measures required to implement the Protocol. Those parts of the Protocol which are self-implementing, self-executing, are beyond the ambit of this enabling power. Thus, it is pertinent to ask: in what respects did this discrete element of the elaborate statutory withdrawal arrangements not become immediately self-implementing? By this route one returns to the purpose and function of the Protocol. Per Article 1(3):

> "This Protocol sets out arrangements necessary to address the unique circumstances on the Island of Ireland, to maintain the necessary conditions for continued North-South co-operation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions."

There is no suggestion in the language used that the Protocol was designed to establish such arrangements in a limited or partial way. Rather it clearly aimed, broadly, to do so comprehensively. Moreover, this was not some hurried measure, in contrast with NIA 1998, as noted in *Re JR80* at paras [36] and [42]). It was, rather, the product of protracted negotiation and debate, public and otherwise.

[428] There is another aspect of the implementation analysis. Much of the Protocol is declaratory and proclamatory in nature, Articles 1 – 4 being prime illustrations. The extensive lists of measures of Union Law in Annexes 1 – 5 contain pre-existing Union laws. While many of these are Directives, there is no indication of any failure by the UK to implement them. Thus, no further implementation was required.

[429] The nuts and bolts of the controversial trading and customs regime established by the Protocol are contained in Articles 5 – 10 and Annexes 2 – 5 inclusive. There is no suggestion that these extensive provisions required further implementation. While the words "implemented and applied", "implementing and applying" and "implementation and application" appear in certain provisions – see Articles 11 and 12 of the Protocol – it is not clear that "implement" adds anything of substance to "apply" in these contexts. Furthermore, all of the measures of Union law detailed in the Protocol were transformed into domestic law by section 7A of EUWA 2018 and this was expressly effected "without further enactment." Therefore, no "implementation" was required on this front either.

[430] The next consideration is that the Protocol was designed to come into operation as a whole and with immediate effect, in a choreographed manner, dovetailing with an extensive corpus of other measures, in overnight fashion. Its provisions are interlocking, forming a unified whole, devised for the purposes specified in Article 1(3). There was no element of piecemeal, intermittent implementation.

[431] Article 18 of the Protocol is an exception to the immediately preceding analysis. The democratic consent mechanism which it established was, of course, self-implementing. However, it required further legislative action, for two basic reasons. First, Article 18(2) did not spell out the detail of what the UK would have to do in the discharge of its obligation to "seek democratic consent in Northern Ireland in a manner consistent with the 1998 Agreement." Second, since Article 18(5) could not co-exist harmoniously with section 42 of NIA 1998, a further legislative act would be required to remedy this conflict.

[432] While section 8C of EUWA 2018, as a whole, is of broad scope, the same cannot be said of section 8C(1)(a). The narrow and specific target of section 8C(1)(a) is implementation of the Protocol insofar as required. The same description – narrow, targetted and specific - applies to the action taken by the SOSNI in making the 2020 Regulations.

[433] Given all of the foregoing, I consider that, in the language of Lord Bingham of Cornhill in *R v Secretary of State for the Environment Transport and the Regions, ex parte Spath Holme* [2001] 2 AC 349, at 382, there is "*little room for doubt about the scope of the power*" enshrined in section 8C(1)(a). Nor can there be any plausible debate about the direct nexus between the invocation of this power by the SOSNI and Article 18 of the Protocol.

[434] For all of the preceding reasons I would reject the contention that the 2020 Regulations are *ultra vires* the powers of SOSNI under section 8C of EUWA 2018.

[435] As the foregoing conclusion is not dispositive of this ground of challenge, it is necessary next to consider Schedule 2 to NIA 1998. I consider it clear beyond peradventure that the act of the SOSNI in making the 2020 Regulations fell within the compass of the excepted matter of "international relations, including relations with territories outside the United Kingdom …" (para 3 of Schedule 2). It is in this context that the dual juridical identity of the WA assumes some importance. This is an international treaty which has been incorporated in domestic law by primary legislation. The Protocol is one of its integral parts. Thus, the whole of the WA is, in the introspective context of the UK legal system, part of domestic law

[436] Turning to the second dimension of its juridical identity, the WA has been from its inception, and remains, an international treaty regulating relations between the UK and the EU in the sphere to which it applies. In the pithy language of Article 26 of the Vienna Convention on the Law of Treaties (1969):

> "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

This is reinforced by the specific prohibition in Article 27:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

Viewed from this external, international perspective, one specific provision of this treaty, namely Article 18 (5) of the Protocol, required domestic legislative action. I consider that the action under scrutiny, namely the making of the 2020 Regulations, fell squarely within the broad sweep of "international relations."

[437] The correctness of this analysis is confirmed by recourse to a different perspective. The argument to the contrary involves the contention that the making

of the 2020 Regulations was an act of "observing and implementing international obligations." The fallacy in this argument must be that there was no relevant international obligation on either the devolved territory of NI or the NI Assembly or, for that matter, the NI executive in play. The parties to the WA were the EU and the European Atomic Energy Community (on the one hand) and the UK (on the other). It cannot be sensibly suggested that the exception contained in paragraph 3(c) of Schedule 2 to NIA 1998 was designed to require the NI Assembly, a devolved legislature with circumscribed powers, to legislate in order to give effect to one discrete aspect of an international treaty made by the government of the UK.

[438] The two conclusions expressed above are not, however, dispositive of this ground of challenge in view of the appellants' contention that the 2020 Regulations are incompatible with section 10(1)(a) of EUWA 2018. While this argument is superficially attractive I consider it unsustainable for the following reasons. Its basic fallacy is the unexpressed suggestion that section 42 was cast in permanent stone when NIA 1998 came into operation some 21 years ago. Thus, the contention offends against the entrenched principle that no Parliament can bind its successors. The radically changed circumstances in which both the UK executive and UK legislature found themselves some two decades later illustrate vividly the rationale and wisdom of the long standing common law prohibition against an earlier legislature purporting to bind a later one. In the discrete context under scrutiny, the later parliament has adopted as a measure of primary legislation a provision empowering the relevant Government minister to implement the Protocol by subordinate legislation "as the Minister considers appropriate." In so doing it acted in accordance with established legal principle: see *inter alia Public Law Project* above.

[439] My further reasons for rejecting the appellants' section 10(1)(a) contention are the following. When one examines the title deeds of section 42, namely the corresponding provisions of the 1998 Agreement, together with NIA 1998 as a whole, it becomes clear that the cross-community voting procedural safeguard was designed to operate only in the sphere of matters within the law making competence of this devolved legislature. While the baseline position for Assembly legislation was a simple majority of its members (1998 Agreement, para 26 of Strand One), there was to be a different type of majority, of the "cross-community" species, "where appropriate" and in respect of matters to be "designated in advance" (1998 Agreement, para 5 of Strand One). Section 42 of NIA 1998 can be traced to these provisions. It is also necessary to consider para 33(a) and (b) of Strand One of the 1998 Agreement, where one finds specific provision that the Westminster Parliament would legislate for all excepted matters and would "… legislate as necessary to ensure that the United Kingdom's international obligations are met."

[440] All of the foregoing considered as a whole, I agree with the submission of Mr McGleenan that neither the advance designation/cross-community voting mechanism nor the petition of concern device triggering voting of this kind could conceivably have been intended to confer any competence on the NI Assembly in respect of excepted matters. These two mechanisms were, from their initial

conception, designed to protect the rights and interests of all sides of an acutely divided NI community in the devolved sphere only.

[441] A further, freestanding reason for rejecting this ground of challenge relates to the subject matter of section 10 of EUWA 2018, which is expressed in the cross-heading to be "Protection of North-South co-operation and prevention of new border arrangements." Section 10 is the first of several provisions belonging to a discrete chapter entitled "Devolution." This reflects the style and layout of the substantive provisions of the statute, from beginning to end. As observed in *Cross, Statutory Interpretation* (3rd ed, p131) while Parliament does not vote on headings they are included in the Bill and form part of the text entered on the Parliament roll. Likewise a new Part or Schedule added to a Bill by amendment during the Bill's passage through Parliament will contain headings. By virtue of these considerations they are considered to have Parliamentary authority. Therefore a court, while alert to their shortcomings, as noted in *Bennion,* section 16.7 (of Chapter 16 in Part 5), may legitimately consider them in construing the text which follows.

[442] Bearing in mind that EUWA 2018 is a modern statute, one of constitutional stature, which was the product of intense parliamentary scrutiny, the heading of section 10 is unlikely to be the result of either inadvertence or aberration on the part of the draftsman or the legislature. Furthermore, while section 10(1)(a) of EUWA 2018 undoubtedly imposes a constraint on Government Ministers and devolved authorities proposing to exercise any of the powers conferred on them by EUWA 2018, it is pertinent to ask for what purpose and in what context? The broader context is that of devolution, while the narrow context is that of furthering the continuation of North-South co-operation and preventing new border arrangements. These two aims, inter-related in nature, had become imperatives in the post-referendum setting. Plainly, the 2020 Regulations are remote from this discrete sphere and commit no trespass thereon.

[443] It is also of significance that section 10(1)(a) of EUWA 1998 employs the language of "compatible with." This invites reflection on what *compatibility* denotes in this context. The concept of compatibility, in its ordinary and natural meaning, is a little more elastic than those of slavish adherence or exact symmetry. As the Shorter Oxford Dictionary definition indicates, compatibility denotes mutual tolerance. Furthermore, the EUWA 2018 being a statute of constitutional character a generous and purposive construction is appropriate. While the 2020 Regulations modified section 42 of NIA 1998 they did so in a narrow and bespoke fashion, leaving the original section 42 mechanism intact for all other purposes. There is scope for the view that this does not warrant the stamp of incompatibility. While an argument to this effect seems to me persuasive I shall decline to scrutinise it further as it was not addressed in the parties' submissions.

[444] I consider it incontrovertible that section 42 of NIA 1998 is not a species of protected statutory provision possessed of a status insulating it against the later modification wrought (in this instance) by the 2020 Regulations. It is in this context

that some of the potential hazards of a wide ranging doctrine of constitutional statutes and ordinary statutes are identifiable. Mr McGleenan drew to the attention of the court a series of statutory provisions which affect (or affected) NIA 1998 in a hierarchical way. These include section 2(1), (2) and (4) of ECA 1972, section 3 of the Human Rights Act, section 3(7) of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, section 13 of EUWA 2018, Article 4(2) WA and sections 22(1), 26(2) and 29(1) of the European Union (Future Relationship) Act 2020. These are all clear illustrations of subordinating NIA 1998 to other statutory provisions. The alignment with section 7A(3) is evident.

[445] The final element of this ground of challenge is constituted by Mr Lavery's contention that the 2020 Regulations conflict with Article 1 of the Protocol. This I consider unsustainable for two reasons. First, Article 1 of the Protocol does not enshrine rights or corresponding duties. It is, rather, a high level statement of intent and purpose. Mr McGleenan submits correctly that it is merely declaratory of the objectives of the Protocol. Second, and in any event, Article 1 is clearly directed to section 1 of NIA 1998 and the related provisions of the 1998 Agreement. For the reasons which I have given in rejecting the second ground of challenge, there is no incompatibility between the Protocol and section 1 of NIA 1998.

[446] For all of the foregoing reasons I would reject this ground of challenge.

The Article 3 of Protocol 1 ECHR Ground

[447] Article 3 of The First Protocol to the ECHR ("A3P1") is in these terms:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Being included in Schedule 1 to the Human Rights Act 1998, A3P1 is one of the Convention Rights justicable in the UK courts.

[448] This ground of challenge entails the following contention. Article 18 of the Protocol subjects the citizens of NI to EU laws and EU law making processes in which they are not represented, contrary to A3P1, whether by itself or in conjunction with article 14 ECHR.

[449] The trial judge summarised his reasons for rejecting this ground at para [266]:

> "… In the court's view, the limitations arising from the Protocol can be justified as within the margin of appreciation available to the state. Any restrictions arising are in pursuit of a legitimate aim, namely the objectives of the Protocol and the obligation of the UK

> legislature to implement the referendum result for the United Kingdom to withdraw from the European Union. In light of the democratic protections provided in the Protocol the means adopted by the UK are not disproportionate. From the analysis above it will be seen that residents in Northern Ireland have the right to vote for two legislatures, namely the Northern Ireland Assembly (of which three of the applicants are currently members) and the UK Parliament, who between them have the ongoing ability to influence, consent to or bring an end to existing and future EU laws arising from the safeguards and protections that have been built into the Protocol. This opportunity was not available to the applicant in the Matthews case. In this way the A3P1 rights of residents in Northern Ireland have been protected. They have not been curtailed to an extent so as to impair their very essence or to deprive them of effectiveness."

At paras [260] – [263] the judge drew attention to certain other related considerations.

[450] The meaning and scope of A3P1 have been the subject of extensive consideration by the ECtHR in a number of decisions. In *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41 the Court formulated a series general principles, at paras [56] – [62] (reproduced in the judgment of the LCJ).

[451] In *Strobye and Rosenlind v Denmark* [Apps 25802/18 & 27338/18] the Court, having reviewed paras [57] – [62] of *Hirst*, continued at paras [92] – [93]:

> "92. In addition to the principle above about the margin of appreciation being wide in this area, the Court recalls that the quality of the parliamentary and judicial review of the necessity of a general measure, such as the disputed disenfranchisement imposed as a consequence of declaring a person legally incompetent, is of particular importance, including to the operation of the relevant margin of appreciation (see, among others, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts), and *Correia de Matos v Portugal* [GC], no. 56402/12, §§ 117 and 129, 4 April 2018)."

At para [93], the Court emphasised the interrelated factors of the Contracting Parties' margin of appreciation and their "domestic legitimation." The importance of Parliamentary scrutiny and legislation features in paras [101] and [120]. This

judgment also highlights the significance of judicial review, at paras [103] – [110] and the absence of common ground in the national laws of Contracting States, at paras [111] – [112], as factors bearing on each state's margin of appreciation.

[451] In *Matthews v United Kingdom* (1999) 28 EHRR 361, a decision of the Grand Chamber, having declared that A3P1 "… enshrines a characteristic of an effective political democracy" – at para [42] – the Court proceeded to examine the complaint under scrutiny, namely the inability of the residents of Gibraltar to vote in European parliamentary elections. The Court, in essence, found this to be profoundly undemocratic. The following summary of A3P1 is provided at para [63]:

> "The Court recalls that the rights set out in Article 3 of Protocol No. 1 are not absolute, but may be subject to limitation. The Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with. It has to satisfy itself that the conditions do not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart "the free expression of the people in the choice of the legislature."

[453] The attention of the court was also drawn to an admissibility decision of the European Commission, *Mohin v Belgium* [App No 9267/81] and *Mathieu v Belgium* (1988) 10 EHRR 1, (the same case as *Mohin*, but endowed with a new title, reflecting the narrowly drawn admissibility decision of the Commission), the ECtHR reversed the decision of the Commission by 13 votes to 5. The court stated at para [52]:

> "The rights in question are not absolute. Since Article 3 … (P1-3) recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3 ... They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol no. 1 (P1) have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular,

> such conditions must not thwart 'the free expression of the opinion of the people in the choice of the legislature."

In the case of *Timke v Germany* [App No 27311/95] the State's broad margin of appreciation is once again a prominenct theme.

[454] The Court's repeated focus on the two basic rights protected by A3P1 is illustrated again in *Zdanoka v Latvia* (2005) 45 EHRR 478. There the ECtHR reiterated that A3P1 protects two specific rights, namely the right to vote and the right to stand for election. The Court characterised the former right "active" and the latter right "passive" at paras [105] – [106]. In passing, this characterisation of the two rights does not appear to have any profound doctrinal implications.

[455] The threshold of complete deprivation of one of the rights protected in order to establish a violation of A3P1 is illustrated in *Aziz v Cyprus* [2004] 46 ECHR 69949/01. Cyprus has for long been a divided island. In this case the applicant was a member of the Turkish-Cypriot community. He resided in that part of the island governed by the Cypriot government. He was a national of the country and had resided there a lifetime. The governing laws excluded him from registration on the electoral role. The decision of the ECtHR, in his favour, was uncompromising. The offending law deprived him entirely of any opportunity to influence the election of members of the House of Representatives. A violation of A3P1 in conjunction with article 14 ECHR was found, the differential treatment being based on the applicant's status of Turkish Cypriot.

[456] The preceding review of some of the Strasbourg jurisprudence considered invites the following analysis. Both the ECtHR and the Commission have consistently confined the rights protected by A3P1 to, (a) voting in parliamentary elections, and (b) standing to be elected in such exercises. The jurisprudence, consistently, has gone no further. The overarching aim, namely the free expression of the people in the choice of the legislature, has not given rise to the recognition of any further specific rights.

[457] Next it is appropriate to highlight two recurring themes of the Strasbourg jurisprudence. First, the rights protected by Art3P1 are not absolute: they are, rather, subject to implied limitations. Second, in the sphere to which A3P1 applies the state enjoys a wide margin of appreciation. One feature of this latitude arises out of the consideration that A3P1 does not feature an express list of legitimate aims, in contrast with other ECHR provisions such as articles 8 – 11. Thus, while the second paragraphs of these specific ECHR provisions may be considered informative, they are indicative only and the invocation of <u>other</u> legitimate aims by the State in any given context is possible. (In passing, this has some resonance in these appeals – see *infra*.)

[458] Of course, the sustainability of every legitimate aim invoked will be measured by reference to the overarching objectives of the ECHR, including

compatibility with the rule of law. However, consistent with the "*implied limitations*" principle developed in its A3P1 jurisprudence, the ECtHR has not espoused the theme of pressing social need familiar in the context of other qualified Convention rights.

[459] The authors of *Human Rights Law and Practice* (3rd ed) draw attention to the foregoing reflections, at para 4.21.1:

> "Instead, the [ECtHR] focuses on two criteria: whether there has been arbitrariness or a lack of proportionality and whether the restriction has interferred with the free expression of the opinion of the people."

To this one must add the clearly established test embedded in the Strasbourg case law of whether the impugned features of the regime under scrutiny curtail the right to vote or to stand for election to such an extent as to impair its very essence and deprive it of effectiveness. The thrust of this criterion arguably stands out most clearly in the decision in *Matthews*. In short, in the language of the ECtHR, these rights serve to promote an effective and meaningful democracy governed by the rule of law.

[460] At this juncture it is necessary to identify with some precision the substance of the Appellants' complaint in asserting a breach of A3P1. It is that the series of Union laws pertaining to the new trading and customs regime applicable to NI, under Articles 5 – 10 of the Protocol and Annexes 2 – 6, may change from time to time. Such changes will be effected by the appropriate EU institution. This will occur in the absence of what are considered to be the expression of basic democratic rights, via elected representatives, and democratic input generally. While a more sophisticated analysis of this situation will be necessary (see *infra*), this gives rise to the following questions:

(i) Does A3P1 apply to this situation?

(ii) If "yes", does this situation infringe A3P1 in the manner asserted?

(iii) If "yes" to (i) and "no" to (ii), does this situation infringe A3P1 in the manner asserted in conjunction with article 14 ECHR?

[461] The EU legislative changes of the foregoing kind will affect those of the appellants who are citizens of NI. The appellants have no democratic relationship with the institutions which will alter these laws. Their fundamental complaint is that by virtue of and pursuant to the statutory EU withdrawal arrangements the population of NI has no representation in the European Parliament. NI citizens may not participate in elections to this supranational legislature. The following excerpt from the skeleton argument of Mr Larkin QC and Ms Kiley captures the essence of this complaint:

> "The European Parliament remains a legisature for Northern Ireland (but for no other region of the United Kingdom) and the Northern Ireland electorate has no voice in the composition of this legislature."

The related complaint advanced is that the Article 18 consent mechanism is defective. The focus of the appellants' case, therefore, in common with most of the Strasbourg decisions considered above, is on the right to vote dimension of A3P1.

[462] A review of the Protocol's history discloses a recognition of the so-called "democratic deficit" which it would foreseeably bring about in NI. This is illustrated most vividly by the Unilateral Declaration, noted in para [329] above. The following passages in this text are especially noteworthy:

> "**Democratic Consent Process**
>
> 3. The United Kingdom undertakes to provide for a Northern Ireland democratic consent process that consists of:
>
> a. A vote to be held in the Northern Ireland Assembly on a motion, in line with Article 18 of the Protocol, that Articles 5 to 10 of the Protocol shall continue to apply in Northern Ireland.
>
> b. Consent to be provided by the Northern Ireland Assembly if the majority of the Members of the Assembly, present and voting, vote in favour of the motion.
>
> c. The Northern Ireland Assembly notifying the United Kingdom Government of the outcome of the consent process no less than 5 days before the date on which the United Kingdom is due to provide notification of the consent process to the European Union.
>
> 4. The United Kingdom will make provision such that if the motion for the purpose of paragraph 3(a) has not been proposed by the First Minister and deputy First Minister, acting jointly, within one month of the written notice in paragraph 2 being given, the motion can instead be tabled by any Member of the Legislative Assembly. Where the motion for the purpose of paragraph 3(a) has been proposed by the First Minister and deputy First

> Minister the Northern Ireland Executive should consider the matter in line with normal practice and procedure, including providing the Assembly with explanatory materials as appropriate.
>
> **Alternative process**
>
> 5. The United Kingdom will provide for an alternative democratic consent process in the event that it is not possible to undertake the democratic consent process in the manner provided for in paragraphs 3 and 4.
>
> 6. The alternative process referred to in paragraph 5 will make provision for democratic consent to be provided by Members of the Legislative Assembly if the majority of the Members of the Legislative Assembly, present and voting, vote in favour of the continued application of Articles 5 to 10 of the Protocol on Northern Ireland and Ireland in a vote specifically arranged for this purpose. This alternative process will also provide for the United Kingdom Government to be notified of the outcome of the consent process."

This circumstance is also explicitly acknowledged in the Protocol's recitals:

> "EMPHASISING that in order to ensure democratic legitimacy there should be a process to ensure democratic consent in Northern Ireland to the application of Union law under this Protocol."

[463] A solution had to be found and the following one was devised. Via the combination of Article 18 of the Protocol and the 2020 Regulations the elected representatives of the population of NI will have the opportunity to vote on the continued application of Union law in this jurisdiction. This right, however, will not be exercisable in the short term. Rather it is postponed to the beginning of 2025. There are other aspects of the elaborate arrangements which must be considered (see *infra*). However, I consider that this analysis suffices to warrant the conclusion that the appellants' complaint belongs to the territory of A3P1. I concur with the judge that A3P1 is engaged and, accordingly, answer in the affirmative the first of the three questions posed in para [460] above.

[464] Having identified the substance of the appellants' complaint under A3P1, it is necessary to formulate a further question with some precision. Does the inability of those appellants who are citizens of NI to vote on the application to this jurisdiction of those Union laws pertaining to the customs and trading regime enshrined in Articles 5 – 10 of the Protocol until 1 January 2025 give rise to a breach

of A3P1? In order to answer this question it is necessary to consider at this juncture certain other aspects of the statutory withdrawal arrangements.

[465] Adoption of the following starting point seems to me appropriate. On the one hand, the creation of the customs and trading regime enshrined in Articles 5 – 10 of the Protocol subjects the population of NI to a suite of EU laws. Furthermore, as Article 13(3) makes clear, this comprises specified EU laws as amended or replaced from time to time. On the other hand, the influence of EU laws in NI is strictly confined to the sphere of operation of the Protocol. In all other respects the governance of NI remains unchanged. In addition, the CTA is unaffected (Article 3) and NI remains part of the customs territory of the UK (Article 4).

[466] Furthermore, as regards the imperative of North-South co-operation, the customs and trading regime established by the Protocol is not to operate in a vacuum. Rather, per Article 11(1):

> "… this Protocol shall be implemented and applied so as to maintain the necessary conditions for continued North-South co-operation, including in the areas of environment, health, agriculture, transport, education and tourism as well as in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport."

In other words, the impugned regime of the WA/Protocol must seek to further these broader aims. This aspect, of itself, serves to draw attention to the uniqueness of the impugned measure.

[467] Next, the role of the Joint Committee ("JC") must be recognised. Per Article 11(2) of the Protocol:

> "The Joint Committee shall keep under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North-South co-operation. The Joint Committee may make appropriate recommendations to the Union and the United Kingdom in this respect, including on a recommendation from the Specialised Committee."

The JC, also, has the further role specified in Article 13(4):

> "Where the Union adopts a new act that falls within the scope of this Protocol, but which neither amends nor replaces a Union act listed in the Annexes to this Protocol, the Union shall inform the United Kingdom of the adoption of that act in the Joint Committee. Upon the

> request of the Union or the United Kingdom, the Joint Committee shall hold an exchange of views on the implications of the newly adopted act for the proper functioning of this Protocol, within six weeks after the request."

As the remaining provisions of this paragraph make clear, the JC is the decision maker with regard to whether the newly adopted act should be added to the appropriate Annex. Furthermore, where agreement cannot be reached the JC must examine "all further possibilities" prior to making any decision. The back stop within this discrete regime entails the intervention of the Union with appropriate measures, but only on advance notice to the UK and with a minimum of six months advance warning.

[468] In this context it is appropriate to consider, also, the role of the Specialised Committee ("SC"). Article 165 of the WA establishes six specialised committees on specified subjects. One of these is the SC "on issues related to the implementation of the Protocol on Ireland/Northern Ireland." All of these committees are co-chaired by a Member of the European Commission and a UK Government Minister and all decisions "… shall be taken by mutual consent" (Annex VIII, Rule 1, paragraphs 1 and 2). Article 14 of the Protocol is reproduced in the judgment of the LCJ.

[469] Yet another layer of scrutiny is established via Article 15 of the Protocol, which establishes the "Joint Consultative Working Group" ("JCWG"). This is another co-chaired entity which has the function of, inter alia, scrutinising and discussing all planned Union acts falling within the scope of the Protocol. This group reports to the SC. All views expressed on behalf of the UK must be communicated to the relevant Union entity without undue delay.

[470] Certain forward looking provisions of the Protocol must also be considered in the context of this ground of challenge. First, there is specific contemplation of a later agreement between the Union and the UK superseding the Protocol in whole or in part, per Article 13(8). This is a reflection of the long established practice whereby any international agreement is capable of being modified, extinguished or replaced by agreement of the states parties: see *Brownlie's Principles of Public International Law* (9th ed), p 371-372 and Articles 39 – 41 of the Vienna Convention on the Law of Treaties. Second, Article 16 of the Protocol authorises unilateral action by both parties in prescribed circumstances. The parties themselves are the arbiters of whether such circumstances exist. While provision is made for consensual resolution, unilateral action is permitted. Finally, there is the so-called "consent mechanism" established by Article 18, considered above.

[471] In addition to all of the foregoing I consider that the good faith and sincere co-operation provisions of the statutory withdrawal arrangement must also be considered. These provisions overshadow everything else. The umbrella provision is Article 5 WA which requires *inter alia* that the EU and the UK:

> "… in full mutual respect and good faith assist each other in carrying out tasks which flow from this Agreement."

Article 5 further provides that this discrete obligation of good faith:

> "… is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere co-operation."

[472] The principle of good faith in international law generally, including international trade law in particular, and in Articles 26 and 31 of the Vienna Convention on the Law of Treaties is firmly embedded in the realm of international relations. It is closely related to the duty of "sincere co-operation" in the realm of EU law: see Article 4(3) TEU which, in turn, imports the standard of "loyality." Article 5 WA does not embody an empty, merely aspirational commitment. It constitutes, rather, a legal obligation, as highlighted by Professor McCrudden (*op cit,* p 98) and is to be distinguished from the concept of good faith in UK domestic law. Professor McCrudden observes (page 99):

> "Taken as a whole, the duty of 'good faith' will be seen to express the 'gravitational force' that the Protocol should have on all decisions taken by the UK and the EU that impact those objectives."

This analysis I consider uncontroversial.

[473] To summarise, I consider that the good faith/sincere co-operation duties imposed on the UK and the EU invite a broad and purposive construction of their content and must be reckoned as one aspect of the riposte to this discrete ground of challenge.

[474] The next step in the exercise is not altogether clear. Summarising, the ECtHR jurisprudence establishes that neither of the basic rights protected by A3P1 is absolute, certain limitations are permissible, the aims and proportionality of limiting measures must be evaluated and the State has a wide margin of appreciation in this sphere. The Strasbourg cases, however, do not adopt a structured, sequential approach to these issues. Rather the ECtHR tends to consider them compendiously. This is illustrated in, by way of example, *Mathieu – Mohin* at para [52] and *Matthews* at para [63]. This approach may also be linked to those features of A3P1 highlighted above. Thus, a broad balancing exercise would appear to be appropriate.

[475] It is appropriate to begin with the margin of appreciation enjoyed by the UK Government in devising the statutory EU withdrawal arrangements. The breadth of the margin of appreciation in play in the context under scrutiny is underscored by a number of considerations. First, the UK Government was operating in the sphere of

international relations. The other negotiating party was representing the interests of 27 foreign states. The subject matter of the negotiations was unprecedented. The negotiations were frequently fraught. Tensions abounded and at times the two sides were clearly poles apart. There was an abundance of complex and, at times, seemingly irresolubable issues. Furthermore, the controversial litigation involving the highest court in the UK and the events in the House of Commons during the relevant period speak for themselves.

[476] It is a notorious fact that the NI situation posed one of the most complex and contentious post - referendum issues. In both the recitals and Article 1 of the Protocol the arrangements devised by the Protocol are expressed to be the solution reached to address the "unique circumstances on the Island of Ireland", as stated in the recitals and Article 1(3). The imperatives at stake and their associated complexities are self-evident: per Article 1 (3), the maintenance of the necessary conditions for continued North/South co-operation, the avoidance of a hard border and the protection of the 1998 Agreement. Importantly, the arrangements devised by the Protocol were considered "*necessary*" to address this unique situation. The UK Government's assessment of what it considered "*necessary*" entailed the formation of an evaluative, political judgement in its conduct of international relations with this body of 27 foreign states. Taking all of the foregoing considerations together, the UK Government's margin of appreciation must surely have belonged to the outer limits of the notional spectrum.

[477] In determining this ground the judge drew attention to certain further considerations: the right of NI citizens to vote in UK Parliamentary elections and the imprimatur of democratic legitimacy on the withdrawal arrangements in their totality which, he reminded himself, were themselves mandated by popular vote. The Westminster Parliament is a forum in which elected NI representatives may engage in debate and representations about all aspects of the Protocol. It is the forum in which the statutory withdrawal arrangements in their totality were approved and enacted. The population of NI is represented in this forum, by virtue of periodic elections. Thus, as recognised by the judge, this is a relevant democratic facility to be weighed in the balancing exercise.

[478] It is also necessary to take into account those aspects of the Protocol arrangements summarised above which provide oversight, scrutiny and accountability. NI citizens and their elected representatives are at liberty to engage with the newly established entities. They can make representations, formulate complaints and provide evidence. The mechanisms for the functioning and proceedings of these entities are elaborate and there is no suggestion of any inaccessibility, dysfunctionality or impotency.

[479] Summarising, heavy parliamentary involvement in the measure under scrutiny ie the Protocol, amounting ultimately to the adoption of primary legislation, was one of the dominant factors in the events under scrutiny. Furthermore, as indicated, there is potential for continuing parliamentary activity. To this must be

added the factor of access to and the functions and responsibilities of the various entities established for the express purpose of counterbalancing the democratic deficit. Next, there is the Article 16 mechanism whereby the Protocol can be terminated or renegotiated. The WA (incorporating the Protocol), in its international treaty orientation, is susceptible to consensual revision. In all of these ways and through all of these mechanisms the Appellants and their political representatives cannot be prevented from being heard, making complaint and submitting evidence, three of the hallmarks of any democratic system.

[480] Furthermore, it is clear from the ECtHR jurisprudence that there are two particular factors to which that court should pay appropriate attention. The first is the Parliamentary involvement, in all its aspects, already examined. The second is the availability of recourse to the courts for the purpose of challenging the impugned measure. As these proceedings demonstrate, judicial review is available.

[481] Next it is necessary to consider the aims which the impugned measure seeks to further. These are clearly expressed in the Protocol's recitals and Article 1(3). They do not lose their status of aims being pursued or their validity by reason of their appearance within the text of the Protocol. Contrary to the submisson of Mr Larkin, I consider that the judge's approach in this respect suffers from no impermissible circularity. Of course, if the purposes (or some thereof) rehearsed in the recitals had no rational connection with the substantive content of the instrument they could not be invoked as legitimate aims as they would be shorn of their legitimacy. This case, notably, is not advanced. Nor could it be. Furthermore, the act of agreeing the Protocol was an executive act, one consequence whereof was the enactment of primary legislation incorporating its terms. Thus I consider that the judge committed no error in identifying the further legitimate aim of giving effect to the 2016 referendum outcome.

[482] The more detailed aspects, or out-workings, of the legitimate aims in play can be found in the affidavit evidence of the respondents, which the judge quoted at some length in his judgment. Some selected extracts from the main affidavit will suffice:

> "Following Prime Minister May's resignation on 23 May 2019, the Government outlined a new negotiating mandate including a proposal for a protocol for Ireland/Northern Ireland centred on the Government's commitment to find solutions compatible with the Agreement. This was first set out in a letter from the Prime Minister to European Council President Donald Tusk on 19 August 2019. This underlined the Government's commitment to the Agreement in all circumstances; the need for any solutions to recognise the delicate balance on which the Agreement was based; and its view that the arrangements contained in the November

> 2018 Withdrawal Agreement were anti-democratic and could not be agreed on that basis. Building on those principles, a subsequent letter and explanatory note from the Prime Minister to then European Commission President Juncker on 2 October 2019 envisioned the concept of an all-island regulatory zone on the island of Ireland, stressing that any such arrangements must depend on the consent of those affected by it, with an opportunity for the Northern Ireland Executive and Assembly to endorse the arrangements. I refer to copies of the said letters and explanatory note as appear at pages 27 to 42 of the bundle."

That letter highlighted that the proposal was based on five elements, and stated:

> "First and foremost, our proposal is centred on our commitment to find solutions which are compatible with the Belfast (Good Friday) Agreement. This framework is the fundamental basis for governance in Northern Ireland and protecting it is the highest priority for all."

The fourth key element related to consent. The letter stated:

> "Fourth, this regulatory zone must depend on the consent of those affected by it. This is essential to the acceptability of arrangements under which part of the UK accepts the rules of a different political entity. It is fundamental to democracy. We are proposing that the Northern Ireland Executive and Assembly should have the opportunity to endorse those arrangements before they enter into force, that is, during the transition period, and every four years afterwards. If consent is not secured, the arrangements will lapse…
>
> Overall, therefore, the UK Government's position was informed by the importance of providing a mechanism that allowed the people in Northern Ireland to provide or withhold consent to the maintenance of any specific arrangements applied by the Protocol; which could operate through the Northern Ireland institutions established by the Agreement, and the Northern Ireland Assembly in particular; which took account of circumstances in which those institutions were not operating; and ensured that the agreed solution could be reached that could not be said to provide a veto for any one party or community, while recognising that it would

> always be in the interest of all parties for any arrangements to enjoy the broadest possible support across communities in Northern Ireland."

The relevant averments serve to identify the aims pursued. I consider that given the contextual features of high level politics and the conduct of international relations their legitimacy cannot be impugned by this court.

[483] As the ECtHR jurisprudence demonstrates, it is also necessary to consider the proportionality of the measure impugned by the appellants. At this stage of the exercise there is unavoidable interlocking of the State's margin of appreciation, the legitimate aims pursued and the doctrine of proportionality. These do not belong to self-sealed compartments. In this context it is helpful to recall what the ECtHR said in one of its major pronouncements:

> "61. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of art 14 (*Kjeldsen, Busk Madsen and Pedersen*, cited above, para 56). Moreover, in order for an issue to arise under art 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*D.H. v the Czech Republic* [2007] ECHR 57325/00, para 175, ECHR 2007; Burden v UK [2008] ECHR 13378/05, para 60). Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden*, cited above, para 60). The scope of this margin will vary according to the circumstances, the subject-matter and the background. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation' (*Stec v UK* [2006] ECHR 65731/01 and 65900/01, para 52)."

(Carson and others v United Kingdom (2010) ECHR 42184/05 at para [61].)

[484] In cases where a measure is said to lack proportionality, it is not uncommon for alternative measures to feature evidentially in the debate. That is not this case. The appellants do not point to any alternative mechanism whereby (they would say) the aims pursued by the Protocol could have been achieved while avoiding the democratic deficit of which they complain. The absence of any alternative mechanism in the matrix of these proceedings is, in my view, indicative, though admittedly not determinative, of the proportionality of what is under challenge. Of course, as a matter of historical fact, an alternative measure, namely the "back stop" arrangement, was at one stage in the arena, prominently so. However, following extensive debate, an earlier version of the WA incorporating this was rejected by Parliament. There were politically momentous events in that forum and a change of Prime Minister ensued. There is ample evidence before the court that this alternative measure was abandoned by the Government *inter alia* because of its perceived incompatibility with the 1998 Agreement and its threat to political stability in NI. Two further years of intense negotiations were required before the Protocol emerged. This brief recital of the relevant history firmly supports both the proportionality of the impugned measure and the limited role for judicial intervention.

[485] One must graft onto the preceding analysis the factors of the UK Government's wide margin of appreciation, the legitimate aims pursued, the international relations dimension, the intensely political nature of the subject matter and the correspondingly attenuated role of the court. All of these considerations combine to fortify the view that the impugned measure withstands the complaint of disproportionality.

[486] The ultimate touchstone for the compatibility of the Protocol regime with A3P1 is whether it curtails the rights protected to such an extent as to impair their very essence and deprive them of their effectiveness (*Mathieu–Mohin v Belgium* at para [52]). I consider that the determination of this discrete ground of challenge entails identifying all material legal and factual considerations and then standing back, forming a broad evalutive judgement. The first part of this exercise has been conducted.

[487] At the second stage, all material factors identified must be evaluated as a whole. Furthermore, the court must be alert to the constitutional limits of its role so as to avoid impermissible intrusion in the political arena in contravention of the separation of powers. Balancing everything, I consider that to find a breach of A3P1 would be to impermissibly second guess the UK Government's decision to opt for a difficult, unique solution to a seemingly intractable problem in an intensely political context involving the conduct of international relations. I conclude that no breach has been established.

[488] Alternatively, carrying out the somewhat different analytical exercise appropriate where breaches of the qualified ECHR rights (for example Article 8) are asserted, my conclusion would be that while there is a *prima facie* interference with the right to vote dimension of A3P1 such interference pursues several legitimate aims and is manifestly proportionate, in the context of a broad margin of appreciation.

[489] While the Appellants' arguments also contained faint references to other provisions of the Protocol, I consider that these belong to a vacuum for two fundamental reasons. First, this ground of challenge is centred squarely on the appellants' complaint about undemocratic future law making by the relevant EU institutions within the realm of Articles 5 – 10 and the associated Annexes. Second, what the future may hold for other provisions of the Protocol, out-with the boundaries of this ground of challenge, is pure speculation.

[490] For the reasons given I would reject the pure A3P1 ground of challenge. I would add, in passing, that if this had been a non-ECHR challenge, it would probably not have overcome the hurdle for leave (permission) given, particularly, the dimensions of high level politics and the conduct of foreign relations.

A3P1 With Art 14 ECHR

[491] The Appellants' fall back position is to assert a breach of A3P1 in conjunction with article 14 ECHR. By article 14:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

At first instance, the judge, while holding that the "ambit" and "other status" tests were satisfied, decided that differential treatment had not been established and, further, that any such treatment was justified.

[492] Article 14 ECHR has occupied much judicial time and attention in the NI Court of Appeal and the Supreme Court. In the former forum, notable recent illustrations include *Stach v Department for Communities* [2020] NICA 4, *Re Sterritt's Application* [2021] NICA 4 and *Re Cox* [2021] NICA 46. The submissions on behalf of the Respondents drew attention to various passages in these decisions, including para [69] of *Sterritt*:

> "The article 14 tests operate in a cumulative way. Thus, each of the questions must be answered in a manner favourable to the claimant before proceeding to the next.

> If the resolution of any of the questions is unfavourable to the claimant, the article 14 claim must fail."

It is convenient to observe here that the broader approach consistently favoured by Lord Nicholls entails a less structured analysis: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 at para [7]ff and *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at para [3]. This involves concentrating primarily on the questions of why the impugned decision or measure occurred and whether the alleged differential treatment can withstand scrutiny. The more regimented alternative has progressively gained more widespread acceptance at the highest judicial UK levels.

[493] The most recent evolution of the article 14 jurisprudence in the UK is marked by the decision of the Supreme Court in *R (SC and Others) v Secretary of State for Work and Pensions* [2021] UKSC 26. Before considering this important decision in greater depth, it is necessary to review certain earlier members of this compartment of the House of Lords and Supreme Court case law.

[494] I shall begin with the issue of ambit. I consider that the application of the ambit test will normally require the court to consider the proximity of the subject matter of the complaint to the core of what the relevant Convention right protects. Given my conclusion above that the subject of the appellants' complaint in this ground of challenge can be related to one of the core rights protected by A3P1, satisfaction of the ambit test is relatively unproblematic. This has not been a contentious issue before the court and I shall proceed on this basis.

[495] The issue of the appellants' status must next be considered. This is undoubtedly more problematic. They are unable to invoke any of the express characteristics specified in the article 14 list. The status which they assert is that of NI resident. They do not pray in aid any decided case specifically supporting the contention that a person's place of residence – or, for that matter, anything kindred - can qualify as an article 14 "*other status.*"

[496] In every case in which the court is required to determine an article 14 "or other status" issue it will, bearing in mind its duty under section 2(1) of the Human Rights Act 1998, search for guidance in the jurisprudence of the ECtHR. As explained by Baroness Hale in *Clift* and at para [71] of *SC*, this exercise may savour of the arid because of the approach which the ECtHR has habitually adopted in article 14 cases. The Strasbourg Court, unlike the UK courts, has inclined towards a broader, less structured approach. This broader sweep is identifiable even in *Clift v United Kingdom,*where the court had no alternative other than to squarely confront the "*or other status*" issue and resolve it.

[497] I return to the House of Lords and Supreme Court jurisprudence. First instance courts, and this court on appeal, paying respect to the doctrine of precedent, will invariably seek guidance in decisions of the House of Lords and Supreme Court,

an exercise which is far from unproductive. In that forum, certain basic principles have been formulated. These have not been static and it has become necessary to review some in light of ECtHR case law developments.

[498] In the early House of Lords case law, it was consistently stated that an article 14 "other status" cannot be defined by the differential treatment of which the claimant complains: see *R(Clift) v SSHD [2007] 1 AC 484* at para [28] (per Lord Bingham), para [49] (per Lord Hope) and para [62] (per Lady Hale). However, these pronouncements must now be balanced against what the ECtHR stated in the same case, *Clift v United Kingdom* [Application No 7205/07] at para [60]:

> "Further, the Court is not persuaded that the government's argument that the treatment of which the applicant complains must exist independently of the 'other status' upon which it is based finds any clear support in its case law."

The court, rather, preferred the following more sweeping approach:

> "The question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory …
>
> It should be recalled in this regard that the general purpose of Article 14 is to ensure that where a State provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified."

[499] On the issue of article 14 "other status" the House of Lords also developed a clear and consistent approach. In *R(S) v Chief Constable of South Yorkshire Police* [2004] UKHL 39, Lord Steyn, with whom all members of the House agreed on this issue, in the context of considering the Appellant's complaint of a breach of article 8(1) ECHR in conjunction with article 14, stated at paras [48] – [49]:

> "The list of grounds in article 14 is not exhaustive, and necessarily includes each of the specifically proscribed grounds as well as "other status." The European Court of Human Rights has interpreted "other status" as meaning a personal characteristic: *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, 732–733, para 56. I

> do not understand Lord Woolf CJ [2002] 1 WLR 3223, 3238 to have expressed a different view in paragraph 47 of his judgment. On the other hand, the proscribed grounds in article 14 cannot be unlimited, otherwise the wording of article 14 referring to "other status" beyond the well-established proscribed grounds, including things such as sex, race or colour, would be unnecessary. It would then preclude discrimination on any ground. That is plainly not the meaning of article 14."

In holding that no article 14 "other status" had been established, Lord Steyn accepted the argument that the differential treatment between those required to provide finger prints and samples in a criminal investigation context and the rest of the population was:

> "… a difference simply reflecting historical fact, namely that the authorities already hold the finger prints and samples of the individuals concerned which were lawfully taken."
>
> (See para [50].)

In passing, this reasoning is closely aligned with Lord Nicholls' favoured "why" question.

[500] This approach was endorsed without reservation soon afterwards, in *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29 (which does not seem to have been considered in *Clift*). There, Lord Hoffmann, with whom all members of the House concurred on this issue, stated at para [65]:

> "In my opinion, there is nothing in this complaint. The argument fails for a number of reasons. The first question is whether discrimination by reference to whether or not someone has started legal proceedings is covered by article 14 at all. In *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, 2213, paras 48-49, Lord Steyn (with the agreement on this point of all other members of the House) said that article 14 required discrimination to be by reference to some status analogous with those expressly mentioned, such as sex, race or colour. (See also *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, 732-733, para 56). Being a person who has started legal proceedings does not readily appear to qualify as a status."

[501] The most extensive treatise of this is found in the judgment of Baroness Hale of Richmond in *Clift* at paras [50] – [63]. Her Ladyship *inter alia* adverted to one of the recurring features of the ECtHR jurisprudence, namely a concentration on the twofold issues of analogous situation and (in short hand) justification. Baroness Hale noted that, in what has become a familiar passage, the Strasbourg Court stated in *Kjeldsen and Others v Denmark* (1976) 1 EHRR 711 at para [56]:

> "Article 15 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguisable from each other."

Baroness Hale next quoted with evident approval the following passage from *A Practitioner's Guide to the European Convention on Human Rights* (Second Edition) at pp261 – 262:

> "It (Article 14) thus aims to strike down the offensive singling out of an individual or members of a particular group on their personal attributes."

This was described as "reminiscent of" the approach of the Supreme Court of Canada to the equal protection provision of the Canadian Charter of Rights and Freedoms, expressed in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, at 529:

> "It may be said that the purpose of section 15(1) [of the Canadian Charter of Rights and Freedoms] is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice and to promote a society in which all persons enjoy equal recognition at law as human beings or members of Canadian society, equally capable and equally deserving of concern, respect and consideration."

[502] Having noted that the "vast majority" of Strasbourg cases where violations of article 14 ECHR have been found concerned one of the proscribed grounds "or something very close" – at para [58] – Baroness Hale commented on some of the Strasbourg decisions in which the basis of the discrimination diagnosed has lain outwith the proscribed grounds: see paras [59] – [60]. In these passages and in what follows, at paras [62] – [63], the importance of diagnosing the "real reason" for the differential treatment under scrutiny is highlighted. It is to be noted that in the case of Mr Clift, who was one of three appellants, the conclusion that the offending measure of legislation was not encompassed by the "or other status" clause of article 14 was made on the assessment that the differential treatment was based on what he

had done, *i.e.* the nature of his offending and the ensuing sentence rather than any personal characteristic.

[503] The proceedings in the *Clift* case did not end there, as noted above. Mr Clift's application to the ECtHR was successful. The decision of the Strasbourg Court (promulgated on 13 July 2010) is notable for its treatment of the "or other status" clause, at paras [55] – [63]. The principle emerging clearly from these passages is that the "other status" invoked does not have to be a personal characteristic of an innate or inherent kind. This is encapsulated in para [59]:

> "The Court therefore considers it clear that while it has consistently referred to the need for a distinction based on a 'personal' characteristic in order to engage Article 14, as the above review of the case law demonstrates, the protection conferred by that Article is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent."

In the passages which follow the court emphasises the general aim of the Convention and article 14 itself. These are evidently invoked as supportive of the principled stance of giving the "or other status" clause a wide meaning. Notably, while the court resolved this issue in favour of Mr Clift, it did not explicitly spell out the "other status" to which he could lay claim. The most that can be said is that by implication it accepted the contention – noted at para [61] – that Mr Clift possessed an "other status" as a prisoner serving a particular type of sentence, namely a determinate sentence of more than 15 years' imprisonment. Stated succinctly, the Strasbourg Court considered this approach too narrow.

[504] Sandwiched between the two *Clift* decuisions is *AL(Serbia) v SSHD* [2008] UKHL 42, which concerned a challenge to an immigration control policy. The House of Lords was satisfied that young adulthood constituted an "other status." Lord Hope addressed this issue most extensively, at para [9]:

> "Second is the appellants' status as single young adults. It is accepted for present purposes that this description falls within the concluding words of article 14. Following the guidance given by the European Court of Human Rights in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 56 we can take it that status means a personal characteristic by which persons or groups of persons are distinguishable from each other. The appellants' case differs from those such as *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484 where the claimant's classification as a prisoner resulted in a difference in treatment but it was not possible to say that this was because of any status. Adulthood is a status,

> as is the state of being not married. But the status of adults is not one which has so far been recognised as requiring particularly weighty reasons to justify their being treated differently from others, as Baroness Hale points out. The less weighty the reasons that are needed, the easier it is to regard the fact that the appellants were treated differently as falling within the discretionary area of judgment that belongs to the executive."

Baroness Hale, who addressed the article 14 subject quite extensively, noted that the article 14 right differs from UK domestic anti-discrimination laws. At para [23] she observed:

> "These focus on less favourable treatment rather than a difference in treatment. They also draw a distinction between direct and indirect discrimination. Direct discrimination, for example treating a woman less favourably than a man, or a black person less favourably than a white, cannot be justified. This means that a great deal of attention has to be paid to whether or not the woman and the man, real or hypothetical, with whom she wishes to compare herself are in truly comparable situations. The law requires that their circumstances be the same or not materially different from one another."

On the issue of "other status" she stated at para [26]:

> "Thirdly, of course, the difference of treatment has to be on a prohibited ground. Article 14 does not purport to challenge all possible classifications and distinctions made by the law or government policy. The list of prohibited grounds is long and open-ended, but it must be there for a purpose and cannot therefore be endless: see *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196; and further in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484. In general, the list concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to change. The Carson case is therefore unusual, because it concerned discrimination on the ground of habitual residence, which is a matter of personal choice and can be changed."

Finally, having highlighted at para [28] that the exercise in identifying precise characteristics of the persons with whom the appellants should be compared had become an arid one, she drew attention to the real issue at para [29]:

> "What does matter is whether the condition falls within the class for which 'very weighty reasons' are required if a difference in treatment is to be justified."

None of the other three members of the five judge judicial committee subjected the "other status" issue to any examination.

[505] *R (RJM) v SSWP* [2009] AC 311, another pre-*Clift v UK* decision, is the next in this chain of House of Lords authority. Lord Neuberger was the author of the main judgment of the House. In that case the "personal characteristic" issue featured in the arguments, in the context of deciding whether homelessness constituted an article 14 "other status." This was the subject of a lengthy treatise by Lord Neuberger, at paras [35] – [47]. The "other status" advanced was accepted by all members of the House. Lord Neuberger's essay includes the following passage, at para [45]:

> "Further, while reformulations are dangerous, I consider that the concept of "personal characteristic" (not surprisingly, like the concept of status) generally requires one to concentrate on what somebody is, rather than what he is doing or what is being done to him. Such a characterisation approach appears not only consistent with the natural meaning of the expression, but also with the approach of the ECtHR and of this House to the issue. Hence, in *Gerger v Turkey* (Application No 24919/94) (unreported) given 8 July 1999, the ECtHR held there could be no breach of article 14 where the law concerned provided that:
>
> "… people who commit terrorist offences … will be treated less favourably with regard to automatic parole than persons convicted under the ordinary law", because "the distinction is made not between different groups of people, but between different types of offence": para 69.
>
> It appears to me that, on this approach, homelessness is an 'other status.'"

At para [46] Lord Neuberger concurred with Lord Bingham's view in *Clift* that a personal characteristic cannot be defined by the differential treatment of which the person complains.

[506] The same decision contains a notable contribution by Lord Walker in a short concurring judgment, at para [5]:

> "The other point on which I would comment is the expression "personal characteristics" used by the European Court of Human Rights in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, and repeated in some later cases. "Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14."

The two members of the unanimous five judge court who did not write judgments (Lord Hope and Lord Rodger), in tandem with Lord Mance, who provided a short concurring judgment on the issue of justification, expressly agreed with Lord Walker. Lord Neuberger's judgment is neutral on this point.

[507] *R (Mathieson) v SSWP* [2015] 1 WLR 3250 is one of the post-*Clift v UK* article 14 decisions of the Supreme Court. This was another social welfare case. Lord Wilson, with whom three of the other six Justices agreed, addressed the issue of status at paras [19] – [23]. The "other status" was that of "a severely disabled child who was in need of lengthy in-patient hospital treatment": see para [19]. Referring to the judgment of Lord Walker in *RJM* (see *infra*), Lord Wilson observed at para [21]:

> "The more peripheral or debatable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

Lord Wilson, also, gave consideration to the decision of the Strasbourg Court in *Clift v UK*, adding what has become a familiar observation:

> "It is clear that, if the alleged discrimination falls within the scope of a Convention right, the ECtHR is reluctant to

> conclude that nevertheless the applicant has no relevant status, with the result that the enquiry into discrimination cannot proceed."

At para [23] Lord Wilson made the "confident conclusion" that the status advanced was embraced by the "or other status" clause in article 14. In the only other judgment delivered, that of Lord Mance, with whom the other two members of the court agreed, there was no disagreement concerning this issue. Any suggestion that *Clift v UK* had eliminated the requirement to demonstrate another "status", where appropriate, was rebuffed. This decision effectively coincided with yet another UKSC contruibution to its article 14 ECHR jurisprudence, *R (Kaiyam) v Secretary of State for Justice* [2015] AC 1344.

[508] In *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16, one of the discfrete group of welfare legislation cases which have featured with some prominence at the highest judicial level, the issues which dominated were those of legitimate aim and proportionality: see for example paras [63] – [77]. On closer analysis it would appear that "other status" was not a contentous issue: see the four issues formulated by the parties for determination by the Supreme Court, reproduced in the judgment of Lord Carnwath at para [97]. The decision is noteworthy for the wide margin of appreciation accorded to the legislature and the 3/2 division among the Justices.

[509] Chronologically, the next consideration of the article 14 "or other status" clause occurred in *R v Docherty* [2016] UKSC 62 when a sentenced offender complained that the sentence imposed upon him infringed his rights under article 7 ECHR and, additionally, article 14 in conjunction with article 5. His appeal was dismissed. Lord Hughes JSC, delivering the unanimous decision of the court, adverted to the issue of "other status" at para [63]:

> "The appellant submits that this discriminates objectionably against him on grounds of "other status", namely either (i) his status as a convicted person prior to 3 December or (ii) his status as a prisoner who is subject to an indeterminate sentence. Assuming for the sake of argument that status as a prisoner subject to a particular regime can in some circumstances amount to sufficient status to bring art 14 into question (Clift v UK [2010] ECHR 1106), it cannot do so if the suggested status is defined entirely by the alleged discrimination; that was not the case in Clift. For that reason, the second suggested status cannot suffice."

[510] The "or other status" issue has continued to arise in recent Supreme Court decisions. In *Re McLaughlin* [2018] UKSC 48 the "other status" invoked was that of being unmarried. The Supreme Court had no difficulty in endorsing this, having

regard to a decision of the Grand Chamber in *Yigit v Turkey* [App No 3976/05] and the decision of the House of Lords in *Re G (A Child)(Adoption: Unmarried couples)* [2008] UKHL 38 (now effectively overruled by *Elan – Cane v Secretary of State for the Home Department* [2021] UKSC 56 at paras [67]– [85]).

[511] The issue required more extensive consideration in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59. The challenges that can be posed in resolving "other status" issues are reflected in the elaborate dissertation which Lady Black considered necessary to resolve the point, at paras [13] – [81]. In common with *Clift*, this was another sentenced prisoner case. Lady Black examined the decisions in *Clift*, at both the national and supranational levels, in considerable detail. She then turned to some of the more recent ECtHR decisions, impelling her to the conclusion that "… there has been little change in the approach exhibited in Clift v United Kingdom" (para [36]). At para [43] she highlighted the continuing tendency of the ECtHR –

> "… for consideration of the issue of whether a difference in treatment is on the ground of 'other status' to convert, almost seamlessly, into consideration of whether the applicant is in an analogous situation and/or whether the difference is justified …"

In concluding that Mr Stott,who was an extended determinate sentenced prisoner, thereby possessed an article 14 "other status" Lady Black was clearly influenced by the analogy with Mr Clift: see paras [77] – [80]. She prayed in aid, also, the following:

> "Although not open-ended, the grounds within Article 14 are to be given a generous meaning [and] bearing in mind the warning of the ECtHR that there is a need for careful scrutiny of differential early release schemes, lest they run counter to the very purpose of Article 5 …."

[512] Lord Hodge, the second member of the majority, agreed with Lady Black on this issue: see paras [184] – [185]. Lord Mance, the second member of the minority, while adding his own contribution to the topic of status at paras [228] – [235], concluded "without hesitation" that Mr Stott had a relevant status based on the nature of the sentence imposed on him. Lord Carnwath, the third member of the majority, was the only member of the Court who held that Mr Sott did not possess an article 14 "other status." In brief compass, Lord Carnwath preferred the approach of the House of Lords to "other status" to that of the ECtHR, drawing also on the decisions of the Strasbourg Court in *Kjeldsen* and *Gerger v Turkey* [Application No 24919/94] and the statement of Lord Neuberger in *RJM* at para [45]:

> "I consider that the concept of 'personal characteristic' (not surprisingly, like the concept of status) generally requires one to concentrate on what somebody is, rather

> than what he is doing or what is being done to him. Such a characterisation approach appears not only consistent with the natural meaning of the expression, but also with the approach of the ECtHR and of this House to this issue."
> [Lord Neuberger's emphasis.]

At para [178], Lord Carnwath lamented the absence from the Strasbourg jurisdiction of a "rational criterion" for defining and limiting the "other status" clause in article 14 ECHR. One suspects that many UK judges would rejoin "Amen to that."

[513] Baroness Hale, for her part, emphasised the "very broad approach" espoused by the ECtHR and noted that in *Clift v United Kingdom* the ECtHR had, in essence, held that the "personal characteristic" prism was too narrow. She further drew attention to the court's disapproval of the UK Government's argument that the treatment of which the applicant complains must exist independently of the "other status" upon which it is based (see paras [209] – [210]). Having quoted para [60] of *Clift*, Baroness Hale professed herself satisfied that prisoners subject to an extended determinate sentence constitute a distinct group, even more clearly than in *Clift*: see para [212].

[514] The continuing scope for live debate and genuine doubts about the application of the "or other status" clause in article 14 is illustrated in *R (DA and DS) v Secretary of State for Work and Pensions* [2019] UKSC 21, another article 14 social welfare case. There, the "other status" canvassed by the claimants was framed in a multiplicity of ways: lone parent mothers, lone parent mothers of children aged under 2 (or 5) years and the children of such mothers. Three members of the seven judge bench acceded to this contention in full: Lady Hale, Lord Kerr and Lord Wilson: see paras [38] – [39], [138] and [159]. For another judicial cohort of three, the single "other status" in play was that of lone parents: see especially para [108], per Lord Carnwath. The seventh member of the court, Lord Hodge, expressed himself in non-committal terms.

[515] The following passage in the judgment of Lord Carnwath JSC, at para [114], is worthy of note:

> "In the *SG* case itself the discrimination was said to be against women and this within one of the core grounds. As one moves further away from those concepts to the more distant groups identified in the present case, there is still less reason to depart from the MWRF approach."

In this passage Lord Carnwath was debating the applicability of the manifestly without reasonable foundation ("MWRF") test in cases involving article 14 ECHR. Notwithstanding, his observations, albeit indirectly, draw attention to the dichotomy

of the listed, proscribed grounds in article 14 ECHR and the undefined category of "other status."

[516] Lord Hodge, for his part, was content to assume that the claimants possessed an "other status." He added the following cautionary words, at para [126]:

> "…Some may argue that the requirement of status is not an important hurdle for a claimant to overcome and that the Convention requires the state to justify any failure to treat differently people whose situation is relevantly different. But as national rules on social security benefits are required to be expressed in broad terms which will affect different people differently, the lack of clarity as to the entitlement of groups and sub-groups to challenge is a mischief. I do not therefore wish to endorse the view that each of the cohorts of claimants has the necessary status."

While one must acknowledge the context in which Lord Hodge made this pronouncement and the arguably *obiter* status of his words, it serves as a reminder that the importance of establishing "other status" in those cases where this gateway to article 14 is invoked cannot be jettisoned or diluted. This is particularly clear from what Lady Hale said in *Stott* at paras [209] – [212].

[517] *SC* and *R(A) v Criminal Injuries Compensation Authority* [2021] UKSC 27 *("A")* are the most recent decisions of the Supreme Court in this field. In *SC* the challenge to a social security measure introduced by primary legislation featured a claim of incompatibility with article 14 ECHR in conjunction with article 8 and article 1 of the First Protocol. The rejection of the appellants' case was unanimous.

[518] Certain aspects of this decision have a particular resonance in the present appeals. Both the resume in para [37] (which, in passing, does not mention the ambit test) and a reading of the judgment as a whole indicate a preference for determining article 14 cases in the structured manner noted above. Thus, the first issue addressed was that of the ambit of the substantive Convention rights invoked, at para [39]ff; followed by that of relevant characteristic of status, at para [44]ff; then the issue of analogous situation, at para [55]ff; the issues of proportionality, the manifestly without reasonable foundation test and the State's margin of appreciation at para [97]ff; and, finally, the issue of justification in the case concerned, at [186]ff.

[519] In *SC* the article 14 characteristic invoked was that of *sex:* see para [44]. It is doubtless for this reason that the court did not examine the issue of "or other status." Furthermore, having noted the article 14 status invoked, the court embarked at once on an examination of differential treatment, at para [45]ff. The court did, however, highlight this issue in the context of considering the approach espoused by Leggatt LJ in the Court of Appeal, at [69] – [71]. Notably the reasoning of Leggatt LJ was approved.

[520] Echoing what had been said by previous constitutions of the Supreme Court in, for example, *Clift*, *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250, *Re McLaughlin* and *Stott,* the judgment continues at [2021] UKSC 26, para [71]:

> "I respectfully agree with that reasoning, and with that conclusion. I would add that the issue of "status" is one which rarely troubles the European court. In the context of article 14, "status" merely refers to the ground of the difference in treatment between one person and another. Since the court adopts a stricter approach to some grounds of differential treatment than others when considering the issue of justification, as explained below, it refers specifically in its judgments to certain grounds, such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. But in cases which are not concerned with so-called "suspect" grounds, it often makes no reference to status, but proceeds directly to a consideration of whether the persons in question are in relevantly similar situations, and whether the difference in treatment is justified. As it stated in *Clift v United Kingdom*, para 60, "the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified." Consistently with that purpose, it added at para 61 that "while … there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by article 14 of the Convention should be narrowly construed." Accordingly, cases where the court has found the "status" requirement not to be satisfied are few and far between."

[521] Thus, in cases where one of the listed article 14 characteristics is invoked, the court will focus intensely on the inter-related issues of reasonably analogous situation and differential treatment. However, in those cases where a claimant seeks to unlock the article 14 door by the identification of some unlisted status I consider that this issue cannot be glossed or bypassed. As a matter of elementary textual construction the discrete phrase "or other status" adds to all that precedes it. Thus, in my view the court has no alternative other than to grapple with the "other status" asserted where this arises. The foregoing aproach is reflective of the Supreme Court decisions considered above.

[522] There is a brief mention of Lord Walker's judgment in *RJM* in para [103] of *SC*. This draws attention to a certain evolution in the Strasbourg jurisprudence shifting the focus from a personal status relating to the development of an individual's personality to treatment giving rise to the mischiefs of stereotyping, stigma and social exclusion preventing a person's participation in society on a footing equal to that of others. The context is, as ever, important. This mention occurred in the context of a consideration of the inter-related issues of the "manifestly without foundation" test and the margin of appreciation principle. The Court was not, in this passage, concerned with the issue of article 14 "other status."

[523] Lord Walker's analysis, reflecting that of Lord Hope in *Clift*, reinforces the view that the "other status" extension of the express article 14 characteristics is not unlimited. Given its indisputable link with the list which precedes it, the proposition that the contents of that list will serve to inform the sustainability of the "other status" advanced in any given case seems to me persuasive. The reason for this is essentially that proffered by Baroness Hale in *Stott* at paras [209] – [212].

[524] There is no suggestion in any Strasbourg or Supreme Court decision that the requirement to establish "other status" in those cases where it is invoked has been cast aside or is to be quietly ignored. This is confirmed by the erudite analysis of Lord Lloyd-Jones in *A* at para [40] ff. The correct analysis, I believe, is that in a substantial number of cases, particularly in the Strasbourg jurisprudence, it has been considered unnecessary to address and determine this issue. This is a familiar judicial technique, both nationally and supranationally. Standing back, when one considers the rather nebulous terms in which the final three words of article 14 are expressed it is unsurprising that the challenging judicial task of construing these words and applying them to to a particular litigation context has not been undertaken when considered unnecessary. The one proposition which I consider incontestable is that article 14 ECHR does not have the effect of outlawing every conceivable type of discriminatory treatment. To my mind, for the reasons elaborated above, its carefully constructed text makes this abundantly clear.

[525] That said, the challenge emerging from the foregoing is the absence of clearly formulated legal principles, tests or criteria, to be applied in the determination of the article 14 "or other status" issue in any given case. Around 70 years after the adoption of the ECHR and some 20 years following the introduction of the Human Rights Act, this undesirable state of affairs continues unremedied. That this phenomenon continues is confirmed by Lord Lloyd – Jones' espousal in *A* of a broad and generous intetrpretation of "other status" - see para [57] – which is doctrinally unassailable but leaves unresolved the issue of clear, coherent and workable criteria. This state of affairs is antithetical to legal certainty, requires the investment of judicial and related resources which might be considered disproportionate and does nothing to discourage unmeritorious cases. In particular, but far from exhaustively, there is a substantial body of authoritative judicial guidance, outlined in [498] – [520] above, of which would benefit from up to date assimilation by the Supreme Court.

The clearest statement which can perhaps be made is that it has been neither explicitly endorsed nor expressly disavowed in a series of decisions of the Supreme Court post-dating *Clift v United Kingdom*. However, continuing questions and uncertainties are likely to persist in the minds of both first instance and appellate judges. Perhaps this is an innate feature of the language of article 14, as unavoidable as it is unwelcome to those searching for coherence, certainty and predictictability, core values of any 21st century system of law.

[526] By the admittedly lengthy route charted above, I return to the cold light of day. The "other status" under article 14 ECHR advanced by the appellants is that of normal place of residence. Instinctively, in a legal system governed by the doctrine of precedent, the judicial mind almost immediately turns to the question of whether this proposed "other status" has been accepted in any decided case, whether at the national or Strasbourg supranational level. This is the way of the common law world. In passing, one of the notable features of the ECtHR jurisprudence is its increasing adoption of a broadly similar approach, albeit – officially and outwardly at least – unshackled by precedent. It is this reflection which brings to mind Lord Carnwath's observation, noted at para [515] above, that there was no decision of the Grand Chamber dictating a particular result in the case under consideration.

[527] The decision in *P v United Kingdom* (Application No 13473/87: unreported, 11 July 1988) would appear to provide the closest analogy. There the subject matter of the complaint was the imposition of liability to pay poll tax for residents of Scotland prior to the introduction of a similar liability for residents of England. The applicant asserted that this infringed his rights under A1P1, in conjunction with article 14 ECHR. The "other status" advanced was his place of residence. In declaring his application inadmissible the Commission stated:

> "*The Applicant complains of a difference in the level of rates* payable between two regional jurisdictions within the United Kingdom and alleges that this is discrimination against a national minority. The Commission notes in this regard that in many, if not all, of the Contracting States different legal jurisdictions exist in different geographical areas within the State ….
>
> The Commisson considers that Article 14 does not require a state to operate a uniform system of rate valuation throughout its national territory. Thus, the mere existence of variations between such jurisdictions within a State does not constitute discrimination within the meaning of Article 14 …"

This decision was noted by Lady Hale in *Clift* at para [59]. Regrettably, it rather disappoints in the search for some clear guiding principle.

[528] Place of residence was also a feature of the *R (Carson) v SSWP* [2005] UKHL 37. Mrs Carson, a British citizen who had spent most of her working life in England and had a full record of national insurance contributions emigrated to South Africa and had resided there for some ten years prior to her 60th birthday. Under the relevant English statutory provisions this had the consequence that while she qualified to receive a pension she was excluded from the annual uprating provided to those residing in England. Her appeal to the House of Lords was dismissed by a majority of four to one. Lord Hoffman assumed that her case fell within the ambit of A1P1: see paras [11] – [12]. Likewise he assumed that being ordinarily resident in South Africa was a status protected by article 14 ECHR: see para [13]. At [14] he formulated the following general principle:

> "…Discrimination means a failure to treat like cases alike. There is obviously no discrimination when the cases are relevantly different …
>
> There is discrimination only if the cases are not sufficiently different to justify the difference in treatment."

[529] At para [15], Lord Hoffmann addressed the distinction between the so-called "suspect" grounds and other grounds:

> "Whether cases are sufficiently different is partly a matter of values and partly a question of rationality. Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political party and (here a change in values since the Enlightenment) gender, are seldom, if ever, acceptable grounds for differences in treatment. In some constitutions, the prohibition on discrimination is confined to grounds of this kind and I rather suspect that article 14 was also intended to be so limited. But the Strasbourg court has given it a wide interpretation, approaching that of the Fourteenth Amendment, and it is therefore necessary, as in the United States, to distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some rational justification: *Massachusetts Board of Retirement v Murgia* (1976) 427 US 307.

What follows in para [16] is also of some importance:

> "There are two important consequences of making this distinction. First, discrimination in the first category cannot be justified merely on utilitarian grounds, e.g. that it is rational to prefer to employ men rather than women because more women than men give up employment to look after children. That offends the notion that everyone is entitled to be treated as an individual and not a statistical unit. On the other hand, differences in treatment in the second category (eg on grounds of ability, education, wealth, occupation) usually depend upon considerations of the general public interest. Secondly, while the courts, as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination in the first category, decisions about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government."

At para [17] he contrasted the "right to respect for the individuality of a human being" with "a question of general social policy."

[530] Lord Walker, concurring in the result, clearly had reservations about whether a person's place of residence is a status protected by article 14 ECHR: see paras [50] – [59]. Ultimately, Lord Walker's reasons for dismissing both appeals were based on his application of the more compendious, less structured, approach espoused by Lord Nicholls, another member of the majority, at para [3], echoing his judgment in *Shamoon v Royal Ulster Constabulary* [2003] NI 174 at para [8]:

> "Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14. If this pre-requisite is satisfied, the essential question for the court is whether the alleged discrimination, that is the difference in treatment of which complaint is made, can withstand scrutiny."

Lord Carswell, who dissented in the case of Mrs Carson, confined himself to noting at para [95] that the place of residence article 14 status invoked by her was not contentuous.

[531] Specific case law guidance on the article 14 "other status" issue in these appeals is not to be found. The resolution of "other status" questions does not entail the application of any hard edged legal rules and principles. Bright luminous lines are conspicuous by their absence. There are no presumptions in play. The phrase is

rather nebulous and detailed authorative judicial guidance is sparse. The judicial exercise has elements of evaluative judgement.

[532] In my view, this issue should be determined by adopting the following approach. As already explained, I consider it necessary to juxtapose the "or other status" clause with all members of the immediately preceding list of characteristics. Taken together, the use of the terms "on any ground such as", followed first by the defined category and next by the words "or other status" denote a nexus between the defined category and the undefined category. This construction is reinforced by the consideration that while article 14 ECHR could have ended with the phrase "on any ground" or something cognate it does not do so. I consider it clear that article 14 ECHR was not intended to proscribe all types of discriminatory treatment. By its terms it does not purport to do so. Rather its reach is confined to those cases, or situations, where the offending treatment occurs by reason of a certain characteristic, or status, possessed by the victim. The defined category largely encompasses discriminatory treatment of the most repugnant kind. It specifies the so-called "suspect" or "sensitive", grounds. In doing so, the context in which the ECHR was framed, including the historical background, must be recalled: members of these specifically protected suspect groups had proved to be especially vulnerable at the hands of despotic and dictatorial regimes and were subjected to the most appalling treatment.

[533] Ultimately, I consider the issue to be one of proximity, or nexus. There must be some reasonable, discernible connection between the "other status" asserted and one or more of the characteristics contained in the defined category. A precise analogy is not required. But there must be some linkage. In cases where there is no such connection, the status advanced will not suffice. Equally, I consider that it cannot have been intended that in cases where the connection is remote, distant or tenuous, when juxtaposed with the members of the defined category, this will be sufficient.

[534] Turning to the present case, habitual residence in NI is the "other status" invoked by all appellants. As highlighted by Mr McGleenan, it would appear that some of the appellants do not possess this "other status." Without unnecessary elaboration, those who do not have this status lack standing to advance this discrete ground of challenge. Furthermore, and self-evidently, sporadic or occasional residence would be even more distant from the members of the defined art 14 category.

[535] Those who reside in any given state by and large choose to do so, refugees and economic migrants being prime exceptions. Their residence is not dictated by any innate, inalienable characteristic. In favour of some of the appellants, it may be said that their habitual residence in NI is linked to their place of birth, their nationality, the language which they speak, the culture which they espouse and the political beliefs which they hold and manifest. But these belong to a broader canvas, extending beyond the specific status which the appellants have chosen to put

forward. I consider that the more one focuses on the precise contours of the "other status" advanced by the appellants, the more remote this becomes from the core characteristics protected by article 14 ECHR.

[536] I have not found this issue altogether easy to resolve in the present appeals. It is borderline in nature. I have concluded, on balance, that the "other status" espoused by those appellants who have the necessary factual foundation lies outwith article 14 ECHR because of its remoteness from the core characteristics expressly recognised and protected by this Convention provision. It is palpably distant from the inner sanctum of article 14. As appears from the foregoing I have drawn from a particular body of Supreme Court jurisprudence which I consider to have lost none of its vigour. The review of the decided cases which I have undertaken demonstrates that article 14 ECHR issues have featured with some frequency in that forum and it will be for that court to decide whether the relevant body of jurisprudence should undergo adjustment. I would, therefore, reject the appellants' A3P1/article 14 ground of challenge on this basis.

[537] If the preceding conclusion is erroneous and/or if the appropriate technique for resolving the A3P1/article 14 challenge in these appeals is to apply the more compendious approach discussed above, my conclusion would be the same for the reasons set forth in the following paragraphs.

Analagous Situation

[538] This issue must be addressed on the premise that my preceding conclusion is incorrect. It is a cornerstone principle of discrimination law that the complainant does not have to demonstrate precise equivalence between his or her situation and that of another identifiable person or group. As Lady Hale stated in *Re McLaughlin* at para [24]:

> "Unlike domestic anti-discrimination law, Article 14 does not require the identification of an exact comparator, real or hypothetical, with whom the complainant has been treated less favourably. Instead it requires a difference in treatment between two persons in an analagous situation … there are few Strasbourg cases which have been decided on the basis that the situations are not analagous, rather than on the basis that the difference was justifiable. Often the two cannot be disentangled."

Followed by, at para [26]:

> "It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an

> obvious difference between the two persons that they are not in an analagous situation."

[539] As appears from para [274] of his judgment, the judge's understanding of the Appellants' case was that they were seeking to compare themselves with all other residents of the UK. He was not persuaded that this was a valid comparison. In their written argument in this court (on which the appellants rested) there is no clear identification of a comparator group. Rather, the appellants advanced their case on the more compenduous basis favoured by Lord Nicholls in *Shamoon and Carson*, formulating the following submission:

> "… there is no policy reason why those normally resident in Northern Ireland have been subjected to such a profound exclusion from what are rightly regarded as the rights to choose those who make laws for them."

[540] On behalf of the respondents it is suggested that this aspect of the appellants' case "loses focus." The submissions of Mr McGleenan and Mr McAteer highlight that there is no differential treatment among UK citizens, irrespective of where they reside, because none of them can exercise a vote relating to the Protocol during the four year period. Thus, all are treated in the same way. It is further submitted:

> "All residents of all parts of the UK had the same indirect say in the approval and implementation of the Agreement and Protocol through the vote their elected Member of Parliament could cast on whether to approve the Withdrawal Agreement and Protocol or not … [the appellants] had the same say in it as other residents of other parts of the UK."

[541] The effect of accepting the foregoing submissions, as I do, is that the appellants are unable to identify any more favourable/less favourable treatment in the adoption of the statutory withdrawal arrangements and the specific provision made for reviewing the continued operation of the Protocol in 2024. Indeed, the citizens of NI will be the favoured group when the Article 18 vote is held. More fundamental, in my view, is that the two groups are in acutely different situations by reason of the factors rehearsed repeatedly and noted in the body of this judgment, the principal sources being the Protocol recitals, Articles 1 and 2 of the text, the UK Government's Unilateral Declaration of October 2019 and the Respondents' affidavit evidence. These texts make clear that the members of the two groups are far from reasonably or relevantly analagous. What stands out is their differences. It follows that the appellants' article 14 case must fail on this discrete ground.

Legitimate Aim and Proportionality

[542] The factors of legitimate aim and proportionality will fall to be considered only if my conclusions relating to "other status" and analogous situation are both erroneous.

[543] It is orthodox dogma that in every exercise of examining the inter-related issues of legitimate aim and proportionality, the degree of judicial scrutiny and the potency of the justificaton required are fluctuating variables. The cases belonging to this discrete compartment of both Strasbourg and UK jurisprudence are both fact sensitive and context specific. Their unifying feature is the application of the test of whether there is an objective and reasonable justification for the impugned difference in treatment, viewed through the prisms of whether the impugned measure pursues a legitimate aim and a reasonable relationship of proportionality exists between the two. It is in this context that the State's margin of appreciation, or discretionary area of judgement, arises. The margin of appreciation is not immutable. Rather, it too is case and context sensitive. It involves a broad degree of latitude in some cases and a narrower one in others. In some cases a single factor may be decisive whereas in others the outcome is dictated by a multiplicity of considerations.

[544] At this juncture, a return visit to *SC* is appropriate. In its review of the Strasbourg jurisprudence, the Supreme Court compared and contrasted the Strasbourg Court's approach in certain decided cases. The Supreme Court's review of the Strasbourg jurisprudence gave rise to the following summary at [2021] UKSC 26, para [115]:

> "In summary, therefore, the court's approach to justification generally is a matter of some complexity, as a number of factors affecting the width of the margin of appreciation can arise from "the circumstances, the subject matter and its background." Notwithstanding that complexity, some general points can be identified.
>
> (1) One is that the court distinguishes between differences of treatment on certain grounds, discussed in paras 100-113 above, which for the reasons explained are regarded as especially serious and therefore call, in principle, for a strict test of justification (or, in the case of differences in treatment on the ground of race or ethnic origin, have been said to be incapable of justification), and differences of treatment on other grounds, which are in principle the subject of less intensive review.
>
> (2) Another, repeated in many of the judgments already cited, sometimes alongside a statement that "very

weighty reasons" must be shown, is that a wide margin is usually allowed to the state when it comes to general measures of economic or social strategy. That was said, for example, in *Ponomaryov*, para 52, in relation to state provision of education; in *Schalk*, para 97, in relation to the legal recognition of same-sex relationships; in *Biao v Denmark*, para 93, in relation to the grant of residence permits; in *Guberina*, para 73, in relation to taxation; in *Bah v United Kingdom*, para 37, in relation to the provision of social housing; in *Stummer v Austria*, para 89, in relation to the provision of a state retirement pension; and in *Yiğit v Turkey*, para 70, in relation to a widow's pension. In some of these cases, the width of the margin of appreciation available in principle was reflected in the statement that the court "will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'": see *Bah*, para 37, and *Stummer*, para 89.

(3) A third is that the width of the margin of appreciation can be affected to a considerable extent by the existence, or absence, of common standards among the contracting states: see *Petrovic* and Markin.

(4) A fourth, linked to the third, is that a wide margin of appreciation is in principle available, even where there is differential treatment based on one of the so-called suspect grounds, where the state is taking steps to eliminate a historical inequality over a transitional period. Similarly, in areas of evolving rights, where there is no established consensus, a wide margin has been allowed in the timing of legislative changes: see *Inze v Austria*, *Schalk* and *Stummer v Austria*.

(5) Finally, there may be a wide variety of other factors which bear on the width of the margin of appreciation in particular circumstances. The point is illustrated by such cases as *MS v Germany*, *Ponomaryov and Eweida v United Kingdom*."

Continuing at para [116]:

"As the cases demonstrate, more than one of those points may be relevant in the circumstances of a particular case and, unless one factor is of overriding significance, it is

> then necessary for the court to make a balanced overall assessment."

This is followed by an explanation of why the touchstone of "manifestly without reasonable foundation" is to be viewed not as a freestanding legal test, rather as a breadth of the margin of appreciation enjoyed by the State in certain contexts. See paras [117] – [130].

[545] It is appropriate to reproduce the Supreme Court's summary of its assessment of the Strasbourg's jurisprudence, at para [142]:

> "In summary, the European court has generally adopted a nuanced approach, which can be understood as applying certain general principles, but which enables account to be taken of a range of factors which may be relevant in particular circumstances, so that a balanced overall assessment can be reached. As I have explained, there is not a mechanical rule that the judgment of the domestic authorities will be respected unless it is "manifestly without reasonable foundation." The general principle that the national authorities enjoy a wide margin of appreciation in the field of welfare benefits and pensions forms an important element of the court's approach, but its application to particular facts can be greatly affected by other principles which may also be relevant, and of course by the facts of the particular case. Indeed, this approach is not confined to cases concerned with article 14, but can be seen in other contexts where the state generally enjoys the wide margin of appreciation …"

The breadth of the margin of appreciation in any given context is informed by the correct characterisation of the ground on which differential treatment is said to have occurred and the characterisation of the executive or legislative measure under scrutiny. Thus, the margin of appreciation is greater when one of the "non-suspect" grounds is in play. Equally, and the two may in appropriate cases be related, the margin of appreciation is greater where the legislative or executive measure under scrutiny belongs to the realm of economic or social strategy (such as welfare benefits), education, pensions and taxation.

[546] It is of no little importance to emphasise that neither any decision of the ECtHR nor any decision of the Supreme Court binding on this court purports to formulate an exhaustive list of situations in which the margin of appreciation of the State belongs to the outer orbit of the notional spectrum. Each case will depend upon its particular factual, legal, political and social context. Any temptation towards the mechanistic or formulaic is to be avoided. Thus, the absence of the

executive conduct of international relations and the executive making of international treaties from the inexhaustive illustrations provided is striking.

[547] It is at this stage of the exercise that certain aspects of my analysis of the A3P1 *simpliciter* breach ground are revived. These interlock and overlap with the legitimate aim/proportionality dimension of the A3P1/article 14 assessment above. Repetition is unnecessary.

[548] One of the stand out features of the EU statutory withdrawal arrangements ultimately finalised is the role of Parliament. Indeed, the litigation culminating in the first of the Supreme Court decisions in *Miller* was specifically designed to establish the centrality of the parliamentary role. This aim was achieved. Thereafter, the executive was obliged to account to Parliament through the formal mechanism contained in section 13 of EUWA 2018 (considered in para [329] above). Ultimately, it was parliament who decided on the terms of the withdrawal arrangements. These, including the international treaty dimension, became domestic UK law in the form of primary legislation. Further evidence of the parliamentary involvement throughout the critical phase is contained in the materials assembled before the court.

[549] It is against this background that paras [178] – [182] of *SC* fall to be considered. At para [182] the court stated:

> "It is of course true that the relevant question, when considering the compatibility of legislation with Convention rights, is not whether Parliament considered that issue before making the legislation in question, but whether the legislation actually results in a violation of Convention rights. In order to decide that question, however, the courts usually need to decide whether the legislation strikes a reasonable balance between competing interests, or, where the legislation is challenged as discriminatory, whether the difference in treatment has a reasonable justification. If it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon interests protected by Convention rights, then that may be a relevant factor in the court's assessment, because of the respect which the court will accord to the view of the legislature. If, on the other hand, there is no indication that the issue was considered by Parliament, then that factor will be absent. That absence will not count against upholding the compatibility of the measure: the courts will simply have to consider the issue without that factor being present, but nevertheless paying appropriate

> respect to the will of Parliament as expressed in the legislation."

One does not, of course, overlook the two caveats added in para [183].

[550] One of the reasons for dismissing the appeal in *SC* was that the statutory measure under challenge did not give rise to a type of differential treatment requiring justification based on "very weighty reasons." This was so because none of the specially protected article 14 grounds of discrimination was in play: see para [203]. Taking into account also that the impugned measure was one of social and economic strategy –

> "… it follows that Parliament's assessment that the difference in treatment is justified should be treated by the courts with the greatest respect."

By this route the Court enuciated its conclusion, at para [208]:

> "The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies."

The judgment adds, at para [209]:

> "That is what happened in this case. The democratic credentials of the measure could not be stronger. It was introduced in Parliament following a General Election, in order to implement a manifesto commitment (para 13 above). It was approved by Parliament, subject to amendments, after a vigorous debate at which the issues raised in these proceedings were fully canvassed, and in

> which the body supporting the appellants was an active participant (para 185 above). There is no basis, consistent with the separation of powers under our constitution, on which the courts could properly overturn Parliament's judgment that the measure was an appropriate means of achieving its aims."

[551] I consider that these passages, with appropriate adjustments to reflect the differing contexts, are, for all of the reasons elaborated above, tailor made for the present case. They point irresistibly to the conclusion that the subject matter of these proceedings, in Convention terms, is not appropriate for judicial intervention, given the breadth of the State's margin of appreciation. This impels ineluctible to the conclusion that the measure impugned by the appellants comfortably withstands review as regards the requirements of legitimate aim and proportionality.

[552] For the reasons given I would reject this alternative formulation of the appellants' A3P1 ground, invoking as it does article 14 ECHR.

Conflict with Articles 10 and 50 TEU

[553] By way of preface to this ground, it is appropriate to recall that the UK membership of the EU ended on 31 January 2020, so-called "exit day." The events of juridical significance preceding this momentous occurrence included the following in particular: the WA, encompassing the Protocol, was concluded on 17 October 2019; on 23 January 2020 the WA and Protocol were approved by Parliament and the EUWAA 2020 received Royal Assent; the acts of formally executing and ratifying the WA occurred on 24 and 29 January 2020; the WA came into operation on 1 February 2020; the Protocol came into operation on 10 December 2020; the transition period ended on 31 December 2020; and the final, formal, legally binding withdrawal of the UK from the EU took effect on 1 January 2021.

[554] The context thus set, Article 10 TEU provides:

> "1. The functioning of the Union shall be founded on representative democracy.
>
> 2. Citizens are directly represented at Union level in the European Parliament.
>
> Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union."

By Article 50 TEU:

"1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3) (b) of the Treaty on the Functioning of the European Union.

> 5. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49."

[555] The threefold propositions developed by the appellants in promoting this ground of challenge are couched in the following terms:

> "The WA goes beyond what is permitted by Article 50 and is pro tanto invalid. Article 50 also prevents the Protocol from continuing to apply the EU treaties to part of the UK, which is the actual effect of the Protocol. The effect of the Protocol is to give legislative and executive authority to the EU over important aspects of life in Northern Ireland without prior democratic consent from the people of Northern Ireland incompatibly with Article 10(1) TEU."

The first contention is that the WA/Protocol contravene Article 50(2) as they impermissibly make provision for the future relationship between the EU and the UK. The second contention is that the WA/Protocol contravene Article 50 as they impermissibly make provision for one part of the withdrawing state, namely NI, to remain subject to the Treaties in certain respects. The third contention, linked to the second, is that the WA/Protocol contravene Article 50(2) as they impermissibly provide for the continued application of certain aspects of the Treaties to the withdrawing state, the UK.

[556] I consider the first contention to be misconceived as it is based on a construction of Article 50(2) TEU which does not withstand scrutiny. Stated succinctly, this provision requires that withdrawal arrangements take account of the framework for the future relationship between the withdrawing Member State and the Union. If the subjects of withdrawal and future relationship are required to be separated in the way in which the appellants suggest, the final clause of Article 50(2) would be rendered meaningless for all practical purposes. If the appellants are contending that Article 50(2) postpones the subject of future relationship – and any agreement pertaining thereto – until after the withdrawal agreement has been concluded, the final clause would be rendered redundant as there would be nothing relating to the topic of future relationship to be considered. Alternatively, if the appellants are contending that, (a) a framework for the parties' future relationship must be constructed and agreed, and (b) this must be considered in finalising their withdrawal agreement but cannot form part thereof, no identifiable logical purpose is served by this segregation.

[557] The appellants do not contend that "framework" denotes something merely skeletal. Clearly "framework" is capable in this context of denoting an entire agreement. Article 50(2) incontestably establishes a close association between withdrawal and future relationship. Standing back, the subject of future relationship

would inevitably loom large as a major issue following the receipt of a withdrawal notification from any Member State. To summarise, the appellants' contention is based on a strained and unsustainable construction of the treaty language, it defies logic, common sense and the reality of the world of international relations, it furthers no identifiable Treaty objective, it runs contrary to the imperatives of certainty and finality which are two of the unwritten but unmistakable themes of Article 50 and, finally, it serves no discernible purpose.

[558] Turning to the appellants' second contention, Article 50 neither explicitly envisages a withdrawal agreement whereby one geographical region of the withdrawing Member State remains subject to a narrowly drawn suite of EU laws in specified respects for a defined period nor explicitly excludes this possibility. It is here that the breadth of the Treaty language resonates. Article 50 does not establish a detailed, prescriptive model for the nuts and bolts of withdrawal. Rather it has the hallmark of expansive, non-prescriptive terms which fall to be construed not as, for example, a deed or contract but in accordance with the general approach to the interpretation of international treaties.

[559] In this connection, Article 31(1) of the Vienna Convention on the Law of Treaties falls to be considered:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Article 31(1) gives primacy to the textual construction principle, one of three methods of interpretation identified by the renowned international law jurist Gerald Fitzmaurice (see (1951) 28 B.Y.I.L. 1). In summary, the prohibition for which the appellants contend is nowhere to be found in either the express terms of Article 50 or any principle of treaty interpretation.

[560] The third of the appellants' contentions, in common with the first two, has mixed ingredients of *vires* and construction. It is founded squarely on the first clause of Article 50(3) TEU. Notably, there is nothing in Article 50(2) subjecting or subordinating this paragraph to the one that follows. I consider that one of the multiple unexpressed possibilities contemplated by the Article 50 machinery is the continued application of identified EU laws in specified respects in the withdrawing state or any part thereof post-withdrawal agreement. To summarise, I consider that this contention must fail for all of the reasons rehearsed in my rejection of the second contention.

Article 10 TEU

[561] This provides:

> "(1) The functioning of the Union shall be founded on representative democracy.
>
> (2) Citizens are represented at Union level in the European Parliament."

This discrete ground is advanced on essentially the same arguments as those belonging to the third ground of challenge. There is nothing objectionable about this *per se* as the arguments have a different juridical foundation.

[562] I consider this discrete ground of challenge, in common with that advanced under A3P1, to be forward looking. There was no democratic deficit, no lack of representation for the citizens of NI, constitutionally part of the UK, in the finalisation of the WA/Protocol. The appellants complain about the outcome of the process. But they can have no complaint about the democratic nature of the process itself. Thus, following a process in which there can be no legitimate suggestion of any violation of any established principle of democracy, NI finds itself subjected to specified provisions of EU law and the possibility of their future amendment or substitution.

[563] The preceding analysis *inter alia* draws attention to the following juridical reality. EU law, except in those respects specifically preserved or extended by the statutory withdrawal arrangements, ceased to have any effect in the UK from midnight on 31 December 2020, when "exit day" dawned and the withdrawal of the UK from the EU was completed. In domestic judicial review proceedings initiated some 14 months following this event, the appellants have invoked two Treaty provisions, inviting successive UK courts to find that specified aspects of the statutory withdrawal arrangements are in breach thereof. The date from which the Treaties ceased to apply to the UK is measured from the date when the WA entered into force, 29 January 2020: per Article 50(3) TEU. Even assuming that the two Treaty provisions invoked by the appellants would have been justicable in this way prior to the aforementioned termination date, it is incontestable that they have not formed part of UK law since then. In short, the UK – represented in these proceedings by an assortment of public authorities – cannot be held to judicial account on the basis of two provisions of an international treaty by which it is no longer bound.

[564] Further, and in any event, the appellants' complaint about specified aspects of the statutory withdrawal arrangements has nothing to do with the present or anticipated "functioning of the Union." This international organisation, with its modified post-Brexit membership, is required by the terms of the Treaties to which its members have subscribed to act in accordance with *inter alia* Article 10(1) TEU. The reach of this Treaty provision extends no further.

[565] Finally, the appellants' contention founded on Article 10 fails to engage with, and cannot be reconciled with, the European Parliament provision enshrined in

Article 10(2) which must be reckoned in the exercise of considering Article 10 as a whole.

[566] I would, therefore, reject the appellants' TEU grounds of challenge.

Delay

[567] By Order 53, rule 4 of the Rules of the Court of Judicature (NI):

> "**Delay in applying for relief**
>
> 4.-(1) An application for leave to apply for judicial review shall be made [promptly and in any event] within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

The words in parenthesis have been included solely for the purpose of highlighting that they were deleted by an amendment which took effect on 8 January 2018 (per SR (NI) 2017/213).

[568] The relevant timeline is the following:

(i) On 17 October 2019 the WA (which of course includes the Protocol) and a revised version of the Joint Declaration were agreed between the UK and the EU Commission and the Commission recommended to the EU Council approval of both texts. The Council did so. On the same date HMG made a Unilateral Declaration concerning the operation of Article 18 of the Protocol. All of this unfolded under Article 50 EU.

(ii) On 23 January 2020 the Protocol was approved by Parliament, and the EUWAA received Royal Assent. This provided for *inter alia* a transition period culminating in the withdrawal of the UK from the EU with effect from 1 January 2021.

(iii) On 24 January 2020 the WA was formally executed.

(iv) On 29 January 2020 the WA was ratified.

(v) On 10 December 2020 the Protocol came into operation.

(vi) On the same date the 2020 Regulations came into force.

(vii) Proceedings were initiated on 23 February 2021 (Mr Peeples) and 5 March 2021 (Mr Allister *et al*).

[569] The next material development consisted of two orders of the High Court, each dated 30 March 2021, granting leave to all of the appellants to apply for judicial review. These orders were made on the papers, *ex parte*. One of the recitals in the orders records:

> "AND UPON THE COURT having received email correspondence from the proposed Respondent …."

This reflects the intimation from the (then) proposed respondents that the grant of leave to apply for judicial review would not be contested.

[570] The judgment of Colton J confirms that delay was a live issue at first instance. The judge rejected the appellants' case that there was no delay issue because they claimed to be challenging the 2020 Regulation: see para [301] above. He did not, however, make any concluded determination on the ground that he was dismissing the challenges on their merits.

[571] The structure of Order 53, rule 4(1) is uncomplicated. It requires the court to address first the following question: on what date was the application for leave to apply for judicial review "*made*"? Having regard to the Order 53 regime in its totality, this date is the date upon which the relevant papers are filed in court (05 March 2021 in the present cases). The second question for the court is: was the leave application made within three months from the date when grounds for it first arose? This is primarily a question of fact, giving rise to the formation of a reasonable evaluative judgement on the part of the court based on all material available evidence. It suffices to observe, in this context, that the dates upon which legal instruments – international agreements, provisions of primary legislation and provisions of subordinate legislation *et al* – come into operation are normally matters of fact rather than questions of law. In the present appeals, they belong to the former category.

[572] If the court determines that the leave application was made within three months from the date when the grounds for making same first arose, the exercise under Order 53 rule 4(1) is completed. Conversely, if the court determines that the leave application did not comply with this three month limitation period, a third stage is reached. At this stage it becomes incumbent on the court to determine the following question: is there good reason for extending the three month period?

[573] Turning to the present cases, as regards the first of the three aforementioned questions, it is both uncontested and incontestable that the appellants' applications for leave to apply for judicial review were made on 23 February 2021 and 5 March 2021 respectively. The second question to be addressed is whether on these dates the appellants made their applications for leave to apply for judicial review within three months from the date when grounds for so applying first arose.

[574] In every court's determination of this, the second question posed by Order 53 rule 4, the judicial exercise to be performed is purely objective in nature. This does not exclude the possibility that something of a subjective kind may fall to be considered and determined. Thus, it is conceivable, in principle, that a litigant's subjective beliefs and understandings may be of relevance: for example in the hypothetical case of a litigant who claims to have believed and understood following a conversation with an official that a decision having legal effects and consequences, *e.g.* the termination of a tenancy by a public authority or the discontinuance of a statutory benefit, would not take effect until a specified future date. In such cases the court will need to determine the facts before applying the test. Furthermore, the court will frequently have to construe the relevant provisions of primary and secondary legislation. None of this, however, arises in the present cases.

[575] Thus, these appeals are paradigm illustrations of the objective judicial exercise both envisaged and required at the second stage of the Order 53, rule 4 model. This is so because the chronology rehearsed in para [9] above is agreed – and, objectively, is incontestable in any event. Next, giving effect to the court's recognition (above) that in certain circumstances a litigant's subjective beliefs or understanding might have a bearing on the determination of the "three month trigger date", we turn to consider the affidavit and other evidence generated. This discrete exercise is confined to determining whether there is anything in the affidavit (and accompanying) evidence of the appellants which might sound on the three month trigger date issue.

[576] Each member of the Allister group of litigants has sworn an affidavit, two in the case of Mr Allister. He deposes, *inter alia*, that the "defence of the Union between Northern Ireland and Great Britain" has been, in substance, a driving force for him during much of his life. He describes the main purpose of these proceedings as that of –

> "…ensuring that proper legal effect is given to three constitutional statutes; the two Acts of Union 1800 and the Northern Ireland Act 1998."

Mr Allister further avers that by reason of the Protocol –

> "…the Acts of Union have been subverted not only contrary to those statutes but also contrary to section 1 of the Northern Ireland Act 1998 …"

He next avers, in substance, that any UK primary legislation giving effect to the Protocol is unlawful.

[577] In further averments, Mr Allister draws attention to the statements in the Protocol (4th recital) and the Joint Declaration (Part V) professing to protect the 1998

Agreement in all of its aspects. He expresses his opinion that the amendment of section 42 of NIA 1998 is a reflection of a political reality, namely –

> "… for Her Majesty's Government cross-community votes in the Northern Ireland Assembly should not be allowed to protect Unionist interests."

Mr Allister also draws attention to extensive provisions of the Protocol which, he suggests, deprive the electorate of NI of a role in law making in the areas where these provisions apply. Having highlighted, also, the issue of trade barriers and how these were addressed by the Acts of Union, Mr Allister completes his affidavit with the following averments:

> "I acknowledge that there are, and will be, a variety of views about the merits of the Protocol and, indeed, about the merit of the decision by the United Kingdom to leave the European Union. I acknowledge also that it will not be the function of the court to pronounce upon the merits of the Protocol or the (2020) Regulations. It will be the function of the court to determine whether the Regulations and the Protocol are compatible with fundamental rules of our constitution and to evaluate any claim that they are not."

[578] Mr Allister's two affidavits exhibit a series of documentary materials. The first exhibit to his first affidavit is the Protocol. Many of the exhibits to the two affidavits are Protocol-related. These include Mr Allister's letter of 8 February 2021 to the Attorney General [page 283] the subject matter whereof is "the constitutional implications of the Ireland/Northern Ireland Protocol." Also exhibited is the PAP letter, dated 19 February 2021. This letter asserts that the 2020 Regulations are the "matter being challenged." This is followed, however, by:

> "The Regulations give effect to Article 18 of the Ireland/Northern Ireland Protocol of the Withdrawal Agreement between the European Union and the United Kingdom … Article 18, the Unilateral Declaration of the United Kingdom giving effect to it and the Protocol generally are unlawful as a matter of the constitutional law of the United Kingdom and the Secretary of State acted unlawfully in purporting to give domestic effect to any provisions of them by the Regulations."

Tellingly, many of the documents exhibited to Mr Allister's affidavits were generated in 2019.

[579] With regard to the affidavits sworn by the other five members of the Allister group of litigants I gratefully adopt the resume in the judgment of the LCJ. In the Order 53 statement the target of the Allister group's challenge is described as (in shorthand):

> "…the making of the [2020] Regulations, and the effect given thereby, directly or indirectly, to the [Protocol]."

This is followed by a claim for eight forms of relief, the first two being an order of certiorari quashing the 2020 Regulations and a declaration that they are unlawful. The remaining six forms of relief are couched in these terms:

> "(c) An order of prohibition restraining the Secretary of State from making Regulations that seek to give effect to any provision of the Protocol.
>
> (d) A declaration that Her Majesty's Government acted unlawfully in agreeing the Protocol with the [EU].
>
> (e) A declaration that the Protocol can only be given effect in the domestic law of the [UK] to the extent that it respects the constitutional law of the [UK].
>
> (f) A declaration that the Protocol possesses no legal effect in [NI].
>
> (g) A declaration that Her Majesty's Government acted unlawfully in making the [U]nilateral [D]eclaration referred to in Article 18 of the Protocol.
>
> (h) A declaration that the [U]nilateral [D]eclaration referred to in Article 18 of the Protocol is unlawful and of no force or effect."

[580] In the next section of the Order 53 statement there are two discrete grounds of challenge ("illegality" and "breach of EU law"). Under the auspices of the first, there are ten particularised grounds, four whereof relate directly to the 2020 Regulations while the remaining six all enshrine, in various ways, the contention that the execution of the Protocol was unlawful. This contention is repeated in the two particularised grounds of the second head of challenge, namely breach of EU law.

[581] As regards Mr Peeples a similar analysis confirms beyond peradventure that his case involves a frontal challenge to the legality of the Protocol. Mr Peeples, unlike the other appellants, formally applies for an extension of time under Order 53, rule 4 if required. In this way he opted for what was in effect a two way bet. This court permitted an amendment to this effect.

[582] Everything outlined above falls to be considered collectively. This exercise yields the conclusion that at first instance the judge made no error in holding that this is in substance a challenge to the Protocol. At para [40] he stated:

> "The affidavits sworn by the Applicants clearly convey their strong opposition to the Protocol based on their conviction that it fundamentally damages Northern Ireland's constitutional position within the UK. They contend that the effect of the Protocol has been to cause a border in the Irish Sea between Northern Ireland and Great Britain."

With specific reference to Mr Peeples, the judge continued, at para [41]:

> "He describes himself as a unionist and like the Applicants in the related case is deeply concerned that the Respondents' actions in negotiating, implementing and operating the Northern Ireland Protocol by creating a custom's border in the Irish Sea between Northern Ireland and Great Britain has damaged the Union and is contrary to the Northern Ireland Act 1998."

The judge's pithy assessment that the Protocol lay at the heart of what all of the Appellants were challenging is reinforced by his summary of the grounds of challenge, at para [44].

[583] It is of some moment that the arguments presented to this court are a precise replica of those advanced at first instance, with one modification as regards Mr Peeples. Furthermore, it is of some significance that whereas the author of the 2020 Regulations, the SOSNI, is a respondent in both judicial review applications, in the case of Mr Peeples there are two respondents who had no role whatsoever in the making of the 2020 Regulations, namely the Prime Minister and the Chancellor of the Duchy of Lancaster.

[584] The final step in this analysis is to draw attention to the grounds upon which the appellants have advanced their respective legal challenges from the outset, summarised at para [3] above.

[585] The central proposition advanced by the Allister group is the following. Their challenge (it is said) is brought primarily against the 2020 Regulations and was initiated within three months of their making. It is permissible to rely on prior acts on which the 2020 Regulations depend for their making.

[586] I consider that the analysis of Colton J at paras [40] – [41] of his judgment (reproduced above) is irreproachable. Any attempt to formulate these cases as a

challenge exclusively, or even primarily, to the 2020 Regulations, is unsustainable, a mere camouflage. The 2020 Regulations feature in but one of the multiple grounds of challenge. I have nothing further to add to the analysis of the LCJ in this respect.

[587] What are the outworkings of the preceding conclusion? I refer to the timetable at para [9] above. At para [322] of his judgment, Colton J concluded that the three month period began on 29 January 2020.

> "At the latest [any challenge] should be three months post-29 January 2020."

For the reasons given I concur fully.

[588] The focus of this court, therefore, turns to the third of the three questions arising out of the Order 53, rule 4 framework, namely: does the court consider that there is good reason for extending the period during which both judicial review applications should have been made? At first instance, as noted by the judge, there was no application by any of the appellants to extend time. Given that there are no restrictions on the ambit of the combined appeals this question is at large before this court.

[589] At this juncture it is appropriate to formulate some basic principles:

(i) In judicial review proceedings, issues of delay lie squarely within the compass of the court.

(ii) Thus the court, whether on the prompting of any party or of its own motion, may either raise or revisit the issue of delay at any time prior to the termination of proceedings.

(iii) Thus the act of a proposed respondent in conceding the grant of leave to apply for judicial review is, fundamentally, not determinative of the issue of delay. *Ditto* any later concession on delay.

(iv) The same proposition would apply if everyone concerned, including the court, simply overlooked the issue at the leave stage.

(v) The court is invested with a broad discretion whether to extend time. By long established practice in the jurisdiction of NI, successive courts have frequently (though not invariably) deferred their final view on the issue of delay until the conclusion of the substantive hearing.

All of these principles are a reflection of the particular character of judicial review proceedings, namely the overlay of public law, the absence of any *lis inter-partes*, the discretionary nature of remedies and the contrast with private law litigation.

[590] "*Good reason*" is of evidently broad scope. It is capable of including all of the factors set out in para [50] of the judgment of the LCJ. Any attempt at a comprehensive definition is to be firmly resisted. Furthermore, while this issue has been addressed in a number of reported cases, it would be erroneous to view these as decisions having precedent status. They are, rather, mere illustrations of the court's determination of this issue in a particular factual matrix. Thus, it will rarely be appropriate to cite decisions such as *Re Black* [1993] NI 368, where the applicant devoted time to pursuing an alternative remedy; *Re Cunningham* [2005] NIJB 224, where time lapsed when attempts to obtain information from and reach agreement with the proposed respondent were being pursued; *Re Zhanje's Application* [2007] NIQB 14 and *Re McCabe's Application* [1994] NIJB 27 (instances of problems with previous solicitors); *Re D's Application* [2003] NIJB 49 or *Re McHenry's Application* [2007] NIQB 22 (instances of seeking public funding or legal advice). The exceptions to this adjuration are *McCabe* at paras 28 – 29 and *Re Shearer* [1993] 2 NIJB 12 at para [27]: see para [592] *infra*.

[591] As the immediately preceding paragraph also makes clear, I consider that the approach to the question of extending time under Order 53, Rule 4 should be of broader scope than that outlined in *R v Secretary of State for Trade and Industry, ex parte Greenpeace* [2000] Env LR 221, a first instance English decision of no binding force in this jurisdiction and belonging to the context of a particular statutory provision – section 31(6) of the Supreme Court Act 1981 – which operates only in England Wales.

[592] In this jurisdiction, some of the more extensive guidance on the correct approach to extending time under Order 53 rule 4 is contained in two first instance decisions. These are *Re Shearer's Application* [1993] 2 NIJB 12 at para [27] and *Re McCabe* [1994] NIJB 27 at paras 28-29. These passages are partially reproduced in the judgment of the Chief Justice at paras [53] – [54], where issues of both principle and good practice are also rehearsed.

[593] In the case management phase of these appeals the court proactively brought to the attention of the parties the issue of delay. The court further highlighted the parties' duty of candour to the court. The possibility of an application to adduce fresh evidence was specifically raised. No such application materialised, with the exception of Mr Peeples. None of the other six appellants has provided the court with evidence bearing on the issue of extending time under Order 53, rule 4. This will not give rise to any inference adverse to them. Rather, I will assume that this is because they are unable to do so. In contrast, in the case of Mr Peeples (only), there is affidavit evidence deposing to his state of mind, his beliefs and his expectations at the time when his legal challenge should properly have been initiated and subsequently.

[594] I consider that there is no individual merit or trait of any of the Allister group or in their individual circumstances favouring an extension of time. In contrast with certain other cases, there is nothing relating to any of these appellants

warranting a sympathetic or benign judicial approach. Standing back, the preponderance of the facts and factors to be weighed points firmly to a refusal to extend time.

[595] As the importance of the issues in the litigation is frequently an important factor in considering whether to extend time, as here, I have considered it appropriate to examine the grounds of challenge in depth before turning to the topic of delay.

[596] I have two main concerns about resolving the issue of delay in favour of these appellants. The first is that, as the examination of their several grounds demonstrates, success for the appellants, whether partial or otherwise, would have potentially profound consequences in NI, the UK and throughout the 27 Member States of the EU. Instability, uncertainty and confusion would inevitably ensue. Informed and confident predictions about the full repercussions are simply impossible. Furthermore, if there is any corner of the continent of Europe which requires maximum stability, certainty and predictability, it is NI. These are the very values which drove the adoption of the Protocol mechanism as part of the international and statutory withdrawal arrangements. The preceding assessment lies within the compass of judicial notice and should not be contentious. While this jurisdiction has no direct analogue of section 31(6) of the Senior Courts Act 1981, detrimental impact on good administration, where relevant, is plainly a legitimate consideration in this context: see Anthony, *Judicial Review In Northern Ireland* (2nd ed), paras 1.07 and 3.29 and *Re Zhanje* [2007] NIQB 14, at para [7] (e).

[597] My second main concern relates to the issue of importance. As decisions such as R v *SSHD, ex p Ruddock* [1987] 1 WLR 1482 and *R (Law Society) v LSC* [2010] EWHC 2550 (Admin) demonstrate, the importance of the issues may tilt the balance in favour of extending time for a tardy judicial review claimant. However, every case which comes before the judicial review court is important in its own right. It is difficult to conceive of any judicial review claimant unable to point persuasively to how important the individual case is for that person. Furthermore, the importance of the case is rarely confined to the claimant, extending rather to a broader circle frequently comprising persons such as family members and social and business acquaintances and, frequently, other cases, actual or putative. Equally, every judicial review application entails a challenge to the exercise, or non-exercise, of State power. This *per se* is invariably a matter of importance, in every case.

[598] Importance, of course, belongs to a notional spectrum. Judicial review entails no *lis inter-partes*. One consequence of this hallowed doctrine is that there is an element of public interest in every case. Furthermore, the nature and depth of the public interest involved is unavoidably variable. However, there are no reliable guides or tests to be judicially applied. Subjectivity is unavoidable. This has the result that the assessment of importance by two different courts might be diametrically different, albeit lying within the band of reasonable approaches. This is antithetical to legal certainty. Furthermore, the application of the criterion of

importance in any given case in determining whether permission to proceed should be granted will give rise to factual and legal comparisons and perceived inequalities among litigants. However, the need to judicially assess the criterion of importance, where required, is unavoidable.

[599] As the preceding analysis demonstrates, the importance of the issues raised represents, in my view, the only foundation of substance on which the issue of delay can be resolved in favour of the appellants. Their ability to hoist the flag of importance is incontestable. But there is nothing else in their favour. Notably, this plea did not prevail in a recent decision of this court, *JR83 (No 2) v The Prime Minister* [2021] NICA 49, belonging to a somewhat analogous domain. This entailed an earlier challenge to the withdrawal arrangements, including the Protocol. A different constitution of this court robustly refused the indulgence of extending time.

[600] To what does all of the foregoing resolve? There is one stand out feature of these proceedings which this court cannot overlook. The issues raised by these appeals are of incontestable constitutional importance. They have also generated much public debate and reaction, including public disorder. While a mechanistic, arithmetical approach would impel to a refusal to extend time, this court must adopt a broader perspective. Not without substantial reservations, on balance I consider it in the public interest that these issues be considered and determined by the highest court in this devolved administration (subject of course to any possible onward appeal). This single factor, by a narrow margin, tips the balance in favour of extending time. As regards Mr Peeples, who of course benefits from this ruling, I confine myself to observing that while many of his averments have the ring of truth, those relating to the triggering of Article 16 in early 2021 require a generous construction. While his case is the strongest of all as regards the delay issue, no basis for differentiating among the appellants is discernible.

Omnibus Conclusion

[601] In agreement with the LCJ, I would extend time in favour of the appellants, dismiss their appeals, affirm the order of the High Court and, subject to further submissions if appropriate, decline to make any specific order regarding the respondents' cross–appeal.

APPENDIX 1

In the Matter of an Application by JR80 for Judicial Review v SOSNI and The Executive Office [2019] NIQB 43

"Governance of Northern Ireland: pre – NIA 1998

[28] The Government of Ireland Act 1920 (the "1920 Act"), operative from 23 December 1920, was introduced by the Westminster Parliament following several unsuccessful attempts to grant "home rule" to the geographical entity of Ireland. By this statute the separate entities of Northern Ireland and Southern Ireland were established with both constitutionally remaining part of the United Kingdom. Some two years later, following much turbulence, the new Irish Free State, excluding Northern Ireland, was established under the Anglo Irish Treaty.

[29] The model of self-government established for Northern Ireland, with its now familiar trilogy of transferred, reserved and excepted powers, closely resembled colonial constitutional arrangements in other States. The Lord Lieutenant of Northern Ireland was appointed the Monarch's representative, with responsibility for *inter alia* establishing a cabinet which did not require parliamentary support. No provision was made for a Prime Minister. The dominance of the Westminster Parliament was proclaimed forcefully in section 6(1). Positioned within a discrete chapter entitled "Executive Authority", section 8(1) provided:

> *'The Executive power in Southern Ireland and in Northern Ireland shall continue vested in His Majesty the King and nothing in this Act shall affect the exercise of that power, except as respects Irish services as defined for the purposes of this Act.*
>
> *(2)* [Irish Services …..]
>
> *(3) Subject to the provisions of this Act relating to the Council of Ireland, powers so delegated shall be exercised - ….*

(b) In Northern Ireland, through such departments as may be established by Act of the Parliament of Northern Ireland, or, subject to any alteration by Act of that Parliament, by the Lord Lieutenant; and the Lord Lieutenant may appoint officers to administer those departments, and those officers shall hold office during the pleasure of the Lord Lieutenant.'

[30] There followed three successive Ministries Acts, in 1921, 1944 and 1946. Pursuant to the Ministries (NI) Order 1972, two new "departments" were established (Environment and Manpower Services) and the terminology of "departments" became more prevalent. Northern Ireland had five Departments, each operating within the realm of devolved (i.e. "transferred") matters. This remained unchanged until 1976, when the Department of the Civil Service was established (by SI 1976 No 1211). Next, by the Departments (Northern Ireland) Order 1982 (the ("the 1982 Order"), the Department of the Civil Service was dissolved and its functions transferred to the Department of Finance and Personnel (formerly the Department of Finance), while specified functions of the Department of Finance were transferred to the Department of Agriculture, the Department of the Environment and the Department of Health and Social Services.

[31] During the intervening period there had been significant changes in the constitutional arrangements for the governance of Northern Ireland. By the Northern Ireland (Temporary Provisions) Act 1972, another measure of primary Westminster legislation, so-called "*direct rule*" was introduced. The mechanisms which this entailed included the prorogation of the Parliament of Northern Ireland, the assumption by the Secretary of State for Northern Ireland of the functions of Northern Ireland's Governor, Ministers and heads of Government Departments and the transfer of the duties of the Attorney General for Northern Ireland to the Attorney General for England and Wales. Section 1(1), under the rubric of "Exercise of Executive and Legislative Powers in NI", provided:

'*So long as this section has effect, the Secretary of State shall act as chief executive officer as respects*

Irish services instead of the Governor of Northern Ireland and no person shall be appointed to hold office under and in accordance with Section 8 of the Government of Ireland Act 1920 as Minister of Northern Ireland or head of a Department of the Government of Northern Ireland; and, subject to the provisions of this Act and any Order there under –

(a) All functions which apart from this Act belong to the Governor, or to the Governor in Council, or to the Government or any minister of Northern Ireland or head of a department of the Government of Northern Ireland, shall be discharged by the Secretary of State; and

(b) All functions which belong to a Department of the Government of Northern Ireland may be discharged by the Secretary of State or (except insofar as he otherwise directs) may, notwithstanding that there is no head of the department), be discharged by the Department on behalf of the Secretary of State and subject to his direction and control …'

[32] Thereafter, the Secretary of State headed the Northern Ireland Office, a non-statutory entity which at no time had the status of one of the Northern Ireland Departments. The political aspiration of the Westminster Government, expressed in section 1(5), was that the suspension of the devolved powers of the Northern Ireland institutions would be a temporary measure, having a duration of one year or, at most, two years.

[33] Next, the Northern Ireland Constitution Act 1973 (the "1973 Act") devised new governance arrangements for Northern Ireland, entailing *inter alia* the abolition of the (then suspended) Parliament of Northern Ireland and the post of Governor of Northern Ireland, together with the creation of a Northern Ireland Executive to be chosen by the new Northern Ireland Assembly which had been established by the Northern Ireland Assembly Act 1973, some two months previously. Part II of the 1973 Act made provision for "Legislative Powers and Executive

Authorities." Under the rubric of "Executive Authorities in Northern Ireland", section 7 provided in material part:

> '*(1) The executive power in Northern Ireland shall continue to be vested in Her Majesty.*
>
> *(2) As respects transferred matters the Secretary of State shall, as Her Majesty's principal officer in Northern Ireland, exercise on Her Majesty's behalf such prerogative or other executive powers of Her Majesty in relation to Northern Ireland as may be delegated to him by Her Majesty.*
>
> *(3) The powers so delegated shall be exercised through the members of the Northern Ireland Executive established by this Act and the Northern Ireland Departments.'*

[34] In the wake of the political divisions and failure which materialised, the Northern Ireland Act 1974 (the "1974 Act") made provision for the prorogation, followed by dissolution, of the Northern Ireland Assembly and established a further "*interim period*" of direct rule, for one year initially and extendable thereafter. In the event, the "*interim period*" continued for 24 years. Schedule 1 established "Temporary Provision for Government of Northern Ireland." Following the heading "Legislative Functions", paragraph 1(1) provided:

> '*During the interim period –*
>
> *(a) No Measure shall be passed by the Assembly; and*
>
> *(b) Her Majesty may b[y] Order in Council make laws for Northern Ireland and, in particular, provide for any matter for which the Constitution Act authorises or requires provision to be made by Measure.'"*

Under the further heading "Executive Functions", paragraph 2 provided:

> '*(1) During the period –*
>
> *(a) No person shall be appointed or hold office under section 8 of the Constitution Act; and*

(b) Any functions of the head of a Northern Ireland Department may be discharged by that Department and any functions of any other person appointed under that section may be discharged by the Secretary of State.

(2) During the interim period any functions of a Northern Ireland Department, including functions discharged by virtue of subparagraph (1)(b) above, shall be discharged by the Department subject to the direction and control of the Secretary of State.'

The lifetime of the 1974 Act was eventually terminated by section 100(2) of and Schedule 15 to the Northern Ireland Act 1998 ("NIA 1998").

[35] I draw attention to the immediately preceding ' direction and control' provision, a statutory mechanism which, following its repeal in 1998, clearly for the purpose of giving proper effect to NIA 1998, was reintroduced by statute in 2000 for another finite period, once again in a governance vacuum context, being repealed some seven years later: see [45] *infra."*