



Press Summary

8 February 2023

James Hugh Allister and others (First Appellants) and Clifford Peeples (Second Appellant) v the Secretary of State for Northern Ireland and others (Respondents)

[2023] UKSC 5

On appeal from: [2020] NICA 15

Justices: Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Sales, and Lord Stephens

Background to the Appeal

These proceedings challenge the lawfulness of the Northern Ireland Protocol (**'the Protocol'**), which formed part of the agreement between the United Kingdom (**'the UK'**) and the European Union (**'the EU'**) regarding the UK's exit from the EU. The Protocol was given legal effect by section 7A (**'section 7A'**) of the European (Withdrawal) Act 2018 (the **'the 2018 Act'**).

The Appellants rely on three grounds of appeal.

Ground One argues the Protocol is incompatible with Article VI of the Acts of Union 1800 (**'Article VI'**), the Acts which provided for the Union of Great Britain and Ireland. The trade limb of Article VI states "[His] Majesty's subjects of Great Britain and *Ireland* shall ... be on the same footing ... in respect of trade". The Appellants argued the Protocol means the people of Ireland are not 'on the same footing' in respect of trade because, for example, the Protocol requires payment of a charge on goods which may be moved into the EU.

The first instance judge found that if there is any conflict between section 7A of the 2018 Act which incorporates the Protocol into UK law and the Acts of Union 1800, section 7A is to be preferred. The Court of Appeal found that Article VI is modified by the Protocol, via section 7A.

The Appellants also argued that the Crown does not have the power to make treaties that do not comply with Article VI. The lower courts found section 7A takes priority over any incompatible provisions of Article VI.

Ground Two relates to section 1(1) of the Northern Ireland Act 1998 ('the NIA 1998'). Section 1(1) of the NIA 1998 says Northern Ireland remains part of the UK unless the majority of the people of Northern Ireland consent via a poll. The Appellants argued there can be no substantial change to the status of Northern Ireland without this, the Protocol changed the status of Northern Ireland, and this was unlawful as the poll procedure was not followed.

The lower courts found section 1(1) of the NIA 1998 did not affect the legality of the changes made by the Protocol.

Ground Three challenges the lawfulness of the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 (the '2020 Regulations'). Section 8C of the 2018 Act provided the power to make the 2020 Regulations. The 2020 Regulations permitted the Northern Ireland Assembly to vote on the continued application of Articles 5 to 10 of the Protocol without the need for cross-community support as required by section 42 of the NIA 1998. The Appellants argued that section 8C does not enable the making of regulations which are incompatible with the NIA 1998.

The lower courts found that deciding whether the Articles should continue to apply relates to the making of treaties and is within the competence of the UK Government. Cross-community support is not required.

Judgment

The Court unanimously dismissed the appeals on all three grounds.

Ground One: Dismissed as Article VI is subject to the Protocol such that any parts which conflict with the Protocol are suspended.

Ground Two: Dismissed as section 1(1) of the NIA 1998 relates only to the right to determine whether Northern Ireland remains part of the UK or joins a united Ireland.

Ground Three: Dismissed as section 7A amended the existing law such that the system created by the 2020 Regulations was lawful without the requirement of cross-community support. The 2020 Regulations were lawfully made.

Reasons for the Judgment

Ground One

The Court proceeds on the basis the Protocol does conflict with Article VI [54] following the findings of the lower courts [53].

First, the Protocol is incorporated into UK law by section 7A. Section 7A stipulates that all enactments are to have effect subject to section 7A. Consequently, Article VI is modified to the extent it conflicts with the Protocol via section 7A [65].

The debate about whether the Acts of Union and/or the Acts enabling the UK's withdrawal from the EU are statutes of a constitutional character, is academic. The suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute. A clear answer has been provided by Parliament in relation to any conflict between the Protocol and any other enactment. The Acts of Union and Article VI remain in place but are modified to the extent and for the period during which the Protocol applies [66].

Second, Parliament, by enacting the 2018 Act and the European Union (Withdrawal Agreement) Act 2020, authorised the making of the Protocol. The clear intention of Parliament in enacting these Acts was to permit the Crown to make the Protocol [73].

Ground Two

The Supreme Court has previously held that section 1(1) of the NIA 1998 does not regulate any change in the constitutional status of Northern Ireland other than the right to determine whether to remain part of the UK or become part of a united Ireland. There is no reason to depart from this finding. The Appellants' submissions regarding a different meaning are incorrect [84].

Ground Three

The requirement of cross-community support is imposed by section 42 of the NIA 1998. The 2020 Regulations inserted section 56A and Schedule 6A into the NIA 1998 [104]. Schedule 6A sets out a system called a 'consent resolution', which allows the Northern Ireland Assembly to vote on the continued application of Articles 5 to 10 of the Protocol [104 – 105]. Schedule 6A states that section 41 of the NIA 1998 does not apply in relation to consent resolutions. The effect of this is that a 'consent resolution' can be passed without the requirement of cross-community support [106].

The Court acknowledged the potential force in the Appellants' argument that cross-community support is still required for matters outside the Assembly's legislative competence. However, all enactments are to be read subject to section 7A. Section 7A had already modified section 42 of the NIA 1998. The 2020 Regulations were compatible with section 42 of the NIA 1998 as modified. There is therefore no incompatibility between the 2020 Regulations and section 42 of the NIA 1998 [108].

Section 8C of the 2018 Act provided the power to make the 2020 Regulations. It is clear from the wording of section 8C that Parliament intended to confer the power to make regulations which amend primary legislation [109].

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)