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(subject to editorial corrections)\**

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
BY HELEN McMAHON

AND IN THE MATTER OF THE EXERCISE OF THE SECRETARY OF STATE'S  
PURPORTED POWERS UNDER ARTICLE 3(1) OF THE FLAGS  
(NORTHERN IRELAND) ORDER 2000

Before: Stephens LJ, Treacy LJ and Horner J

HORNER J (giving the judgment of the Court)

**A. INTRODUCTION**

[1] Helen McMahon ("the appellant") appeals the decision of Keegan J who refused:

- (a) to make a declaration that the Flags Regulations (Northern Ireland) 2000 ("the 2000 Regulations") are unlawful and in breach of a guarantee of parity of esteem of the Unionist and Nationalist communities in Northern Ireland under the terms of the Belfast/Good Friday Agreement 1998 ("the Belfast Agreement") and enacted in the Northern Ireland Act 1998;
- (b) to make a declaration that the Secretary of State for Northern Ireland ("the respondent") acted ultra vires by introducing the Regulations pursuant to Article 3 of the Flags (Northern Ireland) Order 2000 ("the 2000 Order") in that he failed to have regard to the Belfast Agreement and, in particular, its guarantee of parity of esteem to the Unionist and Nationalist communities in Northern Ireland.

[2] Mr O'Rourke QC SC, led Mr Rafferty BL for the appellant. Dr McGleenan QC led Mr Sands BL for the respondent. The court is indebted to counsel for their written and oral submissions.

## B. BACKGROUND

[3] The flying of flags in Northern Ireland is a subject fraught with emotion. It is so contentious that the Northern Ireland Human Rights Commission published a paper entitled "The Display of Flags, Symbols and Emblems in Northern Ireland" in 2013. At 6.2 it states:-

"Flags, symbols and emblems are often expressions of an individual's cultural and national identity. In a public space they can be used as a means of celebration and memorialisation. They may also at times be used as territorial markers and as a method of intimidation and harassment".

[4] The flying of flags, and the Union flag in particular from Government buildings, is an issue which came before the High Court in 2001. Mr Conor Murphy, Member of the Legislative Assembly of Northern Ireland ("MLA"), applied for judicial review of various decisions taken by the Right Honourable Peter Mandelson MP while he was Secretary of State for Northern Ireland. These decisions related primarily to the 2000 Order and 2000 Regulations. In that application for judicial review there were a number of issues raised which are not relevant to the present application. But one of the grounds of challenge is. It was claimed that the Secretary of State's decision to enact the 2000 Order and 2000 Regulations was not in keeping with the Belfast Agreement. It was asserted that it was contrary to the advice given to the Secretary of State by the Equality Commission which advice he failed to take into account and it discriminated against those who were opposed to the flying of the Union flag. It was claimed that the Secretary of State did not have the legal authority to enact the 2000 Order or the 2000 Regulations.

[5] In giving judgment, Kerr J said in *Re Murphy's Application for Judicial Review* [2001] NI 425 at 435(c)-436(f):

"In any event, I do not consider that, in making the Flags Regulations, the Secretary of State acted in breach of section 75. As Mr Mandelson stated, in introducing the Flags Order to the House of Commons, the flying of the Union flag is not designed to favour one tradition over another; it merely reflects Northern Ireland's constitutional position as part of the United Kingdom. The matter was put thus by Mr Crawford in his first affidavit:-

'25. I have read the Applicant's Order 53 Statement and the affidavit of Conor Murphy sworn on 6 November 2000 and would respond in the following

general terms. It is a misunderstanding of the Secretary of State's position on the flags issue to see it as supporting any side against the other. It is also misconceived to view equality as being about the elimination of that to which one objects. On the contrary, the Secretary of State's approach has been, in the absence of agreement within the Executive Committee, to promote, consistently with the constitutional status of Northern Ireland as confirmed at section 1 of the Northern Ireland Act 1998, a recognition of the need for sensitivity in relation to the flying of flags and the need for respect for the rights and aspirations of others. A balance has been arrived at. The Union flag will fly on Government buildings in Northern Ireland on those days on when it is customarily flown in other parts of the United Kingdom. It will not, however, be flown on days when it is not flown in other parts of the United Kingdom. In recognising the constitutional position of Northern Ireland as in the rest of the United Kingdom, the Secretary of State also accepted that the Union flag should not be flown on more days in Northern Ireland than in the rest of the United Kingdom. In endorsing this approach the Secretary of State took the view that the Union flag should not be flown excessively or to provoke others. I refer to an extract from the House of Lords debate on the Regulations exhibited hereto marked RC8. On page 1195 of the debate Lord Falconer said:

**"I believe that these Regulations are consistent both with the principles of the Belfast Agreement and with the wishes of the majority of the people**

of Northern Ireland, from both traditions, who wish to see flag flying handled in a sensitive, respectful and, above all, non-provocative way. The Regulations properly recognise Northern Ireland's place in the United Kingdom, while respecting the concerns of those who hold to a different identity and aspiration. What we are seeking to achieve is mutual respect, both for the flying of the Union flag - and other flags as provided in the Regulations - and for those who hold a different political aspiration by limiting the flying of the Union flag to reflect practice in the rest of the United Kingdom. The flying of the Union flag to provoke others shows no respect for that flag."

In dealing with the issue of the flying of flags at Government buildings as in the rest of the United Kingdom, and reducing the number of flag flying days to bring Northern Ireland into line with this, the Regulations follow the principle that it is the inappropriate or excessive use of symbols, including flags, which should be eliminated, not their constitutional significance. The Regulations achieve a balance based on respect for diversity and tolerance of difference, in full accord with the principles and spirit of the Belfast Agreement. They do not threaten the interests of anyone in Northern Ireland.'

These passages also provide an answer to the applicant's complaint that the making of the Regulations offended section 76(1) of the Northern Ireland Act. It provides: -

**'76. - (1) It shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion.'**

The making of the Regulations and the requirement that the Union flag be flown on government buildings do not treat those who oppose this any less favourably. The purpose of the Regulations is, as I have said, to reflect Northern Ireland's constitutional position, not to discriminate against any section of its population."

[6] The present application before the court is not a direct challenge to the Secretary of State on the basis that the 2000 Regulations are a breach of section 75 or section 76 of the Northern Ireland Act. Rather it is a claim that the Secretary of State did not have regard to the principle of parity of esteem enunciated in the Declaration of Support which formed part of the Multi-Party Agreement which itself was part of the Belfast Agreement. However, the principle of parity of esteem is not referred to in the Joint Declaration by the British and Irish Governments which did state:

**"Rights, Equality, Identity and Community**

25. The two Governments fully support the human rights affirmed in the Agreement, including the right to equal opportunity in all social and economic activity. In partnership with the parties, they rededicate themselves to the achievement of these objectives. Recognizing the importance of the principles and mechanisms contained in the Agreement for the advancement of the human rights and equality agendas, the two Governments commit themselves to the steps outlined in Annex 3."

[7] In the pre-action protocol letter of 27 May 2016 to the Northern Ireland Courts and Tribunals Service the applicant's solicitors wrote as follows:

“We have been instructed regarding the present practice of the Court Service relating to the flying of flags over the Courthouse at Omagh, County Tyrone, on various days. Our client believes that the current practice at flying the Union flag alone is contrary to the terms of the “Good Friday” Agreement 1998 and various other Agreements between the British and Irish Governments, and is also contrary to the terms of the Northern Ireland Act 1998.

Our client expects that the Irish National flag should be on display on the exact terms upon which the Union flag is displayed. The Agreements referred to above guarantee parity of esteem to the two main communities who are recognised as separate in Northern Ireland. Our client believes that the present policy and practice of the Court Service in relation to the public display of flags manifestly offends that guarantee of parity of esteem to the British and Irish communities in Northern Ireland.

As stated, our client expects that policy to be amended to reflect parity of esteem through the flying of the Irish National Flag. We expect to hear from you within the next 14 days that a review of the flag flying is taking place; otherwise we have instruction to issue to proceedings.”

[8] In her affidavit the applicant said:

“3. I am aware of the lawful arrangements in relation to the flying of flags in government buildings and courthouses in Northern Ireland, particularly that provision is made for the flying of the Union flag on specified days. No other flag may be lawfully flown under the relevant legislation, save for the flying of the flag of a visiting Head of State. As such, it is unlawful to fly the Irish National flag from government buildings and courthouses unless there is a visit from the Head of the Irish State.

4. I recognise and acknowledge the Irish National flag as my National flag. I do not recognise the Union flag as my National flag and nor do I believe it represents my beliefs or the beliefs of the Nationalist community generally. As such, the flying of flags in

Northern Ireland does not reflect me as a member of the Nationalist community on any level.”

The applicant complains that the 2000 Order or the 2000 Regulations do not reflect or have any regard to the guarantee of parity of esteem in the Multi-Party Agreement at Article (1)(v) of the Belfast Agreement.

[9] The affidavit of Mr Bilal Zahid, senior civil servant, working in the Northern Ireland Office exhibited various affidavits from Mr Crawford and Mr Jeffrey which were used in *Re Murphy's Application for Judicial Review* some 18 years ago. The affidavit avers that the Secretary of State did have regard to the Belfast Agreement and that is set out in an affidavit which records that:

- (a) The Secretary of State did have regard to the Belfast Agreement in exercising the power to make the Regulations.
- (b) The Secretary of State said to the House of Commons on 25 October 2010 when moving the draft Regulations (at columns 335-336):

“Northern Ireland ... is to maintain the Union and accordingly, that Northern Ireland’s status as part of the United Kingdom reflects and relies upon that wish. The meaning of that is unambiguous. It says that while there are – legitimately – two traditions, two national aspirations and two cultural identities in Northern Ireland, Northern Ireland remains part of the United Kingdom, and where a national flag is flown, it therefore follows that that flag should be the flag of the United Kingdom.

It follows that the principle of consent which governs this process should receive more than lip service in Northern Ireland, as, too, must another cornerstone of the Good Friday Agreement – the principle of equality: there must be just and equal treatment for the identity, ethos and aspirations of both traditions.

There can be no second class citizens in Northern Ireland and, there will not be. That is why we are doing what we are doing, reflecting parity of esteem between the traditions across the board in relation to the range of Government activity, the policing reforms, the criminal justice reforms and every other aspect of society in which identity becomes important. It is why, too, the regulations that I am

introducing tonight have been drawn up in a sensitive way and, why, since May, I have consulted all the parties and offered every opportunity to the Executive and then to the Assembly, to reach a consensus of their own on flag flying that would remove the need for me to make any regulations at all.”

[10] It is also worth noting that in the House of Lords the Minister of State, Lord Falconer made the following remarks:

“The Secretary of State also had regard to another foundation stone of the agreement, the principle of equality. The principle of equality requires that there be just and equal treatment for the identity, ethos and aspirations of both traditions in Northern Ireland. The agreement recognises the legitimacy of both the legal aspirations and the right of both traditions to participate in the devolved institutions, so long as they are committed to peace and democratic means.”

[11] These excerpts from Hansard provide compelling support for the argument that the concept of parity of esteem was actively addressed by the Secretary of State and the views of all of the political parties were taken into account in making the Regulations.

### C. LEGISLATIVE FRAMEWORK

[12] The words “and court-houses” were added to Article 3 of the 2000 Order by section 67 of the Justice (Northern Ireland) Act 2002 (“the 2002 Act”).

[13] The provisions of section 67 of the 2002 Act came into force by virtue of the Justice (Northern Ireland) Act 2002 (Commencement No 14) Order 2010 on 12 April 2010. It would appear that courthouses were added because of the devolution of policing and justice to the Assembly in 2010.

[14] Article 4(4) of the 2000 Order states:

“4(4) In exercising his powers under Article 3 the Secretary of State shall *have regard* to the Belfast Agreement.” (Emphasis Added).

Regulation 2 of the 2000 Regulations provides:

**“Flying of flags at government buildings on specified days**



2(1) The Union flag shall be flown at the government buildings specified in Part I of the Schedule to these Regulations on the days specified in Part II of the Schedule. ...

(4) Where a government building specified in Part I of the Schedule has more than one flag pole, the European flag shall be flown in addition to the Union flag on Europe Day."

[15] Part I of the Schedule identifies seven specified government buildings. Following the amendments of the 2002 Act, all court-houses in Northern Ireland were added to the list. Part II of the Schedule identifies specified days on which the "Union flag" shall be flown.

Regulation 3 of the 2000 Regulations states:

**"Flying of flags at government buildings on the occasion of a visit by a Head of State other than Her Majesty the Queen**

3(1) On the occasion of a visit to a government building by a Head of State other than Her Majesty The Queen, the Union flag may be flown at that building.

(2) Where on that occasion the Union flag is flown at that building and the building has more than one flag pole, the National flag of the country of the visiting Head of State may also be flown at that building on that occasion."

Regulation 4 of the 2000 Regulations:

**"Flying of flags at government buildings on the occasion of a visit by Her Majesty the Queen**

4(1) On the occasion of a visit to a government building by Her Majesty the Queen, the Royal Standard shall be flown at that building.

(2) Where the government building concerned has more than one flag pole, the Union flag shall also be flown at that building on the occasion of Her Majesty's visit."

Regulation 5 of the 2000 Regulations provides for the manner of the flying of flags:

**“Manner of flying flags required or permitted to be flown by regulations 2, 3 or 4**

5(1) Where Regulation 2, 3 or 4 requires or permits the flying of a flag at a government building, the flag in question shall be flown at full mast, provided that:

(a) where Regulation 2(4) or 3(2) requires or permits the flying of a flag in addition to the Union flag, that flag shall not be flown in a superior position to the Union flag; and

(b) where Regulation 4 requires the flying of the Royal Standard and the Union Flag, the Royal Standard shall be flown in a superior position.

(2) Where Regulation 2, 3 or 4(2) requires or permits the flying of a flag at a government building, it shall be flown from 8.00 am until sunset on the day in question.

(3) Where Regulation 4(1) requires the Royal Standard to be flown at a government building, it shall be flown whilst Her Majesty is present in the building.”

Regulation 9 of the 2000 Regulations prohibits the flying of any other flag:

**“Prohibition on the flying of flags other than in accordance with the Regulations**

9. Except as provided by these Regulations, no flag shall be flown at any government building at any time.”

[16] The specified days are listed in Part II of the Schedule of the 2000 Regulations. At the present time, there are 15 such days in the year (formerly 17, now reduced to 15 following the deaths of Princess Margaret and the Queen Mother). On the 350 other days of the year, no flag is flown on Omagh Court-house.

[17] Section 75 of the Northern Ireland Act 1998 provides:

**“75 Statutory duty on public authorities**

(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity –

(a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;

(b) between men and women generally;

(c) between persons with a disability and persons without; **and**

(d) between persons with dependants and persons without.

(2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group."

**Section 76 of the Northern Ireland Act 1998 states:**

**"76 Discrimination by public authorities**

(1) It shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion.

(2) An act which contravenes this section is actionable in Northern Ireland at the instance of any person adversely affected by it; ...

(5) Subsection (1) applies to the making, confirmation or approval of subordinate legislation only if -

(a) the legislation contains a provision which discriminates against a person or class of

person on the ground of religious belief or political opinion; and

- (b) the provision extends only to the whole or any part of Northern Ireland.”

#### **D. THE JUDGMENT OF KERR J IN *RE MURPHY'S APPLICATION FOR JUDICIAL REVIEW***

[18] The applicant, a member of the Assembly, sought judicial review of the decisions of the Secretary of State made in relation to the enactment of the 2000 Order and 2000 Regulations arguing the Order and the Regulations discriminated against those opposed to the flying of the Union flag, in particular that this decision to permit the flying of the Union Flag on certain days from public buildings was inconsistent with sections 75 and 76 of the Northern Ireland Act 1998.

[19] On 11 February 2000 during the suspension of the devolved institutions of Northern Ireland the Secretary of State under powers conferred by the Northern Ireland Act 2000 was empowered to carry out the functions of the Northern Ireland Assembly. These functions included its law making functions. The Assembly had power to make laws in relation to the flying of flags and that power also passed to the Secretary of State. By 15 May 2000, there had not been any resolution of the flags issue following discussions between locally elected representatives from Northern Ireland. The Secretary of State in those circumstances wrote to the party leaders to explain how he proposed to deal with the matter. While it was expected there would be restoration of devolved institutions, the Secretary of State had decided that a draft Flags (Northern Ireland) Order should be made, but in his letter to the party leaders he made it clear that he preferred that the Executive Committee should agree on basis for the flying of flags and that if it could reach agreement he did not envisage using his power to regulate the issue. Unfortunately, the Executive Committee could not reach any consensus on this issue. In the absence of agreement, the Secretary of State wrote to the political parties on 10 July 2000 stating that he was considering making draft regulations under the power conferred by the 2000 Order and seeking their views.

[20] A response was received to the letter and on 8 September 2000 following consideration of the views expressed in that letter, the Secretary of State sent to the Assembly a set of draft Regulations in compliance with the procedures set out in the 2000 Order. The Secretary of State asked the Assembly to report its views on the Regulations by 20 October 2000. The Assembly reported to the Secretary of State on 18 October 2000. There were no agreed recommendations. The Secretary of State then laid the draft Regulations before Parliament on 23 October 2000.

[21] These draft Regulations were debated by the House of Commons on 25 October 2000. In the course of this debate, the Secretary of State stated that agreement within the Assembly or the Executive Committee would have removed

the need for him to make these Regulations but that such agreement had not been forthcoming. He considered that in the absence of agreement it would be wrong to leave to individual ministers the decision about whether or how the Union flag should be flown, as this was likely to lead to a practice differing from building to building. He also indicated that if the Executive Committee was able to agree a way forward in the near future then he would be content to seek the approval of Parliament to revoke the Regulations. Following this debate the Regulations were made by the Secretary of State on 8 November 2000 and came into effect on 11 November 2000.

[22] It is against that background that Mr Conor Murphy MLA applied for judicial review on the basis inter alia that the Secretary of State's decision to enact the Order and the Regulations discriminated against those opposed to the flying of the Union flag and, in particular, that the decision was inconsistent with sections 75 and 76 of the Northern Ireland Act 1998. Kerr J disagreed. He held at 436(e):

“The making of the Regulations and the requirement that the Union flag be flown on government buildings do not treat those who oppose this any less favourably. The purpose of the Regulations is, as I have said, to reflect Northern Ireland's constitutional position, not to discriminate against any section of its population.”

[23] The other argument which Kerr J had to address was the claim that the Regulations were inconsistent with the Belfast Agreement because they failed to have regard for “partnership, equality and mutual respect” between opposing political parties and thus were contrary to the undertakings given in the Agreement that the government's jurisdiction in Northern Ireland “shall be exercised with rigorous impartiality on behalf of all of the people in the diversity of their identities and traditions” and that they fail to recognise the birth right of those who wish to be accepted as Irish.

[24] Kerr J referred to the affidavit submitted on behalf of the Secretary of State in concluding as follows at pages 437(h) – 438(a):

“These paragraphs set out the political considerations that informed the Secretary of State's approach to the Regulations. The Union flag is the flag of the United Kingdom of which Northern Ireland is a part. It is the judgment of the Secretary of State that it should be flown on government buildings only on those days on which it is flown in Great Britain. By thus confining the days on which the flag is to appear, the Secretary of State sought to strike the correct balance between, on the one hand, acknowledging

Northern Ireland's constitutional position, and, on the other, not giving offence to those who oppose it. The approach seems to me to exemplify a proper regard for *partnership, equality and mutual respect* and fulfil the Government's undertaking that its jurisdiction in Northern Ireland *shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions*. I do not consider, therefore, that the Regulations have been shown to be in conflict with the Belfast Agreement."

## E. JUDGMENT OF KEEGAN J

[25] Keegan J rejected the argument that the issue raised in this case was res judicata given the examination of it by Kerr J in *Re Murphy's Application*. She noted that the core point made by the applicant was that Article 1(v) of the Belfast Agreement should be separated into two distinct principles namely:

"(a) An obligation to exercise *with rigorous impartiality on behalf of all people in their diversity and traditions*; and

(b) That the power being exercised shall be founded on the principles of full respect for, and equality of, civil, political, society and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities."

She recorded that the applicant made the case that the first of these applies to individual citizens and the latter to communities. The complaint of the applicant was that the decision in *Murphy* examined only one aspect of Article 1(v), namely individual rights, but did not address the wider aspirations of both communities. She concluded:

"[23] I am not convinced that Kerr J restricted his consideration of this issue to individual rights. In particular I rely upon his conclusion that the approach adopted by the Secretary of State exemplified a proper regard for *partnership, equality and mutual respect* and to fulfil the government's undertaking that its jurisdiction in Northern Ireland *shall be exercised with rigorous impartiality on behalf of all of the people and the diversity through identities and*

*traditions*. In any event, I am not attracted to Mr O'Rourke's arguments for the following reasons:

(i) It is artificial to disaggregate parity of esteem as a separate consideration or principle from the overriding objective contained in Article 1(v) of the Agreement. This reads as one paragraph. In my view it is unhelpful to interpret it in any other way.

(ii) The principles contained in the Agreement ensure as Kerr J stated that there must be proper regard for *partnership, equality and mutual respect of all of the people and the diversity of their identities and traditions*. This encompasses the rights of individuals and communities. (Emphasis added)

(iii) The concept of parity of esteem is not defined in the Agreement itself, nor is there any reference to it in the Northern Ireland Act. The academic arguments which have been provided, illustrate the lack of political consensus on this issue. In that context I favour Mr McGleenan's analysis that parity of esteem comes within the broad principles of equality, fairness and respect as applied to the two communities in Northern Ireland.

(iv) The commitment to equality must be framed by virtue of the fact that Northern Ireland would remain part of the United Kingdom pending a decision by the people in relation to this. There has been no change to this constitutional position. This part of the Agreement is enacted in section 1 of the Northern Ireland Act which 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.'

(v) The requirement in the Flags Order in Article 4(4) is broad; to have regard to the Belfast Agreement when making regulations. The manner in which this

obligation is fulfilled is clearly within the discretion of the Secretary of State.

(vi) I have had the benefit of extracts of Parliament which set out the speeches made on the floor. I have considered this evidence in particular the evidence filed by the Secretary of State at the time and the Hansard extracts. In my view it is clear from all of this that the general principles of the Agreement were taken into account by the Secretary of State. This includes the concept of parity of esteem. No new facts have emerged. The result of that consideration may have led to a view being taken with which the applicant does not agree. However, that is not the issue. In my view it is abundantly clear that the Secretary of State fulfilled his obligation to have regard to the principles contained in the Agreement in conducting a balancing exercise and as such the Regulations cannot be said to be unlawful.”

#### **F. APPLICATION FOR LEAVE TO CROSS APPEAL**

[26] The respondent sought permission to cross appeal on the basis that:

- (a) The appellant did not have sufficient standing to bring the application for judicial review.
- (b) Keegan J had erred in concluding that the applicant’s delay in applying for relief and failure to explain the reasons for the delay were not fatal to the application.

[27] We did not consider it necessary, given our decision on the appeal, to decide these issues.

#### **G. CASES MADE BY THE APPLICANT AND RESPONDENT**

Case made by applicant

[28] Mr O’Rourke made the case on behalf of the appellant that she accepted the Northern Ireland Courts and Tribunals Service and Omagh Courthouse were applying the 2000 Regulations as they stand, but that these were unlawful as they breach the guarantee of parity of esteem to the Unionist and Nationalist communities in Northern Ireland, as rooted in the Belfast Agreement. The full text of the Belfast Agreement which the Secretary of State sought to enshrine in legislation included a guarantee of parity of esteem, it is claimed. The 2000 Regulations are inconsistent with Article 1(v) of the Belfast



Agreement because there was a failure on the part of the Secretary of State to consider whether the impugned regulations gave effect to the requirement of parity of esteem to the Nationalist Community.

### **The respondent's case on appeal**

[29] Dr McGleenan on behalf of the respondent made it clear that the legal obligation under Article 4 of the 2000 Order was to have regard to the Belfast Agreement and the evidence plainly establishes that that is what is the respondent has done. In any event there has been no misinterpretation of Article 1(v) of the Belfast Agreement, whether of the British-Irish Agreement or of the multi-party agreement. Finally, he claimed that the issues raised in the challenge had already been determined by Kerr J in *Re Murphy's Application* and this application was effectively res judicata.

## **H. DISCUSSION**

[30] The Belfast Agreement comprises two inter-related documents. They are:

- (a) A Multi-Party Agreement ("the Multi-Party Agreement");
- (b) An International Agreement between the British and Irish Governments ("the Bilateral Agreement"). It is the Bilateral Agreement which is the Treaty. It is this which was enacted in the 1998 Act. Bennion on Statutory Interpretation (7<sup>th</sup> Edition at 24.16) states:

"When a statute is passed in order to give effect to the United Kingdom's obligations under a Treaty, the statute should if possible be given a meaning which conforms to that of the Treaty. For that purpose the provisions of the Treaty may be referred to as an aid to interpretation."

So even taking the appellant's case at its height, and assuming the Multi-Party Agreement which contains the principle of parity of esteem is a Treaty, it can only be used as an aid to interpretation of the 2000 Regulations.

[31] Furthermore, the obligation under Article 4(4) of the 2000 Order is that "in exercising its powers under Article 3 the Secretary of State shall have regard to the Belfast Agreement". This obligation is not prescriptive as to which parts of the Agreement are to be considered or what weight is to be given to any or all of them or what the outcome of that consideration should be. The obligation is simply to "have regard" to the Belfast Agreement.

[32] It is clear from the terms of 2000 Order that when the Secretary of State makes the 2000 Regulations for the flying of flags he has:

- (a) To refer the draft regulations to the Assembly.
- (b) The Assembly has then to prepare a report.
- (c) The Secretary of State is bound to consider that report.
- (d) The Secretary of State in any event is bound to have regard to the Belfast Agreement.

[33] The pre-ambule to the 2000 Regulations records:

“Whereas:

- (a) The Secretary of State has referred to the Assembly a draft of the Regulations he proposes to make under Article 3 of the Flags (Northern Ireland) Order 2000;
- (b) The Assembly has reported to the Secretary of State the views expressed in the Assembly on the proposed Regulations;
- (c) The Secretary of State has considered the Assembly’s Report on the proposed Regulations;
- (d) **The Secretary of State has had regard to the Belfast Agreement;**
- (e) A draft of these Regulations has been laid before Parliament, accompanied by a copy of the Assembly’s Report on the proposed Regulations no changes having been made to the proposed regulations as a result of that Report;
- (f) A draft of these Regulations has been approved by resolution of each House of Parliament.”

The extracts from Hansard demonstrate that the Secretary of State did have regard to the views of both communities without in any way affording one community preferential treatment. He said, inter alia:

“... while there are - legitimately - two traditions, two national aspirations and two cultural identities in Northern Ireland, Northern Ireland remains part of the United Kingdom, and where a National flag is flown, it therefore follows that the flag shall be the flag of the United Kingdom.

It follows that the principle of consent which governs these powers should receive more than lip service in Northern Ireland, as, too must another cornerstone of the Good Friday agreement - the principle of equality: there must be just and equal treatment of the identity, ethos and aspirations of both traditions.

There can be no second-class citizens in Northern Ireland, and there will not be. That is why we are doing what we are doing, **reflecting parity of esteem between the traditions** across the board in relation to the range of Government activity, the policing reforms, the criminal justice reforms and every other aspect of society in which identity becomes important, it is why, too, the regulations that I am introducing tonight have been drawn up in a sensitive way ...” (emphasis added)

Finally, the Secretary of State is recorded as saying to Parliament:

“The regulations are sensitive to the needs of each tradition and they are provided in the letter and spirit of the Good Friday agreement.”

[34] So we are satisfied that the Secretary of State did have regard to the Belfast Agreement in making the 2000 Regulations as he was duty bound to. The decisions he took, as reflected in the Regulations, are not intended to ‘disrespect’ those members of the population who do not consider the Union flag to reflect their identity and aspirations. Neither should they be perceived in that spirit. Tolerance of the presence of the Union flag is a practical demonstration of the principle of consent which the majority of people on both sides of the Border have agreed to adopt. Sensitivity in the display of the symbols of one community *viz a viz* another is an appropriate demonstration of the principle of parity of esteem which implies as Kerr J noted in *Re Murphy* that such flags should not be flown excessively ‘or to provoke others’. In our view the display of the Union flag on 15 days of the year over a courthouse which administers the laws of the UK cannot be regarded as excessive or provocative. Rather it should be regarded as a pragmatic reflection of the current reality of the constitutional position and actively consented to in

accordance with the spirit of the Agreement that the Irish people, North and South, signed up to.

[35] The appellant complains that the Secretary of State failed to understand and to take into account that Article 1(v) contains two obligations:

- (a) Firstly, the principle of full respect for, equality of, civil, political, social and cultural rights, freedom from discrimination for all citizens.
- (b) Secondly, the principle of parity of esteem, of just and equal treatment of the identity, ethos and aspirations of both communities.

But Keegan J was correct when she concluded at paragraph [23](i):

“It is artificial to disaggregate parity of esteem as a separate consideration of principle from the overriding objective contained in Article 1(v) of the Agreement. This reads as one paragraph and in my view it is unhelpful to interpret it in any other way.

In any event it is quite clear from the extracts before the House that the Secretary of State did consider the flags issue in the context of parity of esteem between the two traditions.”

We also agree with Keegan J when she concluded at paragraph [23](iii):

“The concept of parity of esteem is not defined in the Agreement itself, nor is there any reference to it in the Northern Ireland Act. The academic arguments which have been provided illustrate the lack of political consensus even on this issue. In that context I favour Mr McGleenan’s analysis that parity of esteem comes within the broad principles of equality, fairness and respect as applied to the two communities in Northern Ireland.”

[36] The flying of flags on a small number of selected days over Omagh courthouse does not disrespect the applicant or her community or any part of her community or provide additional respect to the Unionist community or its members. It prefers neither one community over another nor does it hold one individual in higher esteem than another. It is not discriminatory. It simply reflects the constitutional position of Northern Ireland as part of the United Kingdom, as Kerr J has already pointed out.

[37] Res judicata was raised by the Secretary of State on the basis that a dispute before this court had already been decided in *Re Murphy's Application for Judicial Review*. It is true to say that res judicata rarely raises its head in judicial review applications because of the requirement of promptitude in the issue of proceedings. But it can do so from time to time. The Court of Appeal held in *Re Teresa Jordan's Application* [2018] NICA 23 that the doctrine of res judicata is applicable in public law proceedings: see paragraphs [26] and [31]. As Deeny LJ observed in delivering the judgment of the court at paragraph [32]:

“We respectfully adopt the view expressed by Lord Clarke and Lord Bridge that the doctrine is generally applicable to public law, albeit subject to the need to yield to issues of illegality or public interest on appropriate occasions. The importance, highlighted by Lord Bridge, of the principle that it is in the interests of the public that there should be an end to litigation is fully applicable here. We note that Halsbury's Laws echoes that at paragraph 1605 from the above section:

**‘It is a fundamental doctrine of all courts that there must be an end of litigation.’**

Where a judge properly charged with an issue or cause of action has given judgment upon it, it is contrary to the public interest to have the matter reheard again unnecessarily.”

[38] However, in this case it is unnecessary for us to decide whether the applicant is re-litigating a matter which has been substantially determined by Kerr J in *Re Murphy's Application*. In the circumstances we decline to make a ruling on this issue.

## I. CONCLUSION

[39] In the circumstances and for the reasons given we refuse the application and dismiss the appeal.