5 February 2020

PRESS SUMMARY

A 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 (Northern Ireland)
[2020] UKSC 2

JUSTICES: Lady Hale, Lord Reed, Lord Kerr

BACKGROUND TO THE REFERENCE

This is an application by the Attorney General for Northern Ireland under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 ("**the 1998 Act**"). Paragraph 34 provides that the Attorney General may refer to the Supreme Court any devolution issue which is not the subject of proceedings. A devolution issue includes a question whether a purported exercise of a function by a Northern Ireland Department is or would be invalid by reason of s. 24 of the 1998 Act. S. 24(1)(a) provides that a Department of Northern Ireland has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act is incompatible with any of the rights guaranteed by the European Convention on Human Rights ("**the ECHR**").

By the Welfare Reform (Northern Ireland) Order 2015 (Commencement No. 8 and Transitional and Transitory Provisions) Order 2017, the Secretary of State commenced a number of universal credit provisions for claims on or after 27 September 2017 where the claimant resides in an area known as "No. 1 relevant districts."

Although it is for the Secretary of State to appoint the dates for commencement, he does so by a legislative technique which requires action by the Northern Ireland Department for Communities (part of the Northern Ireland Executive). The 2017 Order defines the "No. 1 relevant districts" as "the postcodes specified in the table in the List of the No. 1 Relevant Districts." It is the Department for Communities which must issue such lists. The same holds true of a second order made by the Secretary of State relating to "No. 3 relevant districts" and "No. 2 relevant districts."

The basis for the Attorney General's reference is his assertion that the universal credit provisions in question breach Article 1 Protocol 1, Articles 8, 14 and 12 of the ECHR and are therefore invalid per s. 24 of the Northern Ireland Act 1998.

The Attorney General submits that the provision of lists by the Department for Communities is necessary in order to give effect to the Secretary of State's commencement orders and thus constitutes an act, per s. 24 of the 1998 Act, which is incompatible with the ECHR and invalid. It is for this reason that the Attorney General submits that the publication of lists by the Department for Communities raises a devolution issue under Schedule 10 of the 1998 Act.

The Department for Communities refutes this, contending that the provisions under challenge concentrated the power to make welfare provision in the office of the Secretary of State. The Department for Communities submits that its role in issuing the lists amounts to nothing more than providing administrative support to the Secretary of State, and that the lists have legal effects solely by reason of the act of the Secretary of State, not the act of the Department. The publication of lists is not, therefore, an act raising a devolution issue under s. 24 of the 1998 Act.

JUDGMENT

The Supreme Court unanimously refuses to accept the Attorney General's application to refer this issue to the court under paragraph 34 of Schedule 10 to the 1998 Act. Lord Kerr, with whom Lady Hale and Lord Reed agree, gives the judgment.

REASONS FOR THE JUDGMENT

The Court notes that acts by the Secretary of State for Northern Ireland or by departments in Westminster do not come within the purview of section 24 of the 1998 Act. For a devolution issue to arise, it must be shown that an act or function has been carried out by a Northern Ireland *minister or department*, and that the act in question is invalid by reason of s. 24 **[6]**. The prohibitions in s. 24 are disjunctive: it is forbidden to make, confirm or approve any subordinate legislation, *or to do any act*, so far as the legislation *or act* is incompatible with the ECHR. Acts ancillary to the enactment of subordinate legislation are thus in principle capable of being caught by s. 24. It is therefore possible, on a theoretical or technical level, to consider that the Department's provision of the postcode lists in question amounts to such an ancillary act **[11]**.

There are, however, two reasons that the provision of such lists cannot be said to raise a devolution issue. First, as the Court held in *AGNI's reference* [2019] UKSC 1, where the Attorney General sought to refer to this court a devolution issue that arose in parallel pending proceedings, it was considered not to be appropriate to accept the reference. The same holds true here: a challenge to the universal credit provisions will come before this court shortly on appeal from a decision of the English Court of Appeal. It will be open to the Attorney General to apply to intervene in that appeal **[12]**.

Second, the fundamental underpinning of the Attorney General's case is that the introduction of universal credit in Northern Ireland by act of the *Secretary of State* is incompatible with the ECHR. It is *not* that *the Department's act* in identifying the areas where universal credit is to be introduced that is incompatible. The publication of the lists itself is not an act sufficient to give rise to an incompatibility with the ECHR. For a devolution issue under Schedule 10 to arise, it must be shown that the departmental act under challenge is capable of being incompatible with the ECHR. Because the publication of lists is not in itself capable of giving rise to an incompatibility, it is not appropriate to accept a reference under paragraph 34 **[13 – 14]**.

References in square brackets are to paragraphs in the judgment.

NOTE
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
https://supremecourt.uk/decided-cases/index.html