

Judicial Communications Office

Friday 27 September 2019

COURT DISMISSES BREXIT APPEAL

Summary of Judgment

The Court of Appeal today¹, dismissed an appeal brought by three appellants in a challenge to decisions of the UK Government to conduct Brexit negotiations which they suggest would not protect the operation of the Belfast Agreement and/or are incompatible with the Northern Ireland Act 1998.

Raymond McCord, Jamie Waring and JR83 (“the appellants”) appealed against the decision of Lord Justice McCloskey (“the judge”) to dismiss those parts of their applications for judicial review of various decisions of the Prime Minister, the Rt Hon Boris Johnson MP, and the Secretary of State for Exiting the EU, the Rt Hon Stephen Barclay which relied on section 10 of the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”) and refusing their applications for leave to apply for judicial review of those decisions on all other grounds. In essence, the decisions which were challenged by the appellants are those which have led the UK Government to conduct negotiations with the European Union countries (“EU 27”) proposing measures which it is suggested do not protect the Belfast/Good Friday Agreement (“the Agreement”) and/or which are not compatible with the Northern Ireland Act 1998 (“the NIA”). The appellants contended that the prerogative power of the Executive to conduct negotiations has been curtailed or abrogated either expressly or by necessary implication by the Withdrawal Act so that those negotiations are justiciable and subject to the supervisory jurisdiction of the courts.

The Court summarised the relevant provisions of EU and domestic law in paragraphs [7] – [47] of its judgment. In particular it referred to a section of the Joint Report of the negotiations between the UK Government and the EU dated 8 December 2017 (“the Joint Report”) dealing with “Ireland and Northern Ireland”. This stated that both parties agreed that the Agreement must be protected in all its parts and recognised the need to respect the provisions of the Agreement regarding the constitutional status of Northern Ireland and the principle of consent. It noted that the UK Government and the EU had carried out a Mapping Exercise which showed that the UK’s departure gives rise to substantial challenges to the maintenance and development of North-South Cooperation. The report stated that the UK Government remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. In the absence of agreed solutions, the UK said it would ensure that no new regulatory barriers would develop between Northern Ireland and the result of the UK, unless, consistent with the Agreement, the NI Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland.

The Withdrawal Act was made on 26 June 2018 with the purpose of repealing the European Communities Act 1972 and making other provision in connection with the withdrawal of the United Kingdom from the EU. Section 10 was introduced by Lord Patten in the House of Lords. The heading of section 10 is “Continuation of North-South Co-operation and the prevention of new border arrangements”. In its judgment, the Court set out the debate that took place when the

¹ The panel was the Lord Chief Justice, Lord Justice Stephens and Lord Justice Treacy. The Lord Chief Justice delivered the judgment of the court.

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provision was being introduced (paragraphs [31] – 34]). Lord Patten said the provision would bring into legal effect the commitments the UK Government had already made to the EU and would provide clarity and legal certainty, ensuring unimpeded cross border movement and north south cooperation. In the House of Commons, David Liddington MP said the amendment was a statement of Government policy and sought to ensure that it would not act incompatibly with the NIA and prevent, among other things, physical infrastructure on the border with Ireland.

The judge’s findings are summarised at paragraph [50] of the Court’s judgment. He firstly considered whether the Prime Minister had exercised any of the powers under section 10 of the Withdrawal Act². He concluded that in conducting negotiations with the EU under Article 50(2) of the Treaty on the European Union, the Executive was not exercising any of the powers under the Withdrawal Act but was exercising prerogative powers. The judge concluded there was no breach of section 10(1) of the Withdrawal Act. He granted leave to apply for judicial review in respect of the section 10 Withdrawal Act issue only but dismissed that application. He refused leave to apply for judicial review on all other grounds.

Consideration

The appellants submitted that a UK withdrawal from the EU without an agreement would give rise to the very considerable risk of a deterioration in the security situation in Northern Ireland, an adverse impact on the Northern Ireland economy and a severe limitation on the work of the implementation bodies operating with the support of the North-South Ministerial Council. The Court said it was not its task to evaluate the merits of a UK withdrawal from the EU without an agreement. The case before it was whether the Withdrawal Act imposes a constraint on those negotiating with the EU 27 to proceed on the basis that the UK can only leave the EU if an agreement is reached so that the operation of the Agreement continues undisturbed and the existing arrangements for the all-island economy continue unimpeded by any hard border.

The starting point in this exercise was to examine the exercise of the Royal Prerogative (“the prerogative”). The Royal Prerogative encompasses the powers which remain vested in the Crown, and are exercisable by ministers, as long as the exercise is consistent with Parliamentary legislation. The residual prerogative is now confined to such matters as summoning and dissolving Parliament, declaring war and peace, regulating the armed forces in some respects, governing certain colonial territories, making treaties (though as such they cannot affect the rights of subjects), and conferring honours. A prerogative power may be curtailed or abrogated by statute. The statutory curtailment or abrogation may be by express words or by necessary implication. 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. This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state. The second proposition is that, although they are binding on the United Kingdom in

² Section 10(1) provides that in exercising any of the powers a Minister of the Crown or devolved authority must act in a way that is compatible with the terms of the NIA and have due regard to the Joint Report. Section 10(2) provides that nothing in section 8, 9 or 23(1) or (6) of the Withdrawal Act authorises regulations which diminish any form of North-South co-operation provided for by the NIA or create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which feature physical infrastructure, including concluded border posts or checks and controls that did not exist before exit day and are not in accordance with an agreement between the United Kingdom and the EU.

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international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law. It is only on the basis of these two propositions that the exercise of the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter UK domestic law. Negotiations on the international plane of themselves cannot alter domestic law. The only issue on the scope of the power is the effect of section 10 of the Withdrawal Act.

This appeal was not directly concerned with the making or unmaking of treaties but with the negotiations which are likely to lead to the making or unmaking of treaties. The negotiations commenced after the service on 29 March 2017 of notice under Article 50(2) of the Treaty on European Union of the intention of the United Kingdom to withdraw from the EU. The Withdrawal Act was made on 26 June 2018 long after negotiations had begun. There was no real dispute before the Court that the negotiations prior to that date were conducted in exercise of the prerogative power. Applying the principles set out above the issue was whether the making of the Withdrawal Act excluded the prerogative power in respect of the negotiations or alternatively circumscribed the power.

The Court firstly examined the statutory scheme of the Withdrawal Act, namely to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU. Section 1 of the Withdrawal Act repeals the 1972 Act on exit day. Exit day as originally drafted was defined as 29 March 2019 at 11 PM but subsequent amendments now provide that exit day is 31 October 2019 at 11 PM to allow further time for negotiation. The process of negotiation is referred to in two sections of the Withdrawal Act. Section 13 establishes a mechanism for Parliamentary engagement with the outcome of the withdrawal negotiations. The Court said there are two important features of this section. First, it neither expressly nor impliedly abrogated nor constrained the exercise of the prerogative power to conduct negotiations with the EU. It was concerned with ensuring that Parliament had an opportunity to consider the outcome of any negotiations to ensure the ability of Parliament to control the outcome of those negotiations. The second feature was that it plainly contemplates the possibility that no agreement in principle might be achieved in negotiations dealing with the arrangements for the United Kingdom's withdrawal from the EU: "Indeed section 13 imposed no duty to actively pursue negotiations after the commencement of the Act."

The Court next considered section 10 of the Withdrawal Act. The appellant placed considerable weight on the heading ("Continuation of North-South co-operation and the prevention of new border arrangements") as indicating an intention to impose upon Ministers an obligation to secure the objectives stated in the heading in all circumstances. If correct that would act as a constraint on the conduct of any negotiations with the EU and arguably would prevent the United Kingdom leaving the EU if the objectives stated in the heading had not been secured. The correct approach to the use of headings and interpretation states that they can be considered in construing a provision in an Act of Parliament but less weight can be attached to them than to the parts of the Act that are open for consideration and debate in Parliament. It was broadly accepted that the statute was of a constitutional character and that its interpretation should be approached purposively. The appellants, however, contended that the judge had adopted a black letter approach in his interpretation rather than taking a purposive approach. Citing case law, the Court said that its task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose and controversial provisions should therefore be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

The Court said there is no power under the Withdrawal Act to negotiate:

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“Apart from the obligation contained in section 17 of the Act there is no constraint on the prerogative power to conduct those negotiations. The distinction between section 10(1) and (2) is that the obligations under section 10(2) only arise in respect of those powers expressly identified whereas in section 10(1) they arise in relation to each of the powers under the Act. We are satisfied, therefore, that the language of the section suggests that the intention of Parliament was to constrain the exercise of powers under the Act but not to exercise any constraint on the prerogative power to negotiate.”

The Court noted that although it was satisfied there is no express power in section 10 of the Withdrawal Act to constrain the conduct of withdrawal negotiations under the prerogative it must also look at whether such a constraint arises by necessary implication having regard to the other provisions of the Act, namely sections 8, 9 and 23 (1) and (6) which apply to both section 10(1) and (2).

Section 8 is headed “Dealing with deficiencies arising from withdrawal” and provides that a Minister may by regulations make such provision as is considered appropriate to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency in retained EU law arising from the withdrawal of the UK from the EU. By virtue of section 8(7) such regulations may not amend or repeal the NIA and the time period within which regulations may be made is limited so that it expires after the period of two years beginning with exit day. Consequently it appears that these powers could be used during any transition period if such were agreed. The Court said there is nothing expressly in the regulations which indicates that they have an effect upon the conduct of negotiations. Section 10(2) ensures that these regulations cannot be used to diminish any form of North-South cooperation or interfere with border arrangements after exit day unless those are agreed between the UK and the EU. Compatibility with section 10(1)(a) is secured by the provisions relating to the repeal or amendment of the NIA and any regulations are also constrained by the obligation to satisfy section 10(1)(b). The Court said these provisions have been commenced by section 25(1)(a) of the Withdrawal Act so that they can be used during the negotiating period but there is nothing to indicate any implication that they can be used to constrain or abrogate the exercise of the prerogative power to negotiate.

Section 9, headed “Implementing the withdrawal agreement”, provides that a Minister may by regulations make such provision as the Minister considers appropriate for the purpose of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day. The Court said this power can only be exercised after the negotiations have concluded and cannot, therefore, act to constrain the conduct of the negotiations leading up to that agreement. It commented that the power could be used in the window between the statutory approval by Parliament of a withdrawal agreement and exit day. During that period the protections for North-South cooperation and prohibition on the creation or facilitation of border arrangements after exit day in section 10(2) would remain in place whatever the terms of any withdrawal agreement. If, of course, the withdrawal agreement approved border arrangements those could be implemented in accordance with the section. The exercise of power under section 9 would also have to respect the obligations in section 10(1). The prohibition on amendment or repeal of the NIA in the section itself should largely secure compliance with its terms. The due regard duty in section 10(1)(b) would have to be considered in the context of whatever withdrawal agreement had been reached. That could only be considered if and when such an agreement is reached. The proviso to section 9 requires the approval of a withdrawal agreement so the power does not come into play in the event

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of withdrawal without such an agreement, which is the situation the appellants seem to contemplate. The entitlement to exercise any power under this section ceases on exit day.

The Court said these provisions plainly provide some protection for the existing arrangements under the Agreement to function up to exit day but the position thereafter is uncertain and depends on the outcome of the negotiations:

“We do not consider that it is possible to derive from these statutory arrangements a necessary implication that the negotiators must strive to secure an outcome which protects those arrangements after exit day or that an agreement that did not protect those arrangements after exit day was prohibited.”

Section 23 is concerned with consequential and transitional provisions. Neither appellant suggested that this section could under any circumstances be interpreted so as to operate as a constraint on the conduct of negotiations. That was also the view of the Court.

The Court then considered two further provisions. Section 20(4) deals with the definition of exit day. That power has already been used in order to redefine exit day as 11 PM on 31 October 2019. It had an effect on negotiations in that it extended the period within which those negotiations might be conducted but the Court said it could see no basis upon which it could be argued that it constrained the negotiators in the manner in which those negotiations were taken forward. Section 25(4) provided a power to make the commencement regulation which brought into force section 1 of the Withdrawal Act allowing the repeal of the European Communities Act 1972 on exit day. It was submitted that this was a step towards implementation of the withdrawal of the UK from the EU without any agreement. The Court said it could not see how the commencement of this section could act as a constraint on the exercise of the prerogative power to conduct negotiations with the EU. The underlying complaint in this case was about the outcome of those negotiations. The Court agreed with the judge that it would be premature for it to embark on an analysis of the outcome of negotiations based on political rhetoric when that will be a matter to be dealt in accordance with the Withdrawal No 2 Act 2019.

The other interpretive tool relied upon by the appellants in support of the argument that section 10 was intended to have an effect on the conduct of negotiations was the rule which provides that the court may have regard to reports of the debates in Parliament on a Bill for the purpose of ascertaining the meaning of a provision of the resulting Act where it is ambiguous or obscure. The Court agreed that in moving which introduced section 10 of the Withdrawal Act, Lord Patten was contending for an outcome that would continue to secure a frictionless border in Ireland. When the Bill returned to the House of Commons for further debate David Liddington MP stated that the amendment in many ways was a statement of government policy. He was asked by Nigel Dodds MP to confirm that the powers in the amendment were restricted purely to the purposes of the Bill. Mr Liddington confirmed that he was correct.

The Court said it was not satisfied that the provisions of the Withdrawal Act are ambiguous as to whether or not the Act was intended to constrain the prerogative power of negotiation: “But in any event we are quite satisfied that there was no clear statement from the Minister who was the promoter of the Bill supporting the meaning for which the appellants contend. The response to Mr Dodds by Mr Liddington pointed firmly away from any suggestion that the section would constrain the negotiations.”

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Conclusion

The Court reached the following principal conclusions:

- The executive is exercising prerogative powers in its negotiations with the EU 27 in respect of the UK's withdrawal from the European Treaties. Ministers are, of course, subject to questioning in Parliament about the negotiations and secondary legislation facilitating withdrawal is subject to scrutiny. Parliament will have the opportunity to vote on the outcome of the negotiations.
- Section 10 of the European Union (Withdrawal) Act 2018 does not expressly or by necessary implication abrogate or constrain that exercise of that prerogative power.
- It is not the purpose of section 10 of the European Union (Withdrawal) Act 2018 to constrain the exercise of the prerogative power in the said negotiations so there is no frustration of the will of Parliament.
- Subject to our remarks about section 17 above, the exercise of the prerogative power in the negotiations with the EU 27 is within the scope of the prerogative and is not justiciable.
- It is not appropriate for this court to examine the possible outcome of the negotiation on the basis of political rhetoric and in any event Parliament has made provision for any such outcome in the Withdrawal Act and the Withdrawal (No 2) Act 2019.

The judge gave leave to apply for judicial review in relation to the section 10 Withdrawal Act point and then dismissed that application. We dismiss that part of the appeal. The judge declined to give leave to apply for judicial review in relation to all the other grounds of challenge. We consider that he was correct to do that and we dismiss the appeals in relation to all those other grounds of challenge.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk