Judicial Communications Office

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COURT DISMISSES APPEAL AGAINST EU EXIT PROTOCOL

Summary of Judgment

The Court of Appeal[1] today dismissed appeals against the decision of Mr Justice Colton delivered on 30 June 2021 wherein he dismissed applications for judicial review challenging the EU Withdrawal Protocol and the Withdrawal Acts and Regulations. Two appeals were before the court. The first was by Jim Allister and others[2] ("the Allister group") and the second by Clifford Peeples. There was a substantial degree of overlap between the appeals.

The target of the appellants' challenges were the Ireland/Northern Ireland Protocol to the Withdrawal Agreement ("the Protocol") and the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 ("the 2020 Regulations"). The appellants raised the following grounds of challenge:

Ground 1: Incompatibility of the Protocol and the 2020 Regulations with Article VI of the Acts of Union 1800 ("the 1800 Act")

Ground 2: Incompatibility of the Protocol with section 1(1) of the Northern Ireland Act 1998 ("the NIA 1998")

Ground 3: Unlawful elimination of the constitutional safeguard enshrined in section 42 of the NIA 1998 as qualified by the 2020 Regulations

Ground 4: Breach of Article 3 of Protocol One ("A3P1") of the European Convention on Human Rights ("ECHR")

Ground 5: Breaches of EU law.

The Protocol creates a customs and regulatory border between NI and Great Britain 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 this regulated trading regime until the beginning of 2025. The judgment included a chronology of events leading up to the making of the 2020 Regulations at paragraph [9].

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

[1] The panel was Keegan LCJ, Treacy LJ and McCloskey LJ. Keegan LCJ delivered a judgment with which Treacy LJ agreed and McCloskey LJ delivered a concurring judgment.

[2] Jim Allister MLA, Benyamin Habib (elected as an MEP as a member of the Brexit Party), Arlene Foster MLA, Steve Aiken MLA, Baroness Hoey, Lord Trimble.

	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 19 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")
ix.	On 19 October 2019, HMG also made 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.

The factual matrix to the appeal was explained in paragraphs [11] – [27] of the judgment. Before dealing with the grounds of appeal, the court considered the preliminary issues of justiciability of prerogative powers and the delay in bringing the proceedings. On justiciability (paragraphs [31] – [40]), the court noted that prerogative powers such as those relating to the making of treaties are not reviewable by the court as they are matters within the political domain. It said that parts of the challenge in this case are clearly non-justiciable on this basis such as the making of the Withdrawal Agreement ("WA") itself which is an international treaty but that this did not prevent a full consideration of the other statutory provisions such as the Withdrawal Acts, the Acts of Union, the NIA 1998 and the 2020 Regulations.

On the issue of delay (paragraphs [41] – [58]), the court noted that the text of the WA (which enshrines the Protocol) was agreed and published on 19 October 2019 and ratified on 29 January 2020. Order 53, rule 4 of the Court of Judicature Rules provides that any challenge should be brought within three months of the impugned decision (in this case within three months of the WA being ratified). The application for judicial review, however, was not lodged until 5 March 2021. The court therefore had to focus on whether there is good reason to extend time. It said there is a clear and consistent line of jurisprudence establishing the principle that in judicial review proceedings an applicant's affidavit seeking to extend time should ordinarily and proactively address the reasons for the application. Mr Peeples indicated to the court that he would wish to apply for an extension of time but no such application materialised from the members of the Allister group. The court commented:

> "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."

The court outlined the findings of the trial judge in paragraphs [59]-[66]. It then referenced some of the evidence in the form of affidavits from the appellants and respondents in paragraphs [67] – [93]. The court summarised the devolution settlement arrangements from the passing of the Acts of Union in 1800 and the various statutes which have been described as of a constitutional nature in paragraphs [94] – [135]. It then turned to some of the core legislative provisions and to the exercise in statutory interpretation which it said was at the heart of this case (see paragraphs [136] – [158] on the Protocol; paragraphs [159] – [164] on the core legislative provisions in the EUWA 2018 as amended by the EUWAA 2020; and paragraphs [165] – [170] on the NIA 1998).

Ground 1: The Acts of Union 1800

The essence of the first ground of appeal was that there is an inconsistency between the "same footing" guarantee of Article VI of the Acts of Union 1800 and Articles 5-10 of the Protocol (incorporated into UK domestic law by the EUWA 2018) and that the earlier statute should have interpretative supremacy. The appellants argued that the outcome reached by the trial judge offended constitutional principles in that it validates implied repeal of the 1800 Act. The court said this was an exercise in statutory interpretation and distilled four core questions from the arguments put before it.

Is there an inconsistency between the 1800 Act and the EUWA 2018 (as amended)?

The court said there was a valid argument that the EUWA 2018 as amended conflicts with the same footing provision in Article VI of the 1800 Act because the citizens of NI remain subject to some EU regulation and rules as part of the withdrawal framework which does not apply to other citizens of the UK. It said it was prepared to accept the proposition that there is some inconsistency between the terms of the two statutes in relation to trade but stressed that this conclusion related to one specific part of the Acts of Union regarding trade and not the entire statute.

The effect of EUWA 2018 as amended

Section 1 of the EUWA 2018 expressly repeals the European Communities Act 1972 ("ECA 1972"). Section 7A(1) of the EUWA 2018 (as amended by the EUWAA 2020) provides that all rights, powers etc are "without <u>further enactment</u> to be given legal effect or used in the UK". The court said this means the WA terms become part of domestic law. This is confirmed by section 7A(2). The court said that by virtue of section 7A(3), Parliament has expressly determined that all previous Acts of Parliament are to be read "subject to" the EUWA 2018 as amended including the Protocol. It questioned whether this was in effect a repeal of Article VI of the 1800 Act but said it could not see that it did in strict terms:

> "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."

The will of Parliament

The court said the words in section 7A of the 2018 Act are clear. The purpose of the EUWA 2018 was to effect implementation of the Protocol. The court said that Parliament was clearly sighted on the Protocol which was the end result of a "protracted, transparent, debated, informed and fully

democratic process which decided arrangements for Northern Ireland post Brexit". It said the terms were settled and made law after a long parliamentary process and it could not be suggested that Parliament was unaware of the changes that may be wrought.

Legality

The principle of legality is an aid to interpretation which can justify a restrictive construction of the words used by Parliament where words are unclear and fundamental human rights are concerned. The court's view was that the principle of legality was not engaged in this case and there was no basis for saying that Parliament had interfered with a fundamental human right. It thought this claim was really directed at constitutional principles but said that too must fail as the constitutional status of Northern Ireland remains unchanged by virtue of the statutes which effected withdrawal from the EU:

> "Parliament had 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 EI. 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."

The court concluded there was no reason to doubt that a sovereign Parliament having enacted the law contained in section 7A of the EUWA 2018 as amended knew what the legislation involved, particularly the arrangements on NI and acted lawfully. It dismissed this ground of appeal.

Ground 2: Section 1(1) of the Northern Ireland Act 1998

The appellants argued that section 1(1) of the NIA 1998 clashed with the WA/Protocol in that a customs border within the UK as changed the constitutional status of NI and was unlawful as it had been enacted without democratic consent. Section 1(1) of the NIA 1998 contains a statutory declaration as to the constitutional status of NI within the UK in that it can only be changed by majority vote on both sides of the border. The appellants argued that this was designed to protect against any substantial change to the Union and that a referendum was required to make the changes introduced by the EUWA 2018 as amended and the Protocol.

The court, however, said the ordinary and natural meaning of section 1(2) was clear in that it referred to the choice reflected in the 1998 Agreement about the formal constitutional status of NI and whether it was to remain part of the UK or become part of a united Ireland:

> "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. … It is clear that section 1(1) only related to a change in the formal constitutional status of Northern Ireland. As such it does not apply to this circumstance. 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."

Ground 3: Section 42 of the NIA 1998 as qualified by the 2020 Regulations

The appellants argued that the 2020 Regulations have unlawfully made a significant alteration to the "petitions of concern" mechanism in section 42 of the NIA 1998. Further it was argued that the 2020 Regulations are ultra vires and specifically that the Secretary of State acted incompatibly with section 10(1)(a) of the 2018 Act (which provides that in exercising any of the powers under the 2018 Act a Minister must act in a way that is compatible with the terms of the NIA 1998).

Section 42 of the NIA 1998 provides for petitions of concern about matters which members of the Assembly consider should require cross-community support. The 2020 Regulations provide that "section 42 [of the NIA 1998] does not apply in relation to a motion for a consent resolution". This provision is related to Article 18 of the Protocol which provides for democratic consent to the ongoing operation of Articles 5-10 of the Protocol.

The court firstly considered whether the Secretary of State had power to make the 2020 Regulations. Referring to section 8C(1) and (2) of the EUWA 2018, the court said it was clear that the 2020 Regulations were made lawfully by the Secretary of State under this power:

> "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 disapplied 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 … provide clearly that section 42 does not apply in relation to a motion for consent resolution. Therefore, the question is whether these 2020 Regulations which are subordinate legislation lawfully amend the NIA 1998, which is primary legislation."

The court further found that the 2020 Regulations do not offend the 1998 Agreement. It said the WA and the Unilateral Declaration are not devolved matters under the terms of the NIA 1998 as they fell within the "international relations". The court was more attracted to the argument that the Article 18 fall back mechanism is a method concerned with implementation of the international obligations ie withdrawal from the EU:

> "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."

The court also held that there was no basis for an argument based upon the 1998 Agreement. It said that while section 10(1)(a) of the EUWA 2018 refers to the need to protect the 1998 Agreement, there is a difference between a declaration to that effect and justiciable rights under the 1998 Agreement which is not part of domestic law. The court agreed that the Assembly was not intended to have legislative or executive responsibility for matters such as international relations in the EU. It said the cross community safeguard of the petition of concern was only ever intended to be deployed in respect of devolved matters and not intended to have any application to excepted matters:

> "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. … Therein lies a solid impediment to the appellant's argument."

The court considered that the importance of consent for the Protocol was reflected by the fact that government took the step of providing an opportunity for the Assembly to consent to the continuation of Articles 5-10 of the Protocol and that the Unilateral Declaration makes provision for a democratic consent process that is now in place: "There is therefore no conflict with it".

The court concluded that the 2020 Regulations are lawful and made intra vires the powers conferred by the 2018 Act. It dismissed this ground of challenge.

Ground 4: The Protocol and the ECHR

The appellants contended that the Protocol results in citizens of NI suffering a democratic deficit in that laws made by the EU will continue to be applicable in NI without the electorate being able to vote in EU elections or to have representation in the EU Parliament. A3P1 of the ECHR provides that parties will "ensure the free expression of opinion of the people in the choice of the legislature". A3P1 is a justiciable right and enshrines a principle of democracy.

The court, citing case law from the European Court of Human Rights, said that two particular points of principle emerge. First, A3P1 is only engaged to voting in parliamentary elections; second, it is subject to limitations and the State has a wide margin of appreciation. The court said the specific terms of the Protocol governing future arrangements are important. Article 18, which requires democratic consent for ongoing arrangements, means that from 2025 and at intervals thereafter the people of NI may vote for the continuation of the protocol or otherwise. In addition, there are the collective mitigations and safeguards that are designed to monitor the operation of the Protocol on an ongoing basis (the Specialised Committee and the Joint Consultative Working Group). The court said it must also be remembered that in parallel with the Protocol the citizens of NI remain franchised to vote in the UK Parliamentary and NI Assembly elections:

> "Taking into account the above factors we cannot discern a valid argument as to how the UK obligation to offer elections 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."

The court received no oral submissions from the appellants on the A3P1 argument and said it was not convinced it was actually engaged. In any event, even if engaged, the court considered there was justification for an interference within the State's wide margin of appreciation. This was 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 safeguards ... 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."

The appellants also argued that the Protocol was in breach of Article 14 ECHR (which provides that the enjoyment of the rights and freedoms set out in the Convention shall be secured without discrimination on any ground). Again, the court did not receive any oral argument on this point. Citing the approach adopted by the UK Supreme Court, the court proceeded on the basis that the appellants came within the ambit of Article 14. The appellants argued their status as residents of NI established their "other status". The court said this was problematic as they could not purport to speak for all NI residents and did not profess to do so. The appellants also appeared to compare themselves with all other residents of the UK. The court did not consider this proposition could satisfy the test saying that UK citizens are treated in the same way save that in the future NI citizens are actually favoured with a mandate by virtue of Article 18.

The court held that the justification for differential treatment in this case fell within the choices made in a "highly visible, political process" which was firmly within the margin of appreciation. It rejected this ground of appeal.

Ground 5: The Protocol and EU Law

The appellants contended that the Protocol is invalid because it conflicts with EU law and in particular Article 50 of the Treaty of the European Union ("TEU") and Article 10 TEU. Article 50 TEU provides the mechanism for a member state to leave the EU and requires the EU and member state to negotiate and conclude an agreement setting out the arrangements for its withdrawal. Article 10 TEU provides that the function of the EU shall be founded on representative democracy. Again, the appellants did not make any oral arguments on these claims. The court found no merit in these arguments.

The Peeples Case

The court found no merit in any of the additional arguments raised by Mr Peeples.

Overall Conclusion

The court dismissed the appeal affirming the decision of the High Court. It summarised its core findings 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 simply be read "subject to" the EUWA 2018 in relation to trade arrangements. The Acts of Union are not repealed and 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 Article 3 Protocol 1. 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.

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:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk