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THE Supreme Court's judgment in *Re an application by James Hugh Allister for Judicial Review* [2023] UKSC 3, [2023] 2 W.L.R. 457 provides evidence, if any were needed, that the UK's Constitution is still grappling with the implications of Brexit; in this instance, the implications of the Northern Ireland Protocol and the legislation by which it is given domestic effect: the European Union Withdrawal Act 2018, as amended by the European Union Withdrawal Agreement Act 2020.

Perhaps the most discussed aspect of the judgment is the court's treatment of the constitutional statutes doctrine. However, it is difficult to draw broad conclusions about the state of that doctrine – or of wider notions concerning the relative weight of relevant constitutional norms, principles and rights – because the consideration of these matters is extremely limited. Instead, the court considered that the questions before it could satisfactorily be answered primarily by reference to the language of the relevant provisions. This note, in considering the other, perhaps less well explored, issues before the court, illustrates that this approach pervades throughout the judgment, to considerable effect.

There were three grounds of appeal, the first of which had two components: First, that the 2018 Act was incompatible with "rights of a constitutional character contained in the trade limb of article VI" of the Acts of Union 1800 (at [52]). "Some inconsistency" between the Protocol and the trade limb of article VI was accepted, not being the subject of the appeal (at [54]; *Allister v Secretary of State for Northern Ireland* [2022] NICA 15, at [186]). However, Lord Stephens – giving the unanimous judgment of the court – said (at [64]) 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". Put simply, section 7A provides that "[e]very enactment … is to be read and has effect subject to" the domestic recognition and enforcement of obligations and restrictions in the Protocol.

"The Acts of Union," said Lord Stephens, "are clearly enactments so that the terms of the trade limb of article VI [are] subject to the obligations and restrictions in the Protocol as incorporated into domestic law." The consequence is that "article VI is modified to the extent and for the period during which the Protocol applies" (at [65]). It is Lord Stephens's view that, where Parliament provides for the interaction between statutes with sufficient clarity, debate about the creation of fundamental rights, constitutional statutes or "the correct interpretative approach when considering such statutes or any fundamental rights, is academic" (at [66]). It is rendered academic precisely *because* "[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" (at [66]).

Nonetheless, Lord Stephens did consider it necessary (at [67]) to distinguish the process prescribed in section 7A from implied repeal, the process by which the constitutional statutes doctrine might be engaged. Crucially, because the Protocol does not regulate *all* aspects of trade relevant to Article VI, "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" (at [68], emphasis added). Thus, although this process might be described as "modification" (at [67]; see also [9], [55]–[57]), Lord Stephens's conclusion is that it is *because* section 7A's effect is partial and transient that "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" (at [68]). "The effect of the statutory language is that article VI is 'subject to' the Protocol" (at [68]).

The second component of this ground concerned whether the making of the Protocol was unlawful, prohibited by "a statutory restriction on the exercise of the prerogative power to make a treaty contained in the treaty limb of article VI" (at [52]).

Judgment was again given on the basis of undecided matters: (1) whether Article VI *does* impose a statutory restriction on the exercise of prerogative power; and (2) whether the Protocol is incompatible with any such restriction (at [70]–[71]). Lord Stephens nonetheless held (at [72]) 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". In his judgment, Parliament had done precisely this in the instant case: "a sovereign Parliament by enacting the 2020 Act authorised the making of the Withdrawal Agreement (which included the Protocol)" (at [73]). Parliament's intention in this regard is discernible from the 2020 Act's long title – providing for the *implementation* of the agreement between the UK and EU – and from the provision it makes for that agreement to "give rise to legal rights and obligations in domestic law" (at [74]). Lord Stephens considered that "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 the Withdrawal Agreement, including the Protocol" (at [74]).

Although this authorisation may not be express, it is rendered sufficiently clear on Lord Stephens's analysis, primarily by two contextual matters: first (at [75]), that it followed "intense and protracted parliamentary involvement in and focus on the arrangements for the withdrawal of the UK from the

EU"; second (at [76]), that the agreement itself was only made *after* its authorisation in the 2020 Act. The exercise of the prerogative was, therefore, "the fulfilment of a purpose of the 2020 Act" (at [77]). Indeed, according to Lord Stephens, "the purpose of incorporating the Withdrawal Agreement as part of domestic law … could *only* have been fulfilled by virtue of parliamentary authorisation of the exercise of the prerogative to make the Withdrawal Agreement" (at [77], emphasis added). However, although the justification for *displacing* any restrictions in Article VI, rather than authorising exercise of the prerogative *compatible* with them, is perhaps unclear, it seems that section 7A renders any such restrictions subject to the Protocol, falling away where they prohibit its making in the first place.

The third ground of appeal concerned whether section 1(1) of the Northern Ireland Act 1998 (NIA) regulated not only Northern Ireland's place in the UK, but also its "status" more broadly. The appellants contended that the Protocol represented a "substantial diminution" in that status, which can "only occur if it has been approved in advance by a poll held in accordance with Schedule 1 of the NIA" (at [80]). This broader interpretation of section 1(1) was rejected (at [83]), consonantly with *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [134].

The third challenge concerned the lawfulness of regulations, made under a power contained in section 8C(1) and (2), and paragraph 21 of Schedule 7 to the 2018 Act. This power, the appellants argued, was subject to a restriction (in section 10(1)(a) of that Act) which meant it could only be exercised compatibly with the terms of the NIA (at [101]). Put simply, these regulations provided for a consent process which, though implementing an obligation in the Protocol, set aside cross-community processes contained in section 42 NIA.

Lord Stephens, however, held that section 7A of the 2018 Act *had already modified* the NIA by the time the regulations were made. As before, section 7A means that the NIA is "to be read and has effect subject to" that obligation in the Protocol, which is to be "recognised and available in domestic law", and "enforced, allowed and followed accordingly". Thus, section 42 of the NIA, "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 [on] a simple majority" (at [108]). The proper question required by section 10(1)(a), therefore, was whether the regulations were compatible with the NIA *as modified* (at [107]). Lord Stephens held that they were.

A further vires challenge was based on the argument that the Henry VIII clause in section 8C(2) of the 2018 Act 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" NIA (at [109]). Lord

Stephens noted that there was room to adopt a restrictive approach to Henry VIII powers as an exceptional course (at [109], applying *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; *R. v Secretary of State for Social Security, ex parte Britnell* [1991] 1 W.L.R. 198, 204 (Lord Donaldson)). However, he found that this approach is "only appropriate where there is genuine doubt about the effect of the statutory provision in question", as Lord Bingham had emphasised in *R. v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme* [2001] 2 A.C. 349, 383. For Lord Stephens, no such doubt existed here (at [109]).

This judgment provides a fascinating insight into the UK Constitution's reconciliation with Brexit. In place of reliance on the constitutional statutes doctrine, it emphasises the potency of section 7A of the 2018 Act, demonstrating the ease with which Parliament can bring about significant constitutional change, even sometimes absent express language.

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