

Analysis of Judgment of Colton J in Allister’s (et al’s) application [2021] NIQB 64

Implied repeal of the Act of Union

30 June 2021

Introduction

[1] The decision in the Judicial Review challenge brought by Jim Allister QC, Baroness Kate Hoey, former MEP Ben Habib and others (‘the challenge’) was delivered by Colton J on 30 June 2021. The ruling dismissed all the applicant’s grounds of challenge, despite finding that the Northern Ireland Protocol (‘the Protocol’) conflicted with the Act of Union.

[2] Whilst there are reasons to be concerned about much of the decision by Colton J on all of the grounds of challenge, the most flagrant error finds itself within the findings on the challenge based upon the Act of Union 1800, the foundational constitutional statute of the United Kingdom.

The Act of Union and s7A of the Withdrawal Act 2018

[3] The sixth article of the Act of Union sets forth the basis of equality in matters of trade across the United Kingdom in its first limb, and in its second limb constrains the treaty making powers of the Crown by preventing separate parts of the United Kingdom being left on a different footing. It provides:

“That it be the Sixth Article of Union, that 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, 10 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.”

[4] The Protocol is incorporated in domestic law via s7A of the Withdrawal Act 2018 (as amended by the 2020 Act). This is the direct enforceability provision. It is beyond dispute, and indeed was readily accepted by the Court, that Northern Ireland is not on the same footing as Great Britain. At p 62 Colton J accepts this patently obvious reality:

“[62] Although the final outworkings of the Protocol in relation to trade between GB and Northern Ireland are unclear and the subject matter of ongoing discussions it cannot be said that the two jurisdictions are on “equal footing” in relation to trade. Compliance with certain EU standards; the bureaucracy and

associated costs of complying with customs documentation and checks; the payment of tariffs for goods “at risk” and the unfettered access enjoyed by Northern Ireland businesses to the EU internal market conflict with the “equal footing” described in Article VI.

[5] It is plain therefore, by virtue of Colton J’s own conclusion, that the Act of Union has been breached and conflicts with the Protocol, as given effect in domestic law by s7A of the 2018 Act. This leaves only three options (1) s7A overrides the Act of Union; (2) the Act of Union overrides s7A; or (3) there is a means of harmonising the conflict.

[6] Colton J dismissed the potential for (3) stating at p.81 that “*such harmonisation is not legally open to the Court in light of the analysis of the reviewability of the prerogative power and the manner in which Parliament has legislated for the Withdrawal Agreement, including the Protocol.*”

[7] There would appear to be a ‘cart before the horse’ difficulty with Colton J’s finding on the use of the prerogative power. As set out at p.55 of *Miller 1*¹, the Crown cannot exercise the prerogative in a manner which conflicts statute. The making of the Withdrawal Agreement treaty is plainly a use of the prerogative power. If we pause at that juncture, Colton J has held that the Protocol conflicts with the Act of Union. So, at the point of it being made, the prerogative power (applying the logical outworking of Colton J’s own finding) was used to make a treaty which conflicts with statute. That is unlawful and subject to review.

[8] However, Colton J has bypassed that and dealt with the matter two ways; firstly, by appearing to place even the unlawful use of the prerogative beyond the scope of reviewability (p68); and secondly on the basis that the Protocol is now in domestic law via s7A of the 2018 Act (p 69). None of that however cures the defective use of the Prerogative in the first instance. It appears the ‘solution’ adopted to this conundrum is for Colton J to effectively find that Parliament ratified the unlawful use of the prerogative via s7A of the 2018 Act, and to find that in any event that the use of the prerogative was beyond the scope of review. There is no actual proposition developed to support either contention.

[9] There is clear authority that the use of the prerogative power is not beyond the scope of review in certain circumstances; especially when fundamental constitutional issues arise. Even within p 55 of *Miller 1*, which is ironically quoted at p 68 of Colton J’s judgment, it is clear that the prerogative power is “*subject to any restrictions imposed by primary legislation*”. Therefore, the use of the prerogative power in violation of the long-established constitutional principle that it is not to be used in a manner which conflicts statute provides the gateway for review.

[10] In *Miller 2*² the justiciability of the use of the prerogative was a key feature. The Supreme Court stated its conclusion succinctly in p 52:

¹ *R(Miller and others) v Secretary of State for exiting the European Union (Birnie and others intervening); in Re McCord (Lord Advocate and others intervening); in Re Agnew and another (Lord Advocate and others intervening)* [2017] UKSC 5 (Miller No.1)

² *On the Application of Miller v Prime Minister, Cherry and others v Advocate General for Scotland* [2019] UKSC 41

“52. Returning, then, to the justiciability of the question of whether the Prime Minister’s advice to the Queen was lawful, we are firmly of the opinion that it is justiciable. As we have explained, it is well established, and is accepted by counsel for the Prime Minister, that the courts can rule on the extent of prerogative powers. That is what the court will be doing in this case by applying the legal standard which we have described. That standard is not concerned with the mode of exercise of the prerogative power within its lawful limits. On the contrary, it is a standard which determines the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government on the other hand. An issue which can be resolved by the application of that standard is by definition one which concerns the extent of the power to prorogue, and is therefore justiciable.”

[11] Colton J appears to justify his conclusion as to reviewability by firstly assessing, as a pure excursion, whether a claim under Article 46 of the Vienna Convention would succeed before the International Court of Justice. This purely speculative exercise has absolutely no relevance as to whether the use of the prerogative was lawful or not.

[12] The proper harmonisation could have been achieved by simply applying the doctrine that Parliament is taken to be acting within the principle of legality, and therefore s7A of the 2018 Act is only to be taken as providing direct enforceability to the provisions of the treaty which could have been lawfully made. However, given the manner by which Colton J sidestepped the unlawful use of the prerogative in the first instance, he closed this door on himself and thus the applicants. The scant justification was that this approach would “render s7A inoperative”. Whilst that may have been politically inconvenient, it would nevertheless have been entirely compatible with the constitutional law of the United Kingdom.

[13] Having cut off the harmonisation route to reconciling the conflict between the 2018 Act and the Act of Union, Colton J left himself with an interpretive choice. Either the s7A of the 2018 Act prevails over the Act of Union, or the Act of Union prevails over s7A of the 2018 Act.

[14] At p 91 of Colton J’s judgement he quotes Laws LJ in *Thorburn*³:

63. Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature’s actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not

³ *Thorburn v Sunderland City Council* [2003] QB 151

satisfy this test. Accordingly, it has no application to constitutional statutes. ...

[15] Whilst appearing to rely on *Thorburn*, Colton J misapplies the key tests therein. One of the key tests is: “*is it shown that the legislature’s actual- not imputed, constructive or presumed- intention was to effect the repeal or abrogation...*”. At p 111 Colton J- in the absence of any objective evidence- concludes (in effect) that Parliament knew what it was doing, and it was its intent to repeal the Act of Union. There is no basis for this finding; indeed the Prime Minister himself- the head of Her Majesty’s Government both now and at the time of the relevant Withdrawal Agreement- stated that less than two weeks ago that the Act of Union had not been repealed. This creates the absurd situation whereby Colton J has transported an intent to Parliament, for which no objective basis exists.

[16] Prior to the erroneous misdirection in purporting to know Parliament’s mind and inventing its intent, at p 110 Colton J’s judgement is infected with yet another fatal error. Here the key interplay between general provisions and specific provisions, which is a vital consideration when considering implied repeal, Colton J finds Article VI of the Act of Union as “open textured”, whilst s7A has the benefit of “specificity”. This is plainly wrong; s7A is general and open textured whilst Article IV is specific. The Court has got it the wrong way round. This is not a mere typographical error; it is clear this consideration infects the entire decision on this seminal issue.

[17] Therefore, in reliance upon a multitude of errors, Colton J then purports to ‘make law’ in so far as he answers the unprecedented question before him as to which prevails between two competing constitutional statutes by giving supremacy to the more recent statute, whilst also relying upon the error in p 110 to do so. The correct approach would have been to apply the law as is and to hold fast firstly to the uncontroversial principles of interpretation that general words can not be taken to impliedly repeal a constitutional statute (granted of course that Colton J would have had to apply this principle properly by not getting it back to front at p 110), and secondly not to create a new exception to the long established principle that constitutional statutes are not subject to implied repeal.

[18] Colton J errs in p 110 inferring Parliament’s intent (if the Prime Minister did not even know what they were doing, then its somewhat bizarre Colton J can purport to retrospectively read in intent). He further errs in p 111 in getting the statutes the wrong way around in so far as that which is general and that which is specific. These errors then come together to form the basis of making new law and effectively adding a new qualification to the long-established principle that constitutional statutes are not subject to implied repeal.

[19] I would imagine the core question for the Supreme Court (once the errors at p 110 have been corrected by the Court of Appeal) will ultimately be along the lines of: “*do general provisions of a more recent constitutional statute impliedly repeal the specific provisions of an earlier constitutional statute with which it conflicts?*”

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