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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JAMES HUGH ALLISTER, BENYAMIN NAEEM HABIB, STEVE AIKEN, Rt Hon ARLENE ISOBEL FOSTER, BARONESS CATHARINE HOEY OF LYLEHILL AND RATHLIN, WILLIAM DAVID, The Rt Hon BARON TRIMBLE OF LISNAGARVEY

and

THE SECRETARY OF STATE FOR NORTHERN IRELAND

AND IN THE MATTER
OF THE PROTOCOL IN
IRELAND/NORTHERN IRELAND (DEMOCRATIC CONSENT PROCESS)
EU EXIT REGULATIONS 2020

AND IN THE MATTER OF THE PROTOCOL IN IRELAND/NORTHERN IRELAND TO THE AGREEMENT ON THE WITHDRAWAL OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FROM THE EUROPEAN UNION AND THE EUROPEAN ATOMIC ENERGY COMMISSION

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Mr John Larkin QC with Ms Denise Kiley (instructed by Nelson-Singleton Solicitors) for the Applicants
Dr Tony McGleenan QC with Mr Philip McAteer (instructed by the Crown Solicitor's Office) for the Respondent

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AND IN THE MATTER OF AN APPLICATION BY CLIFFORD PEEPLES FOR JUDICIAL REVIEW

AND

(1) THE PRIME MINISTER
(2) THE SECRETARY OF STATE FOR NORTHERN IRELAND
(3) CHANCELLOR OF THE DUCHY OF LANCASTER

Mr Ronan Lavery QC with Mr Conan Fegan (instructed by McIvor Farrell Solicitors) for the applicant

Dr Tony McGleenan QC with Mr Philip McAteer (instructed by the Crown Solicitor's Office) for the Respondents

COLTON J

Introduction

[1] The context in which these proceedings arise is complex and contentious, both legally and politically. The European Union ("EU") traces its origins to the European Coal and Steel Community ("ECSC") and the European Economic Community ("EEC") established, respectively, by the 1951 Treaty of Paris and the 1957 Treaty of Rome. It was set up with the aim of ending the frequent and bloody wars between neighbours, which culminated in the Second World War. It sought to unite European countries economically and politically in order to secure lasting peace. On 1 January 1973 the United Kingdom ("UK") became a member of the EEC in accordance with the European Communities Act 1972. The Republic of Ireland joined at the same time. In the decades that followed, the EEC expanded and developed, eventually becoming the European Union, a political and economic union of 28 countries.

[2] In December 2015, the UK Parliament passed the European Union Referendum Act. The ensuing referendum on 23 June 2016 produced a majority in favour of leaving the EU, by a margin of 52% to 48%, although in Northern Ireland the majority voted in favour of remaining by a margin of 55.8% to 44.2%. The following day Prime Minister David Cameron resigned. Theresa May was elected Conservative Party leader and became Prime Minister in July 2016.

[3] Article 50 of the Treaty of the European Union (TEU) provides the mechanism for a state to leave the Union. Sub-paragraph (1) provides that any member state may decide to withdraw from the Union in accordance with its own constitutional requirement.

[4] Sub-paragraph (2) provides that a member state is to notify the European Council of its intention. On receipt of notification the Union must negotiate and conclude an agreement with that member state.

[5] On 29 March 2017 Prime Minister May gave notification under Article 50 after Parliament passed the European Union (Notification of Withdrawal) Act 2017.

[6] A General Election was held on 8 June 2017 after Parliament was dissolved on 3 May 2017. Prime Minister May lost her majority in the House of Commons but

was able to form a government pursuant to a "confidence and supply" agreement with the Democratic Unionist Party of Northern Ireland.

[7] The European Union (Withdrawal) Act 2018 ("the 2018 Act") came into force on 26 June 2018. The key provision was section 1 which expressly repealed the European Communities Act 1972. Section 13 established the regime for Parliamentary Approval of the outcome of negotiations with the EU. Crucially, section 13 required Parliamentary Approval of any Withdrawal Agreement reached by the government. As per Lady Hale's summary in **R(On the Application of Miller) v Prime Minister, Cherry and others v Advocate General for Scotland (Miller No.2)** [2019] UKSC 41, section 13 provides:

> *"That a Withdrawal Agreement may only be ratified if:*
>
> *(a) The Minister of the Crown has laid before Parliament a statement that political agreement has been reached, a copy of the negotiated Withdrawal Agreement and a copy of the Framework for the future relations;*
>
> *(b) The House of Commons has approved the Withdrawal Agreement and future framework;*
>
> *(c) The House of Lords has, in effect, taken note of them both; and*
>
> *(d) An Act of Parliament has been passed which contains provision for the implementation of the Withdrawal Agreement."*

[8] On 26 June 2017 formal negotiations on the terms of withdrawal began between the UK and EU. A Withdrawal Agreement was concluded on 25 November 2018. That Agreement included a Northern Ireland Protocol which envisaged the UK remaining in the Customs Union thereby preventing the need for customs checks on the border between Northern Ireland and the Republic of Ireland, which would become a land border between the UK and the European Union after withdrawal. This arrangement became known as the "Backstop" and was opposed by the Democratic Unionist Party with whom the Prime Minister had entered into the "confidence and supply" agreement.

[9] The Agreement was rejected three times by the House of Commons, on 15 January 2019, on 12 March 2019 and on 29 March 2019.

[10] Prime Minister May resigned as leader of the Conservative Party on 7 June 2019 and stood down as Prime Minister on 24 July when she was replaced by Mr Boris Johnson who the Conservative Party has chosen as its leader.

The Protocol on Ireland/Northern Ireland

[11] On 17 October 2019, the UK and EU reached agreement on a new Withdrawal Agreement and political declaration setting out the framework for their future relationship. The Protocol on Ireland/Northern Ireland ("the Protocol") which is at the heart of these proceedings formed part of that Withdrawal Agreement.

[12] Article 1 of the Protocol provides that its objectives are as follows:

> *"1. This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.*
>
> *2. This Protocol respects the essential State functions and territorial integrity of the United Kingdom.*
>
> *3. This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions."*

[13] The 1998 Agreement to which the Article refers is the Good Friday or Belfast Agreement of 10 April 1998 made between the government of the United Kingdom, the government of Ireland and the other participants in the multi-party negotiations. This led to the Northern Ireland Act 1998 and the establishing of devolution arrangements in Northern Ireland including a Northern Ireland Assembly and a power sharing Executive.

[14] In order to address the "*unique circumstances on the island of Ireland*" the UK and the EU agreed a bespoke arrangement which was the product of a political compromise.

[15] Both parties agreed not to have a "hard border" with customs posts and infrastructure between Northern Ireland and the Republic of Ireland because of their respective commitments to the Good Friday/Belfast Agreement. In order to protect the EU's internal market the EU agreed to the UK policing the checks for goods travelling from Great Britain (GB) into the EU. The border between Northern Ireland and Republic of Ireland was now the external border between the EU and the UK after withdrawal. The checks were to take place on goods arriving in Northern Ireland from the UK.

[16] Northern Ireland has in effect remained in the EU single market for goods. This means that Northern Ireland has unfettered access to both the GB and the EU markets. Northern Ireland will also benefit from trade agreements between the UK and third countries.

[17] A subsequent Trade and Co-operation Agreement ("TCA") reduced the extent of tariffs applicable on goods being traded between the UK and the EU.

[18] As a consequence of this political compromise some EU laws continue to be applied in Northern Ireland and there are new checks and administrative burdens on businesses in GB providing goods to Northern Ireland.

[19] These consequences have proven extremely controversial in Northern Ireland and as is clear from these proceedings are opposed by all the unionist political parties.

[20] Cognisant of this controversy, as is clear from the history of the negotiations and public pronouncements, the UK government recognised the importance of seeking democratic consent to these arrangements in Northern Ireland and so made provision for the elected institutions here to decide whether the Protocol arrangements should continue or lapse.

[21] As per the affidavit sworn by Mr Colin Perry, Director, Economy, of the Northern Ireland Office sworn on 11 May 2021 at paragraph 15:

> *"On the same day as the deal was concluded, the government published a Unilateral Declaration concerning the application of the democratic consent mechanism ("Unilateral Declaration"). The Unilateral Declaration affirmed that the objective of the democratic consent process should be to seek to achieve agreement that is as broad as possible in Northern Ireland and, where practicable, through a process taken forward and supported by a power sharing Northern Ireland Executive which has conducted a thorough process of public consultation. This, the Unilateral Declaration stated, should include cross-community consultation, upholding the delicate balance of the 1998 Agreement, with the aim of achieving broad consensus across all communities to the extent possible. The declaration further assured that the UK government would provide support, as appropriate, to the Northern Ireland Executive in consulting with businesses, civil society groups, representative organisations and trade unions on the democratic consent decision, and that the process for affording and withholding consent would not have any bearing on, or implication for, the constitutional status of Northern Ireland."*

[22] The Unilateral Declaration was included in Article 18 of the Protocol which was subsequently implemented by regulations made by the Secretary of State, more of which later.

[23] In addition to the consent mechanism the parties established elaborate 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, established under Article 164 of the Withdrawal Agreement which may delegate representatives to a Specialist Committee under the Protocol as established by Article 165 of the Withdrawal Agreement. A Specialised Committee is provided for in Article 14 of the Protocol. In addition, an international arbitration body was established whose role is to adjudicate on such disputes in the event that they cannot be resolved politically.

[24] The Protocol and the declaration were debated in Parliament on 19 October 2019. It received its second reading stage on 21 October 2019 and was finally approved on 6 November 2019. This was the last act of that Parliament. Parliament was dissolved and after a General Election in December 2019 the Conservative party with a majority of 80 seats formed the next government with a manifesto commitment to complete the UK's withdrawal from the EU in accordance with the Withdrawal Agreement and Unilateral Declaration.

[25] The first Bill of the New Parliament was the European Union Withdrawal Act 2020 ("the 2020 Act") which received Royal Assent on 23 January 2020 having been passed by a significant majority of the House of Commons.

[26] The 2020 Act made significant amendments to the 2018 Act in accordance with the Withdrawal Agreement.

[27] The 2020 Act provided for the withdrawal of the United Kingdom from the European Union on 1 January 2021 after a transition period.

[28] The 2020 Act gave legal force in UK domestic law to the Withdrawal Agreement, including the Protocol, in part by amending the 2018 Act by the insertion of section 7A, of which more later.

[29] Two key further instruments in the Withdrawal architecture are the Trade and Co-Operation Agreement [2021] ("The TCA") made between the UK and the EU which contains the detailed provisions as to the relationship between the UK and EU on trade and other issues and the European Union (Future Relationship) Act 2020 which incorporated the TCA into UK law.

[30] Finally, to complete the jigsaw, for the purposes of this application are the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU) Regulations 2020. These Regulations were made by the Respondent, the Secretary of State for Northern Ireland, in exercise of the powers conferred on him by section 8C(1) and (2) and paragraph 21 of Schedule 7 to the 2018 Act.

[31] Thus, the withdrawal of the UK from the EU and the future arrangements for the relationship between the UK and EU have been effected by a number of overlapping, inter-related, complex and detailed treaties and statutes. There are no self-contained provisions by which the process can be analysed.

Related Supreme Court Decisions

[32] The political and constitutional tumult which accompanied the outworkings of the referendum between 2016 and 2020 made its way into the courts in all three legal jurisdictions in the United Kingdom. That resulted in the two landmark decisions of the Supreme Court in the cases of **R(Miller and others) v Secretary of State for exiting the European Union (Birnie and others intervening); in Re McCord (Lord Advocate and others intervening)**; in **Re Agnew and another (Lord Advocate and others intervening)** [2017] UKSC 5 (Miller No.1) and **On the Application of Miller v Prime Minister, Cherry and others v Advocate General for Scotland** [2019] UKSC 41 (Miller No.2).

[33] In **Miller No.1** the court determined that as a matter of the constitutional law of the UK the Crown – acting as executive government of the day - could not use its prerogative powers to give notice under Article 50 of the European Union Treaty whereby the UK ceased to be a member of the EU. Such a decision required an Act of Parliament.

[34] Also of relevance in **Miller No.1**, the court considered the impact of withdrawal from the EU on the devolution settlement in Northern Ireland. The court held that, although the devolution statutes had been enacted on the basis that the UK would be a member of the EU, they did not require the UK to remain so; that relations with the EU, as with other matters involving foreign affairs, were reserved to the UK government and Parliament; that the decision to withdraw from the union was not a function of the Secretary of State for Northern Ireland within the meaning of section 75 of the Northern Ireland Act 1998 and section 1 of that Act did 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 to become part of a united Ireland.

[35] In **Miller No.2** the courts intervened to declare that the advice given by the Prime Minister to Her Majesty the Queen on 27 August 2019 that Parliament should be prorogued was unlawful.

[36] The Supreme Court has reaffirmed that Parliamentary sovereignty is a fundamental principle of the UK constitution. The effect of the EC 1972 Act was to surrender part of UK sovereignty. The desire to reverse that effect was a driving force in favour of withdrawal from the EU. As this judgment proceeds it will be seen that the importance of Parliamentary sovereignty is key to the consideration of the challenges in these proceedings.

The Applicants' Challenge

[37] There are two sets of proceedings before the court.

[38] The first is the application of Allister and others. The applicants represent a broad range of unionist opinion in Northern Ireland. Mr Allister has served as a member of the European Parliament between 2004 and 2009. He has served as a member of the Northern Ireland Assembly since May 2011. He is the leader of Traditional Unionist Voice (TUV). Mr Habib was elected to the European Parliament as a member of the Brexit party in March 2019 as an MEP for London. At the time the proceedings were issued Mr Aiken was the leader of the Ulster Unionist Party and was and remains a member of the Northern Ireland Assembly.

[39] At the time the proceedings were issued Mrs Foster was the leader of the Democratic Unionist Party, First Minister of Northern Ireland and a member of the Northern Ireland Assembly since November 2003. Lord Trimble is a member of the House of Lords and was leader of the Ulster Unionist Party from 1995 to 2005. He led the Ulster Unionist Party in the political negotiations which culminated in the Good Friday/Belfast Agreement of 1998. He was First Minister of Northern Ireland from 1998 to 2002. Baroness Hoey has not sworn an affidavit in the matter. The court is aware that she was a Labour MP for many years and a prominent supporter of withdrawal from the EU. The respondent is the Secretary of State for Northern Ireland.

[40] The affidavits sworn by the applicants clearly convey their strong opposition to the Protocol based on their conviction that it fundamentally damages Northern Ireland's constitutional position within the UK. They contend that the effect of the Protocol has been to cause a border in the Irish Sea between Northern Ireland and Great Britain.

[41] In the second set of proceedings the applicant is Clifford Peeples who is a Pastor and lives in Northern Ireland. The respondents are the Prime Minister, the Secretary of State for Northern Ireland and the Chancellor of the Duchy of Lancaster. He describes himself as a unionist and like the applicants in the related case is deeply concerned that the respondents' actions in negotiating, implementing and operating the Northern Ireland Protocol by creating a customs border in the Irish Sea between Northern Ireland and Great Britain has damaged the union and is contrary to the Northern Ireland Act 1998.

[42] There was a substantial degree of overlap between the two applications. In the course of pre-hearing directions the court determined to hear the case of Allister and others as the lead one. For the most part Mr Peeples adopted the arguments of Allister and others. He was however given leave to make submissions in relation to an additional matter not relied upon in the lead case.

[43] The court therefore proposes to deal with the grounds of challenge raised by the case of Allister and others and having done so to deal with any additional matters raised by the application in Peeples.

[44] The applicants raise five grounds of challenge to the 2020 Regulations although it will be seen that in effect the challenge is to the Protocol and the Withdrawal Acts under which the Regulations were made. In the following paragraphs I will deal with each of the grounds separately. Although dealt with separately the grounds overlap to a degree and common themes emerge. The five grounds are considered under the following headings:

Ground 1: The Acts of Union 1800 [paras 45-117]

Ground 2: Section 1 of the Northern Ireland Act 1998 [paras 118-137]

Ground 3: Section 42 of the Northern Ireland Act 1998 – the 2020 Regulations on democratic consent [paras 138-212]

Ground 4: The Protocol and the ECHR [paras 213-279]

Ground 5: The Protocol and EU Law [paras 280-297]

Article VI of the Acts of Union 1800

[45] The applicants argue that the Protocol and the regulations made under the Protocol are incompatible with the Acts of Union 1800 and, in particular, Article VI thereof.

[46] The applicants rely upon Article VI of the Acts of Union 1800 which they describe as a constitutional statute. As explained in the affidavit of Mrs Foster, prior to the Acts of Union 1800 Ireland and Great Britain were two separate countries with a common monarch. These constitutional arrangements gave rise to trade and tariff disputes between the two countries. On 1 January 1801 when the Treaty of Union made between the King, Lords and commons of Ireland, and the King, Lords and commons of Great Britain was given legislative effect in acts of the respective Parliaments formed from those two kingdoms, there was formed one United Kingdom of Great Britain and Ireland.

[47] Article VI of the Union in the Act of Union (Ireland) Act 1800, i.e. the act passed by the Parliament of Ireland, reads as follows:

> *"That it be the Sixth Article of Union, that his Majesty's subjects of Great Britain and Ireland shall, from and after the first day of January, one thousand eight hundred and one, be entitled to the same privileges and be on the same footing, as to encouragements and bounties on the like articles, being the growth, produce or manufacture of either country respectively,*

> *and generally in respect of trade and navigation in all ports and places in the United Kingdom and its dependencies; and that in all treaties made by his Majesty, his heirs and successors, with any foreign power, his Majesty's subjects of Ireland shall have the same privileges, and be on the same footing as his Majesty's subjects of Great Britain."*

[48] As can be seen there are two limbs to Article VI. The first provides that from 1 January 1801 the subjects of Great Britain and Ireland shall be "*on the same footing*" in respect of trade. Secondly, it requires that in any future treaty "*with any foreign power*" that equal footing shall be preserved. Mr Larkin advances four propositions in relation to the implications of Article VI.

[49] The first is that the Protocol is incompatible with the first limb of Article VI. The second is that Article VI enjoys interpretative supremacy over any provision of domestic law purporting to give effect to the Protocol. The third proposition is that the second limb of Article VI prevented Her Majesty's government from agreeing the Protocol with the European Union. The fourth proposition is that 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.

[50] In assessing the merits of these propositions a starting point must be whether in fact the Protocol conflicts with the provisions of Article VI.

[51] The relevant provisions are contained in Articles 5-10, which collectively govern the operation of customs rules and those that relate to the EU's single market for goods. They are to be read with an extensive list of provisions in Annexes 2-5 of the Protocol. It is not in dispute that Northern Ireland enjoys unfettered access to the GB market. The controversy arises from restrictions in trade from GB to Northern Ireland. The key contentious article is Article 5.

[52] Paragraph 1 of Article 5 provides that:

> *"1. No customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport, notwithstanding paragraph 3, unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing.*
>
> *The customs duties in respect of a good being moved by direct transport to Northern Ireland other than from the Union or from another part of the United Kingdom shall be the duties applicable in the United Kingdom, notwithstanding paragraph 3, unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing. …"*

Paragraph 2 provides:

> *"2. For the purposes of the first and second subparagraph of paragraph 1, a good brought into Northern Ireland from outside the Union shall be considered to be at risk of subsequently being moved into the Union unless it is established that that good:*
>
> *(a) will not be subject to commercial processing in Northern Ireland; and*
>
> *(b) fulfils the criteria established by the Joint Committee in accordance with the fourth subparagraph of this paragraph."*

[53] Sub-paragraph 2 goes on to provide that the Joint Committee established under the Withdrawal Agreement and Protocol will establish the conditions under which processing is to be considered not to fall within point (a) and also establish the criteria for considering that a good brought into Northern Ireland from outside the Union is not at risk of subsequently being moved into the Union.

[54] Sub-paragraph 2 also provides that "*in taking any decision pursuant to this paragraph, the Joint Committee shall have regard to the specific circumstances of Northern Ireland.*"

[55] It is primarily this provision that has given rise to the very public controversy concerning an "Irish Sea Border."

[56] It will be seen that the Protocol itself does not create any tariffs for goods moving between Great Britain and Northern Ireland. Rather it provides for the payment of tariffs in respect of goods from the UK which are at risk of being moved to the European Union.

[57] The remaining articles provide for protection of the UK internal market (Article 6); technical regulations, assessments, registrations, certificates, approvals and authorisations (Article 7); VAT and Excise (Article 8); single electricity market (Article 9) and state aid (Article 10).

[58] The net effect of Articles 5-10 has been to require customs checks at ports in Northern Ireland in respect of goods coming from GB to Northern Ireland. The implementation of the Protocol has the potential to result in significant disruption in goods moving between GB and Northern Ireland. The difficulties arising from the implementation are the subject matter of ongoing high level discussions between the UK government and the EU.

[59] There are of course advantages for businesses in Northern Ireland in that, unlike businesses in GB, they have unfettered access to the internal market of the EU.

[60] The respondent argues that the Protocol does not create an actual border in the Irish Sea. Rather, it 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 Great Britain to Northern Ireland, but these in no way constitute a border. The respondent also points out that prior to coming into force of the Withdrawal Agreement and Protocol there was a system of sanitary and phytosanitary checks operated by the Department of Agriculture, Environment and Rural Affairs at points of entry in Northern Ireland, reflecting the longstanding operational position of the island of Ireland as a single epidemiological unit.

[61] 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 Committee. The court does not have any significant empirical evidence to assess this although it notes the affidavit of Beth Lunney concerning difficulties encountered by her horticultural business in obtaining plant supplies from Great Britain.

[62] Although the final outworkings of the Protocol in relation to trade between GB and Northern Ireland 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 Northern Ireland businesses to the EU internal market conflict with the "*equal footing*" described in Article VI.

What then are the implications arising from this conflict?

[63] The court turns first to the submission on behalf of the applicants that the UK government had no power to make the agreement on the grounds that it was prohibited from doing so by the second limb of Article VI. In this regard Mr Larkin points to the comments of Lord Neuberger at paragraph 55 of **Miller (No.1)** where he says:

> *"Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts."*

[64] In this regard Mr Larkin points out that, although he does not rely on it, international law supports this analysis. Under Article 27 of the Vienna Convention on the Law of Treaties a state may not invoke the provisions of its internal law as

justification for its failure to perform a treaty. This Article is without prejudice to Article 46 which provides at paragraph 1:

> *"1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."*

Article 46(2) provides that:

> *"2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."*

[65] A cursory examination of the International Court of Justice ("ICJ") decisions does not reveal any situation in which a state convinced an international court that a treaty is invalid under this provision. Reliance was placed on this provision by Nigeria in a boundary dispute with Cameroon before the ICJ, alleging that its own prior Head of State lacked the constitutional authority to enter into a treaty and thus Nigeria was not bound by it. Although the ICJ accepted that Nigeria's constitutional rules about treaty making were "*of fundamental importance*", the court said the failure to comply with them was not "*manifest*" insofar as Heads of State are generally presumed to have the capacity to bind the state, so therefore the other party (Cameroon) had no reason to question his authority. [See **Land and Maritime boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening),** judgment ICJ Reports [2002], page 303 – paragraphs 258-268.]

[66] Whilst this is merely an excursion, the UK would face an uphill battle if it sought to rely on Article 46 in any dispute with the EU over the validity of the Withdrawal Agreement. The Agreement was signed on behalf of the United Kingdom with the authorisation of the Prime Minister.

[67] In any event it is 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 and the conduct of foreign affairs are matters of high politics which are entirely unsuited to supervision by a court on a judicial review application.

[68] This issue was dealt with in the judgment of Lord Neuberger in **Miller (No.1)** in the following way:

> *"54. The most significant area in which ministers exercise the Royal prerogative is the conduct of the United Kingdom's foreign affairs. This includes diplomatic relations, the*

deployment of armed forces abroad, and, particularly in point for present purposes, the making of treaties. There is little case law on the power to terminate or withdraw from treaties, but, as a matter of both logic and practical necessity, it must be part of the treaty-making prerogative. As Lord Templeman put it in ***JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*** *[1990] 2 AC 418, 476, '[t]he Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty.'*

55. Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts - see ***Civil Service Unions*** *case cited above, at pp 397-398. Lord Coleridge CJ said that the Queen acts 'throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority' -* ***Rustomjee v The Queen*** *(1876) 2 QBD 69, 74. This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state. As Lord Kingsdown expressed it in* ***Secretary of State in Council of India v Kamachee Boye Sahaba*** *(1859) 13 Moo PCC 22, 75, treaties are 'governed by other laws than those which municipal courts administer.' The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.*

56. It is only on the basis of these two propositions that the exercise of the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter UK domestic law. Thus, in ***Higgs v Minister of National Security*** *[2000] 2 AC 228, 241, Lord Hoffmann pointed out that the fact that treaties are not part of domestic law was the "corollary" of the Crown's treaty making power. In JH Rayner cited above, at p 500, Lord Oliver of Aylmerton put it thus:*

> *'As a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which*

> *they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta [i.e. something done between others], from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.'*
>
> *57. It can thus fairly be said that the dualist system is a necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers. Professor Campbell McLachlan in* ***Foreign Relations Law*** *(2014), para 5.20, neatly summarises the position in the following way:*
>
> > *'If treaties have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged.'"*

[69] This final line is particularly apt to the particular context of this case. The argument about the ability of the government to make the Withdrawal Agreement must be seen in the context that it is now part of domestic law. Pursuant to the decision in **Miller (No.1)** section 13 of the 2018 Act provided that the Withdrawal Agreement could be ratified only if a number of steps had been taken, including section 13(1)(d); an Act of Parliament has been passed which contains provision for the implementation of the Withdrawal Agreement. Section 13 reflected the commitment in Article 4 of the Withdrawal Agreement where under sub-paragraph 2:

> *"The United Kingdom shall ensure compliance at paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions through domestic primary legislation."*

[70] The process prescribed by Parliament was followed and culminated in the approval of the Agreement in the 2020 Act which made amendments to the 2018 Act and made provision for its implementation in domestic law including through section 7A, section 8C(1) and (2) and paragraph 21 of Schedule 7 to the 2018 Act.

[71] The Withdrawal Agreement (including the Protocol) has therefore been approved and incorporated into domestic law pursuant to the explicit will of Parliament by way of primary legislation.

[72] The real issue on the Article VI point is whether or not it enjoys interpretative supremacy over the later 2018 and 2020 Acts.

[73] Returning to the implementation of the Withdrawal Agreement section 7A(1) of the 2018 Act as amended provides as follows:

> *"(1) Subsection (2) applies to –*
>
> *(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and*
>
> *(b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,*
>
> *as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.*
>
> *(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be –*
>
> *(a) recognised and available in domestic law, and*
>
> *(b) enforced, allowed and followed accordingly.*
>
> *(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)."*

[74] Dealing specifically with Northern Ireland, the 2020 Regulations which were made by the Secretary of State on 9 December 2020 and which are challenged in this application were made in exercise of the powers conferred by section 8C(1) and (2) of, and paragraph 21 of Schedule 7(2) to the EUWA 2018.

[75] That the doctrine of Parliamentary sovereignty is a fundamental aspect of constitutional law in the United Kingdom is beyond dispute.

[76] As was said by Lord Neuberger in **Miller (No.1)** at paragraph 43:

> *"It was famously summarised by Professor Dicey as meaning that Parliament has 'the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'"*

[77] Returning to the passages in **Miller (No.1)** quoted above:

> *"Parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged."*

[78] As to the resolution of any conflict between Article VI and the Withdrawal Acts the applicants seek to qualify the basic rule of legislative supremacy on the basis that the Act of Union 1800 enjoys a privileged status as a "constitutional statute."

[79] Mr Larkin argues that three possibilities arise with respect to section 7A and Article VI; these are:

(i) The Act of Union simply overrides section 7A;

(ii) That section 7A simply overrides the Act of Union; and

(iii) That there are interpretative principles that permit their reconciliation.

[80] The ideal resolution would of course be the third one. The conflict between the provisions of the Protocol and Article VI preclude the route of making it unnecessary to resolve the question. Mr Larkin suggests that proper constitutional harmonisation is achieved by acknowledging (1) that the Crown had no power to agree a treaty incompatibly with Article VI, and (2) that section 7A can only give effect to provisions of the Withdrawal Agreement that the Crown could, compatibly with the fundamental law of the United Kingdom – here the Act of Union 1800 – agree. Section 7A is not therefore to be regarded as giving effect to the provisions of the Withdrawal Agreement that are incompatible with Article VI of the Act of Union. Nor, he argues, can it be regarded as giving effect to provisions of the Withdrawal Agreement (in particular the Protocol) that, by virtue of the second clause of Article VI, HM government had no power to agree.

[81] Such harmonisation is not legally open to the court in light of the analysis of the reviewability of the prerogative power and the manner in which Parliament has legislated for the Withdrawal Agreement including the Protocol. To adopt Mr Larkin's argument would be to in effect render section 7A inoperative.

Constitutional Statutes/Statutes of a Constitutional Character

[82] Therefore, the issue comes down to whether Article VI nullifies or renders the Withdrawal Acts unlawful. Mr Larkin contends that the Act of Union, as

constitutive of the Kingdom as a whole, must be regarded as a "constitutional statute." Given such a status, it can only be repealed expressly by Parliament. As Lord Hope said in **H v Lord Advocate** [2012] UKSC 24 when considering whether or not there had been an amendment to the Scotland Act 1998, at paragraph 30:

> *"In modern times, when standards of parliamentary draftsmanship are high, the presumption against implied repeal is strong: … And it is even stronger the more weighty the enactment that is said to have been impliedly repealed."*

[83] Dr McGleenan suggests that the Supreme Court has been deliberately slow to use the phrase "constitutional statute." In **Miller** the court refers to statutes of a "constitutional character." Dr McGleenan suggests that a proper analysis of constitutional law does not support a suggestion that there is a hierarchy of statutes. However, there is support for such a hierarchy in the case law, whether one refers to a statute as being of a "constitutional status" or one of a "constitutional character." For example, in **Robinson v Secretary of State for Northern Ireland** [2002] NI 390, Lord Bingham, referring to the Northern Ireland Act 1998, said at paragraph 11:

> *"11. The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution."*

[84] This status was accepted in **Re Buick's Application for Judicial Review** (Court of Appeal) [2018] NICA 26.

[85] The Human Rights Act has been described as a constitutional statute in the case of **Re Northern Ireland Commissioner for Children and Young People's Application for Judicial Review** [2007] NIQB 115.

[86] That said, there had been relatively few references to "*constitutional statutes*" in the case law. In **Watkins v Home Office** [2006] UKHL 17; [2006] 2 AC 395, 418-20, at paragraphs 58-64 Lord Rodger identified the definitional difficulties associated with such apparently open-ended common law constructs.

[87] The only actual definition of the term "constitutional statute" is to be found in the judgment of Laws LJ in **Thoburn v Sunderland City Council** [2003] QB 151 when he analysed the European Communities Act 1972. As was made clear in **Miller (No.1)** this Act provides for the primacy of EU law within the UK constitutional order.

[88] The applicants rely upon the decision in **Thoburn** to rebut the suggestion that the 2018 and 2020 Acts should prevail over Article VI of the Act of Union, on the basis of the doctrine of implied repeal. Laws LJ described the doctrine in the following way at paragraph 37 in **Thoburn**:

> *"The rule is that if Parliament has enacted successive statutes which on the true construction of each of them make irreducibly inconsistent provisions, the earlier statute is impliedly repealed by the later. The importance of the rule is, on the traditional view, that if it were otherwise the earlier Parliament might bind the later, and this would be repugnant to the principle of Parliamentary sovereignty."*

[89] At paragraph 60 of the judgment Laws LJ says as follows:

> *"The common law has in recent years allowed, or rather created, exceptions to the doctrine of implied repeal, a doctrine which was always the common law's own creature. There are now classes or types of legislative provision which cannot be repealed by mere implication. These instances are given, and can only be given, by our own courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided. The courts may say – have said – that there are certain circumstances in which the legislature may only enact what it desires to enact if it does so by express, or at any rate specific, provision."*

[90] In **Thoburn** the court was dealing with whether or not regulations made pursuant to the Weights and Measures Act 1985 impliedly repealed section 2(2) of the 1972 EC Act.

[91] The key passages of the judgment are at paragraph 62E onwards:

> *"62. In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental: see for example such cases as R v Secretary of State for the Home Department ex p Simms [2000] 2 AC 115 per Lord Hoffmann at 131, R v Secretary of State for the Home Department ex p Pierson [1998] AC 539, R v Secretary of State for the Home Department ex p Leech [1994] QB 198, Derbyshire County Council v Times Newspapers Ltd. [1993] AC 534, and R v Lord Chancellor ex p Witham [1998] QB 575. And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion 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 also an instance of (b).*

The special status of constitutional statutes follows the special status of constitutional rights. … The 1972 Act clearly belongs in this family. It incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The 1972 Act is, by force of the common law, a constitutional statute.

63. Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. …

64. This development of the common law regarding constitutional rights, and as I would say constitutional statutes, is highly beneficial. It gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes, and now, applying the HRA) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand. Nothing is plainer than that this benign development involves, as I have said, the recognition of the 1972 Act as a constitutional statute."

[92] No doubt Laws LJ would regard this approach as entirely consistent with the description of the constitutional law of the United Kingdom as described in paragraph 40 of **Miller (No.1)** in the following way:

"40. Unlike most countries, the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions. Reflecting its development and its

> *contents, the UK constitution was described by the constitutional scholar, Professor AV Dicey, as 'the most flexible polity in existence' - Introduction to the Study of the Law of the Constitution (8th ed, 1915), p 87.*

[93] The question however that arises in this case relates to the fact that, applying the definition put forward by Laws LJ the court is dealing with a number of overlapping "*constitutional statutes*" rather than a "*constitutional statute*" and an "*ordinary statute*." Applying that definition it is abundantly clear that the Withdrawal Agreements also meet the test of "*constitutional statutes*." Indeed, the purpose of the 2018 Act was to expressly repeal the EC Act 1972. Section 1 of the 2018 Act repealed the European Communities Act 1972. The 2018 Act plainly has both elements of (a) and (b) as set out by Laws LJ. The language employed by the 2018 Act is similar to that of the 1972 Act. Clearly, they are of a "*constitutional character*" to use the Supreme Court phrase, or "*constitutional statutes*" within the definition of **Thoburn**.

[94] Faced with two conflicting statutes of a constitutional character which is to prevail? As in most areas of legal dispute context plays a vital role in the court's consideration.

[95] As a starting point, based on fundamental principles, the most recent constitutional statute is to be preferred to the older one.

[96] Much constitutional water has passed under the bridge since the enactment of the Act of Union. By way of example, the territories involved changed from 1922 onwards following the partition of Ireland and again from 1949 onwards following the creation of the Republic of Ireland. Dealing specifically with Northern Ireland section 1(2) of the Ireland Act 1949 provided:

> *"(2) It is hereby declared that Northern Ireland remains part of His Majesty's dominions and of the United Kingdom and it is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland."*

[97] Section 1(2) of the 1949 Act was repealed by the Northern Ireland Constitution Act 1973. Section 1 of the 1973 Act reads as follows:

> *"It is hereby declared that Northern Ireland remains part of Her Majesty's dominions and of the United Kingdom, and it is hereby affirmed that in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1 to this Act."*

[98] These, of course, were the forerunners to section 1 of the Northern Ireland Act 1998.

[99] Equally, the EC Act 1972 and the Human Rights Act 1998 are relevant statutes of a constitutional character when considering the constitutional arrangements for Northern Ireland. The constitutional character of the 2018 and 2020 Acts should be seen in the context of the modern constitutional arrangements for Northern Ireland and, in particular, the Northern Ireland Act 1998.

[100] These modern acts are plainly lawful notwithstanding the fact that Article 1 of the Act of Union remains in force despite the reference to the union between Ireland and Great Britain being "*for ever.*"

[101] There is no legal precedent whereby the Act of Union 1800 has operated to nullify a subsequent Act of Parliament.

[102] Insofar as the potential repeal of the Act of Union has been considered the House of Lords has determined that the Act of Union had been impliedly repealed – see **Earl of Antrim and others** [1967] 1 AC 691. That case involved a petition by 12 Irish peers seeking a declaration that the peerage of Ireland had a right under the 1800 Act to be represented in the House of Lords by 28 Lords Temporal of Ireland.

[103] The court rejected the petition holding that the provisions of the Union with Ireland Act 1800, ceased to be effective on the passing of the Irish Free State (Agreement) Act 1922, and that accordingly, the right to elect Irish representative peers no longer existed.

[104] Although the House of Lords decision was unanimous there was disagreement about the basis for the rejection. The speeches of Lord Reid and Viscount Dilhorne constitute the majority reasoning.

[105] Viscount Dilhorne concluded (at 719E – EA):

> *"When the Free State and Northern Ireland were created, Ireland as an entity ceased to be part of the United Kingdom. It necessarily follows that there was no territory called Ireland to be represented in United Kingdom Parliament and thereafter it was, in my opinion, no longer possible to elect an Irish peer to sit and vote in the House of Lords on the part of Ireland. For to do so would have meant the election of peers to represent a territory which had ceased to exist as a political entity and as part of the United Kingdom.*
>
> *For these reasons, in my opinion, that part of the Union with Ireland Act which provided for the election of Irish peers to the House of Lords must be regarded as having become spent or obsolete or impliedly repealed in 1922."*

[106] Mr Larkin submits that the reasoning of Lord Wilberforce was preferable. In his judgment at page 724 paragraphs C-E he said:

> *"I prefer to express no opinion on the (to my mind) more difficult questions whether the Act of Union conferred upon the 28 Irish peers some substantive right, of a representative character or otherwise, and if so, whether this had been impliedly repealed by later legislation. In strict law there may be no difference in status, or as regards the liability to be repealed, as between one Act of Parliament and another, but I confess to some reluctance to holding that an act of such constitutional significance as the Union with Ireland Act is subject to the doctrine of implied repeal or of obsolescence – all the more when these effects are claimed to result from later legislation which could have brought them about by specific enactment."*

[107] Mr Larkin argues that in the case of **Lord Gray's Motion** [1999] UKHL 53; [2002] AC 124, Lord Hope appears to prefer the approach of Lord Wilberforce. That case was dealing with the effect of the Union with Scotland Act 1706 and whether a proposed Bill, if enacted, would breach the provisions of the Treaty of Union between England and Scotland.

[108] At the end of the day the Earl of Antrim case is not determinative but it is a clear authority from the House of Lords of the capacity for a "*constitutional statute*", in that case the Act of Union 1800, to be impliedly repealed.

[109] Returning to the judgment of Laws LJ in **Thoburn** it will be noted that he recognised that a constitutional statute can be repealed by specific language if it has the same effect as express repeal. The principle is that general or broad terms will yield to terms which are more specific.

[110] In this regard it will be seen that the text of Article VI is open textured. This is to be contrasted with the specificity of section 7A which expressly refers to the terms of the Withdrawal Agreement. The Withdrawal Agreement is a detailed specific and complex agreement making provision for the withdrawal of the United Kingdom from the European Union, the repeal of the 1972 EC Act and the details for the implementation of the Agreement. These specific details are in marked contrast to the general provisions of Article VI and give further weight to the proposition that in recognising the principle of the supremacy of primary legislation and the importance of "*constitutional*" statutes that section 7A should be given effect. These bespoke provisions are further support for giving them interpretative supremacy over the Act of 1800. To paraphrase Laws LJ they are sufficiently specific that the inference of an actual determination to effect the result contended for is irresistible. 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.

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

[112] This is entirely consistent with the "flexible polity" referred to by Dicey and quoted with approval by the Supreme Court in **Miller (No.1)**.

[113] That Parliamentary sovereignty was to the fore of the legislature's contemplation is reflected in section 38 under the general and final provision of the 2020 Act which states:

> *"38. **Parliamentary sovereignty***
>
> *(1) It is recognised that the Parliament of the United Kingdom is sovereign.*
>
> *(2) In particular, its sovereignty subsists notwithstanding –*
>
> *(a) directly applicable or directly effective EU law continuing to be recognised and available in domestic law by virtue of section 1A or 1B of the European Union (Withdrawal) Act 2018 (savings of existing law for the implementation period),*
>
> *(b) section 7A of that Act (other directly applicable or directly effective aspects of the withdrawal agreement),*
>
> *(c) section 7B of that Act (deemed direct applicability or direct effect in relation to the EEA EFTA separation agreement and the Swiss citizens' rights agreement), and*
>
> *(a) section 7C of that Act (interpretation of law relating to the withdrawal agreement (other than the implementation period), the EEA EFTA separation agreement and the Swiss citizens' rights agreement).*

(3) Accordingly, nothing in this Act derogates from the sovereignty of the Parliament of the United Kingdom."

This approach is entirely consistent with the Supreme Court's strong reaffirmation of the Westminster Parliament's powers and the primacy of its legal sovereignty.

Conclusion

[114] The court therefore concludes 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 any conflict between them section 7A is to be preferred and given legal effect. Judicial review on this ground is refused.

Postscript

[115] After this section of the judgment was completed the court received a communication from the applicants' solicitors dated 17 June 2021 drawing its attention to a question asked of the Prime Minister on 16 June 2021 and the Prime Minister's reply, the contents of which are set out herein:

"**Sir Jeffrey Donaldson**
(Lagan Valley) (DUP)

I know that, like me, the Prime Minister cares passionately about the Union. Can he confirm that the passing of the European Union (Withdrawal) Act 2018 and the Northern Ireland Protocol that forms part of it, has not resulted in an implied repeal of Article 6 of the Act of Union, which enables Northern Ireland to trade freely with the rest of the United Kingdom? Will he commit fully to restoring Northern Ireland's place within the UK internal market?

The Prime Minister

Yes of course. I can give assurances on both counts. I can say that unless we see progress on the implementation of the Protocol, which I think is currently totally disproportionate, then we will have to take the necessary steps to do what the Rt Hon gentleman says."

[116] In the correspondence the applicants' solicitor comments:

"*In this exchange the Prime Minister, among other things, makes clear his view that Article VI of the Act of Union has not been impliedly repealed. This is inconsistent with the case advanced on behalf of the Secretary of State which was not supported by any evidence of a contemporaneous intention or a*

wish to repeal. That Article VI has not, in fact, been impliedly repealed has now been confirmed by the Head of Her Majesty's government."

[117] Whilst the House of Lords in the seminal case of **Pepper v Hart** [1993] AC 593 relaxed the previously well-established exclusory rule in relation to the court's consideration of Parliamentary material, this reply to a question does not come within the permitted relaxation. The one line answer was not a part of the legislative history. The court has not been asked to consider legislation which is ambiguous or obscure or leads to an absurdity. The court has analysed the effect of the Withdrawal Acts in accordance with the appropriate legal principles. The court's analysis of the legal effect of the Withdrawal Acts remains good notwithstanding the material drawn to its attention.

Section 1 of the Northern Ireland Act 1998

[118] The applicants argue that section 1(1) of the Northern Ireland Act 1998, prevented, and prevents, what they describe as "the profound constitutional changes in the relationship of Northern Ireland with Great Britain" that are effected by the Protocol.

[119] Section 1 of the Northern Ireland Act 1998 provides:

"***Status of Northern Ireland***

(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.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland."

[120] Mr Larkin on behalf of the applicants contends that section 1(1) of the 1998 Act is open to two interpretive possibilities. One is that the protection contained in this section extends only to a final, formal severing of the last tie that keeps Northern Ireland part of the United Kingdom and that nothing short of that final, formal severing of the last tie requires the referendum for which Schedule 1 provides - as Mr Larkin put it *"the last lowering of the Union flag."*

[121] The other interpretation is that section 1 protects the status of Northern Ireland under the Acts of Union 1800 and that any diminution in that

status can only occur if it has been approved in advance by a referendum held in accordance with the first Schedule of the 1998 Act.

[122] He argues that the fundamental change under the Protocol in giving away legal power to the EU is a change in the constitutional status of Northern Ireland which could only occur lawfully under section 1 if it has been accepted in advance by a referendum held in accordance with the first Schedule to the 1998 Act.

[123] As indicated earlier, section 1 of the 1998 Act was considered by the Supreme Court in the **Miller (No.1)** case. The question before the court in that case was whether the giving of notice by the UK government under Article 50 of the TEU without the consent of the people in Northern Ireland impedes the operation of section 1 of the Northern Ireland Act.

[124] On this point the Supreme Court was unanimous. The issue was dealt with at paragraphs [134] and [135] of the leading judgment. In particular, paragraph [135] says:

> *"In our view, this important provision, which arose out of the Belfast Agreement, gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom 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 the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union."*
> [My underlining]

[125] Not only did the Supreme Court indicate that the right related to a choice between either remaining part of the United Kingdom or becoming part of a united Ireland but further it did not regulate "*any other change in the constitutional status of Northern Ireland.*"

[126] Mr Larkin urges the court to be careful in interpreting this aspect of the judgment. He points out that the answer to the question that was specifically asked could only have led to one answer since neither the issue of giving notice under Article 50 of TEU nor the departure of the UK from EU, following whatever form of notice had been given sounded on the scope of section 1 of the Northern Ireland Act 1998. He referred to the judgment of Lord Reed at paragraph 242 of the judgment when he simply confined his answer to the specific question asked.

[127] The clearly expressed view of the Supreme Court is binding and determines this issue.

[128] In any event this proposition is clear from the plain meaning of the statute.

[129] The court accepts Mr Larkin's submission that in interpreting section 1 the court should have regard to the Good Friday/Belfast Agreement as an aid to the interpretation of section 1 of the 1998 Act. This principle was emphasised by the House of Lords in **Robinson v Secretary of State for Northern Ireland** [2002] UKHL 32 and this approach has been approved in this jurisdiction in for example the cases of **JR80's Application** [2019] NICA 58 and **Re McCord's Application: Border Poll** [2020] NICA 23. However, it is clear from the text of the Agreements and from the statute itself that reference to the status of Northern Ireland in the constitutional context relates to membership of the UK or a sovereign united Ireland.

[130] Thus, under the heading Constitutional Issues in the Agreement the participants endorsed that they will:

> *"(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;*
>
> *(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;*
>
> *(iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people; …"*
>
> [My underlining]

[131] The Agreement goes on to provide draft clauses/schedules for incorporation in legislation in both the United Kingdom and in the constitution of the Republic of Ireland.

[132] Similar provisions are provided in the Agreement between the government of the UK and Northern Ireland and the government of Ireland. Specifically, the Agreement records that the two governments:

> *"(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland."*
> [My underlining]

[133] It will be noted that section 1 is a word perfect reproduction of the draft legislation contained in Annex A to that part of the multi-party agreement which deals with the constitutional issues. It is what was agreed between the two governments and the political parties. It is also what was approved in referendums in both parts of the island of Ireland.

[134] Schedule 1 to the Act which is referred to in section 1(1) in the context of the poll that is required to justify a change in the status of Northern Ireland makes it clear what the purpose of such a poll should be. It provides, inter alia:

> *"1. The Secretary of State may by order direct the holding of a poll for the purposes of Section 1 on a date specified in the Order.*
>
> *2. Subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland."*
> [My underlining]

[135] Schedule 1 is in effect a word perfect reproduction of the draft legislation contained in Annex A.

[136] The plain words of the statute together with a reading of the agreements underpinning the statute make it clear that Section 1 does not regulate, in the words of the Supreme Court, "*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 Agreement and in the statute is the choice between remaining part of the UK or becoming part of a united Ireland. Indeed, the Agreements were designed to reconcile the acknowledged conflicting wishes of the people of Northern Ireland on this issue.

Conclusion

[137] The court therefore concludes that section 1(1) of the Northern Ireland Act 1998 has no impact on the legality of the changes effected by the Withdrawal Agreements and the Protocol. Judicial review on this ground is refused.

Section 42 of the Northern Ireland Act 1998 – The 2020 Regulations and Democratic Consent

[138] The applicants contend that the UK government acted incompatibly with the constitutional safeguards enshrined in section 42 of the Northern Ireland Act 1998 in making an agreement which included Article 18 of the Protocol and therefore Article 18 has no legal effect in the UK. Further, it is argued that in making the Regulations implementing Article 18 of the Protocol the Secretary of State acted incompatibly with section 10(1)(a) of the 2018 Act.

[139] On the face of it the Order 53 Statement in these proceedings, issued on 5 March 2021 challenges the Protocol in Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 ("the 2020 Regulations"). The Regulations were made on 9 December 2020 and came into effect on 10 December 2020. The Regulations were made by the Secretary of State under powers conferred by section 8C(1) and (2) of the European Union (Withdrawal Agreement) Act 2018.

[140] The Regulations give effect to Article 18 of the Protocol. Article 18 provides the opportunity for democratic consent in Northern Ireland to the continued application of Articles 5-10 of the Protocol.

[141] Article 18 paragraph 2 provides:

> *"For the purposes of paragraph 1, the United Kingdom shall seek democratic consent in Northern Ireland in a manner consistent with the 1998 Agreement. A decision expressing democratic consent shall be reached strictly in accordance with the Unilateral Declaration made by the United Kingdom on [DATE], including with respect to the roles of the Northern Ireland Executive and Assembly."*

[142] The declaration to which paragraph 2 refers was made on 19 October 2019. The declaration sets out the modalities for determining democratic consent in Northern Ireland. The process is set out in paragraph 3 as follows:

> *"**Democratic consent process***
>
> *3. The United Kingdom undertakes to provide for a Northern Ireland democratic consent process that consists of:*
>
> *(a) a vote to be held in the Northern Ireland Assembly on a motion, in line with Article 18 of the Protocol, that Articles 5-10 of the Protocol shall continue to apply in Northern Ireland.*
>
> *(b) Consent to be provided by the Northern Ireland Assembly if the majority of the members of the Assembly, present and voting, vote in favour of the motion. …"*

[143] The declaration provides for an alternative democratic consent process in the event that it is not possible to undertake the process in the manner provided for in paragraphs 3 and 4.

[144] The declaration further provides for an independent review of the continued application of Articles 5-10 of the Protocol in the event that the process is passed by a simple majority rather than with cross-community support. The fact that consent can be provided by a simple majority of the Northern Ireland Assembly as opposed to a vote with cross-community support is at the heart of the challenge to the Regulations and has been a particularly controversial aspect of the Protocol.

[145] The principle of cross-community support can be found in Strand 1 paragraph 5(d) of the Good Friday/Belfast Agreement which provides that among the safeguards for democratic institutions in Northern Ireland will be "*arrangements to ensure key decisions are taken on a cross-community basis*" with "*cross-community*" meaning either an overall majority of members of the Assembly present or 60% of members present and voting including at least 40% of both unionist and nationalists present and voting.

[146] This principle was given domestic legal effect by, in particular, section 42(1) of the Northern Ireland Act 1998.

[147] Section 42 provides as follows:

> "***42. Petitions of concern***
>
> *(1) If 30 members petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, the vote on that matter shall require cross-community support."*

[148] In order to implement the process referred to in Article 18 and set out in detail in the Unilateral Declaration the 2020 Regulations at Part 5 paragraph 18 sub-paragraph (vi) provide:

> "*Section 42 does not apply in relation to a motion for a consent resolution."*

[149] The challenge to the legality of this aspect of the Regulations has echoes of the arguments in relation to the inter-play between Article VI of the Act of Union 1800, and the Protocol, section 7A of the 2018 Act and section 1 of the Northern Ireland Act 1998.

[150] Mr Larkin submits that section 42 of the Northern Ireland Act 1998 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.

[151] He further submits that this argument is underpinned by the provisions of section 10(1)(a) of the 2018 Act which provides:

> *"(1) In exercising any of the powers under this Act, a Minister of the Crown or devolved authority must –*
>
> *(a) act in a way that is compatible with the terms of the Northern Ireland Act 1998."*

[152] Put simply he argues 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 Northern Ireland Act 1998 and therefore has offended section 10(1)(a) of the 2018 Act.

[153] He further points out that this submission is entirely consistent with the various treaties and agreements which form the background to the 1998 Act and the Withdrawal Acts. Thus, under Article 2 of the British Irish Agreement the UK government agreed "*to support and where appropriate implement*" the provisions of the Good Friday/Belfast Agreement. As referred to earlier, at paragraph 5(d) of the Agreement it was provided that arrangements should be made to ensure that key decisions of the Northern Ireland Assembly are taken on a cross-community basis. He submits that it is scarcely possible to conceive of a matter that could be more entitled to a description of "*key decision*" than a vote on the extension of the Protocol. This approach is also evident from Part V of the political declaration on the framework for the future relations between the European Union and the United Kingdom, entitled "Forward Process" which contains a joint commitment by the United Kingdom and the European Union at paragraph 136 "*… the Good Friday or Belfast Agreement reached on 10 April 1998 by the United Kingdom government, the Irish government and the other participants in the multi-party negotiations … must be protected in all its parts.*"

[154] This commitment also finds an echo in the 4th recital to the Ireland/Northern Ireland Protocol:

> *"The Good Friday Agreement or Belfast Agreement of 10 April 1998 … shall be protected in all its parts."*

And Article 1(3) of the Protocol:

> *"This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions."*

[155] This provides very useful context and assists in interpretation. Ultimately, the resolution of this issue comes down to the interpretation of the inter-play between the relevant statutes and the Regulations.

[156] The background to the government's approach to democratic consent in Northern Ireland can be found in the affidavit sworn by Colin Perry.

[157] It is clear from the Parliamentary history of the enactment of the Withdrawal Agreements of 2018 and 2020 that the issue of a Protocol for Ireland/Northern Ireland was a stumbling block to agreeing legislation to implement the outcome of the referendum. As is set out earlier in the judgment the original proposal for a "backstop" was a major factor in the rejection of the Withdrawal Agreement proposed by Prime Minister May. Prime Minister Johnson set out the new government's approach to this issue in a letter to the European Council President, Donald Tusk, on 19 August 2019. As per Mr Perry's affidavit at paragraph 7 this correspondence:

> *"… underlined the government's commitment to the Agreement in all circumstances; the need for any solution to recognise the delicate balance on which the Agreement was based; and its view that the arrangements contained in the November 2018 Withdrawal Agreement were anti-democratic and could not be agreed on that basis."*

I refer to a key passage of the relevant letter:

> *"The backstop is inconsistent with this ambition. By requiring continued membership of the customs union and applying many single market rules in Northern Ireland, it presents the whole of the UK with a choice of remaining in a customs union and aligned with those rules, or of seeing Northern Ireland gradually detached from the UK economy across a very broad range of areas. Both of those outcomes are unacceptable to the British government.*
>
> *Accordingly, as I said in Parliament on 25 July, we cannot continue to endorse the specific commitment, in paragraph 49 of the December 2017 joint report to 'full alignment' with wide areas of the single market and customs union. That cannot be the basis for the future relationship and it is not a basis for the sound governance of Northern Ireland.*
>
> *Third, it has become increasingly clear that the backstop risks weakening the delicate balance embodied in the Belfast (Good Friday) Agreement. The historic compromise in Northern Ireland is based upon a carefully negotiated balance between both traditions in Northern Ireland, grounded in agreement, consent and respect for minority rights. While I*

> *appreciate the laudable intentions with which the backstop was designed, by removing control of such large areas of the commercial and economic life of Northern Ireland to an external body to which the people of Northern Ireland have no democratic control, this has been undermined.*
>
> *The Belfast (Good Friday) Agreement neither depends upon nor requires a particular customs or regulatory regime. The broader commitments in the Agreement, including parity of esteem, partnership, democracy and to peaceful means of resolving differences, can best be met if we explore solutions other than the backstop."*

In his affidavit Mr Perry continues:

> *"Building on those principles, a subsequent letter and explanatory note from the Prime Minister to the then European Commission President Juncker on 2 October 2019 envisaged the concept of an all-Ireland regulatory zone in the island of Ireland, stressing that any such arrangement must depend on the consent of those affected by it, with an opportunity for the Northern Ireland Executive and Assembly to endorse the arrangements."*

[158] The letter confirmed that the proposal centred on the government's commitment to find solutions which are compatible with the Belfast (Good Friday) Agreement.

[159] It is clear that the government recognised the importance of ensuring a process for democratic consent in Northern Ireland. Quoting from the letter:

> *"**Fourth, this regulatory zone must depend on the consent of those affected by it**. This is essential to the acceptability of arrangements under which part of the UK accepts the rules of a different political entity. It is fundamental to democracy. We are proposing that the Northern Ireland Executive and Assembly should have the opportunity to endorse those arrangements before they enter into force, that is, during the transition period, and every four years afterwards. If consent is not secured the arrangement will lapse. The same should apply to the single electricity market, which raises the same principle."*

Towards the end of the letter the Prime Minister says:

> *"Taken together, these proposals respect the decision taken by the people of the UK to leave the EU, while dealing*

pragmatically with that decision's consequences in Northern Ireland and in Ireland.

- *They provide for continued regulatory alignment for a potentially prolonged period across the whole island of Ireland after the end of the transition period, for as long as the people of Northern Ireland agree to that.*

- *They mean that EU rules cannot be maintained indefinitely if they are not wanted – correcting a key defect with the backstop arrangements.*

- *They provide for a meaningful Brexit in which the UK trade policy is fully under UK control from the start.*

- *They ensure that the border between Northern Ireland and Ireland will remain open, enabling the huge gains of the Belfast (Good Friday) Agreements to be protected."*

[160] The letter was accompanied by an explanatory note which in relation to consent provides as follows:

> *"12. The zone of regulatory compliance will mean that Northern Ireland will be in significant sections of its economy, governed by laws in which it has no say. That is clearly a significant democratic problem. For this to be a sustainable situation, these arrangements must have the endorsement of those affected by them, and there must be an ability to exit them. That means that the Northern Ireland institutions – the Assembly and the Executive – must be able to give their consent on an ongoing basis to this zone (and to the single electricity market, which raises similar issues).*
>
> *13. Our proposal is that, before the end of the transition period, and every four years afterwards, the UK will provide an opportunity for democratic consent to these arrangements in the Northern Ireland Assembly and Executive, within the framework set by the Belfast (Good Friday) Agreement. If consent is withheld, the arrangements will not enter into force or will lapse (as the case may be) after one year, and arrangements will default to existing rules."*

[161] Ultimately, it will be seen from the Protocol and Unilateral Declaration that the UK government agreed to a democratic consent process which did not require approval of the Protocol but rather consent for a continuation of Articles 5-10 of the Protocol every four years with the first vote taking place in 2024. It is these Articles which deal with the issues of customs and trade.

[162] Crucially, as has been set out already, the consent was to be indicated by way of a simple majority vote of the Northern Ireland Assembly.

[163] The specific implementation of the arrangements envisaged by Article 18 of the Protocol and the Unilateral Declaration were, as has been already said, implemented by the 2020 Regulations.

[164] These Regulations were made pursuant to section 8C(1) and (2) of the European Union (Withdrawal Agreement) Act 2018 and paragraph 21 of Schedule 7 to the 2018 Act which provide as follows:

> *"**8C Power in connection with Ireland/Northern Ireland Protocol and Withdrawal Agreement***
>
> *(1) A minister of the Crown may by regulations make such provision as the minister considers appropriate –*
>
> *(a) To implement the Protocol in Ireland/Northern Ireland in the Withdrawal Agreement,*
>
> *(b) To supplement the effect of section 7A in relation to the Protocol, or*
>
> *(c) Otherwise for the purposes of dealing with matters arising out of, or related to, the Protocol (including matters arising by virtue of section 7A in the Protocol).*
>
> *(2) Regulation under sub-section (1) may make provision that could be made by an Act of Parliament (including modifying this Act)."*

[165] Section 8C of the 2018 Act supplements section 7A of the Act which relates to the general implementation of the Withdrawal Agreement.

[166] It will be immediately seen that the power provided under section 8C is extremely broad.

[167] It expressly empowers the Minister to make regulations as he considers "*appropriate*" to "*implement the Protocol*." Furthermore, it will be seen that such regulations may include a provision that equates to an Act of Parliament (including modifying the Act itself).

[168] The Regulations impugned in this challenge were made pursuant to that broad power. The Regulations amended the Northern Ireland Act 1998 by inserting Schedule 6A in the Schedules to the Act and by inserting a new section 56A to the Act. The schedule provided the mechanism for the implementation of Article 18 of the Protocol. Part 1, paragraph 1 sets out the general purpose of the schedule, paragraph 2 defines what is meant by a "consent resolution" and paragraph 3

provides the meaning of a "continuation period" and "current period." Part 2 sets out the duty of the Secretary of State to give notification of the start of the democratic consent process. Part 3 provides for a default democratic consent process. Part 4 provides for an alternative democratic consent process. Part 5 provides for the procedural matters and notification of the outcome of the process. Part 6 provides for an independent review in the event that the presiding officer notifies the Secretary of State that the Assembly has passed a consent resolution by a majority of the members voting but not with cross-community support.

[169] The key paragraphs for the purposes of this discussion are Part 1 paragraph 2 and Part 5 paragraph 18(5).

[170] The former sets out the meaning of a consent resolution which is to be in the following form:

> *"That Articles 5-10 of the Protocol on Ireland/Northern Ireland to the EU Withdrawal Agreement should continue to apply during the new continuation period (within the meaning of Schedule 6A to the Northern Ireland Act 1998)."*

[171] Part 5 of Schedule 6A at paragraph 18(5) provides that:

> *"Section 42 does not apply in relation to a motion for a consent resolution."*

[172] The clear effect of section 56A and the insertion of Schedule 6A to the 1998 Act is to dis-apply the petition of concern option as a requirement for the resolution to be passed.

[173] In terms of the policy/thinking behind the democratic consent process the requirement for consent was a specific requirement of the UK government in its negotiations on the Protocol as set out in the correspondence referred to above.

[174] The initial demand of the UK government was to the effect that the consent should be obtained during the implementation period and prior to the commencement of the Protocol. Ultimately, the UK and EU agreed that the consent vote would not in fact take place until 2024.

[175] The affidavit filed on behalf of the respondent does not give any explanation for the change of approach by the UK government other than the general assertion at paragraph 11 of the affidavit of Mr Perry to the effect that:

> *"As would be expected ahead of any process of negotiations the government then considered possible solutions that would meet the Prime Minister's outlined priorities and recognise the need to secure agreement in negotiations. This established that the basis for any negotiated outcome had to be due reflection of the*

> *recognised basic, democratic principle that the people of Northern Ireland should, through a democratic process, be able to consent to the laws that apply in Northern Ireland. Consent was also seen as a means of addressing concerns with the previous "back stop" solution of the people of Northern Ireland not being able to provide or withhold their consent to any specific arrangements applied to them."*

[176] The decision to dis-apply section 42 and remove the requirement for cross-community support is dealt with by Mr Perry in the context of the negotiations between the UK government and the EU. Paragraph 12 of his affidavit provides:

> *"This served as the basis for a detailed process of negotiation with the EU, with the aim of incorporating specific provision for the people of Northern Ireland to have a meaningful opportunity to provide consent regarding any specific arrangements applied, in a manner that remained fully compatible with the Belfast (Good Friday) Agreement. As in any negotiations, this featured discussion and iteration of different options, all of which were assessed by the United Kingdom against those core principles. This took account of the negotiability and viability of any proposals that could be considered to provide a veto for any one party or community (as this began to emerge as an issue) – and the fact that political parties in Northern Ireland, the Irish government and the EU had all stressed that any such proposal would not provide the basis for an agreed solution."*

[177] The thinking of the government on this issue can be discerned from the Prime Minister's statement to the House of Commons on 19 October 2019, following announcement of the Withdrawal Agreement with the EU. He stated:

> *"The arrangements that have made that possible, of course, are temporary and determined by consent. I do think it a pity that it is thought necessary for one side or the other in the debate in Northern Ireland to have a veto on those arrangements because, after all – and I must be very frank about this – the people of this country have taken a great decision and based on the entire four nations of this country by a simple majority vote that went 52/48 and which we are honouring now. I think that principle should be applied elsewhere, and I see no reason why it should not be applied in Northern Ireland as well. It is fully compatible with the Good Friday Agreement."*

[178] This thinking was further reflected by the remarks of Minister Walker on 26 November 2020 in the debate on the draft 2020 Regulations:

> *"If the draft Regulations are approved, the first consent process will take place in 2024, if consent is given at this point, the process will then be repeated every four or eight years … four years if consent is given with a simple majority, 8 years if consent is given with cross-community support. This demonstrates that the mechanism is designed to encourage cross-community support, giving the Assembly the opportunity to provide 8 years of certainty to Northern Ireland's businesses and individuals through cross-community agreement.*
>
> *I have heard arguments that this approach is somewhat contrary or not compatible with the Belfast Agreement, and I do not accept that that is so. Our approach is entirely compatible with the Agreement. The principle of cross-community support set out in the Belfast Agreement applies to internal matters for which the Northern Ireland Assembly is responsible. The consent mechanism, contained as it is in the Northern Ireland Protocol, relates to the UK's continued relationship with EU, an excepted matter in Northern Ireland's devolution settlement. That means that the matter at hand falls outside the remit of the Assembly and outside the principle of requiring cross-community support to pass. We have taken the steps we have, with four versus eight years, to incentivise that support."*

[179] Viscount Younger of Leckie made similar points on 1 December 2020 during the debate in Grand Committee on the 2020 Regulations.

[180] Mr Perry summarises the approach at paragraph 18 of his affidavit when he says:

> *"Overall, therefore, the UK's government position was informed by the importance of providing a mechanism that allowed the people in Northern Ireland to provide or withhold consent to the maintenance of any specific arrangements applied by the Protocol; which could operate through the Northern Ireland institutions established by the Agreement, and the Northern Ireland Assembly in particular; which took account of circumstances in which those institutions were not operating; and ensured that the agreed solution could be reached that could not be said to provide a veto for any one party or community, by recognising that it would always be in the interests of all parties for any arrangements to enjoy the broadest possible support across communities in Northern Ireland."*

[181] The government argues that the United Kingdom's international obligations are not devolved matters and as such are generally outside the Assembly's remit. Recognising however the importance of consent for the Protocol the government

took the step of providing an opportunity for the Assembly to consent to the continuation of Articles 5-10 of the Protocol. 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 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 Regulations in question 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.

[182] Leaving aside the merits of this approach Mr Larkin argues that in fact the vote on the consent process is a devolved matter, thereby undermining the rationale behind the government's approach. He relies on Schedule 2 to the Northern Ireland Act 1998 which sets out the definition of excepted matters. Under paragraph 3 of Schedule 2 excepted matters include:

> *"International relations, including relations with the territories outside the United Kingdom [the European Union] (and their institutions) … but not –*
>
> *…*
>
> *(c) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under [EU] law."*

[183] Mr Larkin argues that in any consent vote the Assembly is "*observing and implementing international obligations"* and therefore the proposed consent vote is not an excepted matter but is a devolved matter which should properly be subject to section 42 and the petition of concern.

[184] Dr McGleenan disputes that such a vote is a devolved matter under paragraph 3 of Schedule 2 consistent with Schedule 6A and the scheme of the Northern Ireland Act including section 26 thereof which delineates transferred or devolved functions from excepted matters. Section 26 ("International Obligations") provides:

> "26-(1) *If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations, ... he may by order direct that the proposed action shall not be taken.*
> *(2) If the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any*

international obligations, … he may by order direct that the action shall be taken.

(3) In subsections (1) and (2), "action" includes making, confirming or approving subordinate legislation and, in subsection (2), includes introducing a Bill in the Assembly."

[185] In this regard he points to the very explicit role of the Secretary of State in the consent mechanism process. It is this role which distinguishes excepted matters from devolved/transferred matters. This is apparent from the decisions in **Buick** and **JR80** which looked at the history of the exercise of devolved or transferred matters during a period when the Assembly was suspended when it became clear that the Secretary of State could not exercise powers which related to transferred matters.

[186] When one examines the consent mechanism process as set out in Schedule 6A it will be 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.

[187] 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.

[188] Although not determinative of the issue he points out that this is entirely consistent with the Good Friday Agreement to the effect that international relations would be outside the Assembly's remit.

[189] Plainly, any decision taken by the Assembly to end the application of Articles 5-10 of the Protocol to Northern Ireland would come within the ambit of international relations, including relations with the territories outside the United Kingdom which is not a transferred or devolved matter. The conduct of making and implementing treaties by the UK government has not been transferred to any of the devolved institutions in the UK.

[190] The court concludes that the consent mechanism or procedure is not a transferred or devolved matter within the meaning of the Northern Ireland 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 observing or implementing an international obligation within its legislative competence.

[191] Even if the court is wrong on this point for the reasons set out below it is not determinative of its consideration of this issue.

[192] Insofar as a legal issue arises, the essential concern of the court is whether or not it is appropriate to in effect amend primary legislation of a constitutional character such as the Northern Ireland Act 1998 by way of Regulations.

[193] The resolution of this issue turns on an analysis of the Regulations themselves and whether they are sufficient to enable the Secretary of State in this case to amend the legislation in question.

[194] This issue was considered by the Supreme Court in the case of **Regina (Public Law Projects) v Lord Chancellor (Office of the Children's Commissioner intervening)** [2015] EWCA Civ 1193.

[195] In that case by sections 1 and 9 of the Legal Aid, Sentencing and Punishment of Offenders' Act 2012, the Lord Chancellor was obliged to make legal aid available for civil legal services described in Part 1 of Schedule 1 to the Act. The cases set out in Part 1 of Schedule 1 were not ones in which the United Kingdom was obliged to provide legal assistance, which were provided for elsewhere in the Act. Purporting to exercise his power under section 9(2)(b) to omit services described in Part 1, a power which was supplemented by section 41 of the Act, the Lord Chancellor proposed to amend Schedule 1 by statutory instrument so as to provide that those who failed a residence test, would, subject to exceptions, be removed from the scope of Part 1. The claimant sought judicial review of the proposal.

[196] At the Supreme Court the applicant argued that as a matter of principle a power conferred on the Executive to amend primary legislation should be narrowly construed. The purpose of the 2012 Act was to restrict the availability of civil legal aid to cases of highest priority need as identified in Part 1 of Schedule 1 and to those cases where there was a human rights or European Union law right to legal protection. It was argued that the power conferred on the Lord Chancellor by section 9(2) to amend the scope of legal aid is a narrow power to update Schedule 1 by adding to, amending or removing categories of law to reflect changes which were perceived as relevant to priority need for legal assistance. The applicants argued that section 9(2) must be read narrowly because it is what is known as a Henry VIII clause. The purpose of the power to amend the scheme by subordinate legislation cannot in principle change the purpose of the design of the scheme in the first place. This approach also reflects the principle that powers provided by secondary legislation to amend primary legislation should be narrowly construed. For the Lord Chancellor it was argued that it was a general rule that statutes must be interpreted as a whole and section 9 must be read together with section 41. The terms of section 41 expressly envisage that, and thus makes even clearer that the power in section 9 is to be read broadly. The fact that the Henry VIII clause, section 9(2) enables primary legislation to be amended by subordinate legislation made by affirmative resolution procedure does not change this. The fact that the primary legislation insists on affirmative resolution procedure is significant. The scope of section 9(2) is a question of interpretation, the answer to which is clear. Any presumption towards a restrictive interpretation only arises where there is "genuine doubt" about the scope of the power. The Lord Chancellor argued that it was clear from the terms of the statute that the power was intended to be very broad giving a wide ranging power to amend the scope of legal aid coverage.

[197] Section 9(2) provided:

> "(2) The Lord Chancellor may by order—
>
> (a) add services to Part 1 of Schedule 1, or
>
> (b) vary or omit services described in that Part,
>
> (whether by modifying that Part or Part 2, 3 or 4 of the Schedule).

[198] The key passages are to be found in paragraph 23 onwards of the judgment of Lord Neuberger as follows:

> *"23. Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is ultra vires, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned. Accordingly, when, as in this case, it is contended that actual or intended subordinate legislation is ultra vires, it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation.*
>
> …
>
> *26. The interpretation of the statutory provision conferring a power to make secondary legislation is, of course, to be effected in accordance with normal principles of statutory construction. However, in the case of an 'amendment that is permitted under a Henry VIII power', to quote again from Craies para 1.3.11:*
>
> > *'as with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. Although Henry VIII powers are often cast in very wide terms, the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation.'*

> *27. In two cases,* ***R v Secretary of State for Social Security, Ex p Britnell*** *[1991] 1 WLR 198, 204 and* ***R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd*** *[2001] 2 AC 349, 383, the House of Lords has cited with approval the following observation of Lord Donaldson of Lymington MR in* ***McKiernon v Secretary of State for Social Security*** *[1989] 2 Admin LR 133, 140, which is to much the same effect:*
>
> > *'Whether subject to the negative or affirmative resolution procedure, [subordinate legislation] is subject to much briefer, if any, examination by Parliament and cannot be amended. The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact 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 conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach.'*
>
> *28. Immediately after quoting this passage in the Spath Holme case, Lord Bingham of Cornhill went on to say:*
>
> > *'recognition of Parliament's primary law-making role in my view requires such an approach.' He went on to add that, where there is 'little room for doubt about the scope of the power' in the statute concerned, it is not for the courts to cut down that scope by some artificial reading of the power.'"*

[199] It is clear therefore that whilst a restrictive interpretation is required legislation can be amended by Regulations.

[200] Turning to the Regulations in question under challenge here, the Protocol which includes the Unilateral Declaration has been implemented in domestic law pursuant to the explicit will of Parliament by the 2018 Act which as I have said in the discussion relating to potential conflict with the Act of Union and the Northern Ireland Act is itself a statute of a constitutional character.

[201] Under this primary legislation of a constitutional character, compliance with the Act requires implementation of the consent mechanism process outlined in Article 18(2) of the Protocol and the Unilateral Declaration.

[202] In order to carry out this obligation the Minister was given the broad powers set out in section 8C which included the power to make provision equivalent to that which could be made under an Act of Parliament.

[203] In order to do so it was necessary to set out the procedure in Schedule 6A and to provide for the disapplication of section 42 in relation to that procedure.

[204] It is relevant that the schedule faithfully replicated the provisions of the Protocol and the Unilateral Declaration. The exercise of the power did not involve the Secretary of State seeking to interpret a general obligation or develop an obligation.

[205] The consent mechanism process was set out in the primary legislation and Parliament was fully sighted of its contents when passing the 2018 Act and when considering the 2020 Regulations.

[206] Even applying the restrictive approach required for such powers this is a case in the words of Lord Bingham 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 Regulations are plainly not outside the scope of the statutory power pursuant to which they were made.

[207] Ultimately, this is an answer to any of the arguments concerning the protection provided by section 10(1)(a) or whether in fact the matter in question is a transferred/devolved or excepted matter. In the context of devolution in Scotland the Supreme Court emphasised again that the legal sovereignty of the Westminster Parliament remains central to the UK constitution.

[208] In **UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill** [2018] UKSC 64, [2019] AC 1022 the court considered a Bill of the Scottish Parliament which sought to limit extensive UK wide regulation making powers that had been given to Ministers of the Crown. In paragraph [41] of the judgment the court stated:

> *"Section 28(1) of the Scotland Act confers on the Scottish Parliament the power to make laws known as Acts of the Scottish Parliament, subject to section 29. Section 28(7) provides:*
>
> > *'(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.'*
>
> *That provision makes it clear that, notwithstanding the conferral of legislative authority on the Scottish Parliament, the UK Parliament remains sovereign, and its legislative power in relation to Scotland is undiminished. It reflects the essence of devolution: in contrast to a federal model, a devolved system*

> *preserves the powers of the central legislature of the state in relation to all matters, whether devolved or reserved."*

Section 28(7) is qualified by sub-section (8) which provides:

> *"But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."*

[209] Section 5(6) of the Northern Ireland Act is similar to section 28(7) of the Scotland Act. It reads:

> *"5(6) This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland, but an Act of the Assembly may modify any provision made by or under an Act of Parliament in so far as it is part of the law of Northern Ireland."*

[210] It will be seen that unlike section 28(7) of the Scottish Act the Assembly retains the power to modify a provision "so far as it is part of the law of Northern Ireland." Section 6 provides that part of the law of Northern Ireland means that the Act must be within the legislative competence of the Assembly. Since the conduct of international affairs is not a devolved matter this qualification does not alter the principle.

[211] For completeness the court notes that under section 7 of the Northern Ireland Act the 2018 Act is an "entrenched enactment" not subject to modification but that regulations made under the Act may be modified by an Act of the Assembly which does not arise in this case.

Conclusion

[212] The court concludes that the 2020 Regulations are lawful and made intra vires the powers conferred by the 2018 Act. Judicial review on this ground is refused.

Article 3, Protocol 1 ECHR

[213] Article 3 of the first Protocol (A3 P1) to the ECHR is included in Schedule 1 to the Human Rights Act 1998. It is, therefore, one of the domestically justiciable convention rights for the purposes of that Act.

[214] A3P1 provides as follows:

> *"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."*

[215] The applicants' case is that the effect of the Protocol is that laws made by the EU will continue to be applicable in Northern Ireland without the electorate in Northern Ireland being granted the free expression of their opinion in the choice of the legislature making those laws.

[216] Whilst the original drafting of A3P1 may well only have envisaged national legislatures, as a living instrument European Courts have developed its jurisprudence to include the European Parliament as a legislature in the context of European law.

[217] The starting point for the consideration of this issue is the extent to which EU law is or will remain part of the law in Northern Ireland. It is difficult to predict with any precision the extent to which EU law will apply in Northern Ireland and much will depend on the outworkings of the Agreement itself and the Joint Committee established to implement it.

[218] 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 Northern Ireland 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 the criticisms of the Protocol may be, they are not apt for comparison with a World War which resulted in millions of deaths and widespread economic devastation.

[219] Under Article 4 of the Protocol "Northern Ireland is part of the customs territory of the United Kingdom."

[220] Thus, Northern Ireland stays in the United Kingdom's customs territory which ensures unfettered access for goods travelling from Northern Ireland to Great Britain. In order to protect the EU's internal market the UK in effect "polices" the European Union internal market. This is achieved by the provisions of Article 5 which have been set out above at paragraph 52.

[221] In addition to the obligations to collect customs duties the Protocol also requires compliance with obligations imposed by the EU Customs Code in relation to summary declarations and custom declarations. It also requires that checks on goods are carried out in order to ensure they comply with the EU Rules which are applicable in relation to matters such as product composition, safety, technical standards and SPS requirements. The requirement to pay tariffs in relation to goods "*at risk*" is mitigated by the Agreement between the UK and the EU under the Trade and Co-operation Agreement which has reduced the scale of tariffs potentially payable.

[222] It is these checks and the administrative burden imposed upon businesses trading with Northern Ireland which has led to much of the controversy surrounding the Protocol.

[223] Much of the actual detail of how this will work has been left to the Joint Committee established under the Protocol.

[224] As set out earlier in the judgment the Protocol clearly has the effect of making EU law applicable in Northern Ireland. Articles 5-10 are to be read with an extensive list of provisions in Annexes 2-5 of the Protocol. By way of example Article 5 sub-paragraph 4 provides that:

> *"The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland."*

[225] Article 5(5) incorporates Articles 30 and 110 TFEU. Article 7(1) provides that Article 34 and 36 TFEU are applicable in Northern Ireland in relation to the lawfulness of placing goods on the market in respect of goods imported from the Union.

[226] Article 8 provides that:

> *"The provisions of Union law listed in Annex 3 to this Protocol concerning goods shall apply to and in the United Kingdom in respect of Northern Ireland.*

[227] Article 9 provides that Annex 4 to the Protocol shall apply in relation to the Single Electricity Market. Article 10 provides for the application of EU law set out in Annex 5 with some modifications.

[228] However, it is clear that the potential for the application of EU law in Northern Ireland goes beyond Articles 5-10. In particular, Article 2(1) provides:

> *"**Rights of individuals***
>
> *1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms."*

[229] The reference to the 1998 Agreement is to the Good Friday/Belfast Agreement.

[230] The reference in the first limb to the 1998 Agreement will raise interesting issues in relation to the potential role of the ECHR. It is the second limb which relates to the protection against discrimination as enshrined in the provisions of Union law listed in Annex 1 to the Protocol which is significant in this context.

[231] Annex 1 relates to the familiar prohibitions on discrimination between men and women in the access to supply of goods and services, the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, the principle of equal treatment between persons irrespective of racial or ethnic origin, the establishment of a general framework for equal treatment and employment in occupation, the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and the principle of equal treatment for men and women in matters of social security.

[232] The implications of this provision are not entirely clear. Much may depend on the courts' consideration of applications by individuals seeking to enforce rights protected by the Annex, insofar as they are not already protected by the Convention or the 1998 Agreement.

[233] It will be noted that the directives in Annex 1 do not apply to the UK but rather impose an obligation on the UK that there will be *"no diminution in the rights protected resulting from its withdrawal from the union."* Questions arise as to whether subsequent decisions of the CJEU in relation to the anti-discrimination protections will be applicable in Northern Ireland.

[234] Article 13(2) of the Protocol places no temporal limitations on the relevant case law. It provides that:

> *"Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union."*

[235] Interesting as those questions may be they do not impact on the consideration of A3P1 as they relate not to acts of the European Parliament but to decisions of the CJEU.

[236] Of particular relevance to future law making by the EU in Northern Ireland is Article 13(3) which provides that:

> *"Notwithstanding Article 6(1) of the Withdrawal Agreement, and unless otherwise provided, where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced."*

[237] In similar vein Article 13(4) of the Protocol provides that:

> *"Where the Union adopts a new act that falls within the scope of this Protocol, but which neither amends nor replaces a Union act listed in the Annexes to this Protocol, the Union shall inform the United Kingdom of the adoption of that act in the Joint Committee. Upon the request of the Union or the United Kingdom, the Joint Committee shall hold an exchange of views on the implications of the newly adopted act for the proper functioning of this Protocol, within 6 weeks after the request.*
>
> *As soon as reasonably practical after the Union has informed the United Kingdom in the Joint Committee, the Joint Committee shall either:*
>
> *(a) adopt a decision adding the newly adopted act to the relevant Annex to this Protocol; or*
>
> *(b) where an agreement on adding the newly adopted act to the relevant Annex to this Protocol cannot be reached, examine all further possibilities to maintain the good functioning of this Protocol and take any decision necessary to this effect.*
>
> *If the Joint Committee has not taken a decision referred to in the second subparagraph within a reasonable time, the Union shall be entitled, after giving notice to the United Kingdom, to take appropriate remedial measures. Such measures shall take effect at the earliest 6 months after the Union informed the United Kingdom in accordance with the first subparagraph, but in no event shall such measures take effect before the date on which the newly adopted act is implemented in the Union."*

[238] Thus, whilst there is some uncertainty about the scope and extent to which EU law will apply to Northern Ireland it is clear that Northern Ireland has the potential to be subject to developing European law in the future as a result of the Protocol.

[239] In relation to existing EU law which has been incorporated under the Withdrawal Agreement and Protocol into domestic law this does not lead to any breach of A3P1 as it has been implemented by the UK Parliament, in respect of which all residents of Northern Ireland have a vote.

[240] However, in relation to the potential future law making capacity of the Union residents of Northern Ireland will not have an opportunity to elect representatives to the European Parliament.

[241] That being so, the A3P1 rights of those applicants who live in Northern Ireland are engaged, in the context of the potential future application of EU law in Northern Ireland.

[242] The principles in relation to rights protected under A3P1 are well-established. A3P1 has been considered on a number of occasions by the European Courts. In **Moreaux v Belgium App No 9267-81** [1988] 10 EHRR 1 the Commission and the ECHR dealt with a complaint on the law determining membership of the Flemish Council. Firstly, the applicants claimed that the law did not in practice enable French speaking electors in a particular administrative district which came within the territory of the Flemish region to appoint French speaking representatives to the Council, while Dutch speaking electors could appoint Dutch speaking representatives. Secondly, it was claimed that the law prevented any Parliamentarian elected in the electoral district and resident in one of the municipalities of the administrative district from sitting on the Flemish Council if he belonged to the French language group in the House of Representatives of the Senate and that this was an obstacle not encountered by the elected representatives who belonged to a Dutch language group and who were resident in one of the same municipalities.

[243] The court held that there had been no violation of A3P1. The court was influenced by the federal type structures of the regions which composed the state and the wide margin of appreciation in respect of the state's internal legal orders.

[244] In **Hirst v United Kingdom** (No.2) (GC, No.74025/01, ECHR 2005) IX – the court dealt with a complaint by a prisoner in the United Kingdom who had been sentenced to discretionary life imprisonment having pleaded guilty to manslaughter. By reason of the conviction he was subject to a law which barred him from voting. Relying on A3P1 the applicant complained that he had been disenfranchised. He further complained that under Article 14 he had been discriminated against as a convicted prisoner. The court held that there had been a violation of A3P1 and therefore no separate issue arose under Article 14.

[245] In **Scoppola v Italy** (APP No.126-05) [2013] 56 EHRR 19 the court considered the case of an applicant who was also sentenced to life imprisonment. Under the domestic law of Italy the sentence imposed led to the permanent forfeiture of his right to vote. In that case the court determined that there had not been a breach of the applicant's A3P1 right, notwithstanding the previous decision of the court in **Hirst** (although it reaffirmed the principles in **Hirst**).

[246] In **Strobye and Rosenlind v Denmark** (Application Nos 28502-18 and 27338-18 – 2 February 2021) the court considered an application against Denmark by two Danish nationals who were declared not to have legal capacity. Consequently, they were not entitled to vote in the 2015 Parliamentary Elections. The court determined that there had not been a violation of A3P1 nor a violation of Article 14 read in conjunction with A3P1.

[247] Finally, perhaps the most relevant consideration by the European Court is the case of **Matthews v United Kingdom** [1999] 28 EHRR 361. In that case the applicant was a British citizen resident in Gibraltar. Her complaint was that despite the fact that the EC, as it then was, was responsible for making laws that were applicable to Gibraltar, she was unable to vote in the 1994 elections to the European Parliament. The court held that there had been a violation of A3P1.

[248] As in most areas of the law the context of each of the individual cases was important in the court's ultimate determination. However, some general principles clearly emerge. Thus, the relevant general principles are set out in **Hirst** in the following way:

> "**1. General Principles**
>
> *56. Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom.*
>
> *57. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote, and to stand for election. Indeed, it was considered that the unique phrasing was intended to give greater solemnity to the Contracting States' commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference.*
>
> *58. The Court has had frequent occasion to highlight the importance of democratic principles underlying the interpretation and application of the Convention, and it would take this opportunity to emphasise that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.*
>
> *59. As pointed out by the applicant, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by*

those in power. Universal suffrage has become the basic principle.

60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere.

61. There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide. There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.

62. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage."

[249] It will be seen that on this issue the United Kingdom must be allowed a wide margin of appreciation.

[250] That said it is for the court to determine whether the requirements of A3P1 have been complied with.

[251] In relation to the authorities which have been quoted the context for each differs significantly from the circumstances of this case. The cases of **Moreaux**, **Hirst**, **Scopola** and **Strobye** all involved a denial of an individual right to vote for a domestic legislature on various grounds. That is a long way from what is involved here. Understandably, Mr Larkin places particular emphasis on **Matthews** given the involvement of the EC and the UK government. Again, however, the factual context is significant.

[252] The background facts are set out at paragraph 8 of the judgment:

> *"8. Gibraltar is a dependent territory of the United Kingdom. It forms part of Her Majesty the Queen's Dominions, but not part of the United Kingdom. The United Kingdom parliament has the ultimate authority to legislate for Gibraltar, but in practice exercises it rarely.*
>
> *9. Executive authority in Gibraltar is vested in the Governor, who is the Queen's representative. Pursuant to a dispatch of 23 May 1969, certain "defined domestic matters" are allocated to the locally elected Chief Minister and his Ministers; other matters (external affairs, defence and internal security) are not "defined" and the Governor thus retains responsibility for them.*
>
> *10. The Chief Minister and the Government of Gibraltar are responsible to the Gibraltar electorate via general elections to the House of Assembly. The House of Assembly is the domestic legislature in Gibraltar. It has the right to make laws for Gibraltar on 'defined domestic matters', subject to, inter alia, a power in the Governor to refuse to assent to legislation."*

[253] Under the applicable EC law at that time Gibraltar was excluded from certain parts of the EC Treaty. However, EC legislation concerning, inter alia, such matters as free movement of persons, services and capital, health, the environment and consumer protection applied in Gibraltar. The question for the court was whether the absence of elections to the European Parliament in Gibraltar in 1994 was compatible with Article 3 Protocol No.1. The court's conclusion is set out at paragraphs 63 and 64 as follows:

> *"63. The Court recalls that the rights set out in Article 3 of Protocol No. 1 are not absolute, but may be subject to limitations. The Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with. It has to satisfy itself that the conditions do not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart 'the free expression of the people in the choice of the legislature.'*
>
> *64. The Court makes it clear at the outset that the choice of electoral system by which the free expression of the opinion of the people in the choice of the legislature is ensured – whether it be based on proportional representation, the 'first-past-the-post' system or some other arrangement – is a matter in which the*

State enjoys a wide margin of appreciation. However, in the present case the applicant, as a resident of Gibraltar, was completely denied any opportunity to express her opinion in the choice of the members of the European Parliament. The position is not analogous to that of persons who are unable to take part in elections because they live outside the jurisdiction, as such individuals have weakened the link between themselves and the jurisdiction. In the present case, as the Court has found, the legislation which emanates from the European Community forms part of the legislation in Gibraltar, and the applicant is directly affected by it.

65. In the circumstances of the present case, the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No. 1, was denied.

It follows that there has been a violation of that provision."

[254] In considering the circumstances of this application it is important to bear in mind some general points about the Protocol. As per the pre-amble to the Protocol the broad aims in negotiating the Protocol were to ensure:

(a) that there is no "hard border" between Northern Ireland and Ireland, whilst at the same time ensuring that there are arrangements to preserve the integrity of the EU single market; and

(b) the protection of the 1998 Agreement 'in all its dimensions' including 'no diminution of rights' and maintaining the necessary conditions for continued north/south co-operation.

[255] In general terms 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 United Kingdom and in accordance with the direction of the Supreme Court in **Miller No.1** ensured that Parliament approved any agreement it entered into with the EU. There has been a thorough review of the Protocol by Parliament.

[256] The Protocol itself is the product of political negotiations. It is a compromise. It provides a high level legal 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 the Joint Committee established by it. These compromises are recognised as addressing "*the unique circumstances on the island of Ireland*."

[257] The drafters of A3P1 are unlikely to have contemplated the complex constitutional arrangements arising from the interplay between the European Union Withdrawal Acts and the Northern Ireland Act 1998 arising from the UK's decision to leave the European Union. It is 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.

[258] Thus, recognising the potential democratic deficit arising from the compromise the UK government provided for the democratic consent mechanism which has been discussed in detail above. Certainly, the mechanism has its limitations. Nonetheless, it provides the opportunity for the Assembly in Northern Ireland, voted for by the people of Northern Ireland to consent to the ongoing implementation of Articles 5-10 of the Protocol and by extension to any amendments, repeals or additions to the Annexes attached thereto.

[259] Furthermore, as in the **Moureaux** case it is important to understand the formal legal relationships between Northern Ireland and Great Britain. Northern Ireland remains a part of the United Kingdom and elects members directly to the UK legislature which ratified the Withdrawal Agreement, enacted the Withdraw Agreement Acts and who, if it desires, can amend or repeal those Acts. This distinguishes residents in Northern Ireland from the applicant **Matthews** in the Gibraltar case.

[260] Furthermore, the Protocol provides democratic protections in addition to the democratic consent process. This is done by way of the establishment of the Joint Committee in which the UK government play a full role.

[261] It will be seen that Article 13(4) provides a post enactment information requirement and provides a mechanism for any new act to be adopted through the Joint Committee and provides for circumstances in which agreement cannot be reached.

[262] Article 15(3)(b) of the Protocol provides further mitigation in that the EU is required to inform the United Kingdom about planned EU acts within the scope of the Protocol, including those amending or replacing the EU acts listed in the Annexes to the Protocol. This is in the context of the joint consultative working group established under that Article.

[263] Northern Ireland residents have the right to vote in UK Parliamentary elections which chooses the UK government. In this way they have a democratic role in the implementation of the Northern Ireland Protocol. In addition, the UK government has the ultimate protection provided by Article 16 of the Protocol which provides:

> "***Safeguards***

> *1. If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.*
>
> *2. If a safeguard measure taken by the Union or the United Kingdom, as the case may be, in accordance with paragraph 1 creates an imbalance between the rights and obligations under this Protocol, the Union or the United Kingdom, as the case may be, may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of this Protocol. …"*

[264] The United Kingdom government has already taken unilateral action in extending the grace period for the implementation of much of the Protocol. The EU threatened to invoke Article 16 in relation to the movement of vaccines although this was promptly withdrawn.

[265] The court recognises 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 requires 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.

[266] As a result of the UK's departure from the EU 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, the limitations arising from the Protocol 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 United Kingdom 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 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. This opportunity was not available to the applicant in the **Matthews** case. 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.

Conclusion

[267] The court concludes that there has been no breach of the applicants' A3P1 rights. Judicial review on this ground is refused.

Article 14

[268] In the course of submissions neither party really developed their respective arguments in relation to Article 14. The applicants contended that they could rely on a breach of A3P1 on a standalone basis. The respondent contended that the justification put forward in defence of any alleged breach of A3P1 was sufficient to meet any case based on Article 14 and that the court in Dr McGleenan's words did not have to grapple with the vexed jurisprudence on Article 14.

[269] Article 14 prohibits discrimination and provides:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

[270] The general purpose of Article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantee set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified – see **Clift v United Kingdom** (App No.7205/07 at paragraph 60). That reflects the aim of the Convention which is to guarantee rights which are practical and effective rather than rights that are theoretical or illusory.

[271] The approach to the consideration of Article 14 was considered by the Supreme Court in **R(Stott) v Secretary of State for Justice** [2018] 3 WLR 1831.

[272] The basic approach adopted by all five justices in that case is set out in paragraph [8] of the leading judgment of Lady Black as follows:

"***The approach to an article 14 claim***

8. In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or 'other status.' Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of ***R (Carson) v Secretary of State for Work and Pensions*** *[2005] UKHL 37; [2006] 1 AC 173. He observed that once the first two elements are satisfied:*

> *'the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.'"*

[273] Returning to the four elements identified in light of the discussion above I consider that the circumstances do fall within the ambit of a Convention right namely A3P1. Secondly, have the claimants established "other status" within the meaning of Article 14? There is much jurisprudence on what is meant by other status including in **Stott**. The authorities, in particular those of the ECHR, suggest a generous interpretation of that provision. In this case the applicants appear to be relying on status based on residency in Northern Ireland. Given the broad interpretation encouraged by the jurisprudence the court considers that residence would be sufficient as falling within "*other status*" for the purpose of Article 14.

[274] The real issue for the court relates to the third and fourth questions identified in **Stott**. Perhaps more fundamentally, the issue is identifying the difference of treatment relied upon by the applicants. Who are the people that are in an

analogous situation? Obviously all residents in Northern Ireland are in the same position. Do the applicants rely on residents in the remainder of the UK who are not subject to the Protocol as the group who had been treated differently? Are they the people relied upon as being in an analogous position? It is difficult to see how they would meet this definition. Referring to Lord Nicholls formulation it seems to the court that there is an obvious, relevant difference between the applicants and residents in Great Britain. They are not subject to the Protocol in the same way as residents in Northern Ireland are. Insofar as the Protocol has been enacted in UK law by a UK Parliament all residents of all parts of the UK had the same say in the approval and implementation of the Protocol through the vote their elected Member of Parliament could cast on whether to approve the Protocol or not. In terms purely of any A3P1 entitlement there is no differential treatment, never mind an identifiable group in an analogous position.

[275] However, if the court is wrong about this and given the overlap between the third and fourth stages it is worth considering the issue of justification. The jurisprudence suggests different tests for considering the question of justification. In **Stott** the court approved the approach of Lord Nicholls in **Carson**, that is whether the differentiation had a legitimate aim, whether the means chosen to achieve the aim were appropriate and not disproportionate in its adverse impact. More recent cases have pointed to the "*manifestly without reasonable foundation test*" in recognition of the wide margin which should be afforded to the legislature. In **DA and DS v Secretary of State for Work and Pensions** [2019] UKSC 21 the Supreme Court was dealing with the issue of the adverse effects of rules for entitlement to welfare benefits. The majority of the justices held that in relation to the government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question was whether it was manifestly without reasonable foundation; that when the government put forward its reasons for having countenanced the adverse treatment, it established justification for the measure unless the complainants could demonstrate that it was manifestly without reasonable foundation; and that it was for the court to proactively examine whether the foundation was reasonable.

[276] Whether a proportionality test or a manifestly without reasonable foundation test is applied the court concludes that any difference of treatment established has been justified by the respondent. It is clear from the history set out in this judgment that the government entered into an agreement with the EU to implement the result of the referendum. In negotiating the agreement as per Article 1 paragraph 3 of the Protocol essential elements of that agreement were "*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*."

[277] 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.

[278] 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.

Conclusion

[279] The court concludes therefore that there has been no breach of Article 14 in conjunction with A3P1. Judicial review on this ground is refused.

Breach of EU Law

[280] The applicants contend that the Protocol is invalid because it conflicts with EU law, in particular, Article 50 TEU and Article 10 TEU together with general principles of EU law.

[281] As has been set out already the Protocol became part of domestic law in this jurisdiction by way of section 7A of the 2018 Act with specific provisions of the Protocol being implemented pursuant to Regulations made under section 8C of the Act.

[282] The Withdrawal Agreement was made on 17 October 2019 and came into force in the UK at 11pm on 31 January 2020. This is because "Exit Day" which was initially meant to be 29 March 2019 was extended to 31 January 2020 by Regulation 2 of the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No.3) Regulations 2019. Under Article 127 of the Agreement union law is to be applicable to and in the United Kingdom during the transition period.

[283] Before that date EU law applied to both the EU and the United Kingdom which means that both parties were subject to the limitations imposed by EU law when making the Withdrawal Agreement.

[284] Section 7A gives legal affect to all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Withdrawal Agreement. The reference to from 'time to time' created it is submitted must mean 'lawfully' created. The applicants argue that if the Withdrawal Agreement itself contravenes EU law then section 7A and section 8C cannot lawfully implement the Protocol in domestic law.

[285] In what respects is it alleged the Agreement is in breach of EU law?

[286] Article 50 TEU provides for a member state deciding to withdraw from the union in accordance with its own constitutional requirements.

[287] Importantly, Article 50 paragraph 2 provides:

> *"2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament."*

Article 3 provides:

> *"3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."*

[288] It will be seen that Article 50(2) requires the Union to negotiate and conclude an agreement "*setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union*." From the text it is argued therefore that Article 50 is limited to setting out the arrangements for the withdrawal. In other words it is designed to put an end to a relationship but not to make provision for a future relationship.

[289] Mr Larkin argues that the parties fell into error when they recognised as per the recital to the Agreement:

> *"Acknowledging that, for an orderly withdrawal of the United Kingdom from the Union, it is also necessary to establish, in separate Protocols to this Agreement durable arrangements addressing the very specific situation in relation to Ireland/Northern Ireland and to the sovereign base areas in Cyprus."*

[290] In addition to including the arrangements for the future relationship with the Union the applicants argue that Article 50 contemplates only the departure of a State as a whole and cannot provide a legal basis for a part of a state to remain subject to EU laws as is the case under the Protocol.

[291] This is the first occasion upon which Article 50 has been invoked by a member state. It will be seen that on receipt of notice from the member state the Union "*shall negotiate and conclude an agreement with that state*." That agreement is to set out the arrangements for its withdrawal but there is nothing to prevent the Union negotiating a future arrangement with the departing member state. The UK

government and the EU negotiated such an agreement. Article 50 clearly envisaged a "framework for its future relationship with the Union" when a member state decides to withdraw. There is no reason why that framework could not include a formal agreement of the type entered into between the EU and the UK. The negotiation and ratification of that international treaty was made under the supervision of the constitutional orders of both parties. On the EU side the Agreement was concluded on behalf of the Union by the Council having obtained the consent of the European Parliament. In this regard, in passing, it is noted that this Agreement was actually voted for by the second applicant, Mr Habib, who now seeks to challenge the legality of the Agreement in these proceedings. Equally, the Withdrawal Agreement was approved by the relevant constitutional orders in the United Kingdom. The Treaty was concluded by the UK government who subsequently put the matter before Parliament by way of primary legislation as already described in the judgment.

[292] The applicants further say in relation to EU law that the Withdrawal Agreement is in breach of Article 10 of TEU and the general principles of EU law.

[293] Democracy and the rule of law are general principles of EU law. This is evident from the first recital to the EU Charter of Fundamental Rights and from cases such as **Maribel Dominguez v Centre Informatique du Centre Ouest Atlantique and Prefet de la Region Centre Case C-282/10**.

[294] This is underlined by Article 10.1 TEU which provides that "*the function of the Union shall be founded on representative democracy*."

[295] The applicants say that the position under the Protocol whereby some EU law is and will be applicable in Northern Ireland without prior democratic approval from the political community over which it exercises authority is therefore contrary to European law.

[296] This issue resonates with the discussion earlier in the judgment in relation to A3P1. Adopting that analysis, the fact that the Protocol and any existing EU law has been incorporated into domestic law by a statute of a constitutional character together with the protections provided for in the Protocol to include a democratic consent procedure and the infrastructure provided by way of the Joint Committee is consistent with the principles of the Rule of Law and democracy.

[297] On this issue, consistent with the court's analysis of the applicants' challenge the principle of Parliamentary sovereignty ultimately defeats this argument as well. 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.

Conclusion

[298] The court concludes that there has been no breach of EU law. Judicial review on this ground is refused.

The Peeples Case

[299] The Order 53 Statement in support of this application pleads multiple grounds challenging the legality of the Withdrawal Agreement and seeking multiple primary relief.

[300] In addition to the general challenge to the lawfulness and constitutionality of the respondent's decisions and actions in negotiating, implementing and operating the Withdrawal Agreement he also challenges the purported removal of the mechanism of the petition of concern in relation to the continuation of the Protocol by the 2020 Regulations.

[301] In the course of case management hearings in relation to a number of judicial review challenges to the Withdrawal Agreement and the Regulations it was agreed that the case of **Allister and others** would be the lead case at the subsequent hearing. A similar application brought by Lord Empey and others was discontinued because of the obvious overlap between the cases.

[302] The court considered whether it should grant leave in the **Peeples** case or whether that case should be left until the completion of a hearing in the Allister case. With some reluctance leave was granted to the applicant but it was agreed that at the hearing the court would only deal with points not raised in the **Allister** case.

[303] The applicant was given leave to amend his Order 53 Statement in light of the case management directions.

[304] As matters transpired there was a very significant, if not total overlap, between the two applications. Mr Lavery adopted Mr Larkin's submissions and the substance of the applicants' case has been dealt with in the judgment in relation to the **Allister** case.

[305] The court proposes to deal with the separate point raised by Mr Peeples. In short form the substantial additional point made by Mr Peeples is to the effect that rather than using the Good Friday/Belfast Agreement as an interpretative tool in considering the relationship between the Northern Ireland Act 1998 and the Withdrawal Acts, the relevant provisions of the Agreement have been incorporated into domestic law and are therefore justiciable.

[306] The Belfast Agreement is made up of two interlinked Agreements; the British Irish Agreement ("BIA") and the Agreement reached in the multi-party negotiations on 10 April 1998 (the "Multi-party Agreement"). Article 1(iii) of the BIA and

"constitutional issues" para 1(iii) of the multi-party Agreement by identical wording, provide that the British and Irish governments and the parties will:

> *"… acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people."*

[307] Mr Lavery argues that Article 1(iii) of the BIA has been incorporated into domestic law by Section 1 of the Northern Ireland Act 1998.

[308] Section 1 has already been set out in the judgment and as has been seen in accordance with the British Irish Agreement guarantees that Northern Ireland will remain part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland.

[309] As I have made clear in the judgment in the **Allister** case there is nothing in the Withdrawal Agreements that conflicts with section 1 of the Northern Ireland Act 1998. Mr Lavery however develops his argument by saying that the constitutional issues set out in para 1(iii) of the Multi-party Agreement are now incorporated in domestic law by reason of section 7A of the 2018 Act.

[310] Because the Protocol is an integral part of the Withdrawal Agreement and imposes "*liabilities, obligations and restrictions*" it is caught within the meaning of 7A(i) and is therefore enforceable in domestic law by reason of section 7A(ii).

[311] Article 1(1) of the Protocol provides:

> *"This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people."*

[312] Article 1(3) of the Protocol provides that it is designed "*to protect the 1998 Agreement in all its dimensions*."

[313] On this basis Mr Lavery argues that when the court considers the issue as to whether or not the Withdrawal Agreement conflicts with either section 1 or section 2 of the Northern Ireland Act it should carry out this interpretive task in light of the entirety of the Belfast Agreement.

[314] Section 10(1) provides:

> *"In exercising any of the powers under this Act, a Minister of the Crown or developed authority must:*
>
> *(a) Act in a way that is compatible with the terms of the Northern Ireland Act 1998, and*
>
> *(b) Have due regard to the joint report from the negotiators of the EU and United Kingdom government on progress during phase 1 of negotiations under Article 50 of the Treaty on European Union."*

[315] The requirement in section 10(1)(b) is to have "*due regard*" to the Joint Report. Paragraph 48 of the Joint Report provides that:

> *"The Good Friday or Belfast Agreement … must be protected in all its parts and that this extends to the practical application of the 1998 Agreement on the island of Ireland to the totality of the relationship set out in the Agreement."*

[316] For the reasons set out in the Allister judgment the court concludes that there has been no breach of either section 1 of the Northern Ireland Act 1998 or section 10 of the 2018 Act.

[317] The assessment of whether the provisions of the Withdrawal Agreement are consistent with the terms of the Good Friday/Belfast 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 Good Friday/Belfast Agreement. The political compromise involved is also reflected in the obligation in section 10(2) of the 2018 Act which provides:

> *"Nothing in section 8 … or 23(1)(vi) of this Act authorises regulations which:*
>
> *(a) Diminish any form of north/south co-operation provided for by the Belfast Agreement (as defined by section 98 to the Northern Ireland Act 1998) or*
>
> *(b) Create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which featured physical infrastructure, including border posts, or checks and controls, that did not exist before exit day and are not in accordance with an agreement between the United Kingdom and the EU."*

[318] In summary the court concludes that there is nothing in the Withdrawal Agreements which breaches section 1 of the 1998 Act or alters the constitutional position of Northern Ireland within the United Kingdom as understood by that Act, including the Good Friday/Belfast Agreement which led to its enactment. Furthermore, there is no basis for the court declaring the Protocol invalid by reason of any failure to comply with section 10 of the 2018 Act or that Parliament in passing the 2018 and 2020 Acts had not had due regard to the joint report between the UK and the EU.

[319] The court does not consider that the Good Friday/Belfast Agreement has been incorporated into domestic law. 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 Northern Ireland and the principle of consent and it sets out arrangements which are necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions of the north/south co-operation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions. Thus, the Article sets out the objectives of the Protocol but does 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.

Conclusion

[320] Accordingly, the application brought by Peeples for judicial review is dismissed.

Delay

[321] In the course of submissions Dr McGleenan argued that it is abundantly clear from the contentions in support of the applicants' case that the true target of the challenge is not to the 2020 Regulations but to the Withdrawal Agreement itself which includes the Protocol. The relief sought seeks to prevent the implementation of the Protocol which was a fundamental part of the Withdrawal Agreement as a whole in every respect.

[322] The text of the Withdrawal Agreement which includes the Protocol as an integral part was agreed and published on 19 October 2019. It was approved and implemented by Parliament on 23 January 2020 when it passed the European Union 2020 Act. It was signed on 24 January 2020 and ratified thereafter on 29 January 2020. In those circumstances any challenge to the Agreement or the negotiation of the Agreement should arguably have been brought within 3 months of that Agreement as required by Order 53 Rule 4. At the latest it should be 3 months post 29 January 2020. These proceedings were initiated on 5 March 2021.

[323] The applicants did not seek leave to extend time but rather argued that the Regulations which are challenged in the Order 53 Statement are unlawful because of the unlawfulness of the Agreement and the 2018 Act under which the Regulations

were made. They argue that because the Protocol itself was unlawful any attempt to give effect to it is equally unlawful.

[324] There is a real issue in relation to delay. The UK government and the EU which is comprised of 27 states have acted on the basis that the agreement was lawful and ratified by both parties. 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. This would be particularly relevant in relation to the relief sought by the applicants insofar as they seek declarations about the lawfulness of the Agreement itself.

[325] If the court's consideration was limited to the 2020 Regulations which seek to implement only Article 18 of the Protocol and it came to the conclusion that they were unlawful this would have the effect of denying the people of Northern Ireland any say in the continuation of Articles 5-10 of the Protocol through a vote in the Northern Ireland Assembly.

[326] It has not been necessary to determine the case on the basis of delay and the court has assessed the substance of the challenges made by the applicants.

Conclusion

[327] For the reasons set out above the applications by Allister and others and Peeples are both dismissed.