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CONSTITUTIONAL STUDIES GROUP

BRIEFING PAPER

**UK SUPREME COURT JUDGMENT IN ALLISTER
AND OTHERS**

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Preliminary analysis of Supreme Court judgment in *Allister et al* challenge to the Protocol

Introduction

This paper is designed to provide an initial overview of the judgment of the UK Supreme in *Allister et al* [2023] UKSC 5. A fuller analysis will follow. This is designed to be a preliminary summary which can be expeditiously circulated.

The majority judgment was provided by Lord Stephens with whom Lord Reed, Lord Lloyd Jones, Lord Sales and Lord Hodge agree. It can be accessed here: [In the matter of an application by James Hugh Allister and others for Judicial Review \(Appellants\) \(Northern Ireland\) - The Supreme Court](#)

There were three broad grounds of appeal. The appeal was summarised as follows:

*The appellants brought judicial review applications challenging the Protocol and the 2020 Regulations on the following grounds. **First**, the Protocol and the 2020 Regulations were incompatible with the Acts of Union 1800, and specifically with Article VI which provides that the subjects of Great Britain and Ireland shall be on the same footing with respect to trade, and that any future treaty entered into with a foreign power shall preserve that footing. **Secondly**, the Protocol was incompatible with the Northern Ireland Act 1998, specifically section 1(1) which provides that “Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of the majority of the people of Northern Ireland voting in a poll...”. **Thirdly**, the 2020 Regulations unlawfully eliminated the constitutional safeguard enshrined in section 42 of the Northern Ireland Act 1998, which requires Assembly votes to have cross-community support.*

Summary

The Supreme Court has held that the Acts of Union 1800, the fundamental constitutional underpinning of the United Kingdom, has been subjugated and suspended by the NI Protocol, which has complete supremacy in domestic law via the conduit of pipe of section 7A of the European Union (Withdrawal) Act 2018.

This exposes the significant constitutional damage inflicted by the Protocol, which whilst it may have been 'legal' in an expansive view of Parliamentary sovereignty, that is an entirely different question as to whether it was truly constitutional, or moral. The Supreme Court dealt only with the legality of the alteration of the constitutional change, rather than its constitutional propriety or merits.

It is an interesting point that if Parliament can 'lawfully'- in exercise of Parliamentary sovereignty- subjugate Article VI of the Acts of Union, then could Parliament- for example- abolish Article III of the Acts of Union, and thus itself?

If the answer is no because Article III (which creates Parliament) is a constitutional fundamental, then upon what basis has Article VI been afforded a lesser status?

It is of note that the Prime Minister at the time of the Withdrawal Act, Boris Johnson MP, told Parliament that they had not interfered with the Acts of Union. The Supreme Court disagrees: whether knowingly or otherwise, the Government in agreeing the treaty and Parliament in enacting it, did undermine the fundamental constitutional basis of the United Kingdom of Great Britain and Northern Ireland, by virtue of the subjugation of the Acts of Union.

The Supreme Court has been clear that the Acts of Union remains on the statute books, but in regards Northern Ireland the fundamental rights enshrined therein (specifically Article VI) do not apply for so long as the Protocol persists. It is difficult to envisage a more fundamental constitutional change.

In addition, it was held that section 1 (1) of the NI Act 1998 (the principle of consent) is purely territorial and does not act as a safeguard against any constitutional change other than the final surrender of sovereignty over Northern Ireland. Put simply, *you*

can change everything but the last thing in relation to Northern Ireland's place in the Union, the last thing being merely the final formal handover of sovereignty.

This has fundamental and far-reaching consequences for power sharing in Northern Ireland. Those within unionism who supported the 1998 Agreement did so on the basis of arguing the Agreement enshrined the principle of consent, which would guard against any diminution of Northern Ireland's place in the Union. The Supreme Court has confirmed that the principle of consent is no such safeguard. It is trite to point out that if law-making and judicial powers can be handed to the EU in relation to NI without unionism being able to rely upon the principle of consent as a safeguard, then so too could such powers be handed to Dublin.

That is an untenable position, and given the core foundation upon which pro Agreement unionism rested has been exposed as constitutional quicksand, it is difficult to envisage any intellectually credible argument upon which pro Agreement unionism can now be based.

In a further exposure of how the Protocol has dismantled the supposedly 'sacred' fundamental principles of power sharing, cross community consent for 'key decisions' to be voted on by the Assembly (Strand One (5) (d) of the Belfast Agreement given effect via section 42 of the NI Act 1998) was disapplied by the Protocol.

The court has held that this express disapplication was not even necessary, because the Protocol- via section 7A of the Withdrawal Act- had already had the effect of disapplying this supposedly fundamental pillar of power-sharing in order to ensure unionism could not rely upon it in opposition to the Protocol which subjugates Northern Ireland's place in the Union.

This, alongside the exposure of the principle of consent as being largely worthless, raises fundamental and far-reaching consequences about whether there is any basis upon which unionism could ever again operate power sharing within the framework of such a corrosive and fundamentally imbalanced Agreement.

Ground one- Subjugation of the Acts of Union

The Court proceeded on the basis the Protocol does conflict with Article VI [54] following the findings of the lower courts [53].

It was held that section 7A of the European Union (Withdrawal) Act 2018 subjugates all other statutes, including the Acts of Union. The Supreme Court holds Article VI is modified to the extent it conflicts with the Protocol via section 7A [65].

The Supreme Court held that the suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute. In this respect it was held that Parliament had provided the answer via section 7A of the 2018 Act in relation to any conflict between the Protocol and any other enactment. The Court confirmed Acts of Union and Article VI remain in place, but in a matter of the most serious constitutional significance, are modified and suspended to the extent and for the period during which the Protocol applies [66].

This is a matter of enormous significance. The late Lord Trimble was correct in saying “*the Act/s of Union is the Union*”. The effect, therefore, of the Protocol is to suspend NI’s place in the Union for so long as the Protocol remains. That, in of itself, is a conclusive reason where there can not be, and must not be, any compromise in relation to the Protocol.

The Court proceeded on the basis that the second limb of Article VI of the Acts of Union did impose a restriction on the treaty making power of the Government. [70]

The Court proceeded on the basis that “the Protocol, a part of a treaty entered between the UK and the EU did not provide for His Majesty’s subjects of Northern Ireland having the same privileges and being on the same footing in respect of trade as His Majesty’s subjects of Great Britain.” [71]

The Court held that Parliament, by enacting the 2018 Act and the European Union (Withdrawal Agreement) Act 2020, authorised the making of the Protocol, and thus authorised the subjugation of the Acts of Union. [73].

Ground Two

The Supreme Court, in perhaps the most significant finding in regards the future of power sharing, held that the principle of consent does not protect against any diminution of Northern Ireland's place in the Union other than in relation to the final formal handover of sovereignty. This exposes the principle of consent as being worthless in terms of a safeguard, and contrary to the claims of pro Agreement unionism, it does not offer any substantive protection to Northern Ireland's place in the Union **[84]**.

Ground Three

The requirement of cross-community support is imposed by section 42 of the NIA 1998. The 2020 Regulations inserted section 56A and Schedule 6A into the NIA 1998 **[104]**. Schedule 6A sets out a system called a 'consent resolution', which allows the Northern Ireland Assembly to vote on the continued application of Articles 5 to 10 of the Protocol **[104 – 105]**. Schedule 6A states that section 41 of the NIA 1998 does not apply in relation to consent resolutions. The effect of this is that a 'consent resolution' can be passed without the requirement of cross-community support **[106]**.

The Court acknowledged the potential force in the Appellants' argument that cross-community support is still required for matters outside the Assembly's legislative competence. This will be welcomed by all those who have repeatedly made this point, only to be shouted down and told it was incorrect.

In a crucial exposure of the deceptive nature of the Protocol the Court held that the limitation on making regulations incompatible with the NI Act 1998 (section 10 (1) (a) of the 2018 Act) had to be read on the basis that the cross-community consent provision had already been disapplied by section 7A of the 2018 Act (and thus the Protocol). Put simply, whilst the words on the statute require a Minister of the Crown to act compatibly with the 1998 Act, this in fact means the 1998 Act which had already been impliedly subjugation in regards cross community consent, by the Protocol when incorporated into domestic law. **[108]**.

Note: References in square brackets are to paragraphs in the judgment

Conclusion

The Supreme Court judgment has highlighted both the constitutional impact of the Protocol on the very foundation of the Union, and the deception at the heart of the Belfast Agreement in regards the principle of consent.

As pro Agreement unionism's case for supporting the 1998 deal was rooted in the claim that the principle of consent offered a robust safeguard to the Union (remembering "*the Act/s of Union is the Union*"), this Supreme Court judgment fundamentally undermines that contention. That being so, where now is to be found the foundation upon which unionist support for the Belfast Agreement, or the power sharing institutions within its framework, could be (with any credibility) built?

This case was always about more than law. The Protocol may well have been lawfully imposed, but that does not speak to whether it was constitutional in the broadest sense. Given the impact on the Acts of Union, the constitutional vandalism it has perpetrated can no longer be credibly denied.

Key Points:

- This may well be a legal loss, but it is a political win. The true pernicious impact of the Protocol on the United Kingdom's constitutional status is clear for all to see. It can no longer be denied. Rather than impede the progress of the anti-Protocol movement, this judgment will only fuel the resistance of every person who values the Union.
- The Government, despite themselves claiming they hadn't, may well have legally subjugated the Acts of Union, but something being legal and it being morally and constitutionally proper are worlds apart. The Government will now have to bear the political cost given that their true extent of their constitutional vandalism has been exposed.
- Those in unionism who supported the Belfast Agreement did so on the basis the principle of consent safeguarded the Union. The Supreme Court has made clear that is not so. The apparent safeguard in fact only directs itself to the final surrender of sovereignty. That means law making powers could as easily be

handed over the heads of unionists to Dublin, as they have been to the EU. That is not a sustainable foundation for power sharing, and therefore- in the absence of fundamental structural reform- the Supreme Court judge would seem to make it impossible for any self-respecting unionist to continue to support the 1998 Agreement, based as it is on such a fundamental deception.

- The court has found that cross community consent did not even need to be expressly disapplied, because the all-conquering provisions of section 7A of the Withdrawal Act did this by implication anyway. Of what use is cross community safeguards to unionists when the first time unionism seeks to rely upon them, they are simply disapplied?
- This judgment has cleared away the undergrowth and constructive ambiguity. It exposes the forked tongue nature of the Government, the Protocol and the Belfast Agreement. Sunlight is the best disinfectant, and the Supreme Court has delivered a large dose of reality to anyone who believes that the Protocol or the Belfast Agreement offer anything to unionism or the Union.

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