

Judicial Communications Office

30 June 2021

COURT DISMISSES CHALLENGE TO EU EXIT PROTOCOL

Summary of Judgment

Mr Justice Colton today dismissed two applications for judicial review challenging the EU Withdrawal Protocol and the Withdrawal Acts and Regulations. In doing so, the court said that the making of treaties and the conduct of foreign affairs are matters of high level politics which are unsuited to supervision by a court on a judicial review application.

Two sets of proceedings were before the court. The first was the application of Jim Allister and others¹ (“Allister”) who represented a broad range of unionist opinion in Northern Ireland. The second was brought by Clifford Peeples, a Pastor who lives in Northern Ireland, and also described himself as a unionist. There was a substantial degree of overlap between the applications. The court said it would hear Allister as the lead case and, having done so, would deal with any additional matters raised by the application in Peeples.

The Allister case

The applicants raised five grounds of challenge to the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU) Regulations 2020 (“the 2020 Regulations”) but in effect the challenge was to the Protocol on Ireland/Northern Ireland (“the Protocol”) and the European Union (Withdrawal) Act 2018 and the European Union Withdrawal Act 2020 (“the Withdrawal Acts”) under which the 2020 Regulations were made. The grounds of challenge were under the following headings:

- Ground 1: The Act of Union 1800 [paragraphs 45-117 of the judgment];
- Ground 2: Section 1 of the Northern Ireland Act 1998 [paragraphs 118-137];
- Ground 3: Section 42 of the Northern Ireland Act – the 2020 Regulations on democratic consent [paragraphs 138-212];
- Ground 4: The Protocol and the European Convention on Human Rights (“ECHR”) [paragraphs 213-279];
- Ground 5: The Protocol and EU Law [paragraphs 280-297].

Ground 1: The Act of Union 1800

The applicants argued that the Protocol and the 2020 Regulations are incompatible with Article VI of the Act of Union 1800 which they describe as a constitutional statute. There are two limbs to Article VI of the Act of Union:

- The first limb provides that from 1 January 1801 the subjects of Great Britain (“GB”) and Ireland shall be “on the same footing” in respect of trade;
- The second limb requires that in any future treaty “with any foreign power” that equal footing shall be preserved.

¹ Jim Allister MLA, Benyamin Habib (elected as an MEP as a member of the Brexit Party), Arlene Forster MLA, Steve Aiken MLA, Baroness Hoey, Lord Trimble.

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Counsel for the applicants advanced four propositions:

- The Protocol is incompatible with the first limb of Article VI;
- Article VI enjoys interpretive supremacy over any provision of domestic law purporting to give effect to the Protocol;
- The second limb of Article VI prevented the Government from agreeing the Protocol with the EU; and
- No provision of domestic law purporting to give effect to the Protocol “cures” the breach of Article VI with the result that no provision of domestic law succeeds in giving effect to the Protocol.

The relevant provisions are contained in Articles 5-10 of the Protocol which govern the operation of customs rules and those that relate to the EU’s single market for goods. The key contentious article is Article 5 which relates to goods coming into NI from another part of the UK and is primarily the provision which has given rise to the public controversy concerning an “Irish Sea Border”. The court said that the net effect of Articles 5-10 has been to require customs checks at ports in NI in respect of goods coming from GB and has the potential to result in significant disruption to the movement of goods. These difficulties are the subject matter of ongoing high level discussions between the UK Government and the European Union.

The respondent argued that the Protocol does not create an actual border in the Irish Sea but applies a subset of EU rules strictly required to avoid a hard border on the island of Ireland. As part of that application, certain administrative processes are in place for goods moving from GB to NI:

“There is undoubtedly room for debate about the extent to which the Protocol has affected trade between GB and Northern Ireland and the extent to which any disruption can be mitigated through negotiations and the work of the Joint Committee². The court does not have any significant empirical evidence to assess this ... Although the final outworkings of the Protocol in relation to trade between GB and NI 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 NI business to the EU internal market conflict with the “equal footing” described in Article VI [of the Act of Union].”

The court firstly considered the applicants’ submission that the UK Government had no power to make the Withdrawal Agreement on the grounds that it was prohibited by doing so by reason of the second limb of Article VI. The court said it was clear that the making of treaties is a prerogative power not readily subject to domestic judicial supervision:

“This contention is uncontroversial. That is not to say the exercise of a power is immune from review simply by virtue of its prerogative source. The making of treaties

² In addition to the consent mechanism included in Article 18 of the Protocol, the UK and EU established governance arrangements for the implementation of the Protocol, in particular, a Joint Committee of representatives of the EU and UK to consider outstanding issues and resolve disputes and an international arbitration body to adjudicate on such disputes in the event they cannot be resolved politically.

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and the conduct of foreign affairs are matters of high level politics which are entirely unsuited to supervision by a court on a judicial review application.”

As to interpretative supremacy, the Withdrawal Agreement (including the Protocol) has been approved and incorporated into domestic law pursuant to the explicit will of Parliament by way of primary legislation. In *Miller (No.1)* [2017] UKSC 5, the Supreme Court said the doctrine of Parliamentary sovereignty is a fundamental aspect of constitutional law in the UK which means that Parliament has the right to make or unmake any law whatsoever and no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament.

The applicants sought to qualify the rule of legislative supremacy on the basis that the Act of Union enjoy a privileged status as a “constitutional statute”. The issue for the court was whether Article VI of the Act of Union nullifies or renders the Withdrawal Acts unlawful. The court noted that the only definition of the term “constitutional statute” is found in the judgment of *Thoburn v Sunderland City Council* [2003] QB 151 when analysing the European Communities Act 1972. In that case Laws LJ recognised a hierarchy of Acts of Parliament: “ordinary statutes” and “constitutional” statutes:

“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 an instance of (b). Ordinary statutes may be impliedly repealed. Constitutional statutes may not.”

The question that arose in this case relates to the fact that in applying this definition the court is dealing with a number of overlapping “constitutional statutes” rather than a “constitutional statute” and an “ordinary statute”. Context therefore plays a vital role in the court’s consideration. As a starting point, based on fundamental principles, the most recent constitutional statute (the 2018 Act) is to be preferred to the older one. The court said there was no legal precedent whereby the Act of Union has operated to nullify a subsequent Act of Parliament. It commented that the text of Article VI is open textured. This is to be contrasted with the specificity of section 7A of the 2018 Act that expressly refers to the terms of the Withdrawal Agreement which is a detailed specific and complex agreement making provision for the withdrawal of the UK from the European Union, the repeal of the 1972 EC Act and the details for the implementation of the Agreement:

“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. 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 was 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

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Union should be resolved in favour of the [Withdrawal] Agreement Acts of 2018 and 2020.”

The court concluded 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 a conflict they are to be preferred. Judicial review on this ground was refused.

Ground 2: Section 1 of the Northern Ireland Act 1998

The applicants argued that section 1(1) of the Northern Ireland Act 1998 (“the 1998 Act”) prevented, and prevents, what they described as “the profound constitutional changes in the relationship of Northern Ireland with Great Britain” that are effected by the Protocol. The court noted that section 1 of the 1998 Act was considered by the Supreme Court in *Miller (No.1)* where it was unanimous on the view that this provision, which arose out of the Belfast/Good Friday Agreement, gives the people of NI the right to determine whether to remain part of the UK 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 people in Northern Ireland to the withdrawal of the United Kingdom from the European Union”.

The court accepted the applicants’ submission that in interpreting section 1 of the 1998 Act it should have regard to the Belfast/Good Friday Agreement as an aid. It said that the plain words of the 1998 Act together with a reading of the agreements underpinning it make it clear that section 1 does not regulate “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 [Belfast/Good Friday] Agreement and in the [1998 Act] is the choice between remaining part of the UK or becoming part of a united Ireland.”

The court concluded that section 1(1) of the 1998 Act has no impact on the legality of the changes effected by the Protocol and refused judicial review on this ground.

Ground 3: The 2020 Regulations and Democratic Consent

The applicants contended that the UK Government acted incompatibly with the constitutional safeguards enshrined in section 42 of the 1998 Act in making an agreement which included Article 18 of the Protocol (which provides the opportunity for taking a vote on democratic consent in NI on the continued application of Articles 5-10 of the Protocol) and therefore Article 18 has no legal effect in the UK. Section 42 of the 1998 Act provides for petitions of concern about matters which members of the Assembly consider should require cross-community support. Further it was argued that in making the 2020 Regulations implementing Article 18 of the Protocol 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 1998 Act).

The democratic consent process in Article 18 of the Protocol provides for a vote to be held in the NI Assembly on a motion that Articles 5-10 of the Protocol continue to apply in NI and consent will be provided by a simple majority of the Assembly. The fact that consent can be provided by a simple

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majority of the NI Assembly as opposed to a vote with cross-community support is at the heart of the challenge to the 2020 Regulations and has been a particularly controversial aspect of the Protocol. Counsel for the applicants contended that section 42 of the 1998 Act is a provision of fundamental constitutional importance which is not subject to implied repeal or amendment or to be dis-applied by subordinate legislation unless the enabling legislation provides expressly for this. Counsel further submitted that in dis-applying section 42 to the vote on democratic consent the Secretary of State has acted in a way that is incompatible with the terms of the 1998 Act and therefore has offended section 10(1)(a) of the 2018 Act.

The resolution of this issue came down to the interpretation of the interplay between the relevant statutes and the 2020 Regulations. The court said it was clear that the issue of a protocol for Ireland/Northern Ireland was a stumbling block to agreeing the legislation to implement the outcome of the EU Exit referendum. The original proposal for a “backstop” was a major factor in the rejection of the Withdrawal Agreement proposed by the then Prime Minister, Theresa May. In a letter to the European Council President, Donald Tusk, dated 19 August 2019 Prime Minister Boris Johnson envisaged the concept of an all-Ireland regulatory zone in Ireland stressing that such arrangements “must depend on the consent of those affected by it” with an opportunity for the NI Executive and Assembly to endorse the arrangements before they enter into force and every four years afterwards. The court said it was clear that the UK Government recognised the importance of ensuring a process for democratic consent. This consent was to be indicated by way of a simple majority vote of the NI Assembly.

The 2020 Regulations amended the 1998 Act by inserting a new section 56A and Schedule 6A to dis-apply the petition of concern option as a requirement for the consent resolution to be passed. The initial demand of the UK Government was that the consent should be obtained during the implementation period and prior to the commencement of the Protocol but ultimately the UK and EU agreed that the consent vote would not take place until 2024. The court referred in paragraphs [176] to [181] to an affidavit filed on behalf of the respondent in respect of the change of approach by the UK Government. It also referred to the Prime Minister’s statement to the House of Commons on 19 October 2019, following announcement of the Withdrawal Agreement and the remarks of a Minister made during a debate on the draft 2020 Regulations. The government argued that the UK’s international obligations are not devolved matters and as such are generally outside the NI Assembly’s remit, however, recognising the importance of consent for the Protocol it took the step of providing an opportunity for the NI Assembly to consent to the continuation of Articles 5-10 of the Protocol. The court commented:

“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 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 [2020] Regulations which faithfully replicated the provisions of Article 18 of the Protocol including the unilateral declaration which set out the method for the consent process. At all times the rationale behind and the contents of the Regulations were transparent to Parliament.”

Counsel for the applicants, however, argued that the vote on the consent process is a devolved matter relying on Schedule 2 to the 1998 Act which sets out that “observing and implementing international obligations ... under [EU] law” is not an excepted matter and should therefore be

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properly be subject to the cross-community and petition of concern provisions. Counsel for the respondent disputed this, pointing to the very explicit role of the Secretary of State in the consent mechanism process saying this distinguishes reserved matters from excepted matters. The court said the consent mechanism process introduced by the 2020 Regulations makes it clear that the role of the Secretary of State is paramount throughout:

“The process is controlled by him, it is commenced by him, the parameters are set by him and he communicates the outcome to the EU. It is therefore argued that, read coherently, the democratic consent mechanism is not a transferred/devolved matter. Parliament has dictated that the process is under the control of the Secretary of State.”

The court noted that any decision taken by the Assembly to end the application of Article 5-10 of the protocol to Northern Ireland would come within the ambit of international relations, including relations with the territories outside the UK which is not a transferred or devolved matter:

“The conduct of making an implementing treaties with the UK government has not been transferred to any of the devolved institutions in the UK. The court concludes that the consent mechanism or procedure is not a transferred or devolved matter within the meaning of the [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 obeying or implementing an international obligation within its legislative competence.”

The court then considered whether or not it was appropriate to amend primary legislation of a constitutional character such as the 1998 Act by way of Regulations. This issue was considered by the Supreme Court in the case of *R(Public Law Projects) v Lord Chancellor (Office of the Children's Commissioner intervening)* [2015] EWCA Civ 1193. In that case the court held that secondary legislation would be held to be invalid if it has an effect, or is made for a purpose, which is outside the scope of the statutory power under which it was made. Secondary legislation is made by the Executive, is subject to a briefer, if any, examination by Parliament and cannot be amended. The Supreme Court said 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 it should be resolved by taking a restrictive interpretative approach. Looking at the 2020 Regulations, the court said the Protocol has been implemented in domestic law by the 2018 Act which is a statute of a constitutional character. Compliance with the 2018 Act requires the implementation of a consent mechanism process outlined in Article 18(2) of the Protocol and the unilateral declaration. The court said that the Secretary of State was given broad powers in section 8C of the 2018 Act which include the power to make provision equivalent to that which could be made under an Act of Parliament and it was necessary to provide for the disapplication of section 42 of the 1998 Act in relation to that procedure:

“Even applying the restrictive approach required for such powers it seems to me this is a case ... where there is “little room for doubt about the scope of the power” in the statute concerned. It was clearly within the class of action that Parliament must have contemplated. In such circumstances it is not for the court to cut down that scope. The [2020] Regulations are plainly not outside the scope of the statutory power pursuant to which they were made.”

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The court concluded that the 2020 Regulations are lawful and made *intra vires* the powers conferred by the 2018 Act.

Ground 4: The Protocol and the ECHR

Article 3, Protocol 1 (“A3P1”)

A3P1 of the ECHR provides that parties will “ensure the free expression of opinion of the people in the choice of the legislature”. The applicants contended that the effect of the Protocol is that laws made by the EU will continue to be applicable in NI without the electorate in NI being granted the free expression of their opinion in the choice of the legislature making those laws. The court said that the starting point for the consideration of this issue is the extent to which EU law is or will remain part of the law of NI:

“Whilst it is correct to say that the full panoply of EU laws does not apply to the operation of the Protocol the contention by the respondent that the continued application of EU norms in this jurisdiction relates to a limited cohort of technical legal rules considered necessary to facilitate trade and the movement of agri-foods is at best an understatement. Equally, contentions on behalf of the applicants comparing NI to a colony or the Vichy government in France under the Nazi regime during the Second World War are wide of the mark and unhelpful. Whatever be the criticisms of the Protocol they are not apt for comparison with a World War which resulted in millions of deaths and widespread economic devastation.”

Articles 5-10 of the Protocol have the effect of making EU law applicable in NI. Article 2(1) of the Protocol provides that the UK shall ensure that no diminution of rights, safeguards or equality of opportunity as set out in the Belfast/Good Friday Agreement results from the UK’s withdrawal from the EU including in the area of protection against discrimination as enshrined in the provisions of EU law listed in Annex 1 to the Protocol (Annex 1 relates to prohibitions on discrimination and equal treatment). Whilst there is some uncertainty about the scope and extent to which EU law will apply to NI the court said it is clear that NI has the potential to be subject to developing EU law in the future as a result of the Protocol. Residents, however, will not have an opportunity to elect representatives to the European Parliament and that being so the A3P1 rights of the applicants in these proceedings who live in Northern Ireland are engaged.

The principles in relation to rights protected under A3P1 are well established and have been considered by the European Courts. From case law it can be seen that on this issue the UK must be allowed a wide margin of appreciation and that it is for the court to determine whether the requirements of A3P1 have been complied with. The factual context of each case is significant. The court said that, in this case, the Protocol is the product of political negotiations. It is a compromise which provides a high level framework as a solution to its aims and has left many of the practical aspects of implementation and technical details for the ongoing work of the UK government and the EU to various Joint Committees established by it. These compromises are recognised as addressing “the unique circumstances on the island of Ireland”. The court commented that the drafters of A3P1 are unlikely to have contemplated the complex constitutional arrangements arising from the interplay between the EU Withdrawal Acts and the 1998 Act arising from the UK’s decision to leave the EU and that it was precisely for this reason that the courts recognise the very wide margin of appreciation permitted to states in their arrangements for democratic elections to their relevant legislatures.

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The court said that the UK government provided the democratic consent mechanism recognising the potential democratic deficit arising from the compromise reached with the EU. It said the mechanism provides the opportunity for the consent to the ongoing implementation of Articles 5-10 of the Protocol. The manner in which it has been established is within the broad margin of appreciation available to the state and any restrictions arising are in pursuit of a legitimate aim, namely to implement the referendum result for the UK to withdraw from the EU:

“It is important to recognise that the Withdrawal Agreement including the Protocol has been thoroughly considered by the UK Parliament and has been enacted by way of primary legislation and regulations made under that primary legislation. The legislature was implementing the result of a referendum; the government was implementing a policy for which it obtained a mandate from the electorate in the UK and ... ensured that Parliament approved any agreement it entered into with the EU. There has been a thorough review of the Protocol by Parliament.”

The court said it was important to understand that NI remains a part of the UK and elects members directly to the UK legislature which ratified the Withdrawal Agreement, enacted the 2018 and 2020 Acts and who, if it desires, can amend or repeal those Acts. The court also noted that the UK government under Article 16 of the Protocol has the ultimate protection by way of unilaterally taking appropriate safeguard measures, an example of which being the unilateral extension to the grace period for the implementation of much of the Protocol. The court said it recognised that different decisions could have been made by the UK Parliament:

“The “backstop” proposal was rejected on three occasions by Parliament with the backing of MPs from the Democratic Unionist Party. Other procedures could have been negotiated to provide for a mechanism for consent to the Protocol by the people of Northern Ireland such as a referendum or cross-community voting in the Assembly. It is the function of political and not judicial bodies to resolve intensely political questions. Proportionality is relevant to the balance to be struck by the UK Parliament on this issue. The upholding of the principles of the Good Friday/Belfast Agreement was a fundamental ingredient in the decision reached by Parliament in relation to the Protocol. On the issue of withdrawal from the EU and its implications those on opposite sides of the argument seek to invoke the Agreement in support of their case. The true position is that the Good Friday/Belfast Agreement neither depends upon nor required a particular customs or regulatory regime. Ultimately, the balance to be struck is essentially a matter of political judgment and one which has been exercised by the legislature in this case.

“As a result of the UK’s departure from the European Union 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, any limitations 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 UK 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

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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. 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.”

The court concluded that there has been no breach of the applicants’ A3P1 rights. Judicial review on this ground was refused.

Article 14

Article 14 ECHR provides that the enjoyment of the rights and freedoms set out in the Convention shall be secured without discrimination on any ground. The court referred to the decision of the Supreme Court in *R(Stott) v Secretary of State for Justice* [2018] 3WLR 1831 which sets out the approach that should be adopted in order to establish that different treatment amounts to a violation of Article 14.

A central issue was to identify what is the difference of treatment relied upon by the applicants. The court said there is an obvious, relevant difference between the applicants and residents in GB who are not subject to the Protocol and who do not have a vote on the application of the Protocol. It concluded that any difference of treatment established has been justified by the respondent. An essential element in Article 1 of the Protocol are the “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 protect the 1998 Agreement in all its dimensions”. The court commented:

“The arrangements which were agreed were classically matters of political judgment but importantly were fully endorsed by Parliament by way of primary legislation which provided it with democratic legitimacy. In conclusion on this issue the court determines that the applicants 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.”

Ground 5: The Protocol and EU Law

The applicants 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. It was argued by counsel for the applicants that Article 50 is limited to setting out the arrangements for the withdrawal and not to make provision for a future relationship. The court, however, said there is nothing to prevent the EU negotiating a future arrangement with the departing member state and that the UK government and EU had done so.

The applicants also contended that the Withdrawal Agreement is in breach of Article 10 TEU which provides that the function of the EU shall be founded on representative democracy. They claimed that the position under the Protocol whereby some EU law is and will be applicable in NI without

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prior democratic approval from the political community over which it exercises authority is contrary to European law. This issue resonated with the discussion in relation to A3P1. The court said that in adopting its analysis in respect of A3P1, the protections provided for in the Protocol to include a democratic consent procedure and the infrastructure provided by way of the Joint Committees was consistent with the principles of the rule of law and democracy. The court concluded that the principle of Parliamentary sovereignty ultimately defeated the argument in respect of breach of EU law:

“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.”

The court concluded that there has been no breach of EU law. Judicial review on this ground was refused.

The Peeples Case

Mr Peeples submitted that the relevant provisions of the Belfast/Good Friday Agreement have been incorporated into domestic law by the 1998 Act and are therefore justiciable. The court said that the assessment of whether the provisions of the Withdrawal Agreement are consistent with the terms of the Belfast/Good Friday Agreement involves a balancing of interests and ultimately a political assessment: “The Withdrawal Agreement and the Protocol is Parliament’s settled view as to how to balance the various obligations under the Belfast/Good Friday Agreement.

The court concluded that there is nothing in the Withdrawal Agreements which breaches section 1 of the 1998 Act or alters the constitutional position of NI within the UK as understood by that Act, including the Belfast/Good Friday Agreement which led to its enactment. The court did not consider that the Belfast/Good Friday Agreement has been incorporated into domestic law. It said that 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 NI and the principle of consent but did 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 court dismissed the application by Clifford Peeples for judicial review.

Delay

In the course of submissions it was argued that it was clear from the contentions in support of the applicants’ case that the true target of the challenge was not to the 2020 Regulations but to the Withdrawal Agreement itself including the Protocol. The court noted that the text of these documents was agreed and published on 19 October 2019 and ratified on 29 January 2020. It said that in those circumstances any challenge should arguably have been brought within three months of the Agreement being ratified. The proceedings were not initiated until 5 March 2021. The applicants did not seek leave to extend time but argued that the 2020 Regulations are unlawful because of the unlawfulness of the Agreement and the 2018 Act under which they were made.

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The court said there was a real issue in relation to delay as the UK Government and the EU have acted on the basis that the Agreement was lawful and ratified by both parties. It said they have entered into detailed and protracted discussions in relation to trade arrangements:

“Any challenge to the lawfulness of the Agreement some 15 months after it was enacted would clearly be contrary to the efficient and proper administration of government and international relations. If the court’s consideration was limited to the 2020 Regulations which seek to implement only Article 18 of the Protocol and it had come to the conclusion that they were unlawful this would have the effect of denying the people of NI any say in the continuation of Articles 5-10 of the Protocol through a vote in the NI Assembly.”

The court dealt with the substance of the challenges and did not determine the case on the basis of delay.

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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