



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 80

P958/19

OPINION OF LORD PENTLAND

In the Petition of

JOLYON MAUGHAM

Petitioner

for

SUSPENSION AND INTERDICT

**Petitioner: O'Neill, QC; Balfour+Manson LLP, Solicitors
Defender: Moynihan QC; Office of the Advocate General**

18 October 2019

Introduction

[1] This case came before me today on the petitioner's motion for *interim* orders in terms of heads (i) and (ii) of the Prayer of the Petition. The motion was opposed on behalf of the respondent, the Advocate General for Scotland who was convened in accordance with the Crown Suits (Scotland) Act 1857 in his capacity as the Law Officer representing the United Kingdom Government in proceedings before the Scottish Courts.

[2] The *interim* orders sought by the petitioner were in the following terms:

“(i) to suspend *ad interim* the purported agreement which is said by the United Kingdom government to have been concluded between it and the European Union and the United Kingdom government, on the basis that this agreement provides for Northern Ireland to form part of a separate customs territory to Great Britain; and

(ii) for interdict *ad interim* against Ministers of the Crown in right of the United Kingdom including the Prime Minister (and anybody acting on their behalf or at their request) from entering into arrangements under which Northern Ireland is to form part of a separate customs territory to Great Britain”.

[3] The background to the present case may be briefly summarised as follows.

[4] On 17 October 2019 the United Kingdom Government announced that, as envisaged by Article 50(2) of the Treaty on European Union, it had secured a new deal with the European Union setting out the arrangements for the United Kingdom’s withdrawal from the European Union, taking account of the framework for the United Kingdom’s future relationship with the European Union.

[5] On the same day the European Commission published four documents relative to this new deal. These four documents were as follows:

“(1) a revised Protocol on Ireland/Northern Ireland and the necessary technical adaptations to Article 184 and 185 of the original Withdrawal Agreement of March 2019,

(2) a revised Political Declaration,

(3) a letter from the European Commission President to the President of the European Council,

(4) a formal Communication to the European Commission from those on the European Union side charged with conducting the withdrawal negotiations with the United Kingdom recommending that the Commission:

(i) endorse the revised Protocol on Ireland/Northern Ireland and the necessary technical adaptations to Articles 184 and 185 of the original Withdrawal Agreement of March 2019, as well as the revised Political Declaration;

(ii) take note of the draft unilateral Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the ‘Democratic consent in Northern Ireland’ provision of the Protocol on Ireland/Northern Ireland;

(iii) authorise the Commission President to transmit these texts to the European Council with the letter enclosed.”

[6] The United Kingdom Government intends to lay before each House of Parliament on Saturday 19 October 2019 a statement that the United Kingdom has concluded an agreement with the European Union under Article 50(2) of the Treaty on European Union as required by section 1 of the European Union (Withdrawal) (No 2) Act 2019 and at the same time (i) a statement that political agreement has been reached, (ii) a copy of the negotiated withdrawal agreement and (iii) a copy of the framework for the future relationship, all as required by section 13(1)(a) of the European Union (Withdrawal) Act 2018.

[7] Article 4 of the Draft Withdrawal Agreement Protocol provides as follows:

“Customs territory of the United Kingdom

Northern Ireland is part of the customs territory of the United Kingdom.

Accordingly, nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of any agreements it may conclude with third countries, provided that those agreements do not prejudice the application of this Protocol.

In particular, nothing in this Protocol shall prevent the United Kingdom from concluding agreements with a third country that grant goods produced in Northern Ireland preferential access to that country’s market on the same terms as goods produced in other parts of the United Kingdom.

Nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of its Schedules of Concessions annexed to the General Agreement on Tariffs and Trade 1994.”

The petitioner’s case

[8] The petitioner argue that what the Protocol seeks to do is to create what Mr O’Neill QC described as an overlapping Venn diagram in which Northern Ireland is at one and the same time both a part of the customs territory of the United Kingdom and a part of the customs territory of the European Union. By contrast, the island of Great Britain will, post-Brexit, form a part of the customs territory of the United Kingdom, but the island of Great Britain will no longer form a part of the customs territory of the European Union.

[9] Mr O'Neill drew attention to section 55 of the Taxation (Cross-Border Trade) Act 2018 ("the 2018 Act"). This provides as follows:

"55 Single United Kingdom customs territory

(1) It shall be unlawful for Her Majesty's Government to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain.

(2) For the purposes of this section '*customs territory*' shall have the same meaning as in the General Agreement on Tariffs and Trade 1947 as amended."

[10] Mr O'Neill submitted that the terms of section 55 constituted an express statutory prohibition imposed by Parliament on how the Executive might exercise its foreign affairs powers and, in particular, conduct and conclude international negotiations with other parties, including the European Union. He argued that section 55 was a prohibition specifically directed to what the United Kingdom Government can or cannot do in this area. In particular, according to Mr O'Neill's approach, the section does not allow the Government even to propose for ratification by the UK Parliament any arrangement allowing for Northern Ireland to form part of a separate customs territory to Great Britain as this would involve the United Kingdom Government impermissibly having entered into an arrangement with another party to allow for such a result.

[11] Mr O'Neill submitted that the proposed *interim* orders would not have the effect of preventing the United Kingdom Parliament from considering matters as intended on Saturday 19 October 2019. He said that it would be for Parliament to decide what it should do in the light of the orders pronounced by the court. This was part of what he maintained was the constitutional dialogue between the courts and Parliament. The present case was concerned with the proper functioning of the Constitution of the United Kingdom. Parliament could still consider the motion proposed in the name of the Prime Minister for

approval of the draft Withdrawal Agreement, but it might have to repeal or amend section 55 of the 2018 Act before doing so. The petitioner was seeking *interim* orders so that, as Mr O'Neill put it, Parliament was fully advised of the legal position.

The response for the UK government

[12] On behalf of the Advocate General, Mr Moynihan, QC opposed the motion for *interim* orders on five grounds.

[13] First, the petition was incompetent because it amounted to a manifest attempt to persuade the court to interfere with proceedings in Parliament. Under section 13(1) of the European Union (Withdrawal) Act 2018, parliamentary approval of the outcome of negotiations with the EU was required. Subsection 1 provided that the Withdrawal Agreement may be ratified only if (a) a minister of the Crown has laid before each House of Parliament – (i) a statement that political agreement has been reached, (ii) a copy of the negotiated Withdrawal Agreement, and (iii) a copy of the framework for the future relationship. It was important to note that subsection 16 defined “negotiated Withdrawal Agreement” as meaning the draft of the Withdrawal Agreement identified by the statement that political agreement has been reached. The government’s intention was simply to follow these procedures in accordance with the statutory framework. Moreover, section 1(1) of the European Union (Withdrawal) (No 2) Act 2019 envisaged that a minister of the Crown would lay before each House of Parliament a statement that the United Kingdom had concluded an agreement with the European Union under Article 50(2) of the Treaty on European Union and a copy of the agreement. Again, this was what was now being put in train.

[14] Mr Moynihan contended that against the background of this statutory framework it was clearly a matter for Parliament to address its own mind to the terms of the draft Withdrawal Agreement.

[15] Mr Moynihan also submitted that the effect of an *interim* order for suspension would be to prevent the responsible minister from making to Parliament the statements required by the Withdrawal Acts. The agreement would have been declared void and there would be nothing that could lawfully be laid before Parliament. The remedies sought would amount to a manifest interference with the proper processes and procedures of Parliament and would prevent legitimate debate in Parliament about the terms of the Withdrawal Agreement.

[16] It was submitted on behalf of the respondent that it would be wrong for the court to attempt to prescribe the order in which Parliament chose to address any of the issues that might arise. It was for Parliament to decide whether and when anything should be done to amend or revoke the terms of section 55 of the 2018 Act.

[17] As to the balance of convenience, Mr Moynihan submitted that the petitioner had failed to demonstrate any genuine urgency. They accepted that section 55 could be amended or repealed. The balance of convenience strongly favoured allowing the legitimate democratic processes to proceed and for Parliament to have a free hand in the forthcoming debates.

[18] Mr Moynihan also submitted that the averments in the petition failed to disclose a *prima facie* case. There had been no attempt to put forward a factual basis for any reasonable apprehension on the petitioner's part such as would justify the granting of *interim* orders. Article 4 of the draft Protocol was an unequivocal and unambiguous statement. There was no factual basis for showing that this statement was wrong. In particular, there was no

factual evidence to support the assertion that Northern Ireland would not be part of the customs territory of the United Kingdom in future.

[19] Mr Moynihan submitted that in interpreting section 55 of the 2018 Act it was important to have regard to the definition of “a customs territory” contained in Article XXIV(2) of the General Agreement on Tariffs and Trade (“GATT”). This made clear that a customs territory was to be understood as meaning any territory with respect to which separate tariffs or other regulations of commerce were maintained for a substantial part of the trade of such territory with other territories. The petitioner had made no attempt, as a question of fact, to establish that a substantial part of Northern Ireland’s trading in goods would not continue to be with Great Britain. The Protocol indicated that the intention was for Northern Ireland to remain part of the customs territory of the United Kingdom. Goods circulating within Great Britain and Northern Ireland would be the subject of the United Kingdom customs territory regime. The exception to this would relate only to such goods as were intended for onward destination to a part of the European Union from within Northern Ireland. The existence of such variations did not mean that a substantial part of trade in Northern Ireland would be outwith the United Kingdom. There was no information or material before the court which addressed the question as to whether there would be a substantial part of trade in Northern Ireland that would take place with the European Union. The declaration contained in Article 4 of the draft Protocol was clear and should be given effect. The petitioner’s case was said to proceed on the basis of a fundamental misreading of the meaning of a customs territory. At the very worst for the respondents, they had an arguable defence in relation to the interpretation of section 55 read alongside article 4 of the draft Protocol.

[20] Finally, Mr Moynihan submitted that the petition failed to recognise that the Protocol was in draft form and required ratification both in the United Kingdom and in the European Union. If it was considered necessary for any steps to be taken in relation to section 55 of the 2018 Act, these could be addressed in the course of the forthcoming parliamentary procedure due to take place on the draft withdrawal legislation.

Analysis and decision

[21] The issues which the court must address at this stage are (i) whether the petitioner has a *prima facie* case and (ii) where the balance of convenience lies.

[22] In my opinion, the petitioner does not have a *prima facie* case. In the first place, the petition is of very doubtful competency. The orders sought would unquestionably interfere to a major extent with the proposed proceedings in Parliament. Suspension of the draft withdrawal agreement would mean that the motion for its approval could not realistically or properly go ahead as planned. I cannot see that it would be right for Parliament to be invited to consider a draft treaty which the court had suspended on the basis that it was unlawful. It is a cardinal principle of constitutional law that the courts should not intrude on the legitimate affairs and processes of Parliament. I consider that it should be left to Parliament to proceed in relation to the draft withdrawal agreement in the manner and according to the procedures that Parliament considers most appropriate in the circumstances.

[23] Secondly, I consider that the petitioner's legal argument as to the incompatibility of the draft withdrawal agreement with section 55 of the 2018 Act is at best a weak one. The starting point, in my opinion, is the clear declaration in article 4 of the draft Protocol. That statement is closely aligned with the definition of a "customs territory" contained in Article

XXIV of GATT. The petitioner has placed nothing before the court by way of evidence, averment or oral submission to show that in future Northern Ireland's trading and customs arrangements will not qualify and fall to be treated as amounting to a "customs territory" in the manner envisaged in the draft Protocol. The clear intention underlying the draft Protocol is that Northern Ireland will remain part of the customs territory of the United Kingdom. There is nothing to show that this will not play out as intended and work in a satisfactory manner. The fact that there will also be trade between Northern Ireland and the EU on which customs duties shall be payable does not necessarily infer that Northern Ireland cannot at the same time be part of the customs territory of the United Kingdom. A substantial part of Northern Ireland's trade will still be with Great Britain and will not be subject to customs duties.

[24] Thirdly, the balance of convenience, in my view, strongly points towards it being right for the court to decline to grant the *interim* orders sought. The petitioner has not convinced me that there is any genuine urgency such as to justify the granting of *interim* orders. Mr O'Neill suggested that even if orders were granted, matters could nonetheless proceed in Parliament as currently planned, but Parliament would be able to have regard to the court's view on the legality of the draft withdrawal agreement. This, to my mind, makes little sense. It is not for the court to provide Parliament with some kind of advance advisory guidance.

[25] Fourthly, the petitioner's approach fails to take account of the fact that the withdrawal agreement is at present still at the stage of being merely a draft instrument. It requires to be ratified, both at UK and EU levels. These procedures should be allowed to be followed through in line with the appropriate processes in the UK Parliament and

elsewhere. It would be quite wrong and contrary to basic constitutional principles for the court to interfere with them in the way that the petitioner has proposed.

[26] For all these reasons, I conclude that the petitioner's applications for *interim* orders are misconceived and unjustified. They have no or at best a weak *prima facie* case. The balance of convenience comes down firmly on the side of refusing to make the orders. I shall accordingly refuse the petitioner's motion insofar as it seeks *interim* orders.

[27] I shall order intimation and service of the petition and appoint answers to be lodged within 7 days.