

Judicial Communications Office

14 May 2019

COURT REFUSES FLAGS APPEAL

Summary of Judgment

The Court of Appeal¹ today held that the Flags Regulations (Northern Ireland) 2000 were lawful and said it was satisfied that the Secretary of State had regard to the Belfast Agreement when making regulations about the flying of the Union flag at prescribed buildings on prescribed days.

Helen McMahon (“the appellant”) objected to the practice of flying of the Union flag at Omagh Courthouse on the days prescribed by the Flags Regulations (Northern Ireland) 2000 (“the 2000 Regulations”). She said she recognised the Irish National flag as her national flag and that she expected it should be on display in the exact terms upon which the Union flag is displayed. In these proceedings, the appellant appealed a decision of Mrs Justice Keegan on 2 October 2018 when she refused to make a declaration that the 2000 Regulations are unlawful and in breach of a guarantee of parity of esteem under the terms of the Belfast/Good Friday Agreement (“the Agreement”). The judge further refused to make a declaration that the Secretary of State for Northern Ireland acted *ultra vires* when introducing the 2000 Regulations in that he failed to have regard to the Agreement and, in particular, its guarantee of parity of esteem. The Court of Appeal noted that the same issue was brought before the courts in 2001 when Kerr J (as he then was) determined that the 2000 Regulations did not offend the Agreement. The discrete point at issue in these proceedings was whether the 2000 Regulations offend the principle of “parity of esteem”.

Legislative Framework

The words “and courthouses” were added to Article 3 of the Flags (Northern Ireland) Order 2000 (“the 2000 Order”) on 12 April 2010 upon the devolution of policing and justice to the Northern Ireland Assembly. Regulation 2 of the 2000 Regulations provides that the Union flag shall be flown at the government buildings listed in the Regulations and at all courthouses on specified days. At present there are 15 such days each year and on all other days no flag is flown at Omagh Courthouse.

The 2001 Decision²

In 2001, Conor Murphy MLA, applied for a judicial review of the decisions of the Secretary of State in relation to the enactment of the 2000 Order and Regulations arguing that they 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 and held that the making of the 2000 Regulations and the requirement that the Union flag be flown on government buildings was not designed to favour one tradition over another – “it merely reflects Northern Ireland’s constitutional position as part of the United Kingdom”.

¹ The Court of Appeal panel was Lord Justice Stephens, Lord Justice Treacy and Mr Justice Horner. Mr Justice Horner delivered the judgment of the Court.

² *In re Murphy’s Application for Judicial Review* [2001] NI 425

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Kerr J was also asked to address the claim that the 2000 Regulations were inconsistent with the Agreement as they failed to have regard for “partnership, equality and mutual respect” between opposing political parties and were therefore 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 failed to recognise the birth right of those who wish to be accepted as Irish. Kerr J concluded that the 2000 Regulations had not been shown to be in conflict with the Agreement. He said that by confining the days on which the Union flag is to appear, the Secretary of State sought to strike the correct balance between acknowledging Northern Ireland’s constitutional position and not giving offence to those who oppose it. He said the Secretary of State’s approach seemed 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”.

The 2018 Decision

In her decision, Mrs Justice Keegan rejected the argument that the issue was *res judicata* given Kerr J’s decision. She noted that the core point made by the applicant in this case was that Article 1(v) of the Multi-Party Agreement (one of the two inter-related documents contained in the 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.”

Mrs Justice Keegan recorded that the applicant made the case that the first of these applies to individual citizens and the latter to communities. The applicant’s complaint 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. Mrs Justice Keegan said she was not convinced that Kerr J restricted his consideration of this issue to individual rights and that it was artificial to disaggregate parity of esteem as a separate consideration given it reads as one paragraph and that in her view it was unhelpful to interpret it in any other way. The judge concluded that it was abundantly clear that the Secretary of State had fulfilled his obligation to have regard to the principles contained in the Agreement in conducting a balancing exercise and as such the Regulations could not be said to be unlawful.

Discussion

The Court of Appeal noted that Article 4(4) of the 2000 Order provides that in exercising his powers to make Regulations on the flying of flags, the Secretary of State must “have regard to the Belfast Agreement”. It said it was clear from excerpts from Hansard that the Secretary of State did have regard to the views of both communities without in any way affording one community preferential treatment. The Court said it was satisfied that the Secretary of State did have regard to the Belfast Agreement in making the 2000 Regulations and that the decisions he took were not intended to

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“disrespect” those members of the population who do not consider the Union flag to reflect their identity and aspirations and that they should not be perceived as such:

“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 Lord Kerr 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 Irish people, North and South, signed up to.”

The Court of Appeal further agreed with Mrs Justice Keegan’s conclusions about the disaggregation of Article 1(v) and said that the concept of parity of esteem is not defined in the Agreement but comes within the broad principles of equality, fairness and respect as applied to the two communities in Northern Ireland:

“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.”

Conclusion

The Court of Appeal refused the application and dismissed the appeal.

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 Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

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

Alison Houston
Judicial Communications Officer
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