

# DIRITTI COMPARATI

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## ALLISTER AND OTHERS V SECRETARY OF STATE FOR NORTHERN IRELAND: A SUMMARY OF THE “NI PROTOCOL” CASE

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### Introduction

The UK's exit from the EU, “Brexit”, added several complexities to the constitutional status of Northern Ireland. Northern Ireland shares a land border with the European Union, and a history of conflict resulted in the [Good Friday Agreement 1998](#) (“GFA”). In order to respect the GFA, the [Northern Ireland Protocol](#) (“the Protocol”) was given effect by the [European Union \(Withdrawal\) Act 2018](#) (“2018 Act”) as amended by the European Union (Withdrawal Agreement) Act 2020, effectively creating a customs border down the Irish Sea.

Within the UK, the creation and accession of international treaties is an executive power of the UK government. But the removal of certain citizen's rights, such as the free movement of people, requires the UK Parliament's intervention. The applicants challenged the Protocol by way of judicial review ( [UKSC 5](#)), first through the High Court of Northern Ireland, alleging that the protocol was unlawful, as it altered the constitutional status of Northern Ireland within the UK. The claim was unsuccessful at the High Court and the Northern Ireland Court of Appeal and was appealed further to the UK Supreme Court.

## **The appellants' case**

The appellants, including two former First Ministers for Northern Ireland - David Trimble and Arlene Foster, alleged that the protocol undermined Northern Ireland's place within the United Kingdom by establishing a customs border between Northern Ireland and the rest of the UK down the Irish Sea. This was in the context of the [Acts of Union 1800](#), ("Acts of Union") enacted in both Westminster and the then appropriate Irish legislative body, which established a common ground for citizens of (Northern) Ireland to be:

"entitled to the same privileges and be on the same footing ... in all treaties made by Majesty, his heirs, and successors, with any foreign power, Majesty's subjects of Ireland shall have the same privileges and be on the same footing as Majesty's subjects of Great Britain"

The appellants contended that the Northern Ireland Protocol breached this provision of the Acts of Union by the effect of placing tariffs on some products entering Northern Ireland, arriving from the UK, that potentially could end up moving into the EU (through Ireland). The lack of any border controls between Northern Ireland and Ireland meant that, to effect the changes to trade caused by the withdrawal of the UK from the EU, the UK government agreed that these tariff checks must be done on arrival through the Irish Sea.

This was the first ground relied upon by the appellants, that the tariff procedure on goods arriving to Northern Ireland from the rest of the UK meant that Northern Ireland was no longer on the "same footing" required by Article VI. Similarly, the access to the EU's internal market, which has arguably had an advantageous economic effect on Northern Ireland, was equally a derogation from the "same footing" definition as the rest of the UK does not have the same access.

The second ground of claim was relating to the [Northern Ireland Act 1998](#), which states that "Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland". The appellants argued that the effect of the Protocol lessened this status, by the creation of the customs border with the rest of the UK, and, as this effect was brought in

without the consent of the people of Northern Ireland, it was unlawful. On the third ground, the appellants contended that the [2020 Regulations](#) were unlawful due to incompatibility with the Northern Ireland Act 1998. Key decisions of the Northern Ireland Assembly, as a result of historic unrest, require cross-community support – defined as a majority vote, with a majority from both nationalist and unionist voting blocs. The 2018 Act required the Secretary of State for Northern Ireland to act in a way that is compatible with the Northern Ireland Act 1998. By setting aside the requirement for cross-community support, the 2020 Regulations did were therefore unlawful due to incompatibility with the Northern Ireland Act 1998.

The respondents countered that the Protocol is a matter of international relations, and under Schedule 2(3) of the Northern Ireland Act 1998 not a devolved matter, and consequently beyond the legislative competence of the Northern Ireland Assembly.

The appellants responded that the Assembly commonly votes on matters which are not within legislative competence, and this is supported by Standing Orders which do not prevent the Assembly considering matters beyond competence.

The Supreme Court justices agreed that the obligations on the UK to acquire the consent of Northern Ireland was fulfilled by the creation of the regulations allowing the democratic consent of Northern Ireland. As the Secretary of State for Northern Ireland must “act in a way that is compatible with the terms of the Northern Ireland Act 1998,” (2018 Act, section 10(1)(a)) the regulations were lawful because the 1998 Act had already been modified by the 2018 Act (para 108). The regulations then modified the Northern Ireland Act 1998, which in turn modified the obligation on the UK Government to require only a “simple majority” rather than the higher “cross-community support” barrier.

Nor did the Supreme Court find the use of the delegated powers to amend primary legislation (via the 2020 Regulations) unlawful. Lord Stephens relied on Section 8C of the 2018 Act which stated, “Regulations under subsection (1) may make any provision that could be made by an Act of Parliament (including modifying this Act)”. Essentially, Parliament

provided that these regulations may be used to amend the Act and there was no question of intent.

The appeal was dismissed on all three grounds.

## **Discussion**

This case may be looked at as a conflict between the doctrine of constitutional statutes, which in [Thoburn](#) established that such statutes could not be impliedly repealed, and the traditional doctrine of Parliamentary Sovereignty. While some commentators have noted [the demise of Parliamentary Sovereignty in the UK](#), this case is a strong argument for the contrary. The Supreme Court showed considerable deference to the traditional doctrine, as the judgment contains several sections approving the clarity with which Parliament showed its intent in legislating for the Protocol. The result of which was that the court could not abrogate from the clear will of Parliament, even in the argument that following it would impliedly repeal (parts of) the Acts of Union without express words. I argue that there isn't a conflict with Laws LJ's judgment in *Thoburn*; a court should consider whether "the legislature's *actual* – not imputed, constructive or presumed – intention was to effect the repeal or abrogation?" (*Thoburn* at ), and it was apparent that it was the actual intention of Parliament in this instance. This meant that the divergence in rights (customs or otherwise) between citizens of Northern Ireland and the rest of the UK was lawful not due to the Government's making of an international treaty, but clear Parliamentary intent.

It could be argued that the Supreme Court has taken a conservative, or at least a less proactive approach, to this decision following political fallout after the [two Miller](#) cases. But the judgment here is hardly extraordinary, Parliamentary Sovereignty has long been the supreme doctrine in the UK, the instant case simply reiterated it (*In the matter of an application by Clifford Peeples for Judicial Review* UKSC 5 at ).

*I would like to thank Professor Rory O'Connell for his comments on an earlier draft of this article.*