



Hilary Term
[2020] UKSC 2

JUDGMENT

A Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (Northern Ireland)

before

**Lady Hale
Lord Reed
Lord Kerr**

JUDGMENT GIVEN ON

5 February 2020

Heard on 27 November 2019

*Attorney General for
Northern Ireland*
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(Instructed by Office of
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Northern Ireland)

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LORD KERR: (with whom Lady Hale and Lord Reed agree)

1. This is an application by the Attorney General for Northern Ireland to refer to this court what is claimed to be a devolution issue. The reference is made under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998. In material part it provides:

“... the Attorney General for Northern Ireland ... may refer to the Supreme Court any devolution issue which is not the subject of proceedings.”

2. By virtue of paragraph 1(b) of Schedule 10, a devolution issue includes a question whether a purported or proposed exercise of a function by a Minister or Northern Ireland department is, or would be, invalid by reason of section 24 of the 1998 Act. And section 24, among other things, provides (in subsection 1(a)) that a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act is incompatible with any of the rights under the European Convention on Human Rights (“ECHR”).

3. By the Welfare Reform (Northern Ireland) Order 2015 (Commencement No 8 and Transitional and Transitory Provisions) Order 2017, the Secretary of State for Work and Pensions commenced a number of universal credit provisions for claims on or after 27 September 2017 where the claimant resides in an area known as “No 1 relevant districts.” Although it is for the Secretary of State to appoint the dates for commencement, he does so by a legislative technique which, the Attorney General contends, requires action by the Northern Ireland Department for Communities, which is one of the Northern Ireland ministerial departments. The 2017 Order defines the “No 1 relevant districts” as “the postcodes specified in the table in the List of the No 1 Relevant Districts.” It is the Department for Communities which must issue such lists. The same holds true for a second order made by the Secretary of State relating to “No 3 relevant districts” and “No 2 relevant districts.” The commencement order was drafted so that Universal Credit could come into effect if the Department published a list of postcodes, which postcodes together make up the district within which the benefit will commence.

4. The basis for the Attorney’s reference is his assertion that the universal credit provisions in question breach articles 8, 12 and 14 of the ECHR and article 1 of the first protocol to the ECHR and are therefore invalid per section 24 of the 1998 Act.

5. The Attorney General submits that a devolution issue arises because the provision of lists by the Department for Communities is necessary in order to give effect to the Secretary of State's commencement orders. The Department refutes this, contending that its role in issuing the relevant lists amounts to nothing more than providing administrative support to the Secretary of State. The commencement orders define the relevant territories by reference to lists of postcodes issued by the Department. The lists were not prepared, however, pursuant to any statutory or other power and do not have any independent legal force or effect, the Department says. They are incorporated by reference into the commencement orders and therefore have legal effects solely by reason of the act of the Secretary of State, not the act of the Department.

Discussion

6. Acts by the Secretary of State or by departments in Westminster do not come within the purview of section 24 of the 1998 Act. In order for a devolution issue to arise, therefore, it must be shown that an act has been carried out or a function has been discharged by a Northern Ireland Minister or a Northern Ireland department.

7. Section 1(1) of the Northern Ireland (Welfare Reform) Act 2015 stated that Her Majesty could make provision for, inter alia, social security and child support maintenance in Northern Ireland by way of an Order in Council. Section 1(2) stipulated that such an Order in Council could confer power on the Secretary of State or a Northern Ireland department to make regulations relating to such payments.

8. The Welfare Reform (Northern Ireland) Order 2015 was made on 9 December 2015, pursuant to the 2015 Act. Article 4 provides that until such date as appointed by the Secretary of State, "a function conferred on a Northern Ireland department" under the 2015 Order to make Regulations for social security and child support maintenance "is to be exercised by the Secretary of State rather than by the Northern Ireland department". It also provides that any statutory provision relating to social security and child support maintenance "may be exercised by the Secretary of State (as well as by the Northern Ireland department otherwise entitled to exercise the function)".

9. These provisions were deemed to be necessary because of disagreements over welfare reform among the Northern Ireland political parties. They were important, the department argued, because they concentrated the power to make regulations relating to welfare provision in the office of the Secretary of State. Actions taken by the Secretary of State could not constitute devolution issues. On one view, it would be anomalous that the provision of lists of postcodes, something

entirely ancillary to the introduction of the welfare provision reforms, could be used as a hook on which to hang the argument that a devolution issue arose.

10. The contrary view is that the provision of postcodes was indispensable to the effective introduction of the welfare reforms. Without them, the commencement orders could not operate. Conceivably, they could have been compiled by a Westminster department which would have rendered the act of preparing the lists immune from challenge as a devolution issue. But, in fact, they were not. A Northern Ireland department prepared the lists. Their existence was integral to the operation of the welfare reforms. The act of preparing the lists and providing them to the Secretary of State constituted an act for the purpose of section 24 of the 1998 Act.

11. It is, I believe, important to recognise that the distinct prohibitions in section 24 are disjunctive. Thus, it is forbidden to make, confirm or approve any subordinate legislation, *or to do any act*, so far as the legislation *or act* is incompatible with any of the Convention rights. The section comprehends, therefore, not only the enactment of subordinate legislation but also acts which may be ancillary or even incidental to that enactment. On a theoretical or technical level, therefore, the compiling of lists of postcodes and providing them as a means of facilitating the introduction of the commencement orders is an act or the discharge of a function under paragraph 1(b) of Schedule 10 to the 1998 Act.

12. Matters do not end there, however. Paragraph 2 of Schedule 10 to the 1998 Act provides that a devolution issue shall not be taken to arise in any proceedings merely because of any contention of a party to the proceedings which appears to the court or tribunal before which the proceedings take place to be frivolous or vexatious. It would be wrong to characterise the Attorney's application for a reference as "frivolous or vexatious" but it would be equally wrong to lose sight of two important and correlated aspects to the application. First, the application is not principally directed at the act of preparing the postcode lists on the basis that that act was incompatible with the ECHR. The avowed incompatibility is said to depend on its being shown that the introduction of Universal Credit is not compatible with the ECHR. The gravamen of the charge is not to the mode of introduction of the measure but to its impact. In *Attorney General for Northern Ireland's Reference* [2019] UKSC 1, this court held that where precisely the same issue as the Attorney sought to refer to this court as a devolution issue arose in pending proceedings in Northern Ireland, it was not appropriate to accept the reference. This court must retain a discretion whether to deal with a reference on a devolution issue where that issue is to be raised in proceedings where the actual claimed incompatibility of the measure occupies centre stage, as opposed to its appearance via a side wind as here. And it is, of course, the case that this issue will come before this court on appeal from a decision of the English Court of Appeal (*R (C) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615; [2019] 1 WLR 5687) which is due to be heard

on 20-22 October 2020. It will be open to the Attorney to apply to intervene in that appeal.

13. This leads to the second reason for refusing to accept the reference. The fundamental underpinning of the Attorney's case is that the *introduction of Universal Credit in Northern Ireland* is incompatible with the ECHR. It is *not* that a means of identifying the areas where it is to be introduced sequentially was incompatible. In this connection a passage from *Reed and Murdoch: Human Rights Law in Scotland*, 4th ed (2017) is instructive. At para 1.148 the authors state:

“Although the term ‘act’ has been given a wide construction, there remains the critical question whether the act is incompatible with the Convention rights. ... what is meant by ‘incompatible’ has proved to be a difficult question. Although it has been said on a number of occasions that the essence of the word ‘incompatible’ is that there is an inconsistency between one thing and another, that explanation does not resolve all the difficulties that have arisen. Whether an act is ‘inconsistent’ with a Convention right may not be obvious: it may not depend on a ‘but for’ causal test ... or involve a ‘remoteness’ test (ie whether any infringement of Convention rights will be the direct or proximate result of the act under challenge). Other approaches have been to ask whether the act under challenge is precluded by the Convention right in question, or whether the act involves an infringement of the Convention right. The latter formulations have the advantage of requiring analysis of the precise bearing of the Convention right, as understood in the Strasbourg and domestic jurisprudence, on the specific act under challenge, rather than falling back on concepts, such as those of causation or remoteness, borrowed from other areas of domestic law.”

14. The relative isolation of the “act” (in this case the compilation and the provision of the postcode lists) from the actual introduction of Universal Credit in the areas covered by them throws into stark relief the inappropriateness of regarding the preparation of the lists as an act sufficient to give rise to a devolution issue.

Conclusion

15. I would therefore refuse to accept the Attorney's application to refer this issue to the court under paragraph 34 of Schedule 10 to the 1998 Act.