



Hilary Term
[2019] UKSC 1

JUDGMENT

**Reference by the Attorney General for Northern
Ireland of devolution issues to the Supreme Court
pursuant to Paragraph 34 of Schedule 10 to the
Northern Ireland Act 1998 (No 2) (Northern
Ireland)**

before

**Lady Hale, President
Lord Reed, Deputy President
Lord Kerr**

JUDGMENT GIVEN ON

14 January 2019

Heard on 17 December 2018

Attorney General for Northern Ireland

John F Larkin QC

Attorney General for Northern Ireland

(Instructed by Office of the Attorney
General for Northern Ireland)

Advocate General for Northern Ireland

Tony McGleenan QC

Paul McLaughlin BL

(Instructed by Crown Solicitor's Office)

Alternative A5 Alliance

Gregory Jones QC

Richard Honey BL

(Instructed by C & J Black Solicitors)

LORD KERR: (with whom Lady Hale and Lord Reed agree)

Introduction

1. The Attorney General for Northern Ireland (AGNI) has referred five questions to this court under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (NIA). This paragraph operates in conjunction with paragraph 33 of the same Schedule. Paragraph 33 provides that the AGNI (among others) may require any court or tribunal to refer to the Supreme Court any devolution issue which has arisen in proceedings to which he is a party. By virtue of paragraph 5 and the equivalent provisions for proceedings in England and Wales, and in Scotland, the AGNI always receives notice of any devolution issue which arises in any proceedings, unless he is already a party to the proceedings. Under paragraph 6 and its equivalents, he can then take part as a party to the proceedings so far as they relate to the devolution issue, and can make a reference under paragraph 33. Paragraph 34 deals with the situation where the devolution issue is not the subject of proceedings, and where paragraph 33 therefore cannot apply. In that event, he may refer to this court “any devolution issue which is not the subject of proceedings.”

2. The role of the Supreme Court on a reference under paragraphs 33 and 34 of Schedule 10 to the NIA is to provide authoritative legal guidance on the questions of law which arise on the reference. It is central to the exercise of this function that the reference be made on a devolution issue. A devolution issue is defined in paragraph 1(d) of Schedule 10 as, “any question arising under this Act about excepted or reserved matters.” The reference to excepted or reserved matters reflects the circumstance that there are three types of matter in the devolved settlement established by NIA - excepted, reserved or transferred. These three categories find their predecessors in the Government of Ireland Act 1920 and various items of legislation dealing with devolution in Northern Ireland which succeeded the 1920 Act.

3. In broad outline, transferred matters are those which the Westminster Parliament has decided should be within the competence of the Northern Ireland Assembly; reserved matters are those which are not currently within that competence but the list of reserved matters may be varied by way of Order in Council, approved in draft by Parliament - section 4(2) NIA; excepted matters are those which are not within the Assembly’s competence and the list of excepted matters may only be varied by primary legislation.

4. The questions referred by the AGNI were these:
 1. Does section 28A(1) of NIA require a Northern Ireland Department in the absence of a Minister to act in accordance with the Northern Ireland Ministerial Code?
 2. Does section 28A(10) of the Northern Ireland Act 1998 deprive a Northern Ireland Department of its authority to take decisions under any statute empowering or requiring it to take decisions?
 3. Does the function in section 20(4)(a) of the Northern Ireland Act 1998 exist when there is no programme as referred to in paragraph 20 of Strand One of the Belfast Agreement?
 4. Does section 20(3) of NIA, taken together with section 28A(5) of that Act, limit the power or responsibility of a Northern Ireland Department to take decisions under any statute empowering or requiring it to act when there is no Executive Committee and no Northern Ireland Minister is in post?
 5. Does the requirement referred to in section 28A(5) of the NIA exist when there is no programme as referred to in paragraph 20 of Strand One of the Belfast Agreement?
5. The background to the reference is, of course, that the Northern Ireland Assembly and its Executive Committee have not been functioning since January 2017, so that many of the decisions which ministers and the executive might have taken have either had to be deferred or they have been taken by civil servants or departments of the Civil Service. In *In re Buick* [2018] NICA 26 the Northern Ireland Court of Appeal held that the relevant department did not have the power to make the decision to grant planning permission for a major waste incinerator in the absence of a minister. This decision, it is said, has had a significant impact on the functioning of Northern Ireland departments, in the absence of ministers. It is claimed that the judgment did not answer all the questions raised in this reference.
6. The respondent in the *Buick* case, the Department for Infrastructure, did not apply for permission to appeal against the decision and this court has therefore not had the opportunity to consider the issues raised by the reference before now.
7. Following the decision in *Buick*, Parliament enacted the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018. Section 3(4) provides

that the absence of Northern Ireland ministers is not to be treated as preventing any senior officer from exercising functions of the relevant department. The Act is time limited. Its provisions extend only during the statutory period for the formation of an Executive Committee ie until 26 March 2019. Those provisions may be extended, but only for a period of five months.

8. The AGNI and the Advocate General for Northern Ireland therefore argue that this court should rule on the questions referred because clarification of the issues raised in the reference is in the public interest and is likely to be of importance both in relation to the functioning of devolved government in Northern Ireland in the longer term and also to the restoration of the Executive in the shorter term.

9. This court decided to convene a preliminary hearing to consider the question whether the matters referred by the AGNI were properly to be regarded as devolution issues.

10. Alternative A5 Alliance is an unincorporated association which opposed the construction of a new dual carriageway in Northern Ireland. In statutory review proceedings it had challenged the decision that the carriageway should be constructed. Among the grounds of challenge was the claim that that decision had been taken by a civil servant rather than a minister. After the AGNI's reference had been intimated, the High Court in Northern Ireland adjourned the Alliance's application for statutory review, pending the result of this reference. Alternative A5 Alliance then applied to intervene on the preliminary issue hearing before this court. The application was granted. Before the preliminary hearing, however, the Alliance's statutory review application was disposed of when the Department for Infrastructure decided that it would not oppose the grant of certiorari quashing the decision in relation to the construction of the carriageway. The Alternative A5 Alliance has continued as an intervener in the hearing of the preliminary issue, however. Gregory Jones QC and Richard Honey have acted pro bono in the hearing and the court is grateful to them for the valuable contribution that they have made.

Devolution issues

11. The intervener submits that the matters raised by the reference are not devolution issues. It makes that submission on two basic grounds. Firstly, it says that the issues do not concern reserved or excepted matters. Secondly, it claims that the questions referred "do not arise" under NIA. Both are fundamental requirements under paragraph 1(d) of Schedule 10.

12. The AGNI and the Advocate General contend that the questions in the reference are about reserved matters. They claim that they concern the meaning of provisions which fall within the class of reserved matters specified in paragraph 42(a) of Schedule 3 to NIA which provides that among reserved matters is included:

“Any matter with which a provision of this Act falling within the following subparagraphs solely or mainly deals -

(a) In Part III, sections 19, 20, 28, 28A and 28B ...”

13. It is argued that the first two questions in the reference inquire into the possible application to Northern Ireland departments of section 28A of NIA and the Ministerial Code which it provides for. On its face section 28A refers only to ministers, and the Ministerial Code is expressed as applying only to them. The AGNI argues, therefore, that, because there are currently no ministers, there is a legal uncertainty as to whether the code should apply to civil servants.

14. The intervener’s riposte to this submission is that section 28A is not itself a reserved matter; to qualify as a reserved matter the subject must *fall within* the provision. The section itself does not constitute a reserved matter. Furthermore, to come within the category, the matter must be one which is *solely or mainly dealt with* by the section. There must therefore be a matter in existence; it must fall within the section and it must be dealt with solely or mainly by the terms of the section. None of these requirements is present in the instant case, the intervener says. It contends that the reference poses purely theoretical questions, entirely unrelated to any factual matrix against which the conditions intrinsic to section 28A might be tested.

15. The reference mechanism is not available for resolving academic questions of law, the intervener submits. The questions posed in paras 1 and 2 of the reference partake precisely of that character.

16. In any event, the intervener says, even if, *prima facie*, the issues raised by the reference could be said to fall within section 28A and that they are solely or mainly dealt with by that section, they are removed from the category of reserved matters by paragraph 42(ii) of Schedule 3. It provides that paragraph 42 does not apply to:

“(ii) any matter to which a description specified in this Schedule or Schedule 2 is stated not to apply.”

17. Paragraph 1(a) of Schedule 2 provides that the “functions of the First Minister and deputy First Minister, the Northern Ireland Ministers or the Northern Ireland departments, or functions in relation to Northern Ireland of any Minister of the Crown” are matters to which the description of the Crown as an excepted matter is stated not to apply. The intervener submits, therefore, that the functions of departments exercised by civil servants are removed from the category of reserved or excepted matters.

18. In relation to section 28(10) of NIA (referred to in question 2 of AGNI’s reference), the same arguments pertain. It provides that a minister or junior minister has no authority to take any decision in contravention of a provision of the Ministerial Code. No different issue arises in relation to that provision from those already discussed under section 28A(1).

19. Section 20(4)(a) of NIA (which is the subject of the third question) provides that the Executive Committee of the Northern Ireland Assembly shall have the function of discussing and agreeing upon significant or controversial matters that are clearly outside the scope of the agreed programme referred to in paragraph 20 of Strand One of the Belfast Agreement. Discussion of this question can conveniently be taken with section 20(3), the subject of the fourth question.

20. Section 20(3) provides that the Executive Committee shall have the functions set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement. Paragraph 19 requires the Executive Committee to provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more ministers, for prioritising executive and legislative proposals and for recommending a common position where necessary. Paragraph 20 requires the Executive Committee to seek to agree each year a programme incorporating an agreed budget linked to policies and programmes.

21. Essentially the same arguments as were deployed by both sides of the debate are repeated in relation to these two questions. These are, the intervener says, purely theoretical and academic queries. It is not the function of this court, it is claimed, to give abstract opinions on issues of law which are unconnected with any actual matters arising under the relevant provisions.

22. The subject of the fifth question, whether the requirement in section 28A(5) of the NIA exists when there is no programme as referred to in paragraph 20 of Strand One of the Belfast Agreement falls to be determined by the resolution of the same arguments. This subsection provides that the Ministerial Code must include provision for requiring ministers to bring to the attention of the Executive

Committee any matter that ought by virtue of section 20(3) or (4), to be considered by the Committee.

23. The intervener made a final argument about the propriety of making a reference under paragraph 34 of Schedule 10. It pointed out that AGNI in his printed case suggested that the questions in the reference “[b]roadly, ... ask whether these provisions mean what the Court of Appeal in *Buick* thought they did”. The intervener argues, therefore, that the AGNI should have used his powers under paragraph 33 of the Schedule. If the AGNI was, as he now submits, concerned with the “correctness” of the Court of Appeal’s judgment in *Buick*, he could have applied for permission to appeal to this court or referred the devolution issues to this court when those proceedings were underway (pursuant to his power to do so under paragraph 33 of Schedule 10).

24. To permit the AGNI to use the paragraph 34 referral power would be tantamount, the intervener argues, to allowing him to bypass the normal requirement of applying for permission to appeal to this court. This would constitute an abuse. The AGNI refutes this argument, relying principally on the decision of this court in *Lee v Ashers Baking Co Ltd* [2018] 2 WLR 1294 and, in particular, the judgment of Lord Mance at paras 76-81. The effect of those paragraphs, the AGNI argues, was that a reference may be made after proceedings have ended. *A fortiori*, it is suggested, there is nothing to contraindicate a reference where there are no proceedings involved but where points of law arise which give rise to devolution issues.

25. There is much to be said for the intervener’s argument that it was Parliament’s clear intention that references should be made by the AGNI in the context of actual proceedings - under paragraph 33 where he was a party to the proceedings and under paragraph 34 where there are no proceedings in train. And the *Ashers* case was significantly different from the present in that there the Court of Appeal had held (wrongly, as this court decided) that it was not open to the AGNI to require it to make a reference under paragraph 33 because proceedings had come to an end when judgment had been handed down. This court concluded that proceedings remained on foot until any contentious issues about the form of order appropriate to give it effect and about other matters such as costs had been resolved and a final order issued. The AGNI’s notice requiring the Court of Appeal in Northern Ireland to make a reference fell within the terms of paragraph 33 and the Court of Appeal had erred in refusing to do so.

26. Under paragraph 34 a devolution issue which is not the subject of proceedings may be referred. This is not necessarily an open-ended facility, however. There may be an issue as to the circumstances in which that can properly be done, and in particular whether it can be done where there were proceedings in

which the AGNI did not take the opportunity to refer under paragraph 33, or to appeal, or where other proceedings are in existence in which the devolution issue could arise and be referred under paragraph 33. That issue need not be further examined here for reasons that will appear in the next section of this judgment but it is one which may have to be addressed in the future.

Discussion

27. There is considerable force in the arguments presented on behalf of the intervener. But those arguments do not have the quality of unanswerability that will customarily be required to dispose of proceedings on a preliminary issue. Because of the course that it is proposed to take in relation to these proceedings, it is not appropriate to say anything further about the merits of the competing claims made by the parties.

28. In general, it is desirable that legal questions be determined against the background of a clear factual matrix, rather than as theoretical or academic issues of law. The opportunity for discussion and determination of the legal questions raised in the AGNI's reference exists. Litigation concerning the validity of a proposed electricity interconnector between Northern Ireland and Ireland potentially raises most, if not all, of the issues adumbrated in the current reference. This court was told that that litigation has been stayed pending the outcome of this reference. The stay of proceedings is not appropriate. Those proceedings will provide the chance for the issues raised in the reference to be ventilated against a clear factual backdrop. They will also have the advantage of having the courts of Northern Ireland deal with those issues by reference to the practical reality of their impact on society there, so that an insight into the outworking of the competing arguments can be obtained.

29. The AGNI suggested that it was not open to him to become involved in those proceedings, absent service of a devolution notice. That is not accepted. Nothing in Schedule 10 specifically excludes him from applying to intervene in the proceedings even if he has not been served with a devolution notice. Nothing in paragraphs 4-6 of Schedule 10 (which deal with institution and participation in proceedings dealing with a devolution issue) preclude his applying to intervene in proceedings or even from seeking to persuade the relevant court or tribunal that it should issue a devolution notice.

30. The stay on the proceedings in relation to the interconnector should be lifted. If necessary, the AGNI should apply to intervene in those proceedings in order to canvass the issues which arise on the current proposed reference. In the meantime, the present reference will stand adjourned.