Hilary Term
[2023] UKSC 5
On appeal from: [2022] NICA 15

JUDGMENT

In the matter of an application by James Hugh Allister and others for Judicial Review (Appellants) (Northern Ireland)
In the matter of an application by Clifford Peeples for Judicial Review (Appellant) (Northern Ireland)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Sales
Lord Stephens

JUDGMENT GIVEN ON
8 February 2023

Heard on 30 November and 1 December 2022

Appellants (James Hugh Allister and others)
John Larkin KC
Denise Kiley
(Instructed by Nelson Singleton)

Appellant (Clifford Peeples)
Ronan Lavery KC
Conan Fegan BL
(Instructed by McIvor Farrell Solicitors)

Respondent
Tony McGleenan KC
Philip McAteer BL
(Instructed by Crown Solicitor's Office (Belfast))

Appellants:

(1) James Hugh Allister
(2) Benyamin Naeem Habib
(3) Steve Aiken
(4) The Rt Hon Arlene Isobel Foster
(5) Baroness Catharine Hoey of Lylehill and Rathlin
(6) William David, The Rt Hon Baron Trimble of Lisnagarvey

LORD STEPHENS (with whom Lord Reed, Lord Hodge, Lord Lloyd-Jones and Lord Sales agree):

Introduction

1. The issues in these appeals relate to the lawfulness of the Protocol on Ireland/Northern Ireland ("the Protocol"). The Protocol formed part of the Withdrawal Agreement between the United Kingdom ("the UK") and the European Union ("the EU") under article 50(2) of the Treaty on European Union ("TEU") as to the arrangements for the UK's withdrawal from the EU.

2. Judicial review proceedings challenging the lawfulness of the Protocol were commenced in March 2021 by James Hugh Allister, Benyamin Naeem Habib, Baroness Catharine Hoey of Lylehill and Rathlin, Steve Aiken, the Rt Hon Arlene Isobel Foster, and the Rt Hon Baron Trimble of Lisnagarvey ("the first appellants") against the Secretary of State for Northern Ireland ("the respondent"). Earlier, in February 2021, Mr Clifford Peeples ("the second appellant") had also commenced judicial review proceedings challenging the lawfulness of the Protocol. Those proceedings were brought against the Prime Minister, the Secretary of State for Northern Ireland, and the Chancellor of the Duchy of Lancaster ("the respondents"). Both sets of proceedings were heard together and came before Colton J who, on 30 June 2021, dismissed both applications: [2021] NIQB 64. The first and second appellants appealed to the Court of Appeal which, on 14 March 2022, dismissed both appeals: [2022] NICA 15. Keegan LCJ, with whom Treacy LJ agreed, delivered the lead judgment and McCloskey LJ delivered a concurring judgment.

3. I will refer to the "first appellants" and "the second appellant" collectively as "the appellants." I will also refer to "the respondent" and "the respondents" collectively as "the respondents."

4. The appellants applied to the Court of Appeal pursuant to section 42(2) of the Judicature (Northern Ireland) Act 1978 for leave to appeal to the Supreme Court. On 25 April 2022, the Court of Appeal granted leave to appeal. However, the leave to appeal did not encompass all the issues argued before Colton J or before the Court of Appeal and was limited to three grounds.

5. To explain the three grounds of appeal, it is first necessary to set out in summary form the issues raised by the appellants before the lower courts and the conclusions of those courts in relation to each of those issues. At the end of a summary

in relation to each ground, I will set out the ground of appeal in relation to which the Court of Appeal gave leave to appeal to this court.

An outline of the conclusions of the lower courts, and the questions in respect of which the Court of Appeal gave leave to appeal to this court

(a) Ground one: Article VI of the Acts of Union 1800

6. Ground one relies on article VI in each of the Acts of Union 1800 ('the Acts of Union') which made provision for the Union of Great Britain and Ireland. Article VI of the Act of Union (Ireland) Act 1800 was enacted by the Irish legislature. The identical article VI in the Union with Ireland Act 1800 was enacted by the Westminster legislature. For convenience, when I refer in this judgment to article VI, I am referring to article VI in the two Acts of Union. Article VI provides:

> ""… [His] Majesty's subjects of Great Britain and *Ireland* shall from and after [1 January 1801] 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*" (Emphasis added).

Article VI contains two distinct limbs. The first part of article VI up to the semi colon can, for convenience, be termed "the trade limb" and the second part of article VI after the semi colon can, for convenience, be termed "the treaty limb."

7. In respect of the trade limb, the appellants contended that the Protocol has resulted in His Majesty's subjects of Great Britain and Northern Ireland not being on the "same footing" in respect of trade given, for instance, that the Protocol requires the payment of a tariff in respect of goods coming from Great Britain into Northern Ireland which are at risk of being moved to the EU. Colton J accepted that the Protocol conflicts with article VI of the Acts of Union in that the Protocol has resulted in His Majesty's subjects of Great Britain and Northern Ireland not being on the "same footing" in respect of trade. Colton J held at para 62 that:

> "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."

8. The respondents contended that even if the Protocol conflicted with the right in the trade limb of article VI for His Majesty's subjects of Great Britain and Northern Ireland to be on the "same footing" in respect of trade, that the effect of section 7A of the European Union (Withdrawal) Act 2018 ("the 2018 Act") suspended the effect of article VI for as long as the Protocol was in existence. The respondents argued that section 7A, which was inserted into the 2018 Act by section 5 of the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act"), made provision for the Withdrawal Agreement, which includes the Protocol, to be given effect in domestic law and for the disapplication of inconsistent or incompatible domestic legislation where it conflicts with the Withdrawal Agreement. Section 7A in so far as relevant provides:

> "(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)."

9. Colton J found at para 114 that "section 7A of the 2018 Act [overrides] 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."

10. The Court of Appeal addressed the question as to whether the Protocol has resulted in His Majesty's subjects of Great Britain and Northern Ireland not being on the "same footing" in respect of trade. Keegan LCJ raised two queries in relation to Colton J's finding that the Protocol conflicts with article VI of the Acts of Union. First, she touched on the issue, at paras 176-179, as to what is meant now by His Majesty's subjects of *Ireland* given the major constitutional changes which have occurred after the Acts of Union by the partition of Ireland under the Government of Ireland Act 1920 and by the creation of the Irish Free State in 1922. In that respect, Keegan LCJ referred to the majority speech of Viscount Dilhorne in the *Earl of Antrim and others* [1967] 1 AC 691, 719E which stated that "[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 ….". Second, Keegan LCJ also raised the issue at para 184 as to what was meant by "encouragements and bounties", thus raising the question as to "whether disruption to trade caused by provisions to preserve the UK internal market throughout the UK and protect the EU single market offends the same footing [provision] which relates to 'encouragements and bounties.'" Despite those queries, Keegan LCJ, at para 186, in agreement with Colton J, accepted that the Protocol had brought about "a difference in footing between the citizens of Northern Ireland and those in the remaining part of the United Kingdom in terms of trade" so that there was "some inconsistency" between the terms of article VI and the 2018 Act which incorporated the Protocol into domestic law. However, Keegan LCJ, at para 191, in agreement with Colton J, stated that "the language of section 7A is clear and unambiguous and provides a complete answer". Keegan LCJ held that the 2018 Act, which is the later statute, "takes precedence" over article VI of the Acts of Union. She stated that this "aligns with the core tenets of parliamentary sovereignty, … including the principle that Parliament cannot bind its successors." Accordingly, the Court of Appeal found, at para 193, that the "terms of article VI are subject to the Protocol and so are clearly modified to the extent and for the period during which the Protocol applies."

11. In respect of the treaty limb of article VI, the appellants contended that this imposes a statutory restriction on the exercise of the prerogative power to make a treaty that does not provide for His Majesty's subjects of Ireland having the same privileges and being on the same footing in respect of trade as His Majesty's subjects of Great Britain. It is accepted by the appellants that any limitation on the prerogative power is limited to the stage at which a treaty is *made* so that any limitation would not extend to the anterior stage during which negotiations are being conducted in relation to a prospective treaty. Furthermore, it is accepted by the appellants that the prerogative power to negotiate a treaty is non-justiciable. However, the appellants contend that as the Protocol, a treaty between the UK and the EU, did not provide for His Majesty's subjects of Ireland having the same privileges and being on the same footing in respect of trade as His Majesty's subjects of Great Britain, it was *made* contrary to the statutory restriction on the prerogative power to make a treaty, contained in the treaty limb of article VI. Accordingly, it is said that the Protocol is unlawful.

12. Colton J rejected this submission at paras 69-70. At para 69, he stated that the "ability of the government to make the Withdrawal Agreement must be seen in the context that it is now part of domestic law". He continued by stating that "an Act of Parliament has been passed which contains provision for the implementation of the Withdrawal Agreement." He added at para 71 that "[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." From this and from his conclusion at para 114, Colton J found that if there was any restriction on the prerogative power to make the Withdrawal Agreement (which included the Protocol) then the explicit will of Parliament by way of section 7A of the 2018 Act had modified that limitation in respect of the Withdrawal Agreement. In the Court of Appeal, Keegan LCJ also concluded, at para 202 that "some provisions of the Acts of Union found in article VI in relation to trade are now, in accordance with the sovereign will of Parliament, to be read and have effect subject to the terms of the later Act, the [2018 Act], which was necessary to effect the United Kingdom's exit from the EU." She stated that this "subjugation has been expressly provided for in the words of the [2018 Act] itself." The Court of Appeal dismissed the appellants' appeal in relation to the treaty limb of article VI of the Acts of Union.

13. In respect of ground one, the Court of Appeal gave leave to appeal to this court in relation to the question:

> "Did the Court of Appeal err in law by concluding that section 7A(3) of the European Union (Withdrawal) Act 2018, as

amended, lawfully modifies article VI of the Acts of Union 1800?"

(b) Ground two: section 1 of the Northern Ireland Act 1998

14. Ground two relies on section 1(1) of the Northern Ireland Act 1998 ("the NIA 1998") which declares the status of Northern Ireland as remaining a part of the UK. Section 1(1) of the NIA 1998 also declares that Northern Ireland shall not cease to be a part of the UK without the consent of a majority of the people of Northern Ireland and makes provision for a poll to be held in accordance with Schedule 1 of the same Act. The appellants contended that section 1(1) of the NIA 1998 does not just regulate whether Northern Ireland should remain part of the UK or become part of a united Ireland. Rather, the appellants argued that section 1 of the NIA 1998 protects the status of Northern Ireland and that any substantial diminution in that status can only occur if it has been approved in advance by a poll held in accordance with Schedule 1. The appellants further submitted that a substantial diminution in the status of Northern Ireland had been brought about by the Protocol which created a customs border within the UK between Great Britain and Northern Ireland. Accordingly, it was contended that the change to the status of Northern Ireland, effected by the Protocol, was unlawful as it ought not to have taken place without the agreement of a majority voting for it in a poll in Northern Ireland pursuant to section 1 of the NIA 1998.

15. Section 1 of the NIA 1998 provides:

> "(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."

16. The respondents, relying on the decision of this court in *R (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 ("*Miller No. 1*"), contend that section 1 of the NIA 1998 does not regulate any change in the constitutional status of Northern Ireland other than whether it remains part of the United Kingdom or becomes part of a united Ireland.

17. Colton J, in dismissing this ground of challenge, held, at para 127, that the decision of this court in *Miller No. 1* was binding and determinative. Keegan LCJ, in dismissing this ground of appeal, stated at para 222 that "section 1(1) of the NIA 1998 has no impact on the legality of the changes enacted by the [2018 Act] as amended and the Protocol." McCloskey LJ, in his concurring judgment stated, at para 410, that the decision in *Miller No. 1* was binding.

18. In respect of ground two the Court of Appeal gave leave to appeal to this court in relation to the question:

> "Did the Court of Appeal err in law by concluding that the aforementioned modification of Article VI of the Acts of Union 1800, insofar as lawful, does not effect a change in the constitutional status of Northern Ireland in conflict with section 1(1) of the Northern Ireland Act 1998?"

(c) Ground three: cross-community votes in the Assembly pursuant to section 42 of the NIA 1998 and whether the 2020 Regulations are lawful

19. Ground three is a challenge to the lawfulness of what I will term the 2020 Regulations, namely the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 (SI 2020/1500). The 2020 Regulations make provision for democratic consent in Northern Ireland to the continued application of articles 5 to 10 of the Protocol. One method of obtaining democratic consent is by way of a simple majority vote in the Northern Ireland Assembly. This method of obtaining democratic consent differs from the method for obtaining democratic consent set out in section 42 of the NIA 1998 in respect of other Assembly votes. Section 42 gives effect to the principle of cross-community support enabling decisions in the Assembly to be taken on a cross-community basis rather than by a simple majority vote. Section 42 achieves that purpose by what is termed a 'petition of concern' so that in relation to "a matter which is to be voted on by the Assembly", if 30 members petition the Assembly expressing their concern about a matter then the vote on that matter shall require cross-community support. However, the effect of the 2020 Regulations is that

a vote on the continued application of articles 5 to 10 of the Protocol can be passed by a simple majority rather than requiring cross-community support.

20. The 2020 Regulations achieved that effect by amending primary legislation, namely section 42 of the NIA 1998. The 2020 Regulations inserted section 56A and Schedule 6A into the NIA 1998. Schedule 6A makes provision for what is termed a "consent resolution" by which the Northern Ireland Assembly votes on whether articles 5 to 10 of the Protocol should continue to apply. Paragraph 18(5) of Schedule 6A provides that section 42 of the NIA 1998 "does not apply in relation to a motion for a consent resolution." The effect of paragraph 18(5) of Schedule 6A, as inserted into the NIA 1998 by the 2020 Regulations, is that a vote on a motion for a consent resolution can be passed by a simple majority rather than requiring cross-community support.

21. The 2020 Regulations were made on 9 December 2020 by the Secretary of State under the power contained in section 8C(1) and (2) of, and paragraph 21 of Schedule 7 to, the 2018 Act. The appellants contend that the enabling power contained in section 8C is limited by section 10(1)(a) of the 2018 Act to a power to make regulations which are compatible with the NIA 1998. The appellants contend that altering the applicability of section 42 of the NIA 1998 in respect of a motion for a consent resolution concerning the Protocol is incompatible with the NIA 1998. Accordingly, the appellants contend that by virtue of the limitation contained in section 10(1)(a) of the 2018 Act, the 2020 Regulations are ultra vires.

22. The appellants also mounted a further vires challenge to the 2020 Regulations on the basis that the Henry VIII delegated power contained in section 8C(2) of the 2018 Act to amend primary legislation should be construed narrowly in order that it does not enable the Secretary of State to change the fundamental constitutional principle contained in section 42 of the NIA 1998 regarding cross-community support in relation to Assembly votes following a petition of concern ("the Henry VIII challenge").

23. Colton J held at paras 189-190 that a decision "to end the application of articles 5 - 10 of the Protocol to Northern Ireland would come within the ambit of international relations" which is not a transferred or devolved matter within the legislative competence of the Assembly. Rather, the provision for democratic consent in Northern Ireland to the continued application of articles 5 to 10 of the Protocol was a "bespoke arrangement facilitating a vote by the Assembly under the control of the Secretary of State." Accordingly, the 2020 Regulations were compatible with the NIA 1998.

24. In relation to the Henry VIII challenge to the vires of the 2020 Regulations, Colton J held at para 202 that section 8C of the 2018 Act "included the power to make provision equivalent to that which could be made under an Act of Parliament" and he also held at para 206 that there was "little room for doubt about the scope of the power" contained in section 8C and it was not for the court to cut down that scope. Accordingly, as the 2020 Regulations were within the scope of the statutory power, the Henry VIII challenge to the vires of the 2020 Regulations failed.

25. Keegan LCJ dismissed the appeal in relation to the contention that the 2020 Regulations were outside the power to make regulations under section 8C of the 2018 Act because they were incompatible with section 42 of the NIA 1998 which gives effect to the principle of cross-community support. She held, at para 243, that there was no incompatibility because "the petition of concern was not intended for anything other than devolved matters" and that "section 42 … was designed to protect the rights of all by way of cross-community voting in devolved matters." As the conduct of making and implementing treaties by the UK government had not been transferred to the Assembly, the provisions of section 42 did not apply to a motion for consent resolution in respect of articles 5 to 10 of the Protocol and accordingly the 2020 Regulations were compatible with the NIA 1998.

26. Keegan LCJ also dismissed the appeal in relation to the Henry VIII challenge to the vires of the 2020 Regulations. At paras 230-232 she stated that wording of section 8C was "broad in scope" and that section 8C(2) mandated the amendment of primary legislation. Accordingly, the 2020 Regulations were made within the enabling power.

27. In respect of ground three, the Court of Appeal gave leave to appeal to this court in relation to the question:

> "Did the Court of Appeal err in law by concluding that the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020, which disapply section 42 of the Northern Ireland Act 1998 in a single, specific future context, were lawfully made as (a) the necessary vires is provided by section 8C(1)(a) of the European Union (Withdrawal) Act 2018 and (b) they are embraced by the "excepted matter" of international relations as specified in Schedule 2 to the Northern Ireland Act 1998?"

Factual background

28. I set out the factual background in some detail (a) to remind as to the intense and protracted parliamentary involvement in and focus on the arrangements for the withdrawal of the UK from the EU; see paras 36 to 47 below; (b) to demonstrate that the procedure for ratifying the treaty with the EU, namely the Withdrawal Agreement, differed from the normal parliamentary procedure set out in sections 20 – 25 of the Constitutional Reform and Governance Act 2010 ("the CRGA 2010"); (c) to demonstrate that the treaty between the UK and the EU, namely the Withdrawal Agreement, was made after the enactment of the 2020 Act; see paras 46 together with paras 48 and 49 below; and (d) to demonstrate that whilst ordinarily under our dualist system international law and domestic law operate in independent spheres, this treaty between the UK and the EU was to form part of UK law and give rise to legal rights and obligations in domestic law; see para 47 below together with para 8 above.

29. Before setting out the factual background, I should refer in summary form to our dualist system in relation to treaties and the usual procedure for ratifying treaties when it is not intended to incorporate the treaty into domestic law, so that it can be compared to what occurred in respect of the Withdrawal Agreement.

30. The prerogative power embraces the making of treaties but that power under our dualist system does not extend to altering the laws, or conferring rights upon individuals, or depriving individuals of rights which they enjoy in domestic law, without the intervention of Parliament. The dualist system is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power is to make and unmake treaties, but it does not extend to altering the law of the land.

31. If it is not intended to incorporate a treaty into domestic law, then the role of Parliament in relation to the ratification of treaties is limited and is now contained in sections 20-25 of the CRGA 2010. Section 20 of the CRGA 2010 provides that a treaty is not to be ratified unless a Minister of the Crown has laid before Parliament a copy of the treaty and a period of 21 days has expired without either of the Houses of Parliament having resolved that the treaty should not be ratified. If the House of Commons resolves that the treaty should not be ratified, then the treaty may be ratified if a Minister of the Crown has laid before Parliament a statement indicating that the Minister is of the opinion that the treaty should nevertheless be ratified and explaining why, and a further period of 21 days has expired without the House of Commons having resolved, within that period, that the treaty should not be ratified. However, if the House of Lords resolved that the treaty should not be ratified but the House of Commons did not, then the treaty may be ratified if a Minister of the Crown

has laid before Parliament a statement indicating that the Minister is of the opinion that the treaty should nevertheless be ratified and explaining why.

32. If it is intended to incorporate a treaty into domestic law, then legislation is required. In respect of the Withdrawal Agreement, it was intended that this be incorporated into domestic law. Accordingly, legislation was required and as the factual summary demonstrates, the relevant legislation was enacted.

33. On 23 June 2016, a referendum was held in the UK and Gibraltar on whether the UK should remain a member of the EU (pursuant to the European Union Referendum Act 2015). More than 33.5 million people, some 72% of registered voters, voted in the referendum and 52% of those who voted, voted to leave the EU.

34. Immediately after the referendum, Mr David Cameron resigned as Prime Minister. Mrs Theresa May was chosen as leader of the Conservative Party and took his place.

35. The machinery for leaving the EU is contained in article 50 TEU. This provides that any member state may decide to withdraw from the Union "in accordance with its own constitutional requirements". That member state is to notify the European Council of its intention. The Union must then negotiate and conclude an agreement with that member state, "setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union". The EU treaties will cease to apply to that state when the withdrawal agreement comes into force or, failing that, two years after the notification unless the European Council, in agreement with the member state, unanimously decides to extend this period.

36. On 2 October 2016, Mrs May announced her intention to give notice under article 50 before the end of March 2017. Mrs Gina Miller and others challenged her power to do so without the authority of an Act of Parliament. That challenge succeeded in *Miller No. 1*. Parliament responded by passing the European Union (Notification of Withdrawal) Act 2017, which received Royal Assent on 16 March 2017 and authorised the Prime Minister to give the notification. Mrs May did so on 29 March 2017.

37. That Parliament was dissolved on 3 May 2017 and a general election was held on 8 June 2017. The result was that Mrs May no longer had an overall majority in the House of Commons, but she was able to form a government because of a "confidence

and supply" agreement with the Democratic Unionist Party of Northern Ireland. Negotiations for a withdrawal agreement with the European Council proceeded.

38. Meanwhile, Parliament proceeded with some of the legislative steps needed to prepare United Kingdom law for leaving the EU. The 2018 Act came into force on 26 June 2018. In brief, it defined "exit day" as 29 March 2019, but this could be extended by statutory instrument: section 20. From that day, it repealed the European Communities Act 1972, the Act which had provided for our entry into what became the European Union, but it preserved much of the existing EU law as the law of the United Kingdom, with provision for exceptions and modifications to be made by delegated legislation. Crucially, section 13 required parliamentary approval of any withdrawal agreement reached by the Government. In summary, it provided that a withdrawal agreement may only be ratified if (a) a 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 relationship; (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. The provisions in section 13 are markedly different from the normal parliamentary procedure for ratifying a treaty; see paras 30 to 31 above. The starkest contrast is that a withdrawal agreement could not be ratified until an Act of Parliament had been passed.

39. On 14 November 2018, the Government published a draft of a withdrawal agreement (agreed at negotiator level). As prescribed by section 13 of the 2018 Act, this agreement was laid before Parliament on 26 November 2018. Also as prescribed by section 13, this agreement was subject to votes in the House of Commons, and was rejected on 15 January 2019 (by 432 to 202 votes), on 12 March 2019 (by 391 to 242 votes), and on 29 March 2019 (by 344 to 286 votes).

40. On 20 March 2019, the Prime Minister had asked the European Council to extend the notification period. This extension was granted only until 12 April 2019. However, on 8 April 2019, the European Union (Withdrawal) Act 2019 was passed. This required a Minister of the Crown to move a motion, that day or the next, that the House of Commons agrees to the Prime Minister seeking an extension to a specified date and, if the motion was passed, required the Prime Minister to seek that extension. Pursuant to that Act, the Prime Minister sought an extension, which on 10 April 2019 was granted until 31 October 2019. The Regulation changing the “exit day” was made the next day: European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No 2) Regulations 2019 (SI 2019/859).

41. On 24 July 2019, Mrs May resigned as Prime Minister. Mr Boris Johnson was chosen as leader of the Conservative Party and took her place. Mr Johnson committed to negotiating a new withdrawal agreement and negotiations for a new withdrawal agreement with the European Council proceeded.

42. On 17 October 2019, a new withdrawal agreement was agreed by European leaders at the European Council. On the same day, the Government made a unilateral declaration concerning the operation of the 'Democratic consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland, which was published on the same day.

43. On 19 October 2019, the Government laid before Parliament the new Withdrawal Agreement and new framework for the future relationship between the UK and the EU.

44. On 21 October 2019, the European Union (Withdrawal Agreement) Bill was introduced to Parliament. The Bill passed its second Reading in the House of Commons by 329-299 votes, but the House rejected the Government's proposed accelerated timetable to complete the remaining Commons stages of the Bill by Thursday 24 October 2019.

45. The European Union (Withdrawal Agreement) Bill lapsed on 6 November 2019 when Parliament was dissolved in preparation for the 2019 general election which was held on 12 December 2019. The result of the election was that the Conservative party had a commanding overall majority in the House of Commons, so Mr Johnson remained in government as Prime Minister.

46. The European Union (Withdrawal Agreement) Bill was reintroduced immediately following the general election and was the first Bill to be put before the House of Commons in the first session of the new Parliament. On 19 December 2019, MPs approved the Second Reading of the Bill by 358 to 234 votes. On 7 January 2020, the Bill then progressed to its Committee stage, where it was debated for two days. No new clauses or amendments were passed. The Bill passed its Report Stage and Third Reading. On Wednesday 22 January 2020, the Bill returned to the Commons from the Lords with five proposed amendments. These were all voted down. The Bill received Royal Assent on Thursday 23 January 2020, when it became the 2020 Act.

47. The 2020 Act made provision for the Withdrawal Agreement to form part of UK law and give rise to legal rights and obligations in domestic law. This was achieved by

section 5 of the 2020 Act which inserted section 7A into the 2018 Act. I have set out section 7A in para 8 above.

48. On 24 January 2020, Mr Johnson signed the Withdrawal Agreement on behalf of the UK.

49. On 29 January 2020, the Government ratified the Withdrawal Agreement.

50. The Withdrawal Agreement was ratified by the Council of the European Union on 30 January 2020, following the consent of the European Parliament on 29 January 2020.

51. The UK's withdrawal from the EU took effect on 11 pm GMT on 31 January 2020. The UK and EU then entered a transition period until 31 December 2020.

The appeal to this court in relation to ground one: Article VI of the Acts of Union

(a) Introduction to this ground of appeal

52. Under this ground of appeal, the appellants contend (a) that the Protocol conflicts with rights of a constitutional character contained in the trade limb of article VI of the Acts of Union and that section 7A of the 2018 Act does not repeal, amend, subjugate or modify those rights; and (b) that the Protocol, a treaty, was made in contravention of the statutory restriction on the exercise of the prerogative power to make a treaty contained in the treaty limb of article VI. The appellants state that the statutory restriction is on the making of any treaty unless His Majesty's subjects of Ireland shall have the same privileges and be on the same footing as to trade as His Majesty's subjects of Great Britain.

(b) The findings of the lower courts as to whether the Protocol conflicts with article VI of the Acts of Union

53. As I set out at para 7 above Colton J accepted that the Protocol conflicted with Article VI. On appeal the Court of Appeal accepted that there was "some inconsistency" between the Protocol and article VI: see para 10 above. Those findings apply with equal force to both the trade limb and the treaty limb of article VI.

(c) The absence of an appeal by the respondents in relation to the findings of the lower courts of a conflict or some inconsistency between the Protocol and article VI

54. The finding by Colton J that the Protocol conflicted with article VI which was upheld by the majority in the Court of Appeal on the basis that there is "some inconsistency" between the Protocol and article VI has not been appealed to this court by way of a respondents' notice. Accordingly, there is no issue in this court as to whether there is a conflict or some inconsistency between the Protocol and article VI. This also means that there is no issue before this court as to the two points raised by Keegan LCJ, namely (a) whether the reference in article VI to His Majesty's subjects of "Ireland" can now be read as referring to His Majesty's subjects of "Northern Ireland"; and (b) whether the words "encouragements and bounties" are apt to describe the differences in trade as between His Majesty's subjects of Great Britain and Northern Ireland brought about by the Protocol. Those two points may require to be considered on another occasion. For present purposes, however, I proceed on the basis that the Protocol does conflict with or has some inconsistencies with article VI of the Acts of Union.

(d) The approach of the lower courts as to the impact of section 7A of the 2018 Act

55. Colton J found, at para 114, that "section 7A of the 2018 Act [overrides] 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", see para 9 above.

56. Keegan LCJ, delivering the majority judgment in the Court of Appeal, held that the complete answer to the inconsistency between article VI and the Protocol was to be found in section 7A of the 2018 Act. Section 7A(3) provides that "[every] enactment is to be read and has effect" subject to legal rights and obligations contained in the Withdrawal Agreement which by virtue of section 7A(2) is incorporated into domestic law. Accordingly, as the Protocol is part of the Withdrawal Agreement, by virtue of section 7A(3) of the 2018 Act article VI of the Acts of Union are to be read and to have effect subject to the Protocol. The respondents had argued that section 7A of the 2018 Act suspended the effect of article VI for as long as the Protocol was in existence. However, Keegan LCJ preferred the concepts of modification and subjugation, as opposed to suspension, in relation to the effect of section 7A of the 2018 Act on article VI of the Acts of Union. She stated at para 193 that "[the] terms of article VI are subject to the Protocol and so are clearly modified to the extent and for the period during which the Protocol applies." She stated at para 194 that "The [2018 Act] is a modern statute which utilises clear language to achieve its purpose which is essentially subjugation in the event of any conflict with a previous enactment."

57. McCloskey LJ in his concurring judgment agreed, at para 391, that the answer to the conflict between the Protocol and article VI was to be found in section 7A of the 2018 Act. He preferred the concept of modification stating, at the same paragraph, that by virtue of section 7A "… Parliament has modified the effect of the relevant provisions of article VI for a finite period" (Emphasis in original).

(e) A summary of the appellants' submissions to this court in respect of the trade limb of article VI

58. On the hearing of this appeal, the appellants submitted that the Acts of Union were constitutional statutes so that the rights in the trade limb of article VI of His Majesty's subjects of Northern Ireland being on the same footing in respect of trade as His Majesty's subjects of Great Britain, could not be subject to repeal or to subjugation, modification, or suspension absent express or specific words in a later statute. In support of that submission, the appellants relied on a line of authorities starting with *Thoburn* v *Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151 for the proposition that whilst ordinary statutes may be impliedly repealed constitutional statutes may not. At para 63 of *Thoburn*, Laws LJ suggested that the repeal of a constitutional statute or the abrogation of a fundamental right could only be effected by a later statute 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 appellants submitted that the Acts of Union are constitutional Acts and that the rights to equal footing as to trade were fundamental rights so that there was no scope for implied repeal and by analogy there was no scope for implied subjugation, modification, or suspension.

(f) A summary of the appellants' submissions to this court in respect of the treaty limb of article VI

59. The appellants' submission in relation to the treaty limb of article VI is that the prerogative power to make the Protocol, a treaty, was restricted by the statutory provision contained in the treaty limb of article VI. Accordingly, it is submitted that when the UK Government made the Protocol, which was part of a treaty between the UK and the EU, and when the Protocol did not provide for His Majesty's subjects of Ireland having the same privileges and being on the same footing in respect of trade as

His Majesty's subjects of Great Britain, it was *made* contrary to the statutory restriction on the prerogative power to make a treaty, contained in the treaty limb of article VI. In this way, it is said that the Protocol is unlawful.

60. The appellants relied on the established and recognised principle that Parliament can impose restrictions on the exercise of the prerogative. That principle was clearly stated by this court in *Miller No. 1*. In the majority judgment, at para 55, it was stated:

> "*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" (Emphasis added).

As emphasised, the prerogative to make or unmake a treaty is "[subject] to any restrictions imposed by primary legislation". Furthermore, as explained at para 48 of the majority judgment in *Miller No. 1*, the ability of Parliament to curtail or abrogate a prerogative, however well-established it may be, is consistent with parliamentary sovereignty.

(g) A summary of the relevant trade terms of the Withdrawal Agreement and of the Protocol

61. Article 4.1 of the Withdrawal Agreement provides:

> "1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
>
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law."

In this way the Withdrawal Agreement makes provision for its direct application in Union law and in UK domestic law. It also makes provision for legal or natural persons being able to rely directly on the provisions of the Withdrawal Agreement in certain circumstances.

62. Article 4.2 of the Withdrawal Agreement provides:

> "2. The United Kingdom shall ensure compliance with 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."

In this way the UK Government shall ensure the disapplication of inconsistent or incompatible domestic provisions through primary legislation. The UK Government fulfilled this obligation by enacting section 7A of the 2018 Act.

63. Article 5(3) of the Protocol provides:

> "Legislation as defined in point (2) of Article 5 of Regulation (EU) No 952/2013 shall apply to and in the United Kingdom in respect of Northern Ireland (not including the territorial waters of the United Kingdom)."

Regulation (EU) No 952/2013 establishes the Union Customs Code ("the code"), laying down the general rules and procedures applicable to goods brought into or taken out of the customs territory of the Union. Point (2) of article 5 defines "customs legislation" as, for instance, meaning "the body of legislation made up of … (a) the Code and the provisions supplementing or implementing it …." In this way article 5(3) of the Protocol provides for the application of the code to and in the United Kingdom in respect of Northern Ireland. However, Article 5(1) provides:

> "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."

In this way the customs duties payable under the code apply to goods brought into Northern Ireland from another part of the United Kingdom by direct transport if those goods are at risk of subsequently being moved into the Union.

(h) Conclusion in relation to the trade limb of article VI

64. Given the absence of any respondents' notice, the starting point is that the Protocol conflicts with or has "some inconsistency" with the trade limb of article VI. However, I consider that the answer to the question as to how the conflict or inconsistency is to be resolved has been answered by Parliament in section 7A of the 2018 Act, which section, in so far as relevant I have set out at para 8 above.

65. Section 7A(1) provides that section 7A(2) applies to, amongst others, "all such … obligations and restrictions from time to time created or arising by or under the withdrawal agreement." The Protocol, which is a part of the Withdrawal Agreement, imposes restrictions on, for instance goods, brought into Northern Ireland from another part of the United Kingdom by direct transport if those goods are at risk of subsequently being moved into the Union. The restriction imposed is that customs duties must be paid under the code in respect of those goods. The obligation is that those customs duties must be collected. Section 7A(2) then provides that the "… obligations [and] restrictions" are to be "(a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly." Section 7A(3) then expressly provides that "[every] enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)." Section 20 of the 2018 Act defines "enactment" as meaning "an enactment whenever passed or made." The Acts of Union are clearly enactments so that the terms of the trade limb of article VI is subject to the obligations and restrictions in the Protocol as incorporated into domestic law by section 7A(2). Consequently, article VI is modified to the extent and for the period during which the Protocol applies. I say for the period during which the Protocol applies as, for instance, articles 5 to 10 of the Protocol are subject to a process of democratic consent so that if those articles do not obtain democratic support they will cease to apply; see para 97 below.

66. The debate as to whether article VI created fundamental rights in relation to trade, whether the Acts of Union are statutes of a constitutional character, whether the 2018 and 2020 Acts are also statutes of a constitutional character, and as to the correct interpretative approach when considering such statutes or any fundamental rights, is academic. Even if it is engaged in this case, the interpretative presumption that Parliament does not intend to violate fundamental rights cannot override the clearly expressed will of Parliament. Furthermore, the suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words

in a later statute. The most fundamental rule of UK constitutional law is that Parliament, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme. A clear answer has been expressly provided by Parliament in relation to any conflict between the Protocol and the rights in the trade limb of article VI. The answer to any conflict between the Protocol and any other enactment whenever passed or made is that those other enactments are to be read and have effect subject to the rights and obligations which are to be recognised and available in domestic law by virtue of section 7A(2).

67. The modification of article VI of the Acts of Union does not amount to a repeal of that article. The Acts of Union and article VI remain on the statute book but are modified to the extent and for the period during which the Protocol applies.

68. The debate as to whether the effect of article VI was suspended or modified or subjugated for as long as the Protocol was in existence is not of real significance. The effect of the statutory language is that article VI is "subject to" the Protocol. However, the Protocol does not cover all aspects of trade between His Majesty's subjects of Ireland and His Majesty's subjects of Great Britain. Accordingly, the subjugation of article VI is not complete but rather article VI is modified in part. Furthermore, the subjugation is not for all time as the Protocol is not final or rigid so that those parts which are modified are in effect suspended.

69. I would dismiss the ground of appeal in relation to the trade limb of article VI.

(i) Conclusion in relation to the treaty limb of article VI

70. Without deciding the point, I proceed on the assumption that article VI does impose a statutory restriction on the exercise of the prerogative power to make a treaty that does not provide for His Majesty's subjects of Northern Ireland having the same privileges and being on the same footing in respect of trade as His Majesty's subjects of Great Britain.

71. Given the lack of any respondents' notice, I will also proceed on the basis that the Protocol, a part of a treaty entered between the UK and the EU did not provide for His Majesty's subjects of Northern Ireland having the same privileges and being on the same footing in respect of trade as His Majesty's subjects of Great Britain.

72. It is correct that a sovereign Parliament may restrict, curtail, or abrogate a prerogative power, see para 63 above. However, the other side of this coin is the

principle that a sovereign Parliament may authorise the exercise of the prerogative power to make a treaty and it may do so by a later statute even if there is a statutory restriction contained in earlier legislation.

73. I reject the appellants' submission that the Protocol was made in contravention of a statutory restriction on the exercise of the prerogative power. The short answer is that a sovereign Parliament by enacting the 2020 Act authorised the making of the Withdrawal Agreement (which included the Protocol). Authorisation can be discerned from the long title of the 2020 Act which states that it is:

> "An Act to *implement*, and make other provision in connection with, *the agreement between the United Kingdom and the EU* under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU" (Emphasis added).

To *implement* the *agreement between the UK and the EU*, the Government must first make that agreement. The clear intention of Parliament was to authorise the Government to exercise the prerogative to make the Withdrawal Agreement, including the Protocol.

74. The 2020 Act made provision for the Withdrawal Agreement to form part of UK law and give rise to legal rights and obligations in domestic law. This was achieved by section 5 of the 2020 Act which inserted section 7A into the 2018 Act. Again, it is obvious that for the Withdrawal Agreement to form part of UK law the Government must first make that agreement. Again, the clear intention of Parliament was to authorise the Government to exercise the prerogative to make Withdrawal Agreement, including the Protocol.

75. I would observe that parliamentary authorisation for the exercise of the prerogative power to make the Withdrawal Agreement came after intense and protracted Parliamentary involvement in and focus on the arrangements for the withdrawal of the UK from the EU (for which see paras 36 to 47 above).

76. Furthermore, I would observe that the Withdrawal Agreement was made after Parliament had authorised the making of the treaty with the EU. The authorisation was in the 2020 Act which was enacted on 23 January 2020. The Withdrawal Agreement was signed by Mr Johnson on 24 January 2020 and was ratified by the Government on 29 January 2020.

77. The fulfilment of a purpose of the 2020 Act, incorporating the Withdrawal Agreement as part of UK law, was made possible by the UK's ratification of it on 29 January 2020 and the EU's ratification on 30 January 2020. In accordance with that purpose, the direct application of the Withdrawal Agreement provisions in domestic law under section 7A of the 2018 Act came into force on 31 January 2020, which was exit day. There was no need for section 7A to come into force any earlier (and indeed it could not do so, since it was only on that date that section 7A could replace the European Communities Act 1972 arrangements which ceased to have effect on the same date). Accordingly, the purpose of incorporating the Withdrawal Agreement as part of domestic law was fulfilled on exit day and it could only have been fulfilled by virtue of parliamentary authorisation of the exercise of the prerogative to make the Withdrawal Agreement.

78. I would dismiss the ground of appeal in relation to the treaty limb of article VI.

(j) Overall conclusion in relation to this ground of appeal

79. I would dismiss this ground of appeal in relation to both the trade limb and the treaty limb of article VI. I would answer in the negative the question in relation to which the Court of Appeal gave leave; see para 13 above.

The appeal to this court in relation to ground two: section 1 of the NIA 1998

80. Under this ground of appeal, the appellants contend that section 1(1) of the NIA 1998 does not only regulate whether Northern Ireland should remain part of the UK or become part of a united Ireland. Rather, the appellants contend for a wider meaning of that section so that it protects the status of Northern Ireland, with the consequence that any substantial diminution in that status can only occur if it has been approved in advance by a poll held in accordance with Schedule 1 of the NIA 1998. The appellants further submit that a substantial diminution in the status of Northern Ireland had been brought about by the Protocol which has created a customs border within the UK between Great Britain and Northern Ireland. Accordingly, it is submitted that the change to the status of Northern Ireland, effected by section 7A of the 2018 Act which made the provisions of the Protocol part of domestic law, was unlawful as the change in status ought not to have taken place without the agreement of a majority voting for it in a poll in Northern Ireland pursuant to section 1 of the NIA 1998.

81. Section 1 of the NIA 1998 was considered by this court in *Miller No. 1*. The background to the decision in *Miller No. 1* was that following the enactment of the

European Union Referendum Act 2015 and the subsequent referendum held in June 2016, the Government proposed to serve notice of withdrawal from the EU under article 50 TEU on the basis that it had power under the Royal Prerogative to do so. The central issue was whether notification could lawfully be made without authorisation by an Act of Parliament, on the ground that the prerogative could not be used to change domestic law of the United Kingdom and since the effect of withdrawal would be to remove rights currently enjoyed under that law, there was no power under the prerogative to give notification under article 50 TEU, which was irreversible.

82. In addition to that central issue, a further issue was raised in judicial review proceedings brought in Northern Ireland by Raymond McCord against the Secretary of State for Exiting the EU and the Secretary of State for Northern Ireland. In those proceedings, relying on section 1 of the NIA 1998 and a legitimate expectation said to be derived from it, and from the Belfast Agreement, it was submitted on behalf of Mr McCord that notice of withdrawal could not be served without the consent of the people of Northern Ireland. That submission was rejected by Maguire J in a judgment given on 28 October 2016: *In re McCord* [2016] NIQB 85; [2017] 2 CMLR 7. Following an appeal against Maguire J's decision, the Northern Ireland Court of Appeal referred to this court the devolution question as to:

> "whether the triggering of article 50 TEU by exercise of the prerogative without the consent of the majority of the people of Northern Ireland impedes the operation of section 1 of the Northern Ireland Act 1998?"

83. At para 134 of the joint judgment of Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, and Lord Hodge, section 1 of the NIA 1998 was set out and the answer to that question was given in the negative. At para 135 the reason for the negative answer was given as follows:

> "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. Contrary to the submission of Mr Lavery QC for Mr McCord, this section cannot support any legitimate expectation to that effect."

All 11 justices in *Miller No. 1* agreed with that negative answer and with the reasoning in para 135.

84. In *Miller No. 1*, this court unanimously held that section 1 of the NIA 1998 does not regulate any change in the constitutional status of Northern Ireland other than the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland. There is no reason to depart from the decision in *Miller No. 1* which is dispositive of this ground of appeal. The appellants' submission as to a wider meaning of section 1 of the NIA 1998 is incorrect.

85. I would dismiss this ground of appeal and I would answer in the negative the question in relation to which the Court of Appeal gave leave; see para 18 above.

The appeal to this court in relation to ground three: cross-community votes in the Assembly pursuant to section 42 of the NIA 1998 and whether the 2020 Regulations are lawful

(a) Introduction

86. Under this ground of appeal, the appellants contend that the 2020 Regulations were not lawfully made.

87. The 2020 Regulations were made by the Secretary of State under the power contained in section 8C(1) and (2) of, and paragraph 21 of Schedule 7 to, the 2018 Act. The 2020 Regulations make provision for various methods by which democratic consent can be obtained in Northern Ireland to the continued application of articles 5 to 10 of the Protocol. The appellants contend that the enabling power to make the 2020 Regulations contained in section 8C of the 2018 Act is limited by section 10(1)(a) of that Act to a power to make regulations which are compatible with the NIA 1998. The appellants argue that as the 2020 Regulations set aside the provision in section 42 of the NIA 1998 enabling decisions to be taken on a cross-community basis that the 2020 Regulations are not compatible with the NIA 1998 and are ultra vires accordingly.

88. The principal submission on behalf of the respondents is that the continued application of articles 5 to 10 of the Protocol is a paradigm example of a matter of international relations between the UK and the EU. Under paragraph 3 of Schedule 2 to the NIA 1998, international relations are an excepted matter and not within the devolved legislative competence of the Assembly. The respondents submit that section 42 of the NIA 1998, which provides for cross-community votes in the Assembly, is

solely concerned with votes in relation to matters within the devolved legislative competence of the Assembly. Accordingly, it is submitted, that as a vote in relation to the continued application of articles 5 to 10 of the Protocol is not within the devolved legislative competence of the Assembly, there is no requirement in section 42 for a cross-community vote. In this way, the 2020 Regulations are said to be compatible with section 42 of the NIA 1998 and not in breach of any limitation in section 10(1)(a) of the 2018 Act on the power in section 8C(1) and (2) of that Act to make regulations.

89. In response to these submissions, it is pointed out on behalf of the appellants, that the plain wording of section 42, which I have set out in para 15 above, is that the petition of concern mechanism applies to "a matter which is to be voted on by the Assembly". Accordingly, it is asserted that the petition of concern mechanism relates to all matters to be voted on by the Assembly, regardless as to whether they are or are not within legislative competence. In addition, one of the appellants, Mr Allister in para 6 of his second affidavit, states that in practice the Assembly does vote on matters outside legislative competence and that the petition of concern mechanism has been used in respect of votes on those matters. He gives an example of such a vote being in respect of a motion of 4 June 2009 calling on Israel to take action desired by the proposer. Furthermore, the appellants call in aid the Standing Orders of the Assembly which do not prevent debating and voting about matters outside the legislative competence of the Assembly. Accordingly, it is submitted by the appellants that to restrict the petition of concern mechanism in section 42 to a vote within legislative competence is contrary to the clear wording of that section and not in accordance with the established practice of the Assembly. Furthermore, it would involve adding in words to section 42 which simply are not there.

90. The appellants also relied on their Henry VIII challenge to the 2020 Regulations under which it is contended that a restrictive interpretation should be applied to the Regulations; see para 22 above.

(b) The Protocol and the unilateral declaration

91. In the negotiations which led to the making of the Withdrawal Agreement, which includes the Protocol, it was recognised by both the UK and the EU that provision should be made for democratic consent in Northern Ireland to the application of Union law to ensure democratic legitimacy. Accordingly, the Protocol made provision in article 18 for democratic consent in Northern Ireland.

92. Before setting out some of the other terms of article 18 it is relevant to note that by virtue of article 18(2) the modalities for determining democratic consent must

be strictly in accordance with those set out in the unilateral declaration made by the United Kingdom on 17 October 2020, including with respect to the roles of the Northern Ireland Executive and Assembly. The consequence, which is expressly recognised in the unilateral declaration, is that the modalities for determining democratic consent must be in accordance with those in the declaration.

93. Article 18(1) of the Protocol provides that:

> "Within 2 months before the end of both the initial period and any subsequent period, the United Kingdom shall provide the opportunity for democratic consent in Northern Ireland to the continued application of Articles 5 to 10."

The initial period is defined in article 18(5) as being "the period ending 4 years after the end of the transition period." The transition period ended on 31 December 2020 so under article 18(1) the first opportunity for democratic consent shall be provided within two months before 31 December 2024.

94. Under article 18(1) the opportunity for democratic consent has also to be provided within two months of the end of any subsequent period. The length of the subsequent period depends on whether the decision reached in a given period was on the basis of a majority of Members of the Northern Ireland Assembly, present and voting, or on whether the decision reached in any given period had cross-community support. In the case of a decision based on a majority vote, the subsequent period is four years and in the case of decision based on cross-community support, the subsequent period is eight years; see article 18(5).

95. Article 18(6) defines cross-community support as being:

> "(a) a majority of those Members of the Legislative Assembly present and voting, including a majority of the unionist and nationalist designations present and voting; or (b) a weighted majority (60%) of Members of the Legislative Assembly present and voting, including at least 40% of each of the nationalist and unionist designations present and voting."

96. The requirement for an opportunity for democratic consent recurs at the end of each subsequent period "for as long as articles 5 to 10 continue to apply."

97. Article 18(4) makes provision for the consequence if the outcome of the process for democratic consent is not a decision that articles 5 to 10 should continue to apply in Northern Ireland. article 18(4) provides that "then those articles and other provisions of this Protocol, to the extent that those provisions depend on those articles for their application, shall cease to apply 2 years after the end of the relevant period…." The relevant period is either the initial period or the subsequent period. However, article 18(4) makes provision for recommendations from the Joint Committee on the necessary measures to be taken given that articles 5 to 10 will cease to apply. The recommendations must take into account the obligations of the parties to the 1998 Belfast Agreement.

98. The unilateral declaration sets out the modalities for determining democratic consent. It contains a UK undertaking to reflect as necessary in the legislation of the United Kingdom the commitments in respect of the democratic consent mechanism set out in the declaration. There then follows in the unilateral declaration a detailed undertaking by the UK to provide for a democratic consent process that includes a vote to be held in the Northern Ireland Assembly on the basis of a majority of those present and voting (see para 3(b)). Accordingly, Article 18(2) of the Protocol, read with the unilateral declaration, creates an "obligation" under the Withdrawal Agreement on the UK Government to legislate for a democratic consent process which enables a decision in relation to the continued application of articles 5 to 10 of the Protocol on the basis of a majority of Members of the Northern Ireland Assembly, present and voting.

(c) The power to make regulations and section 42 of the NIA 1998

99. The UK's obligation under article 18 of the Protocol and under the unilateral declaration to legislate for a democratic process in relation to the continued application of articles 5 to 10 of the Protocol was met by way of 2020 Regulations made under section 8C(1) and (2) of, and paragraph 21 of Schedule 7 to, the 2018 Act.

100. The pertinent enabling provision is section 8C which in so far as relevant provides:

> "(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate—
>
> (a) to implement the Protocol on 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 and the Protocol).

(2) Regulations under subsection (1) may make any provision that could be made by an Act of Parliament (including modifying this Act).

…

(5) Regulations under subsection (1) may (among other things) restate, for the purposes of making the law clearer or more accessible, anything that forms part of domestic law by virtue of section 7A and the Protocol.

…

(7) In this section any reference to the Protocol on Ireland/Northern Ireland includes a reference to—

(a) any other provision of the withdrawal agreement so far as applying to the Protocol, and

(b) any provision of EU law which is applied by, or referred to in, the Protocol (to the extent of the application or reference), but does not include the second sentence of article 11(1) of the Protocol (which provides that the United Kingdom and the Republic of Ireland may continue to make new arrangements that build on the provisions of the Belfast Agreement in other areas of North-South cooperation on the island of Ireland)."

101. Section 10 of the 2018 Act under the heading "Protection for North-South co-operation and prevention of new border arrangements" provides in section 10(1)(a) that:

> "(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,"

Accordingly, in making regulations under section 8C of the 2018 Act the Secretary of State must act in a way that is compatible with the terms of the NIA 1998.

102. The term of the NIA 1998 which the appellants contend is incompatible with the 2020 Regulations is section 42 of the NIA 1998. Section 42(1) provides that:

> "(1) If a petition expressing concern about a matter which is to be voted on by the Assembly is—
>
> (a) presented to the Assembly by 30 members, and
>
> (b) on the day after the consideration period, confirmed by 30 members, the vote on that matter requires cross-community support."

Accordingly, there are two stages in relation to a petition of concern. First, presentation of the petition and then confirmation of it on the day after the consideration period. Section 42(8) provides that the consideration period means the period of 14 days beginning with the day on which the petition is presented. Section 42(6) provides that standing orders must make provision with respect to the procedure to be followed in presenting and confirming a petition under this section.

(d) The 2020 Regulations

103. Paragraph 8F(1) of Schedule 7 to the 2018 Act stipulates that a statutory instrument containing regulations under section 8C(1) which amends, repeals, or revokes primary legislation may not be made unless a draft of the instrument has been

laid before, and approved by a resolution of, each House of Parliament. In accordance with that paragraph, a draft of the 2020 Regulations was laid before and approved by a resolution of each House of Parliament. The Secretary of State then made the 2020 Regulations in exercise of the powers conferred by section 8C(1) and (2) of, and paragraph 21 of Schedule 7 to, the 2018 Act.

104. The 2020 Regulations inserted section 56A and Schedule 6A into the NIA 1998. Schedule 6A makes provision for what is termed a "consent resolution" by which the Northern Ireland Assembly votes on whether articles 5 to 10 of the Protocol should continue to apply.

105. The new Schedule 6A makes detailed provisions in relation to a consent resolution including, for instance, prescribing the form of the resolution under paragraph 2 of Schedule 6A so that there can be no disagreement as to the issue subject to democratic consent. Another instance is that paragraph 16 of Schedule 6A provides for the election of an interim Presiding Officer so that a consent resolution can still take place if the Assembly has not elected from its members a Presiding Officer or any deputy or deputies. Paragraph 16(2) provides that the Assembly must elect from among its members an interim Presiding Officer. Ordinarily, section 39(7) of the NIA 1998 provides that a person shall not be elected as a Presiding Officer without cross-community support. However, paragraph 16(3) of Schedule 6A provides that neither section 39 nor section 42 of the NIA 1998 applies to the election of the interim Presiding Officer (nor is the election of any deputy or deputies required).

106. Paragraph 18(5) of Schedule 6A provides that section 42 of the NIA 1998 "does not apply in relation to a motion for a consent resolution." The effect of paragraph 18(5) of Schedule 6A, as inserted into the NIA 1998 by the 2020 Regulations, is that a vote on a motion for a consent resolution can be passed by a simple majority rather than requiring cross-community support.

(e) Conclusion in relation to this ground of appeal

107. I acknowledge the potential force of the appellants' argument that section 42 of the NIA 1998 applies to "a matter which is to be voted on by the Assembly" so that a vote on a matter which is outside legislative competence is still within the terms of section 42. However, it is not necessary to determine whether this argument is correct because it does not engage with the anterior stage, namely whether section 42 of the NIA 1998 had already been modified by section 7A of the 2018 Act so that the 2020 Regulations were compatible with the NIA 1998 as modified by that section. I consider that the correct starting point is section 7A of the 2018 Act to determine the

modifications that had already been implemented in respect of the NIA 1998 and thereafter to consider under section 10(1)(a) whether the 2020 Regulations are compatible with the NIA 1998 as modified. I consider that if one starts with section 7A of the 2018 Act, which I have set out in para 8 above, then the 2020 Regulations are not incompatible with section 42 of the NIA 1998, meaning that they are within the power to make regulations under section 8C of the 2018 Act.

108. Article 18 of the Protocol, read with the unilateral declaration, which is incorporated into article 18, creates an "obligation" on the UK Government under the Withdrawal Agreement within section 7A(1)(a) of the 2018 Act. The obligation which has been created is to legislate not only to provide the opportunity for democratic consent in Northern Ireland to the continued application of articles 5 to 10 of the Protocol but also to legislate "strictly in accordance" with the modalities contained in the unilateral declaration. This "obligation" on the UK Government which was created under the Withdrawal Agreement is by virtue of section 7A(2) "to be (a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly." Section 7A(3) then provides that every enactment "is to be read and has effect subject to [section 7A(2)]." In this way the NIA 1998, being an enactment, is to be read and has effect subject to the "obligation" on the UK government to legislate for the modalities set out in the Protocol and in the unilateral declaration for determining democratic consent in Northern Ireland to the continued application of articles 5 to 10. Those modalities include a decision based on "a majority of Members of the Northern Ireland Assembly, present and voting", see para 5 of the Protocol and para 3(b) of the unilateral declaration. Accordingly, section 42 of the NIA 1998, which makes provision for cross-community voting in the Assembly, is to be read and has effect subject to the "obligation" on the UK Government to legislate for a democratic consent process based a simple majority of those Members of the Assembly present and voting. Section 7A(3) of the 2018 Act had the effect of modifying section 42 of the NIA 1998 in respect of any legislation by the UK government to provide the opportunity for democratic consent in Northern Ireland to the continued application of articles 5 to 10 of the Protocol. Given that section 42 of the NIA 1998 had already been modified by section 7A(3) of the 2018 Act, there was no incompatibility between the 2020 Regulations and section 42. I would dismiss this aspect of the appellants' challenge to the 2020 Regulations.

109. The appellants also mounted a further vires challenge to the 2020 Regulations on the basis that the Henry VIII delegated power contained in section 8C(2) of the 2018 Act to amend primary legislation should be construed narrowly in order that it does not enable the Secretary of State to change the fundamental constitutional principle contained in section 42 of the NIA 1998 regarding cross-community support in relation to Assembly votes following a petition of concern ("the Henry VIII challenge"). I can deal with this challenge in brief terms. In *McKiernon v Secretary of State for Social*

Security, The Times, 1 November 1989; Court of Appeal (Civil Division) Transcript No 1017 of 1989, Judgment 16 October 1989, Lord Donaldson of Lymington MR said:

> "… 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."

This principle was endorsed by the House of Lords in *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 WLR 198, 204. However, as Lord Bingham stated in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme* [2001] 2 AC 349, 383 "… it is an approach which is only appropriate where there is a genuine doubt about the effect of the statutory provision in question." The statutory provision in question in this appeal is section 8C of the 2018 Act. Section 8C(2) provides that:

> "Regulations under subsection (1) may make any provision that could be made by an Act of Parliament (including modifying this Act)."

There is no "genuine doubt about the effect" of section 8C. Rather, it is clear from the terms of section 8C(2) that Parliament has conferred the power by regulations made under section 8C(1) to amend primary legislation. I would dismiss this aspect of the appellants' challenge to the 2020 Regulations.

110. I would dismiss this ground of appeal and I would answer in the negative the question in relation to which the Court of Appeal gave leave; see para 27 above.

Conclusion

111. I would dismiss all the grounds of appeal and answer in the negative all the questions in relation to which the Court of Appeal gave leave.