

# Judicial Communications Office

2 OCTOBER 2018

## COURT DISMISSES CHALLENGE TO FLYING OF FLAGS LEGISLATION

### Summary of Judgment

Mrs Justice Keegan, sitting today in the High Court in Belfast, dismissed a judicial review challenge to regulations regulating the flying of flags at government buildings and courthouses.

Helen McMahon (“the applicant”) contended that she is a member of the nationalist community in Northern Ireland and does not recognise the union flag as her national flag. She stated that it is not her national flag and she does not believe it represents her beliefs or the beliefs of the nationalist community generally. She brought proceedings challenging the Flags (Northern Ireland) Regulations 2000 (“the 2000 Regulations”) on the basis that they are unlawful and in breach of a guarantee of parity of esteem within the terms of the Belfast/Good Friday Agreement 1998 (“the Agreement”) and that the Secretary of State for Northern Ireland acted ultra vires by introducing the 2000 Regulations. The court heard that this issue was brought before the courts in 2001 when Kerr J (as he then was) determined that the 2000 Regulations did not offend the Agreement. The discrete point at issue in these proceedings was whether the 2000 Regulations offend the principle of “parity of esteem”.

#### **The 2001 Decision**

In the 2001 case, the applicant claimed that the requirements in the 2000 Regulations that the union flag be flown on government buildings discriminated against those people who are opposed to the flying of the flag. In particular, he claimed that it was inconsistent with section 75 of the Northern Ireland Act 1998 as it promoted inequality between persons of different political opinions and therefore placed at an advantage those who favoured the flying of the flag over those who opposed it. Kerr J concluded that the flying of the union flag was not designed to favour one tradition over another but merely reflected Northern Ireland’s constitutional position as part of the United Kingdom. Kerr J further considered that the 2000 Regulations had not been shown to be in conflict with the Agreement.

#### **The Current Proceedings**

The substantive issue in these proceedings was whether or not the Secretary of State fulfilled his obligation to have regard to the Agreement in enacting the 2000 Regulations. Mrs Justice Keegan said there was substantial merit in the argument made on behalf of the Secretary of State for Northern Ireland (“the respondent”) that the issue raised in this case is *res judicata* given the examination of it in 2001 by Kerr J.

The core argument made by the applicant in this case was that Article 1(v) of the Agreement should be separated into two distinct principles namely:

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- (a) an obligation to exercise “with rigorous impartiality on behalf of all people in their diversity and traditions”; and
- (b) that the power being exercised 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.”

The applicant made the case that the first of these applies to individual citizens and the latter to communities. Particular reliance was placed upon the phrase “parity of esteem” and that Kerr J’s decision examined only one aspect of Article 1(v), namely individual rights but failed to address the wider aspirations of both communities.

Mrs Justice Keegan said she was not convinced that Kerr J restricted his consideration of this issue to individual rights. She referred to his conclusion that the approach adopted by the Secretary of State exemplified a proper regard for “partnership, equality and mutual respect” and to fulfil the government’s undertaking that its jurisdiction in Northern Ireland “shall be exercised with rigorous impartiality on behalf of all of the people and the diversity of their identities and traditions.” The judge said she was not attracted to the arguments put forward by the application for the following reasons:

- It was artificial to disaggregate parity of esteem as a separate consideration or principle from the overriding objective contained in Article 1(v) of the Agreement. The judge said this reads as one paragraph and it was unhelpful to interpret it in any other way.
- The principles contained in the Agreement ensure as Kerr J stated that there must be proper regard for “partnership, equality and mutual respect” of “all of the people and the diversity of their identities and traditions”. This encompasses the rights of individuals and communities.
- The concept of parity of esteem is not defined in the Agreement itself, nor is there any reference to it in the Northern Ireland Act 1998. The academic arguments illustrate the lack of political consensus on this issue. In that context the judge favoured the analysis that parity of esteem comes within the broad principles of equality, fairness and respect as applied to the two communities in Northern Ireland.
- The commitment to equality must be framed by virtue of the fact that Northern Ireland would remain part of the United Kingdom pending a decision by the people in relation to this. There has been no change to this constitutional position. This part of the Agreement is enacted in Section 1 of the Northern Ireland Act 1998 which 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.”

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- The requirement in the Flags (Northern Ireland) Order 2000 in Article 4(4) is to *have regard to* the Belfast Agreement when making regulations. The manner in which this obligation is fulfilled is clearly within the discretion of the Secretary of State.
- The evidence filed by the Secretary of State in the 2001 case and the extracts from Hansard when the 2000 Regulations were being made make it clear that the general principles of the Agreement were taken into account by the Secretary of State. This includes the concept of parity of esteem. No new facts have emerged. The result of that consideration may have led to a view being taken with which the applicant does not agree. However, that is not the issue. The judge said that, in her view, it was abundantly clear that the Secretary of State fulfilled his obligation to have regard to the principles contained in the Agreement in conducting a balancing exercise and as such the Regulations cannot be said to be unlawful.

## Conclusion

The application was dismissed.

## 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**

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