

**BREXIT
POTENTIAL ISSUES FOR PUBLIC AND PRIVATE LAW LITIGATION
IN NORTHERN IRELAND**

or How to Survive Without EU Law As We Know It

**Law Society of Northern Ireland and Irish Centre for European Law
Belfast, 13 December 2016**

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1. This paper assumes that there will be a Brexit. How might it affect public and private law litigation?

NI: the past and current situation

2. EU law can come, and for a certain period, at least, will continue to come, before NI courts and tribunals under any of the subject-matter headings within the scope of the EU Treaties.
3. In practice, relatively commonly litigated areas are:
 - a. Employment and social policy rights;
 - b. Equality and fundamental rights;
 - c. Free movement of persons, including immigration;
 - d. Planning and environment;
 - e. Procurement; and
 - f. Jurisdiction, recognition and enforcement of judgments (civil and commercial matters under the Brussels I Regulation, and matrimonial and parental responsibility rights under the Brussels II bis Regulation).
4. EU law has flowed into the estuaries and up the rivers of domestic NI law, principally through the following conduits:
 - a. The European Communities Act 1972 (ECA 1972); and
 - b. The Northern Ireland Act 1998 (NI Act 1998). The NIA 1998 also introduces safeguards, such as s.6(2)(d) which provides that it is unlawful for the Assembly to pass any legislation contrary to EU law. Section 24(1)(b) requires that a Minister or NI department has no power to make, confirm or approve any subordinate legislation, or to do any act, as far as the legislation or act is incompatible with EU law.

¹ Brick Court Chambers (London), Law Library (Dublin) and Bar Library (exempted member) (Belfast). Member of Board of Directors of The Irish Centre for European Law.

² <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice->

5. EU law has flooded into NI by the transposition of, or giving effect to, EU Regulations and Directives in domestic legislative instruments, or by the making of other legislative and administrative measures that must otherwise be consistent with EU law obligations.
6. EU law has been given further effect through the obligations on courts and tribunals to:
 - a. give effect to EU law generally (by a purposive interpretation and conforming construction of legislation);
 - b. disapply contrary national laws;
 - c. apply faithfully case-law of the EU Courts, and, where appropriate, seek guidance from the CJEU (pursuant to Article 267 TFEU);
 - d. stay national proceedings to avoid conflict with decisions of EU institutions or with CJEU judgments;
 - e. give effect to general principles of EU law, including the EU Charter of Fundamental Rights;
 - f. order interim relief, including as against the Crown;
 - g. award damages for breaches of EU law, whether by public or private bodies;
 - h. ensure that effective protection is not stymied by national procedural rules, such as time-limits or rules of evidence;
 - i. introduce points of EU law, even where the parties themselves have not (a controversial issue); and
 - j. provide restitution of monies paid in breach of EU law, such as unlawfully paid taxes, charges or grants.
7. Interpreting and applying EU law requires using particular interpretative instruments to navigate the waters, which are used by litigators and the judiciary, including:
 - a. aiming towards an '*effet utile*' and endorsing a purposive approach to statutory interpretation;
 - b. applying the principle of the conforming interpretation of national law, insofar as possible, to give effect to EU law (and the limitations of such an approach). A comparable technique is the '*reading down*' of legislative provisions by application of the Human Rights Act 1998 (HRA 1998) and the ECHR; and

- c. adopting techniques of statutory interpretation traditionally employed by the CJEU, and now also by the NI courts as methods of discerning legislative intent. This includes the consideration of *travaux préparatoires*, the different language versions of EU legislation, and preambular materials: see *Central Craigavon Limited v The Department for the Environment* [2011] NICA 17, in particular at [36] – [39].
8. The conduits of EU law and the more effective remedies available by virtue of its supremacy have assisted the vindication of fundamental rights.
 9. This has come about, in the first instance, via the reception and application of EU general principles, in turn, enshrining ECHR and other international human rights standards: see *Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651. In the second instance, it has come about via the EU Charter of Fundamental Rights, which is frequently pleaded as a ground of judicial review.
 10. Reliance on EU law has been used to good effect before NI courts, where claims on the same facts under the HRA 1998, for example, have failed, or, even if they had been successful, would not have led to such effective remedies: see, for example *JR65's Application* [2013] NIQB 101.
 11. Litigants before NI courts and tribunals have acted creatively to enforce rights and obtain remedies through EU law. The doctrine of proportionality as an EU administrative law notion was largely developed via the Article 267 TFEU reference to the CJEU in *Re Norbrook Laboratories Ltd Application* [1992] 10 NIJB 36.

What might happen in the future?

12. At risk of stating the obvious, it depends on a number of outcomes. It depends, at least, on the terms of the UK's withdrawal from the EU, the terms of any future agreements between the UK and the EU, and the future status of provisions of EU law which are already transposed into NI law or which otherwise have direct applicability (for example, EU Regulations).
13. As regards the terms of the withdrawal, when the Treaties cease to apply:
 - a. EU law which has been transposed or given effect to by UK and NI legislation will continue to form part of domestic law. Its terms and concepts will be a source of binding rights, and will fall to be applied and interpreted in future (the instruments used for such interpretation will likely have to be tinkered with);
 - b. EU law that has not been transposed or given effect to in UK and NI legislation, but otherwise is to be retained as being directly applicable, will require specific implementing provisions which, ideally, would be

made in tandem with the Act of Parliament following the Great Repeal Bill;

- c. Certain provisions which have been transposed or are directly applicable will not make much sense where they are interwoven with, or dependent upon, actions of the EU institutions or other Member States, and will have to be specifically addressed;
 - d. There will remain islands of purely domestic law (such as those non inter-state provisions in the Competition Act 1998 (CA 1998) or provisions in the Civil Jurisdiction and Judgments Act 1982) which contain certain definitions and concepts that mirror EU law definitions and concepts, and have been interpreted (so far as possible) consistently with those EU concepts;
 - e. Amendments to the Rules of the Court of Judicature (NI) 1980 will be required, in particular to the following: Order 11 (service out); Order 71 (enforcement of judgments); Order 90 (minors); and Order 114 (References to the CJEU); and
 - f. Judgments of the CJEU will no longer be binding on NI courts and tribunals (but would still be relevant and the extent of that relevance would be a matter for the courts to develop).
14. As regards the terms of any future agreements between the UK (as a whole) and the EU:
- a. It may be an EEA-style arrangement. The familiar EU law notions of supremacy, direct effect and the position in the EU legal system of the CJEU do not, however, carry across faithfully to the EEA or the position within that system of the EFTA Court;
 - b. Whatever other agreement (or agreements) the UK negotiates with the EU, it will be incumbent on practitioners and courts to be familiar not only with EU law and its substantive development but also with EU and UK law governing international agreements; and
 - c. Certain fields, in particular those based on close harmonisation and co-operation, may be the subject of special agreements. It is conceivable that this could happen with Brussels I and II bis Regulations, and that there could continue to be a formal role for the CJEU within the UK legal system in that limited context. The various options in respect of private law issues concerning jurisdiction, enforcement of judgments and choice of law are discussed in the Written Evidence of the British Institute of International and Comparative Law dated 29 November 2016; see also the House of

Lords Select Committee (EU justice sub-committee on Brexit: civil justice cooperation).²

15. As regards special arrangements, they will certainly be required to accommodate issues of EU law arising under:
 - a. the devolution settlement codified in the NI Act 1998. There may be bespoke arrangements required to accommodate the cross-border bodies set up under the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999, including the Special EU Programmes Body. There could be a residual role for EU law in that regard. It has been mentioned that EU funding ought to still be available for North-South border projects, but this is a political issue to be resolved in the first instance; and
 - b. other instances of North-South co-operation within the framework of EU law, such as the Single Electricity Market and SEM Committee which regulates the all-island electricity market and whose decision-making Committee comprises officers from both the Utility Regulator for Northern Ireland and the Commission for Energy Regulation jointly taking decisions in accordance with EU law.
16. The procedure and consequence of withdrawal, and any special arrangements, could give rise to litigation where expectations of parties with vested interests are not met.

How might EU law-related issues arise and be resolved?

17. So, conceivably, EU law-related issues could arise in litigation as follows.
18. Firstly, they could arise in relation to the mechanics of lawful withdrawal from the EU: [R \(on the application of Miller and Dos Santos\) \(Respondents\) v Secretary of State for Exiting the European Union \(Appellant\)](#).³
19. Second, same as in *ex parte Miller*, plus the additional layer of accommodating the lawful taking account of the effect of withdrawal on the people of Northern Ireland and their protections under the NI Act 1998:
 - [Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review](#);⁴

² <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/>

³ Does the Government have power to give notice pursuant to Article 50 of the Treaty on European Union of the United Kingdom's intention to withdraw from the European Union, without an Act of Parliament providing prior authorisation to do so?

⁴ 1. Does any provision of the Northern Ireland Act 1998 ('the 1998 Act') read together with the Belfast Agreement and the British-Irish Agreement have the effect that an Act of

- [Reference by the Court of Appeal \(Northern Ireland\) - In the matter of an application by Raymond McCord for Judicial Review.](#)⁵

20. Third, they could arise in circumstances where rights which were intended to be granted and protected under the ECA 1972 are not subsequently given adequate effect on withdrawal via domestic legislation, either by the UK or the NI institutions where it is a devolved matter.
21. Fourth, a considerable number of NI residents are (or are entitled to be) EU citizens, which could lead to complex litigation concerning entitlements and protections of those rights by NI courts, which will be non-EU courts.
22. Fifth, they could arise where provisions of EU law which are, or will be, mirrored in NI law are, in the normal way, relied upon in future by litigants.
23. How will (and ought) the courts interpret those legislative provisions comprising definitions and concepts of EU law?
 - a. By modifying or tinkering with the established EU instruments of statutory interpretation, particularly where the UK is no longer part of the *aquis communautaire*;
 - b. By reliance on CJEU case-law as being not of binding but persuasive authority. Points of contrast are the current obligations on UK courts to “*take account of*” ECtHR case-law under s.2 of the HRA 1998, or to ensure there is no inconsistency with judgments of the CJEU and “*have regard to*” relevant decisions of the European Commission under s.60 of the CA 1998;
 - c. Possible closer consideration of the case-law of its closest common law neighbour, Ireland, and the reception and development by the Irish courts of EU law definitions and notions. Parallels could be drawn with the role of Northern Irish and English case-law as being of particularly persuasive (not but binding) authority on Irish courts post 1922: see, for example, *MMcC v JMcC* [1994] 1 IR 293; and for a

Parliament is required before notice can validly be given to the European Council under Article 50(2) of the Treaty on the European Union?

- 2.If the answer to question 1 is 'yes', is the consent of the Northern Ireland Assembly required before the relevant Act of Parliament is passed?
3. If the answer to question 1 is 'no', does any provision of the 1998 Act read together with the Belfast Agreement and the British-Irish Agreement operate as a restriction on the exercise of the prerogative power to give notice to the European Council under Article 50(2) TEU?
4. Does section 75 of the 1998 Act prevent the prerogative power being exercised to give notice to the European Council under Article 50(2) TEU in the absence of compliance by the Northern Ireland Office with its obligations under that section?

⁵ Does the triggering of Article 50 of the Treaty on European Union by the exercise of the prerogative power without the consent of the people of Northern Ireland impede the operation of section 1 of the Northern Ireland Act 1998?

more critical position, see *Irish Shell Ltd v Elm Motors Ltd* [1984] IR 200.

24. Sixth, via the HRA 1998. A creative route for getting EU law rights, principles and standards before NI courts could be via the HRA 1998 and reliance on case-law of the ECtHR which runs parallel with and is comparable to certain EU Charter rights and CJEU case-law.
25. Will we see a resurgence of the common law and its rights and principles (or perhaps we have been using it all the time, as some distinguished jurists believe)?⁶

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⁶ For example, Lord Neuberger writing extra-judicially in his lecture "*Has the English Common Law been eroded by EU Laws and the European Convention on Human Rights?*", 18 August 2016 at <https://www.supremecourt.uk/docs/speech-160818-01.pdf>