

Judicial Communications Office

31 August 2021

COURT REFUSES LEAVE TO ISSUE PROCEEDINGS AGAINST PRIME MINISTER

Summary of Judgment

The Court of Appeal¹ today refused a renewed application for leave to issue judicial review proceedings against the decision of the Prime Minister to sign the EU Exit Withdrawal Agreement including the Ireland/Northern Ireland Protocol. The appellant (“JR83”) was a 62 year old grandmother who lives in Northern Ireland near the border with the Republic of Ireland. She is concerned about the consequences of a hard border between Northern Ireland and the Republic of Ireland as she regularly crosses the border.

On 30 October 2020, JR83 (“the appellant”) sought leave to issue judicial review proceedings seeking a declaration that the decision of the Prime Minister on 24 January 2020 to sign the EU Withdrawal Agreement, including the Northern Ireland Protocol (“the Protocol”), was unlawful in that he did not intend that the UK Government would be bound by, adhere to or otherwise fully implement the agreement. The application for leave, which was lodged more than nine months after the Withdrawal Agreement was signed by the Prime Minister, was refused on the basis that the court did not consider that the mind-set of the Prime Minister when signing the Withdrawal Agreement was a matter that the court could or should examine. The appellant renewed her application to the Court of Appeal on the basis that the decision of the Prime Minister frustrated the will of Parliament and that it was unlawful for the Prime Minister to sign the Withdrawal Agreement if he did not intend to adhere to and fully implement it.

The arguments

The appellant explained that the trigger for the issue of the proceedings was not just the production of the UK Internal Markets Bill (“the Bill”), but also statements made some days prior to the introduction of the Bill and associated media reporting together with Government policy published following the introduction of the Bill indicating contemplation of further similar statutory measures. She submitted that these developments made it clear that the Government never intended to be bound by the Withdrawal Agreement. Pre-action correspondence was sent on behalf of the appellant on 17 September 2020 setting out these complaints but the reply on behalf of the respondent did not engage with any of the specific issues.

The respondent did not introduce any material to expressly contradict the reports and statements put forward by the appellant but submitted that these were quite insufficient to suggest that the Prime Minister had signed a withdrawal agreement for an improper purpose or in order to frustrate the will of Parliament. It was submitted that the UK exited the transition period on 31 December 2020 in a matter entirely consistent with the terms of the Withdrawal Agreement and with the full implementation of the Protocol.

¹ The panel was the Lord Chief Justice, Lord Justice Treacy and Mr Justice O’Hara. The Lord Chief Justice delivered the judgment of the court.

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The court said that this was an impermissible challenge to the introduction of the Bill which was prohibited by Article 9 of the Bill of Rights Act 1689 which precludes the courts questioning the lawfulness of proceedings in Parliament. In this case, the appellant sought to challenge the substance of inherently political decisions about the manner in which negotiations with the EU about the terms of exit were conducted. The court said the challenge proceeded on the basis that she wished to see the implementation of the Withdrawal Agreement which was now academic as its signing had secured that outcome.

Consideration

The enactment of the EU (Withdrawal Agreement) Act 2020 (“the EUWAA”) on 23 January 2020 implemented and made other provision in domestic law in connection with the Withdrawal Agreement which set out the arrangements for the UK’s withdrawal from the EU. Those provisions of domestic law were binding on the Prime Minister and the UK Government unless amended or repealed by further legislation. The court said that any suggestion in the appellant’s submissions that the Prime Minister had authority to act in contravention of the Protocol in a manner prohibited by domestic law without any legal consequence was unfounded.

In order to be effective the Withdrawal Agreement had to be ratified by all parties. That was effected on 24 January 2020. The act of ratification had no effect on domestic law and did not give rights in domestic law to interpret and enforce its terms. Domestic law rights in respect of the Protocol were, however, established by the EUWAA. Section 20 of the Constitutional Reform and Governance Act 2010 (“the 2010 Act”) establishes a procedure for the ratification of treaties which requires that they should be laid before Parliament to ensure that either House can consider that the treaty should not be ratified. That provision, however, was expressly disapplied by section 32 of the EUWAA in respect of the Withdrawal Agreement. Parliament, therefore decided that no further scrutiny was required before the Prime Minister was entitled to sign and ratify the Withdrawal Agreement.

The court accepted, however, that there were legal limits to the exercise of the power in this case. In particular, the context of the disapplication of section 20 of the 2010 Act established that the Prime Minister was only permitted to sign the Withdrawal Agreement which was before Parliament. The court said that if there was any change to or modification of the terms of the Agreement there would have to have been compliance with the provisions of section 20 of the 2010 Act:

“We do not accept that there is any legal limit to the power to ratify the treaty established by the promises contained in the Conservative manifesto. Such promises do not give rise to any legitimate expectation in law and issues in relation to them are managed in the political rather than the legal process.”

The appellant submitted that the mind-set of the Prime Minister at the time that he signed the Agreement was also a limitation on the exercise of the power. The court said the trigger for the commencement of these proceedings was the indication that the Bill was going to be introduced, its subsequent introduction and the suggestion that further statutory measures of a similar kind may be introduced. It considered there was no legal basis in domestic law for the prohibition of the introduction for a proposal for legislation in Parliament which may be contrary to the UK’s international treaty obligations. The court said it was a matter for Parliament to decide whether to adopt the proposal and whether or not the proposal is accepted there is no basis for contending that the introduction of the proposal frustrates the will of Parliament:

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“To impose a condition on the exercise of the power to ratify a treaty by the Prime Minister that he must not hold the view that Parliament should legislate contrary to any term of the treaty or that the Prime Minister should make full disclosure of such a view, if he held it, before ratifying the treaty constitutes a direct interference with the constitutional right of a member of Parliament to raise matters in Parliament at a time and in circumstances of their choosing. There is no proper basis for inferring that such a limitation should be imposed on the exercise of the prerogative power to ratify any treaty by any Minister.”

The appellant claimed that there was an abuse of power by the Prime Minister contending that he intended to bring forward a proposal to Parliament to change the law which would have been in breach of the treaty. The court said that even if that contention had been made good, it did not consider that it would constitute a limitation on the exercise of the prerogative power. It also did not consider that such a contention gave rise to any basis for calling into question the exercise of the power within its limits. It said that to do so would necessarily involve interfering with the freedom of any parliamentarian to bring forward at such time as they chose any proposal:

“Accordingly we do not consider that the introduction of the relevant clauses of the Bill and the public discussion around them provided any support for the contention that the Prime Minister behaved unlawfully. There was no trigger for the commencement of these proceedings. The application is substantially out of time and raised no legal matter requiring an extension of time.”

The court refused the renewed application for leave to issue judicial review proceedings.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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