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Introduction

Following the ‘Brexit’ referendum a contentious issue that has arisen is the impact that the United Kingdom’s exit from the European Union (EU) will have on the devolved regions, particularly Northern Ireland and Scotland, (who each voted to ‘remain’). A cross-party group in Northern Ireland and Raymond McCord, a local activist, have brought judicial review proceedings to the High Court in Belfast² regarding the legality of the Prime Minister exercising her prerogative power to invoke Article 50 of the Treaty on European Union (TEU). They were also allowed the right to a

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² *McCord’s (Raymond) Application* [2016] NIQB 85

hearing before the United Kingdom (UK) Supreme Court following the High Court judgment in Belfast. The objective of this article is to analyse the reasons why there are constitutional implications leaving the European Union that affect the devolution settlement in Northern Ireland. This article will also reflect upon the judgment of *McCord's (Raymond) Application*³ and the submissions made by the counsel for the appellants and the respondent in the UK Supreme Court, since, at the time of writing, the ruling from the Supreme Court is yet to be published.

Good Friday Agreement and the Northern Ireland Act 1998

The Good Friday Agreement gives the people of Northern Ireland the right to self-determination when dealing with the constitutional

³ [2016] NIQB 85

status of their region. Specifically, this refers to the question of whether Northern Ireland should continue to be a part of the United Kingdom or if it should unite with the Republic of Ireland.⁴ The Northern Ireland Act 1998 ratifies the Good Friday Agreement into domestic law⁵ and hence it reaffirms the right to self-determination of the State of Northern Ireland by ensuring that the question of Irish unification is dealt through a popular referendum in Northern Ireland.⁶ The Agreement also led to the creation of a North/South Ministerial Council⁷ (NSMC), an institution created to promote cooperation and dialogue between Northern Ireland and the Irish government with regards to policy areas including the implementation of EU policies in Ireland and

⁴ *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland*, Art. 1(i)(ii)

⁵ Maguire J in *McCord's (Raymond) Application*, [42]

⁶ *Northern Ireland Act 1998*, section 1(1)

⁷ Strand Two – *North/South Ministerial Council*

Northern Ireland.⁸ Withdrawing from the EU would hinder the functioning of the NMSC, since only one party would be bound by EU law, and so cooperation would be limited because the NMSC focuses largely on the implementation of EU policies⁹. According to Lord Bingham, the Northern Ireland Act 1998 serves as a written constitution for the devolved region and thus the Act should be “interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody”.¹⁰

The Northern Ireland Act 1998 states that subordinate legislation made by a Minister or a Department in Northern Ireland cannot be incompatible with EU law, meaning that individual

⁸ *ibid*, paragraph 3(iii), paragraph 17

⁹ Anthony, 2016:65

¹⁰ Lord Bingham in *Robinson v. Secretary of State for Northern Ireland and Others* [2002] NI 390 at 398, [11]

rights protected by the European Union are ingrained in the devolution settlement.¹¹ Inevitably then, invoking Article 50 and the passing of a “Great Repeal Bill”¹² in the UK Parliament might mean that the Act of 1988 may face the risk of being amended. Although this is legally permissible, it might give rise to political disputes in Northern Ireland. Furthermore, Article 1 of the Good Friday Agreement recognises the right for all Northern Irish persons to choose between Irish or British citizenship or take up both.¹³ The right to possess Irish citizenship means that under the Good Friday Agreement, a person born in Northern Ireland has the right to EU citizenship, because according to the Treaty on the Functioning of the European Union (TFEU), “every person holding

¹¹ *Northern Ireland Act 1998*, section 24(1)(b)

¹² Douglas-Scott, October 2016

¹³ *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland*, Art. 1(vi)

the nationality of a Member State shall be a citizen of the Union”.¹⁴ Most importantly, any ‘Union citizen’ is entitled to the rights and duties that the Treaty provides¹⁵, such as the right to “move and reside freely within the territory of the Member States”.¹⁶ Therefore, the protection of rights enshrined by the EU is implied in the devolution settlement of Northern Ireland. This is because the Republic of Ireland became an important political actor in shaping the Good Friday Agreement.¹⁷

Anthony argues that withdrawing from the EU would impact the devolution settlement of Northern Ireland since it would deprive the region from the EU funding originating from the Special European Union Programmes Body, which has

¹⁴ ‘*Consolidated Version of the Treaty on the Functioning of the European Union*’ Article 20(1), page 25

¹⁵ *Ibid.*, Article 20(2), page 25

¹⁶ *Ibid.*, Article 20(2)(a), page 25

¹⁷ Campbell, September 2016

sponsored cross-community reconciliation programmes in the region.¹⁸ Furthermore, many areas of human rights law in the Northern Irish jurisdiction draw their origins from EU law.¹⁹ Human rights enshrined by case law originating from the Court of Justice of the European Union (CJEU) would either be ignored by the courts or be seen as “persuasive precedent”.²⁰ This implies that parts of the Northern Ireland Act 1998 intended to enshrine equality laws²¹ are at risk.

Raymond McCord’s Application

Maguire Judge delivered the judgment of the judicial review applications made by Raymond McCord and the cross-party group in Northern

¹⁸ Anthony, 2016:66

¹⁹ *Ibid.*:67-68

²⁰ *Ibid.*:68

²¹ ‘Part VII – Human Rights and Equal Opportunities’ of the *Northern Ireland Act* 1998. Refer to section 75 and section 76.

Ireland regarding the legality of the Prime Minister's use of the royal prerogative to invoke Article 50 of the TEU.²² The applicants argued that because of the Northern Ireland Act of 1998 and the Good Friday Agreement²³, a motion of legislative consent must be passed by the Northern Ireland Assembly²⁴ before the UK potentially triggers Article 50 of the TEU.²⁵ Furthermore, because leaving the EU would lead to a change in Northern Ireland's constitutional status, there is an expectation that Article 50 can only be triggered if

²² *McCord's (Raymond) Application*, [1]

²³ *Ibid.* [19a]

²⁴ To read more on this issue, refer to the 'Sewel Convention'. Although the Parliament in Westminster is supreme, it has agreed that it will seek the consent of a devolved assembly before legislating on a devolved matter. Bradley, Ewing and Knight, 2015:39. Refer also to paragraph [119] of *McCord's (Raymond) Application*, which discusses the conventions that existed between Northern Ireland and Westminster before the Sewel Convention, when a devolved assembly created by the Government of Ireland Act 1920 was under effect from the early 1920s-early 1970s.

²⁵ *McCord's (Raymond) Application*, [19b]

the people of Northern Ireland give consent to it.²⁶ Hence, according to the applicants, the Northern Ireland Act 1998 displaces the executive's prerogative power to trigger Article 50.²⁷

Whilst there was "... a working assumption that both states [the UK and Ireland] were likely to remain in the EU"²⁸ and also that none of the States involved in the Good Friday Agreement would "at a later date...decide to leave [the EU]"²⁹, the court held that the prerogative power to withdraw from a treaty was not displaced by the statute³⁰, and that the notification under Article 50 does not change the law of the United Kingdom. Instead, it only marks the beginning of a process whereby changes to domestic law will likely be controlled by the UK

²⁶ *Ibid.* [19e]

²⁷ *Ibid.* [66]

²⁸ *Ibid.* [97]

²⁹ *Ibid.* [97]

³⁰ *Ibid.* [108]

Parliament.³¹ Regarding the argument that a legislative consent motion is required if an Act of Parliament is used to invoke a notification under Article 50, the court took the stance that such legislation would be dealing with an excepted, and not a devolved matter. Furthermore, conventions, like the Sewel convention³², are not legally enforceable by the courts³³. The court was reluctant to intervene on the issue of exercising the prerogative in the field of foreign affairs, as doing so would require a “political judgment”³⁴, which is an area deemed non-justiciable.³⁵

Hence, the High Court did not consider the withdrawal from the EU to be a devolution issue.³⁶ Moreover, invoking Section 1 of the Northern

³¹ *Ibid.* [105]

³² See footnote n24

³³ *McCord's (Raymond) Application*, [121] - [122]

³⁴ *Ibid.* [129]

³⁵ *Ibid.* [131] – [134]

³⁶ *Ibid.* [144]

Ireland Act 1998 to ensure that the Northern Irish would give consent to leaving the European Union was rejected on the basis that a national referendum had occurred months before the judgment. Furthermore, it was held that there were no provisions in the Good Friday Agreement or in the Act of 1998 that allowed for the organisation of a referendum concerning any constitutional change occurring in Northern Ireland.³⁷ The court therefore interpreted Section 1 of the 1998 Act in the literal sense, instead of taking the purposive approach espoused by Lord Bingham in *Robinson v. Secretary of State for Northern Ireland and Others*. It is worrying that the court considered this issue “non-justiciable”. While the question of EU membership can be seen as a foreign-policy issue, it does have implications for the protection of human rights of the Northern Irish, as discussed above.

³⁷ *Ibid.* [152]

Submissions Made by the Attorney-General for Northern Ireland in the Supreme Court

The Attorney General for Northern Ireland in the Supreme Court affirmed the decision in *McCord's (Raymond) Application*. The Attorney General applied a literal interpretation of the Northern Ireland Act 1998 by arguing that Section 1 only deals with “the status of Northern Ireland within the UK”³⁸, instead of the wider notion that Section 1 may be applied with any constitutional change affecting the devolution settlement of Northern Ireland. The Attorney General also interpreted the 1998 Act in the sense that it does not impose the requirement that EU membership must be maintained³⁹, and that it also does not set

³⁸ *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references transcript, Tuesday 6 December 2016, pg. 120*

³⁹ *Ibid.*: 131

any requirements regarding how Article 50 of the TEU can be triggered.⁴⁰

Unlike Maguire J⁴¹, the Attorney General was willing to concede that the issue of invoking Article 50 with the royal prerogative is a justiciable issue⁴², and that in the present case the claimant must prove that the “statute expressly, or where by necessary implication, has taken away the prerogative in that sphere”.⁴³ It was particularly interesting that the Attorney General submitted that withdrawing from the EU would not impact the functioning of the NMSC, on the basis that “as long as one State remains, there will in all likelihood remain EU matters to be discussed..⁴⁴

⁴⁰ *Ibid.*: 132

⁴¹ *McCord's (Raymond) Application* [129], [131]-[134]

⁴² *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references transcript, Tuesday 6 December 2016, pg. 137*

⁴³ *Ibid.*

⁴⁴ *Ibid.*: 127

This is in direct contrast to the views of Professor Gordon Anthony, who contends that when the UK leaves the EU, the “mutual bind” behind the NMSC would be non-existent.⁴⁵

Submissions Made by the Appellants, the Cross-Party Group⁴⁶ and McCord in the Supreme Court

Consistent with the analysis above David Scoffield QC, representing the cross-party group, submitted that the Northern Ireland Act 1998 is like the European Communities Act 1972 as the issue of membership in the EU is not a “neutral” question⁴⁷. Scoffield argued that the 1998 Act serves as a “further conduit” to ensure that EU law

⁴⁵ Anthony, 2016:65

⁴⁶ *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references transcript, Wednesday 7 December 2016, pg. 112*

⁴⁷ *Ibid.*: 113

is properly applied within the UK.⁴⁸ Unlike the submissions from the Attorney General for Northern Ireland, Scoffield saw the NSMC not as a “talking shop”⁴⁹, but as an executive body whereby EU membership is a vital component to ensure the implementation of its policies.⁵⁰ One of the boldest submissions made by Scoffield is that foreign relations is not a fully reserved matter, since Paragraph (3) Schedule(2) of the Northern Ireland Act 1998 transfers certain elements of foreign affairs to the devolved institutions. This not only refers to the cooperation under the NMSC, but also to the duty that the devolved authorities must observe and implement obligations that arise from EU law.⁵¹

⁴⁸ *Ibid.*:115

⁴⁹ *Ibid.*:122

⁵⁰ *Ibid.*

⁵¹ *Ibid.*:129-130

An important submission raised by Ronan Lavery QC, who represented McCord, is that Section 1 of the 1998 Act transferred sovereignty over constitutional changes from the UK Parliament to the people of Northern Ireland⁵², and that triggering Article 50 using this prerogative would violate the principle of consent and self-determination that is ingrained in the devolution settlement of Northern Ireland.⁵³ Section 1 of the Northern Ireland Act 1998 in effect allows the region to be a member of the United Kingdom on a voluntary basis.⁵⁴ This conclusion seems to be consistent with the purposive approach that Lord Bingham supports in *Robinson v. Secretary of State for Northern Ireland and Others*.⁵⁵ Controversially, Mr. Lavery defies the Diceyan notion of

⁵² *Ibid.*:133

⁵³ *Ibid.*:143

⁵⁴ *Ibid.*:136

⁵⁵ [2002] NI 390 at 398, [11]

parliamentary sovereignty⁵⁶ by asserting that because of the devolution arrangement in Northern Ireland, legislative supremacy in the United Kingdom is no longer existent.⁵⁷

Conclusion

Leaving the European Union means that the foundations of the devolution settlement in Northern Ireland are at stake, because the rights and obligations arising from the United Kingdom's membership from the European Union were influential during the creation of the Good Friday Agreement and the Northern Ireland Act 1998. The recent litigation that arose in the Belfast High Court and the Supreme Court questions the status

⁵⁶ Dicey, 1959:39-40

⁵⁷ *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references transcript, Wednesday 7 December 2016, pg.134*

that devolution has within the UK's constitution. Furthermore, interpreting Section 1 of the 1998 Act in a broad and purposive approach might also defy constitutional principles such as parliamentary sovereignty, as suggested in Ronan Lavery QC's submissions. Until the Supreme Court Justices provides a judgment to this case, the questions associated with these constitutional implications remain largely unanswered.

Therefore, it can be argued that if Britain's membership of the EU was not treated neutrally when creating the devolution settlement for Northern Ireland, it is justified to interpret the Northern Ireland Act of 1998 in a wide and purposive approach. The legal disputes that arose following the Brexit referendum which questioned the constitutional role of devolved regions of the United Kingdom, specifically Northern Ireland,

shows that the UK will face a challenging process negotiating its exit from the European Union, in addition to potential domestic challenges.

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The Good Friday Agreement (contains the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland and Strand Two – North/South Ministerial Council)