



# The Union in court, Part 2: *Allister and others v Northern Ireland Secretary* [2022] NICA 15

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## INTRODUCTION

The Ireland/Northern Ireland Protocol (Protocol) to the Withdrawal Agreement between the United Kingdom (UK) and the European Union (EU) has become, if anything, more politically divisive and polarising with time, rather than less. Even as this case is destined for the UK Supreme Court,<sup>1</sup> the House of Lords is considering (the House of Commons has already passed) a Bill to disapply large parts of the Protocol in domestic law,<sup>2</sup> resulting in criticism at the breach of international law brought on by such a step.<sup>3</sup> Nevertheless, the UK Government defends the Bill as necessary to ‘uphold’ the Belfast (Good Friday) Agreement 1998 (GFA),<sup>4</sup> which is of critical importance to all aspects of governance and peace in Northern Ireland. The Northern Ireland Assembly has yet to elect a Speaker after fresh elections in

\* We pay tribute to the Right Honourable William David Trimble, Baron Trimble of Lisnagarvey, one of the appellants (and original applicants) in this case, who died on 25 July 2022. Lord Trimble was a towering figure in Northern Ireland and is perhaps best remembered as an architect of the Belfast (Good Friday) Agreement 1998, which brought an end to decades of violence and bloodshed. We are grateful to Professor Colm Ó Cinnéide and the anonymous reviewer for their thoughtful comments and helpful feedback. Any errors and shortcomings remain our own.

1 John Campbell, ‘[Northern Ireland Protocol: Supreme Court set to hear challenge](#)’ (*BBC News* 25 April 2022).

2 Lisa O’Carroll and Heather Stewart, ‘[Northern Ireland protocol bill passes Commons vote](#)’ (*The Guardian* 27 June 2022).

3 Ronan Cormacain, ‘[Northern Ireland Protocol Bill: A Rule of Law Analysis of its Compliance with International Law](#)’ (*Bingham Centre for the Rule of Law* 17 June 2022).

4 Foreign, Commonwealth and Development Office, ‘[Foreign Secretary: bill will fix practical problems the Protocol has created in Northern Ireland](#)’ (27 June 2022).

May 2022, and is thus unable to function in any capacity, while the Northern Ireland Executive exists in a largely ‘caretaker’ capacity, with no First or deputy First Minister.<sup>5</sup> At the heart of this great unravelling lies the Protocol, or more accurately, what it has come to signify in Northern Ireland and UK politics. Any legal challenges around the Protocol, therefore, are highly anticipated matters.

This comment follows a comment which one of us wrote, concerning the first instance judgment in this case.<sup>6</sup> Consequently, the factual matrix is not rehearsed in any great detail in this comment. Rather, after setting out some general critiques, we explore each of the five grounds of appeal before concluding.

At the outset, it should be noted that *Allister* met with the same fate in the Northern Ireland Court of Appeal (NICA) as it had in the High Court – a dismissal of the various challenges – but for somewhat different reasons.

### GENERAL POINTS

Before we delve into the judgments, it is important to set out two general critiques.

First, the NICA judgments are astonishingly long. Together, they number 601 paragraphs, and are 83.8 per cent longer than the judgment of the High Court, which was set out in 327 paragraphs. Moreover, the concurring judgment of McCloskey LJ in the NICA, at 302 paragraphs, constitutes 50.25 per cent of the total NICA judgment. This reflects the fact that McCloskey LJ rehearsed the factual matrix of the case in similar detail as the Lady Chief Justice, whose judgment for the NICA majority has greater precedential value. We question whether this combined length was necessary, as there are certain segments which expansively set out either well-trodden precedents or the appellants’ evidence and may have been usefully condensed.<sup>7</sup>

Second, the manner in which the NICA appears to have determined the appeal is also somewhat concerning. As will become clear in our substantive analysis of the judgments, several grounds of appeal appear to have been at least determined *de novo*. The judgments rarely examine, or even advert to, any errors (whether or not substantiated) on the part of the first instance judge, Colton J, which could have given rise to an appeal at all. This is surprising, as generally, appeals

5 ‘NI Election 2022: Prime Minister to visit NI as DUP blocks assembly’ (*BBC News* 13 May 2022).

6 Anurag Deb, ‘The Union in court: *Allister and others*’ Application for Judicial Review [2021] NIQB 64’ (2022) 73(1) Northern Ireland Legal Quarterly 138.

7 For example, the majority’s discussion on the justiciability of treaty-making and the delay in bringing the original proceedings, *Allister and others*’ application for judicial review [2022] NICA 15, [31]–[58].

in the NICA are conducted by way of re-hearing rather than *de novo*.<sup>8</sup> The distinction may be fine, but is nevertheless important. A *de novo* hearing entirely disregards whether the court below committed any errors, whereas an appeal by way of re-hearing is successful only if the appellate court is satisfied that there is a legal, factual or discretionary error on the part of the court below, having regard to all the evidence in the appeal.<sup>9</sup> The consequence is that the NICA need not have set out its reasoning or rehearsed the factual matrix in such breadth, if it largely agreed with Colton J's findings (which it did).

## GROUND 1: THE ACTS OF UNION

### Justiciability and timeliness

Before the majority commenced its substantive analysis, two preliminary issues were considered: justiciability and delay. The issue on justiciability arose as one of the appellants' arguments was that the Withdrawal Agreement (WA) was *itself* unlawful by virtue of inconsistency with article VI of the Acts of Union 1800.<sup>10</sup> The majority rejected this on three grounds: first, it conflicted with the well-known rule<sup>11</sup> that international treaties are not justiciable in domestic law unless incorporated;<sup>12</sup> second, the WA was part of a 'distinctly political process', which was not amenable to judicial review;<sup>13</sup> and third, article VI of the Acts of Union did not purport to bind future UK Parliaments.<sup>14</sup> However, this conclusion did not prevent an assessment of the legality of provisions enacting the WA, including the Protocol.

These two statements (treaty-making is non-justiciable and it is still possible to assess the legality of the WA/Protocol) may seem oddly juxtaposed, but the point here is that the *making* of the WA/Protocol in the international plane is non-justiciable, in contrast to the *incorporated* WA/Protocol, which is justiciable.

On delay, the majority agreed with Colton J that the challenge was out of time as it was brought long after three-months post-ratification of the WA,<sup>15</sup> but extended time due to the constitutionally important issues raised.<sup>16</sup>

8 Rules of the Court of Judicature in Northern Ireland 1980, Order 59, r 3(1).

9 See eg *Allesch v Maunz* [2000] HCA 40 (Australia), [23].

10 *Allister* (n 7 above) [36].

11 See *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373, [55]–[56].

12 *Allister* (n 7 above) [37].

13 *Ibid* [39].

14 *Ibid* [39].

15 *Ibid* [50].

16 *Ibid* [57].

## Parliamentary sovereignty

Before addressing the grounds of challenge, it is worth exploring the majority's canvas of the parliamentary sovereignty case law. This was conducted because parliamentary sovereignty was a theme running throughout the claim.

The majority first considered *Thoburn v Sunderland City Council*,<sup>17</sup> which considers parliamentary sovereignty in the context of tensions between 'constitutional' and 'ordinary' statutes. They observed that *Thoburn's* essential principle was that 'constitutional' statutes cannot be impliedly repealed.<sup>18</sup> The next case was *R (HS2) Action Alliance Limited v Secretary of State for Transport*,<sup>19</sup> concerning an alleged conflict between EU and domestic law (when the UK was still an EU Member State and subject to the doctrine of EU law primacy). Although the Supreme Court found no such conflict in *HS2*, they expressed *obiter* that 'there may be fundamental principles [of constitutional law] which Parliament when it enacted the European Communities Act 1972 (ECA) did not either contemplate or authorise the abrogation'.<sup>20</sup> The next case was *R (Miller) v Brexit Secretary*,<sup>21</sup> concerning whether the UK's exit from the EU required primary legislation to effect. The majority considered that the finding that such legislation was required strongly affirmed parliamentary sovereignty.<sup>22</sup> The next case was the *Treaty Incorporation Bills Reference*<sup>23</sup> concerning whether it was within the Scottish Parliament's competence to enact certain legislation incorporating the United Nations Convention on the Rights of the Child into domestic law. The majority notes the following in the Supreme Court's judgment: 'Parliament can itself qualify its own sovereignty, as it did when it conferred on the courts the power to make declarations of incompatibility ... under section 4 of the Human Rights Act'.<sup>24</sup>

The majority concludes from the cases set out thus far that Parliament can limit its own sovereignty, with examples being the ECA 1972 and the Human Rights Act 1998 (HRA); however, no court has ever

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17 [2002] EWHC 195 (Admin); [2003] QB 151.

18 *Allister* (n 7 above) [108]–[109].

19 [2014] UKSC 3, [2014] 1 WLR 324.

20 *Allister* (n 7 above) [111].

21 [2017] UKSC 5, [2018] AC 61.

22 *Allister* (n 7 above) [115].

23 [2021] UKSC 42, [2021] 1 WLR 5106.

24 *Allister* (n 7 above) [120]. This is a controversial view, given that, traditionally, the Human Rights Act 1998 has been understood *not* to have qualified parliamentary sovereignty in any way: see Mark Elliott and Nicholas Kilford, 'Devolution in the Supreme Court: legislative supremacy, Parliament's "unqualified" power, and "modifying" the Scotland Act' (UKCLA 15 October 2021).

ruled an Act of Parliament ‘unconstitutional’.<sup>25</sup> This took them to *R (Jackson) v Attorney General*,<sup>26</sup> where this issue was considered: Lord Steyn opined *obiter* that parliamentary sovereignty is hypothetically circumscribable, being itself a construct of the common law.<sup>27</sup> The majority concludes its canvas of the parliamentary sovereignty case law with the *Continuity Bill Reference*,<sup>28</sup> which concerned another reference considering whether a proposed Bill would be within the Scottish Parliament’s legislative competence. The Supreme Court emphasised that notwithstanding devolution, only the UK Parliament wields legal sovereignty; the Scottish Parliament’s legislative powers are constrained by the Scotland Act 1998.<sup>29</sup> The majority considered that this principle applied equally to the Northern Ireland Act 1998 (NIA).<sup>30</sup> For his part, McCloskey LJ reached the same conclusion,<sup>31</sup> through an exploration of case law and academic literature.

Setting out this canvas is important because we return to it in our critique of the NICA’s reasoning on Ground 1 below.

### **The Substance of Ground 1**

On Ground 1, the appellants argued that Colton J’s decision offended constitutional principles by permitting implied repeal of a constitutional statute, namely article VI of the Acts of Union. Article VI famously declares:

[...] his Majesty’s subjects of Great Britain and Ireland shall, from and after the first day of January, one thousand eight hundred and one, 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.<sup>32</sup>

Further, there was an inconsistency between section 7A of the European Union Withdrawal Act 2018 (EUWA), which gave effect to the WA, and article VI of the Acts of Union. The majority broke this down into four questions:

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25 Ibid [123].

26 [2005] UKHL 56, [2006] 1 AC 262.

27 *Allister* (n 7 above) [124].

28 [2018] UKSC 64, [2019] AC 1022.

29 *Allister* (n 7 above) [128].

30 Ibid [130].

31 Ibid [363].

32 Union with Ireland Act 1800, art VI; Act of Union (Ireland) 1800, art VI.

- (i) Is there any inconsistency between the two statutes?
- (ii) If so, what is the later statute's effect on the earlier one?
- (iii) What was Parliament's intention in enacting the later statute?
- (iv) Does the later statute so offend fundamental principles to be rendered unlawful?<sup>33</sup>

For (i), the majority agreed with Colton J that there was some inconsistency: article VI's meaning was clear and unambiguous – all UK citizens were to have the same rights in terms of trade;<sup>34</sup> however, 'in some respects the EUWA ... bring[s] about a difference in treatment'<sup>35</sup> between citizens of Northern Ireland and those in the rest of the UK – specifically, because of the 'additional checks imposed on GB origin goods sent to NI',<sup>36</sup> and 'because the citizens of NI remain subject to some EU regulation and rules' which do not apply to other UK citizens.<sup>37</sup> Turning to (ii), the majority observed that section 7A(3) of the EUWA's scope was very broad, requiring that 'every enactment', which includes Acts of Parliament, must be read subject to the EUWA. The majority considered that this included article VI of the Acts of Union.<sup>38</sup> This did *not* mean, however, that section 7A purported to *repeal* article VI, explicitly or impliedly. In the majority's view, this was because the 'Protocol is not codified as a permanent solution and is drafted in flexible terms'.<sup>39</sup> Rather than being repealed, '[t]he 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'. There was thus no conflict with *Thoburn*, as the issue of implied repeal did not arise.<sup>40</sup> On (iii), notwithstanding their somewhat 'novel' conclusion on (ii) as to whether article VI was repealed, the majority concluded that Parliament's intent in enacting section 7A of the EUWA was clear: there could be no suggestion that Parliament was unaware of the changes brought.<sup>41</sup> On (iv), the 'fundamental' principle considered was the principle of legality.<sup>42</sup> The majority held that it was not engaged, as there was 'no basis' for contending that Parliament had interfered with fundamental rights, whether in the European Court of Human Rights (ECHR) or at common law.<sup>43</sup> The majority thus dismissed

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33 Ibid [173].

34 Ibid [183].

35 Ibid [186].

36 Ibid [184].

37 Ibid [185].

38 Ibid [189].

39 Ibid [193].

40 Ibid [195].

41 Ibid [197].

42 *R v Secretary of State for the Home Department ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115.

43 *Allister* (n 7 above) [199].

Ground 1; the summary conclusion being that section 7A of the EUWA was enacted by a sovereign Parliament which knew what the legislation involved.<sup>44</sup>

In his concurring judgment, McCloskey LJ came to a similar conclusion, that article VI was modified, rather than repealed, explicitly or impliedly, by the incorporation of the WA/Protocol.<sup>45</sup>

There are four main points to be made here in analysing the majority's reasoning. First, the length of the majority's excursion (a four-stage enquiry to determine any inconsistency between article VI and the EUWA) was unnecessary, given the respondent's lack of resistance to the idea that the EUWA in fact altered trading arrangements between Great Britain and Northern Ireland, in contrast with the 'same footing' command in article VI.<sup>46</sup> Second, by stating that the Protocol is 'not codified as a permanent solution' with reference to safeguarding measures in article 16 and the consent process in article 18, the majority appears to assume, at least in part, that the use of either provision would alter the customs and regulatory border in some major way (otherwise there would be no need to advert to its temporary nature). This is surprising, given that article 16 measures are required to be 'strictly necessary' and those which 'least disturb' the functioning of the Protocol,<sup>47</sup> rather than providing the means to fundamentally alter, far less dismantle the central feature of the Protocol; and that it is far from clear that an article 18 vote to disapply the EU Single Market provisions on goods would lead to a new borderless reality between Great Britain and Northern Ireland.<sup>48</sup> In pointing to the Protocol's non-permanence, the majority appears to gloss over the context in which the Protocol has to operate, in contrast with its detailed exploration of the context in which the Protocol was incorporated (the parliamentary process). Third, the majority's clear distinction between one statute impliedly repealing another (which 'this case is not about')<sup>49</sup> and one statute modifying the effect of another is another surprise given the majority's earlier exploration of a Supreme Court judgment which *equated* the two concepts.<sup>50</sup> In the

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44 Ibid [206].

45 Ibid [392].

46 Ibid [185].

47 Protocol on Ireland/Northern Ireland Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/101, art 16.1.

48 S McBride, 'Read the small print – the Irish Sea border may be impossible to remove, even if MLAs vote it down' (*The Newsletter* 30 January 2021) .

49 Allister (n 7 above) [195].

50 Ibid [119].



*Treaty Incorporation Bills Reference*,<sup>51</sup> the Supreme Court applied its own understanding of the word ‘modify’ in an earlier judgment – the *Continuity Bill Reference*, in which modification was held to encompass implied repeal.<sup>52</sup> Fourth, the majority’s observations on the principle of legality are surprisingly narrow. Legality, as originally defined by Lord Steyn, encompassed the following: ‘Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law.’<sup>53</sup> Fundamental rights form part of this liberal democratic paradigm, but at its heart lies the presumption that Parliament does not legislate to radically alter the ‘previous policy’ of the law without expressing itself clearly.<sup>54</sup> As we set out below, Parliament did indeed clearly express its intentions to radically alter the previous policy of the law, so, contrary to the majority’s view in *Allister*, the EUWA satisfies the principle of legality.

McCloskey LJ’s concurring judgment is also problematic. When exploring constitutional statutes, for example, the judge cited Lord Bingham’s well-known (in Northern Ireland, at least) categorisation of the NIA as ‘in effect a constitution’, and the consequent interpretational approach to that statute, in *Robinson v Northern Ireland Secretary*.<sup>55</sup> However, McCloskey LJ then appears to have drawn a straight line between *Robinson*, Lord Bingham’s approach to the Constitution of Belize in *Reyes v The Queen*, and McCloskey LJ’s own endorsement of that approach when examining the Constitution of Trinidad and Tobago in *Commissioner of Prisons v Seepersad*.<sup>56</sup> With respect, such an equivalence is unconvincing. Whether or not one agrees with Lord Bingham’s characterisation of the NIA as constitutional,<sup>57</sup> it cannot operate to render any other parliamentary statute void – in contrast with the constitutions explored in the other two cases.<sup>58</sup> Thus, the constitutional character of a UK statute is fundamentally different from either the Belizean or Trinidadian Constitutions. Moreover, the factual circumstances in both *Reyes* and *Seepersad* were worlds away from those in *Allister*: *Reyes* involved a constitutional challenge to a mandatory death sentence,<sup>59</sup> while *Seepersad* involved a constitutional

51 *Treaty Incorporation Bills* (n 23 above) [11].

52 *Continuity Bill* (n 28 above) [51].

53 *Regina v Home Secretary, ex parte Pierson* [1998] AC 539, 587C.

54 *Ibid* 587E.

55 *Ibid* [336].

56 *Ibid* [338].

57 See eg the discussion of the Inner House of the Court of Session in *Imperial Tobacco v Lord Advocate* [2012] CSIH 9, [71] (Lord Reed).

58 Constitution of Belize (1981), s 2(1) (constitutional supremacy over ordinary law enacted by the National Assembly of Belize); Constitution of Trinidad and Tobago (1976), s 2 (constitutional supremacy over ordinary law).

59 [2002] UKPC 11 [2002] 2 AC 235, [1].



challenge to judicial detention of minors charged with murder.<sup>60</sup> Indeed, equating *Robinson* with *Reyes* and *Seepersad* might even appear as an argument against having constitutional statutes, if the designation is apt to lead to comparison with constitutional supremacy.

The judge also (like the majority) explored a range of academic literature, concluding that an absolutist reading of parliamentary sovereignty may be qualified by the operation of constitutional statutes,<sup>61</sup> but that the tendency is increasingly *not* to have any such qualifications in a devolved context.<sup>62</sup> As to the first point, McCloskey LJ pointed to a paper by Paul Craig,<sup>63</sup> published before an arguable shift in the judicial understanding of parliamentary sovereignty occurred in *Miller 2/Cherry*.<sup>64</sup> As to the second point, the judge cited an analysis of the *Continuity Bill Reference* by Aileen McHarg and Chris McCorkindale,<sup>65</sup> in which the authors devoted considerable space to exploring the ramifications of the Supreme Court's understanding of how parliamentary legislation is modified (and which encompasses implied repeal).<sup>66</sup> Curiously, this exploration is absent in McCloskey LJ's concurrence, given that this exploration would have given pause to the judge's conclusion (aligning with that of Keegan LCJ) that modification and implied repeal are *distinct* outcomes.

The net effect of the majority and concurring judgments on Ground 1 was, in large part, agreement with Colton J, but with a much wider exploration of academic literature than in the High Court. We would respectfully suggest that such an exploration was both unnecessary and somewhat problematic. Now, we recognise that it is neither appropriate nor necessary for a court to conduct an exhaustive review of academic literature on a point of law before deciding it; indeed, the focus of the judge and that of the academic are fundamentally different.<sup>67</sup> What we aim to offer here is the 'legal reasoning – designed to produce practical

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60 [2021] UKPC 13 [2021] 1 WLR 4315, [3].

61 *Allister* (n 7 above) [344].

62 *Ibid* [363].

63 *Ibid* [344].

64 *Miller 2* (n 11 above), see Aileen McHarg, 'Giving substance to sovereignty' in Brice Dickson and Conor McCormick (eds), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Hart 2021) 217. Incidentally, insofar as this is a shift in the judicial understanding of parliamentary sovereignty, such a shift has been contextualised by both Aileen McHarg and Jason Varuhas within developing judicial attitudes towards the principle of legality, which the NICA unanimously decided was not engaged in *Allister*. See Jason Varuhas, 'The principle of legality' (2020) 79(3) Cambridge Law Journal 578.

65 *Allister* (n 7 above) [362].

66 Aileen McHarg and Chris McCorkindale, 'The Supreme Court and devolution: the Scottish Continuity Bill reference' (2019) *Juridical Review* 190, 193–194.

67 Lord Burrows, 'Judges and academics, and the endless road to unattainable perfection' (2022) 55(1) *Israel Law Review* 50, 54–55.

justice' which '[t]he courts want'.<sup>68</sup> In that spirit, the above critiques are important in a purely doctrinal context. The fact that Craig's paper was published before a shift towards a more substantive understanding of parliamentary sovereignty means that his understanding of the operation of constitutional statutes, and specifically their relationship to parliamentary sovereignty, may not survive the shift. But a doctrinal analysis also reveals a curious omission from both the majority and concurring judgments: any reference to *MacCormick v Lord Advocate*.<sup>69</sup> *MacCormick* is important because it speaks directly to the issue confronting the NICA under the first ground of appeal: namely to determine the interplay between article VI and section 7A of the EUWA. Briefly, *MacCormick* concerned the lawfulness of the monarch being 'Elizabeth II' in Scotland, as Scotland (pre-Union) had never had a monarch styled Elizabeth I. The petitioners in *MacCormick* had invoked article I of the Treaty of Union 1707, which had united England (and Wales) and Scotland into one kingdom, submitting that the article precluded there being an Elizabeth II by implication. The petition was dismissed in the Outer House of the Court of Session, *inter alia* because of the unqualified nature of parliamentary sovereignty.<sup>70</sup> In the Inner House, however, the Lord President doubted whether the UK Parliament possessed unqualified sovereignty, being a creature of a treaty, which contained 'unalterable' elements.<sup>71</sup> Nevertheless, the petitioners' reclaiming motion in the Inner House failed because, *inter alia*, there was no authority for the proposition that the courts could scrutinise Acts of Parliament for their compliance with the Treaty of Union.<sup>72</sup> In so far as Parliament incurred any cost of making laws in breach of the Treaty of Union, such cost would be political and not legal: a very narrow view on justiciability, but one which is a necessary implication of there being no authority (before or since *MacCormick* was decided) suggesting any alternative view.<sup>73</sup>

The point of the above discussion is to highlight the proverbial elephant in the (court)room: despite the NICA's admirable focus on discerning *one* answer to the question of what happened to article VI, and on reconciling the political reality of Brexit with the logic of constitutional operation which that court identified, the answer which

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68 Ibid 55.

69 1953 SC 396 (Inner House). We do not know whether the case was cited to the NICA.

70 Ibid 403, per Lord Guthrie.

71 Ibid 411–412, per Lord President Cooper.

72 Ibid 412, per Lord President Cooper.

73 See also *Gibson v Lord Advocate* 1975 SC 136 (Outer House) 144, per Lord Keith. Indeed, this issue has some vintage in the Scottish courts, see eg *Laughland v Wansborough Paper Co Ltd* 1921 SLT 341 (Bill Chamber).

resulted from this focus is not entirely persuasive when scrutinised using relevant developments in jurisprudence and academia.

The NICA's approach can be contrasted with that of the High Court, where Colton J's attention was less focused on finding a single answer, and instead more focused on how to give effect to a *present-day* statute. Let us recall that Colton J did not conclusively state whether article VI had been modified, repealed (explicitly or implicitly), rendered obsolete or spent, or indeed anything else. Rather, the first instance judge proceeded on the basis that the two statutes had been enacted in radically different eras, and that 'insofar as there is any conflict between them section 7A [of the EUWA] is to be preferred and given legal effect'.<sup>74</sup> Incidentally, Colton J's approach aligns in some major ways with a comment which Keegan LCJ quoted, and which, we respectfully suggest, would have served the NICA better in arriving at a conclusive answer:

Certain statutes alter the constitutional arrangements of the United Kingdom in such a way as create a new framework within which later legislation is to be construed and applied. That does not of course preclude a later statute from expressly repealing or amending these new arrangements for it is of the essence of the notion of Parliament's sovereign supremacy that no one Parliament can fetter the scope of action of a later Parliament. But it does mean that the courts will assume—in accordance with the wish of the Parliament enacting the constitutional statute—that no future Parliament intends to depart or contravene any aspect of the new constitutional arrangements unless it does so in clear and unambiguous words.<sup>75</sup>

Periodically, in response to political developments, Parliament enacts statutes which radically alter constitutional arrangements. These statutes mark eras of constitutional operation which differ from others because the arrangements fundamental to constitutional operation differ between different eras. The judicial approach to such constitutional statutes should be to prefer the latter to the former. If the former survives unamended (in any capacity) into the latter's era, it should be held to have been impliedly repeated to the extent necessary to give the latter effect. In this model, an era has a specific context. A constitutional statute speaks to vertical relationships between citizen and state and may also speak to horizontal relationships between different organs of the state.<sup>76</sup> An era therefore is the sum of these relationships and how rights and obligations relating to citizens and state organs operate consistently with the text of a constitutional

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74 [2021] NIQB 64, [95]–[114].

75 *Allister* (n 7 above) [113], citing D Greenberg, *Craies on Legislation* 12th edn (Sweet & Maxwell 2021) 14.4.6.

76 *Deb* (n 6 above) 143.

statute. In the Protocol era, the sweeping ‘same footing’ command of article VI has been replaced by a customs and regulatory border given domestic effect by the EUWA, with Northern Ireland continuing to be subject to a suite of EU laws beyond simply those relating to goods, none of which apply to Great Britain.

Moreover, where ordinary statutes survive unamended into a new constitutional era, those statutes must then be interpreted consistently<sup>77</sup> with the enacted requirements (as well as the underlying purpose and necessary implications) of the new era. Incidentally, this is what the EUWA requires in any event.<sup>78</sup>

A statute which irresistibly repeals a constitutional statute (or any provision of a constitutional statute) would itself be capable of effecting radical change to constitutional arrangements, thus beginning a new era of constitutional operation. We should stress that ‘era’ in this context does not necessarily signify the complete end of one constitutional statute and the beginning of another. Rather, it is entirely possible for one or more provisions in a constitutional statute to be repealed (explicitly or impliedly) by a later constitutional statute, so that parts of the previous statute remain in operation, but subject to those newer constitutional provisions which repealed the older ones. A prime example is the Northern Ireland Protocol Bill – by explicitly disapplying large sections of the Protocol, the Bill, if enacted, would in fact radically alter constitutional arrangements in the UK. This is apparent in the far-reaching scope of the powers conferred by the Bill on UK ministers, including the power to give domestic effect to any international agreement replacing, supplementing or modifying the Protocol, by secondary legislation,<sup>79</sup> a role reserved traditionally for Parliament. Nevertheless, the Bill will not (even if enacted as it currently stands) completely undo the constitutional realignment between Great Britain and Northern Ireland brought about by the Protocol. For example, the continued application and evolution of EU equality and non-discrimination law (including the relevant sections of the EU *acquis*) listed under annex I of the Protocol<sup>80</sup> is not ‘excluded provision’ within the definition of the Bill.<sup>81</sup> Thus, Northern Ireland will continue to be subject to aspects of EU law, both in its current state and as it evolves, despite the radical changes proposed by the Bill. Vertical and horizontal relationships will therefore continue to be different on either side of the Irish Sea, for example with employment

77 In so far as the ordinary statute in question is *pari materia* with a constitutional statute.

78 EUWA 2018, s 7A(3).

79 Northern Ireland Protocol Bill HL Bill (2022–23) 52, cl 19.

80 See also, Protocol (n 47 above) art 2.

81 Northern Ireland Protocol Bill HL Bill (2022–23) 52, cl 14(2).

rights continuing to be subject to certain EU laws which no longer apply in Great Britain, and with Stormont's legislative competence continuing to be subject to certain EU laws,<sup>82</sup> unlike its Scottish and Welsh counterparts.

Applying the above, the operation of the Acts of Union, in their original context (before the partition of Ireland and Irish independence) marked one era of constitutional operation, changing to another with the emergence of the Irish Free State and ultimately the complete severance of constitutional relationships between the UK and Ireland. This explains why decisions such as the *Earl of Antrim's petition*<sup>83</sup> were handed down without a definitive, *single* answer as to what happened to the provisions of the Acts of Union conferring a right upon Irish peers to sit in the House of Lords. A single answer, predicated as it would be on the assumption of unaltered constitutional continuity, was moot: constitutional relationships and operation had been realigned by Parliament so that the earlier era of constitutional operation had, in the context of the Irish peers and their right to sit in the House of Lords, ceased to exist. Exiting the EU realigned relationships and operation again, through the enactment of the EUWA (as amended). In that sense, the NICA was being asked to reconcile different eras of constitutional operation. Insofar as it tried to do as asked, its reasoning consequently suffered. This is why, for example, discussions of legislative intent behind the Acts of Union<sup>84</sup> are out of place (and indeed, era). Whatever the intent behind a previous era, it yields to the intent behind the present one.

We pause here to acknowledge that Mark Elliott has made a version of the argument we have made here,<sup>85</sup> and that our attempts seek to supplement Elliott's.<sup>86</sup> The discussion here is not an attempt at reinventing the wheel, doctrinally speaking. The majority's focus on the legislative intent of the EUWA is, in our view, entirely correct. Rather, this discussion is about setting the NICA's reasoning within wider constitutional doctrine, both as this case proceeds up the appellate hierarchy and more generally, for future litigation of this kind, which may occur with greater frequency given recent developments. Colm Ó Cinnéide charts these, at times, intensely polarised developments in

82 NIA 1998, s 6(2)(ca) (restriction on legislating in breach of art 2(1) of the Protocol, being the rights of individuals).

83 [1967] 1 AC 691 (HL).

84 *Allister* (n 7 above) [377].

85 Mark Elliott, 'Constitutional legislation, European Union law and the nature of the United Kingdom's contemporary constitution' (2014) 10(3) *European Constitutional Law Review* 379, 387.

86 In addition to supplementing a point about implied repeal of a constitutional statute needing to avoid a constitutional vacuum, made in the comment around the High Court judgment in *Allister*, see Deb (n 6 above) 149.

which rival narratives of constitutional ‘fidelity’ have attempted self-legitimation through an appeal to different histories of constitutional development, each presented as a continuum which is either being ruptured or reclaimed.<sup>87</sup> And nor is this by any means a recent phenomenon. In his examination of the development of the common law, historian J G A Pocock observed, perhaps with a hint of sardonicism:

The English supposed that the common law was the only law their land had ever known, and this by itself encouraged them to interpret the past as if it had been governed by the law of their own day; but in addition the fact that the common law was a customary law, and that lawyers defined custom in a way which heavily emphasised its immemorial character, made even more radical the English tendency to read existing law into the remote past.<sup>88</sup>

The recognition that historical laws of a constitutional character must be understood in their time emerges in recent jurisprudence – for example, around the question of the present-day justiciability of the provisions of the Scottish Claim of Right 1689.<sup>89</sup> Indeed, it is possibly the only way to answer the question of how to reconcile two provisions of constitutional character – the recognition that they operate in different *eras*. Such recognition reinforces the sovereignty of the Crown in Parliament, which is ultimately one of the only constant principles<sup>90</sup> which traverse different eras of constitutional operation; not necessarily because of any particular justification grounded in high constitutional theory, but because there is simply *no other choice*. Parliamentary sovereignty may be justified by reference to its democratic credentials,<sup>91</sup> but it has remained undiminished in its potency because the UK recognises no higher source of law to legally constrain Parliament’s law-making ability. Those who roam the intellectual wilderness in search of a single, complete and timeless<sup>92</sup> account of the UK constitution dismiss its fundamentally positivist character at their own peril. The very fact that parliamentary

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87 Colm Ó Cinnéide, “‘You can’t go home again’: constitutional fidelity and change in post-Brexit Britain’ (Public Law Conference, University College Dublin July 2022).

88 J G A Pocock, *The Ancient Constitution and The Feudal Law* (Cambridge University Press 1987) 30–31.

89 *Cherry v Lord Advocate* [2019] CSIH 49, 2020 SC 37, [85], per Lord Brodie.

90 We would also suggest the rule of law as another constant principle.

91 See eg *R (SC and Others) v Work and Pensions Secretary* [2021] UKSC 26, [2022] AC 223, [169]; *R (Bancoult) v Foreign and Commonwealth Secretary* [2008] UKHL 61, [2009] 1 AC 453, [35]; Paul Craig, ‘The Supreme Court, prerogation and constitutional principle’ (2020) Public Law 248, 254–255; and Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Open University Press 2001) 254.

92 To quote Ó Cinnéide, a ‘prelapsarian’ account of the UK constitution.



sovereignty appears to be one of the only entrenched<sup>93</sup> principles of this constitution further reinforces its positivist tendencies. The UK constitution is not ‘a “thing” to be discovered; it is a term around which competing interests struggle to establish the authority of their own favoured view’.<sup>94</sup> Thus, constitutional realignment is a feature, not a bug, of the UK constitution. Moreover, while this tendency towards constitutional realignment is made possible because a sovereign Parliament is unable (legally) to bind its successors, the inability of one Parliament to bind a future Parliament is reinforced precisely at each moment of constitutional realignment, resulting in realignments as seismic as Brexit. Indeed, a reading of history reveals previous realignments which at least arguably conflicted with article VI.<sup>95</sup>

Recognising different eras of constitutional operation also requires the recognition that, in litigation, courts must determine the necessary implications which flow from and the underlying purpose of constitutional realignment. In eras past, authoritative voices<sup>96</sup> have inferred constitutional purpose from the prevailing religious and socio-political thinking and experience relevant to those eras. Few, however, would argue that, with the modern ‘orgy of statute-making’,<sup>97</sup> courts need to (or should) reach for purpose in scripture. In line with the positivist tendencies fundamental to the UK constitution, the purpose of constitutional alignment (and realignment) revolves primarily<sup>98</sup> (some would argue, *solely*)<sup>99</sup> around the text of enacted law. We acknowledge that this is not an academically complete account of the constitution but remind ourselves that an academically complete account is unnecessary (and indeed, perhaps unhelpful) for the exercise of the judicial function.

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93 Not timeless – see eg Goldsworthy (n 91 above) 159–164 or *Jackson* (n 23 above), [102] per Lord Steyn.

94 Martin Loughlin, ‘In search of the constitution’ in O Doyle, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom* (Cambridge University Press 2021) 332.

95 C R G Murray and Daniel Wincott, ‘Partition by degrees: routine exceptions in border and immigration practice between the UK and Ireland, 1921–1972’ (2020) 47 *Journal of Law and Society* S145.

96 William Blackstone, *Commentaries on the Laws of England* 15th edn (Cadell & Davies 1809) 154, on the tyranny of Charles I’s Long Parliament as a lesson in keeping legislative powers in check; John Locke, *An Essay concerning Human Understanding with the Second Treatise of Government* (Wordsworth 2015) 325, on legislative power requiring conformity to ‘the will of God’.

97 Grant Gilmore, *The Ages of American Law* (Yale University Press 1977) 95.

98 See eg *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209, [70].

99 See eg the differing perspectives in *R(O) v Home Secretary* [2022] UKSC 3, [2022] 2 WLR 343, between Lord Hodge at [30]–[31] and Lady Arden at [65]–[68].

Thus, in our view, the first ground of appeal is misconceived. The framing of article VI, as indeed any other statutory provision, must begin with discerning the will of a sovereign Parliament, and the unimpeachable reality that its will cannot be voided by operation of law, historical or otherwise. This is why, for example, EU membership did not deprive Parliament of its sovereignty, because Parliament retained the ability to repeal the very enactment through which the supremacy of EU law entered the domestic plane.<sup>100</sup>

We stress here that, although we have attempted an answer premised on implied repeal, the operation of the EUWA does not depend on conclusively disposing the question of what has happened to article VI. *Whatever* has happened, as a matter of law, to article VI, the EUWA is to be given effect; to adapt Lord Rodger's phrase (though perhaps not his sentiment behind it),<sup>101</sup> *parlamentum locutum, iudicium finitum* – Parliament has spoken, the case is closed.

## GROUND 2: THE CONSTITUTIONAL QUESTION IN THE NIA

On Ground 2, the issue was whether the Protocol conflicted with section 1(1) of the NIA, which provides that Northern Ireland remains in the UK unless a majority of its people vote to secede from it. The appellants argued: (i) section 1(1) protected against any substantial change to the Union; (ii) as the Protocol and EUWA effected substantial changes to the Union, a referendum was required; (iii) as no referendum was held, the Protocol and EUWA were unlawful. The majority found this Ground failed at the first hurdle, as section 1(1) only relates to a change in the formal constitutional status of NI. Given the case involved a 'change in intra-UK arrangements brought about by withdrawal from the EU', section 1(1) did not apply to whether the changes enacted by the EUWA and the Protocol were lawful.<sup>102</sup> For essentially the same reasons, McCloskey LJ also concurred.<sup>103</sup>

The NICA's conclusions here should not surprise anyone. We would only add to these conclusions by observing that the principle of consent, as contained in the GFA, speaks not to the 'formal' status of Northern Ireland, as the appellants had characterised it;<sup>104</sup> rather, it speaks to whether the UK or Ireland has *sovereignty* over Northern Ireland. This is not an arid, abstract point; this is a very real matter and provides a complete answer to the appellants' principal challenge here.

100 *Miller 1* (n 21 above) [60].

101 *Home Secretary v AF* (No 3) [2009] UKHL 28, [2010] 2 AC 269, [98].

102 *Allister* (n 7 above) [222].

103 *Ibid* [409]–[413].

104 *Ibid* [213].

If a foreign legislature were to make law which is effective in Northern Ireland, such effectiveness results from the exercise of parliamentary sovereignty and not otherwise. That is what Parliament has done in giving effect to the Protocol in domestic law, and any attempt to restrict such effect amounts to considerably qualifying, if not outright negating, the will of Parliament.

### **GROUND 3: DEMOCRATIC CONSENT IN THE NIA**

On Ground 3, the appellants argued that the amendment of section 42 of the NIA by the Protocol on Ireland/Northern Ireland (Democratic Consent Process) EU Exit Regulations 2020 (the 2020 Regulations), removing the cross-community vote process in respect of the democratic consent process in article 18 of the Protocol, was unlawful. They contended that: (i) the democratic consent mechanism in article 18 of the Protocol, as implemented by the 2020 Regulations, was incompatible with the constitutional safeguards (of cross-community voting) in section 42 of the NIA; (ii) the 2020 Regulations were *ultra vires* section 10(1)(a) of the EUWA; and (iii) the 2020 Regulations are inconsistent with the GFA.

There were two main issues to be considered: first, the interpretation of the Henry VIII clauses in the EUWA used to enact the 2020 Regulations, which amended the NIA; and second, the broader constitutional point regarding the democratic consent process. On the first issue, the interpretation of the relevant Henry VIII clauses – in section 8C(1) and (2) of the EUWA – is crucial, and is thus worth setting out in full. Section 8C(1) provides that a minister of the Crown may by regulations make such provision:

- (a) To implement the Protocol in 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 in the Protocol).

Section 8C(2) provides that regulations made under section 8C(1) may amend primary legislation: ‘Regulation under sub-section (1) may make provision that could be made by an Act of Parliament (including modifying this Act).’

The appellants argued that the Henry VIII clause should be interpreted restrictively, following *R (Public Law Project) v Lord Chancellor*.<sup>105</sup> The majority concluded that the present claim differed

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<sup>105</sup> [2016] UKSC 39, [2016] AC 1531.

markedly from the authorities on restrictive interpretation of Henry VIII clauses, as the delegated power here – in section 8C(1) and (2) EUWA – was deliberately conferred in unambiguous terms by Parliament.<sup>106</sup> There was thus no basis for challenging the lawfulness of the delegation.

McCloskey LJ's analysis on this point, although reaching the same conclusion, proceeded slightly differently. Whilst accepting section 8C read as a whole is framed expansively,<sup>107</sup> he considered that this ground of challenge concerns only section 8C(1)(a). In this regard, the operative word 'implement' – which McCloskey LJ considered 'clearly does not extend to variation, repeal, modification or amplification' – was narrow in scope.<sup>108</sup> However, the making of the 2020 Regulations, being 'narrow, targeted and specific', could also be described as 'implementation',<sup>109</sup> which meant that the 2020 Regulations were *intra vires* section 8C(1)(a) EUWA.

On the second issue, the appellants' central argument was that the issue of democratic consent – a central component of the devolution settlement – was impugned by the 2020 Regulations, thus unlawfully offending the 1998 settlement. The majority rejected this for four reasons. First, as stated above, the broad powers in the EUWA gave the Secretary of State the authority to enact the 2020 Regulations. Further, the WA was part of 'international relations', an excepted matter under schedule 2 to the NIA. Second, it was clear that the petition of concern, which engages the cross-community vote process, was only intended for devolved matters. As the WA was not a devolved matter, there could be no argument that section 42 is infringed by article 18 of the Protocol.<sup>110</sup> Third, in relation to the GFA, whilst section 10(1)(a) of the EUWA refers to the need to protect it, there is a difference between a declaration to that effect and justiciable rights under the GFA, which the majority highlight – significantly – is not a part of domestic law.<sup>111</sup> In any event, the form of consent in the article 18 process, even though differing from the NIA's cross-community consent, was a result of considerable political negotiation and subject to parliamentary scrutiny.<sup>112</sup> Fourth, whilst recognising the tension that can arise between devolved legislatures and the UK Parliament in law-making,<sup>113</sup> the NIA permits the Assembly to modify

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106 *Allister* (n 7 above) [238].

107 *Ibid* [424].

108 *Ibid* [425].

109 *Ibid* [432].

110 *Ibid* [243].

111 *Ibid* [244].

112 *Ibid* [247].

113 *Continuity Bill Reference* (n 28 above).

provisions only in so far as it is within legislative competence to do so. Given that the conduct of international affairs is not a devolved matter, this Ground had to be dismissed.<sup>114</sup>

We agree only with the majority's first reason for dismissing this ground, namely the breadth of section 8C of the EUWA. This is a sufficient answer to the appellant's challenge, although the amending of primary legislation, especially a constitutional statute (the NIA) by secondary legislation (the 2020 Regulations) is a matter of some concern from the perspective of legislative scrutiny: Parliament cannot amend secondary legislation, but only approve or disapprove of it in its entirety.<sup>115</sup> Nevertheless, section 8C is clear in its scope. The majority's second, third and fourth reasons, however, proceed on the basis that the democratic consent process is an excepted matter. This is somewhat problematic for an important reason: the Secretary of State is responsible for initiating the process, but Stormont is responsible for the vote within that process. Stormont's vote, whether affirming or rejecting articles 5–10 of the Protocol, does not, by itself, affect the conduct of international relations. This is because if articles 5–10 are rejected, it falls on the UK Government and the EU to negotiate their replacement, *not* Stormont. Eliding the role of Stormont within the consent process, with the *reality* of the conduct of international relations, effectively introduces a judicial qualification of excepted matters by the backdoor.<sup>116</sup>

It is true that a vote by Stormont rejecting articles 5–10 is likely to *trigger* a renegotiation between the UK and the EU to replace the relevant articles. However, Stormont's opinion on *what* might replace the articles is not (under the Protocol) a prerequisite to the replacement, so the way in which Stormont's vote *affects* the renegotiation, and thus international relations between the UK and the EU, is not clear cut. It is therefore questionable whether the NICA (and the High Court, for that matter) should have *categorically* classified Stormont's vote as falling within the realm of international relations.

In respect of the second issue under Ground 2, however, the standout aspect of McCloskey LJ's concurring analysis is his observations on the 'juridical identity' of the WA.<sup>117</sup> His essential reasoning is that the

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114 *Allister* (n 7 above) [249].

115 A point which one of us had also made in the commentary around the High Court judgment in *Allister*, see Deb (n 6 above) 157.

116 The NIA distinguishes between international relations (which is an excepted matter, see NIA, sch 2, para 3) and the observation or implementation of international obligations (which is not an excepted matter, see NIA, sch 2, para 3(c)). For a more detailed version of this argument, see Deb (n 6 above) 155–156.

117 *Allister* (n 7 above) [436].

dual identity of the WA, as both an international treaty and domestic law by primary legislation, permits the reviewing judge to view the 2020 Regulations from an external international perspective, and, in line with the Vienna Convention on the Law of Treaties,<sup>118</sup> it is within the scope of ‘international relations’ under which the Secretary of State held competence to make the 2020 Regulations.

Here, the judge appears to have taken the WA/Protocol’s status as a domestically incorporated international treaty down a somewhat strange path. While it is true that the WA/Protocol is enforceable both in the international and domestic planes, it is only its domestic enforcement which *could* concern the NICA, considering it has no jurisdiction relating to international law. In this context, the judge’s conclusion that the WA/Protocol’s nature as an international treaty *empowers* the ‘making of the 2020 Regulations’<sup>119</sup> is bewildering: nowhere in the text of the treaty is there a power of delegated legislation conferred on the Secretary of State. This conclusion is apparently buttressed by another claim, that article 18.5 of the Protocol ‘required domestic legislative action’,<sup>120</sup> which is also nowhere to be found in the text of article 18.5. Article 18.2 requires the UK to ‘seek democratic consent’ in Northern Ireland,<sup>121</sup> in respect of which Parliament authorised the Secretary of State to make secondary legislation (via section 8C of the EUWA) – resulting in the 2020 Regulations. The 2020 Regulations were thus authorised and made *purely* as an exercise of domestic law, in response to a related – though (in important ways) different – obligation arising under international law.

#### GROUND 4: BREACH OF THE ECHR

On Ground 4, the issue was whether the Protocol violated article 3 of Protocol 1 to the ECHR (A3P1), which protects the right to free elections. This was split into two questions: (i) whether Northern Ireland citizens remaining subject to some aspects of EU law but being unable to vote in European parliamentary elections breaches A3P1; and (ii) whether the differential treatment of Northern Ireland citizens amounts to discrimination contrary to article 14, read with A3P1. On (i), the majority was equivocal as to whether A3P1 was even engaged, giving no firm conclusion, albeit tending towards non-engagement.<sup>122</sup> However, even if it was engaged, the majority considered the interference was

118 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

119 *Allister* (n 7 above) [436].

120 *Ibid.*

121 Protocol (n 47 above) C 384 I/102.

122 *Ibid* [267].



within the state's wide margin of appreciation on A3P1, taking into account the factors in the Protocol which together encompass a degree of democratic oversight.<sup>123</sup> These included article 18's requirement of democratic consent for ongoing arrangements, article 13.4's provision of a post-enactment information requirement and the requirement that any new act be regulated via the Joint Committee. Further, that Northern Ireland citizens remain enfranchised to vote in both the UK parliamentary and Assembly elections was considered significant.<sup>124</sup>

On (ii), the majority had 'serious reservations' about whether an ancillary test was satisfied, namely the issue of ambit, but proceeded on the basis that it was and applied the four-stage test for determining a breach of article 14: (1) status; (2) differential treatment; (3) lack of reasonable justification; and (4) outside the State's margin of appreciation. On (1), the majority disagreed with Colton J's finding that Northern Ireland residency was a relevant 'status', on the basis that the appellants 'cannot purport to speak for all Northern Ireland residents'.<sup>125</sup> On (2), the majority considered there was no differential treatment between Northern Ireland and other UK residents – no one is able to vote in European parliamentary elections under the Protocol no matter their place of residence.<sup>126</sup> On (3) and (4), the majority considered that the tests were not met, given that there was no group against which differential treatment was to be contrasted with.<sup>127</sup> Both limbs of Ground 4 were thus dismissed.

McCloskey LJ's analysis of this ground proceeded on a largely similar note, albeit giving much greater consideration to the relevant Strasbourg jurisprudence. An interesting observation is McCloskey LJ's highlighting that where it is alleged that there is a lack of proportionality in such matters, it is not uncommon for appellants to propose alternative arrangements which may satisfy all parties: in this case, measures which could facilitate the functioning of the Protocol whilst eliminating the democratic deficit.<sup>128</sup> The absence of any such resolution proposed by the appellants, accompanied by the highly political nature of any such alternate solutions to the Protocol (or lack thereof), supported his view that there is limited scope for judicial intervention on grounds of disproportionality.<sup>129</sup>

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123 Ibid [268].

124 Ibid [265]–[266].

125 Ibid [278].

126 Ibid [285].

127 Ibid [286].

128 Ibid [484].

129 Ibid.

A notable preliminary point, in our view, is the majority's elision of the distinction between Northern Ireland *citizenship* and *residency*. In laying the groundwork for Ground 4, the two distinct questions identified by the majority referred to Northern Ireland citizens, which differed from the arguments put to the Court by the appellants, which were through the prism of Northern Ireland residency. However, when analysing the article 14 issue, they referred instead to Northern Ireland residency, likely due to the fact much of the relevant Strasbourg jurisprudence refers to residency, as opposed to citizenship.

Moving to the substance, there are two main points in response to the NICA's dismissal of this ground (that A3P1 was engaged but satisfied). First, the appellants were partly correct when stating that the European Parliament continues to act as a legislature for Northern Ireland:<sup>130</sup> *partly*, because it may amend or replace any of the EU legislation mentioned in the Protocol without any further process or scrutiny, and without any limitation on the scope of the amendment or replacement.<sup>131</sup> Neither the UK Government, nor Parliament, nor indeed the Assembly, have any role to play in this process, belying the safety net of democratic accountability which comforted both the majority and McCloskey LJ.<sup>132</sup> Second, the fact that Northern Ireland residents have no right to vote in the European Parliament in respect of this area of law-making (without any further democratic scrutiny) arguably amounts to a blanket ban on the right to vote, and thereby lies outside the UK's margin of appreciation, a point spelled out explicitly in *Hirst v United Kingdom (No 2)*.<sup>133</sup> A more persuasive point might have been to examine whether a right to vote existed at all for Northern Ireland *residents* (and thus whether A3P1 was engaged) following Brexit, given that the right to vote, under EU law, is tied to nationality of a Member State, which the UK has ceased to be.<sup>134</sup>

If A3P1 was not engaged at all, then there would be no need to examine the corresponding article 14 claim, but seeing as the NICA

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130 *Allister* (n 7 above) [461].

131 See also, A Deb, 'Parliamentary sovereignty and the Protocol pincer' (2022) *Legal Studies* 1, 16–18.

132 *Allister* (n 7 above) [267] and [477].

133 (2006) 42 EHRR 41 (GC), [82].

134 Case C-673/20 *EP v Préfet du Gers*, INSEE (CJEU Grand Chamber, delivered 9 June 2022), [58]. We recognise that *EP* was handed down after *Allister* but are unaware whether the NICA were alerted to this fact, and indeed whether the NICA would have delayed its judgment until after *EP* had been handed down. We should also clarify that while we recognise that all Northern Ireland residents are not UK nationals (and indeed include a significant number of Irish, and thus EU, citizens), there is plainly no obligation under EU law for third countries to allow EU citizens resident in their territories to take part in European parliamentary elections.

did so, the majority drew a particularly problematic conclusion around ‘other status’: the surprising conclusion that the appellants could not claim ‘other status’ within the meaning of article 14, as the appellants ‘cannot purport to speak for all Northern Ireland residents and do not profess to do so’.<sup>135</sup> This conclusion is fundamentally antithetical to the concept of antidiscrimination law. A woman, for example, is not discriminated against as a woman because she can universalise her discriminatory experience to *womankind*.<sup>136</sup> Both the majority and concurring judgments held, however, that ‘other status’ had to bear some relationship to the listed characteristics in article 14, and that residence was too detached from these characteristics to constitute ‘other status’.<sup>137</sup> This conclusion sits somewhat uneasily alongside the fact that residency (albeit in factual circumstances very different from those in *Allister*) has been held to fall within ‘other status’ in the case law of the Strasbourg Court.<sup>138</sup> However, when looked at in the round, a different picture emerges.

The appellants’ claim under article 14 is necessarily tied to their A3P1 claim. A3P1, in turn, provides for a right to vote in the ‘choice of the legislature’, thus predicated on a law-making body in respect of which a vote may be cast. Now, taking the appellants’ claim in this context at its height (that A3P1 is engaged), the European Parliament continues to have the power to make laws – but *only* for Northern Ireland. It has no powers to make law in respect of Great Britain. Northern Ireland residents are therefore in a *relevantly different* situation to those who are resident in Great Britain. Consequently, the article 14 ground falls away. Ultimately, the NICA reaches this exact conclusion.

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135 *Allister* (n 7 above) [278].

136 See eg *Carvalho Pinto de Sousa Morais v Portugal* [2017] ECHR 719, [52], in which the applicant was held to have been discriminated against as an older woman, in relation to how Portuguese courts had viewed the importance and impact of sexual intimacy in her life, as compared to younger people in general, including younger women.

137 *Allister* (n 7 above) [283] and [536].

138 See eg *Carson v UK* (2010) 51 EHRR 13 (GC), [70]. However, it should be noted that in *Carson* residency was found to be ‘other status’ on the basis of residency outside the UK state, whereas the appellants in this case have asserted ‘other status’ based on residence within the different jurisdictions of the UK. It is unfortunate that neither majority nor concurring judgment in this case alluded to, nor engaged with, this point.

## GROUND 5: A BREACH OF EU LAW

On Ground 5, the appellants' argued that the Protocol breached two articles of the Treaty on European Union (TEU): (i) article 50, which provides for the process of withdrawal from the EU; and (ii) article 10, which provides that citizens are to be 'represented at Union level in the European Parliament'. On (i), the majority dismissed the argument that article 50(2) did not permit agreement of a future-facing document like the Protocol after withdrawal had taken place, holding that its ordinary and natural meaning permitted specific terms to be set after a process of negotiation/ratification post-withdrawal.<sup>139</sup> On (ii), the majority dismissed the argument on the basis that article 10(2) deals with the functioning of the EU, of which the UK is no longer part.<sup>140</sup> The majority concludes its dismissal of Ground 5 by highlighting that the Ground in fact raised non-justiciable matters, by seeking to impugn the withdrawal process itself, which occurred on the international plane.<sup>141</sup>

McCloskey LJ largely reiterates the majority's decision with respect to the first alleged breach, describing the appellants' contention as 'misconceived'. The judge also draws attention to the 'juridical reality' that, even assuming the UK to have concluded a treaty in breach of the TEU, it is no longer answerable for any such breaches.

Ground 5 gets possibly the shortest treatment from the NICA: both the majority and McCloskey LJ finding that EU law had been complied with in the process of the UK's withdrawal. Neither judgment explores depths of legal reasoning as profound as under Ground 1 (or indeed any other ground), as indeed such exploration is both unnecessary and, more importantly, *pointless*: no UK court is competent to determine the correct interpretation or application of EU law.<sup>142</sup>

## CONCLUSION

*Allister* was as unique in the NICA as it had been in the High Court, but this is hardly surprising. A case which asks seemingly uncomfortable questions about the very foundations of the modern UK and the longstanding orthodoxies undergirding its constitution is a case which comes along but rarely. For that reason alone, the NICA's allowance of an application which began almost a year after the rules of civil procedure allow – perhaps an indulgence in ordinary cases – is not difficult to understand here.

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139 Ibid [291].

140 Ibid [293].

141 Ibid [293].

142 Not, of course, to be confused with 'retained EU law', which is UK law.

What the case attempts to do is hold a constitutional mirror to the UK Government and Parliament, asking both to account for their decisions and actions in the Brexit saga. But it is precisely because of the nature of the UK constitution, that attempts like these could only be successful in the political arena, which has long since moved onto other issues. Nevertheless, the questions raised in *Allister* await their most authoritative answer yet, as they approach the doors to the Supreme Court.