Neutral Citation Number: [2022] EWCA Civ 118

Case No: CA-2021-000579 (formerly C1/2021/0802)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The High Court of Justice Queen's Bench Division (Divisional Court)
Lord Justice Lewis and Mrs Justice Steyn
[2021] EWHC 950 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 February 2022

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE DINGEMANS

- -

Between :

THE QUEEN *on the application of* **THE COUNSEL GENERAL FOR WALES**	**Claimant/ Appellant**
- and -	
THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Defendant/ Respondent**
- and –	
(1) THE LORD ADVOCATE **(2) THE ATTORNEY GENERAL FOR NORTHERN IRELAND**	**Interested Parties**

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- -

Helen Mountfield QC, Christian J Howells and Mark Greaves (instructed by **Director of Legal Services, Welsh Government**) for the **Appellant**
Sir James Eadie Q.C. and Christopher Knight (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date: 18 January 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10:00 on 9 February 2022

Lady Justice Nicola Davies :

1. These proceedings commenced by way of an application for permission to apply for judicial review brought by the Counsel General for Wales in connection with the interpretation of provisions of the United Kingdom Internal Market Act 2020 ('UKIMA') and their effect on legislation of the Senedd enacted in accordance with the provisions of the Government of Wales Act 2006 as amended ('GoWA').

2. This appeal is brought in respect of the order of a Divisional Court, Lewis LJ and Steyn J, dated 19 April 2021 whereby they refused the appellant permission to apply for judicial review to seek a declaration as to the proper construction of UKIMA as it applies to the effect of GoWA. The refusal was on the grounds of prematurity.

3. The declaration sought is in these terms: "The amendment of Schedule 7B of GoWA by section 54(2) of UKIMA, to add UKIMA to the list of protected enactments, does not amount to a reservation and does not operate so as to prevent the Senedd from legislating on devolved matters in a way that is inconsistent with the mutual recognition principle in UKIMA."

4. On 23 June 2021 Singh LJ granted permission to appeal the decision on the ground that there were compelling reasons for the appeal to be heard as the case raised important issues of principle going to the constitutional relationship between the Senedd and the Parliament of the UK. Permission was not granted to bring the appellant's claim for judicial review, therefore the issue on this appeal was whether to grant permission to apply for judicial review.

5. There is one ground of appeal, namely that the Divisional Court was wrong to conclude that the application for a declaration of principle brought promptly after the introduction of UKIMA could not be tested in the absence of a specific Act of the Senedd.

6. No legislation has been enacted by the Senedd giving rise to issues involving UKIMA. The respondent has not exercised any power to make regulations under UKIMA.

7. In essence, the appellant's case is that the issue as to whether there has been a major restriction upon the competence of the Senedd to legislate as a result of the placing of UKIMA in Schedule 7B of GoWA so as to render it a protected statute and thus operating in effect as a re-reservation of areas of Senedd competence is a point of general public and constitutional importance, which can and should be determined now. It would mean that the court could set what was described by the appellant as 'the rules of the game.' The respondent contends that it would be unwise and inconvenient to address this issue in the absence of specific legislation, which may well, or could have, an impact on the decision of the court. Further, the appropriate route for such a determination is provided in Section 112 of GoWA, namely a reference on the issue of competence to the Supreme Court. In a Respondent's Notice, it is stated that permission should additionally have been refused on the basis that the claim is unarguable.

8. I accept that it would be unwise for this court to address the issue identified in the declaration in the absence of specific legislation, which is likely to impact upon the decision of the court by identifying the respective areas of competence. Further, the appropriate route provided by Parliament to address the legislative competence of the

Senedd is that provided by Section 112 GoWA. For similar reasons, I would not determine the arguability of the claim in these proceedings.

9. The interested parties did not appear and were not represented in this appeal.

The United Kingdom Internal Market Act 2020

10. UKIMA was enacted so as to take effect upon the exit of the UK from the European Union ('EU') on 31 December 2020. Its purpose is to make provision in connection with the internal market for goods and services in the UK. This was necessary because during membership of the EU, its law operated to ensure such an internal market across the EU as a whole, including within member states. As of the date of exit from the EU, the devolved legislatures within the UK possessed substantial law-making power, including the potential to affect the UK's internal market. Under the UK's reserved powers model of devolution, the powers previously reserved for the EU would, in the absence of UKIMA, flow to the devolved legislatures and allow them to legislate in areas which could create intra-UK trade barriers. The parties identified food standards and environmental protection as examples of such areas. The purpose of UKIMA is set out at paragraph 1 of the Explanatory Notes as being:

> "… to preserve the United Kingdom's (UK's) internal market as power previously exercised at European Union (EU) level return to the UK, providing continued certainty for people and businesses that they can work and trade freely across the whole of the UK."

Legislative Framework

11. The relevant provisions of GoWA and UKIMA are to be found at [8]-[20] of the Divisional Court judgment:

> " 8. Section 1 of GOWA provides for a parliament for Wales known as the Senedd Cymru. The Senedd is "a permanent part of the United Kingdom's constitutional arrangements" (see section A1 of GOWA).
>
> 9. The Senedd has power to make laws for Wales, as does the Parliament of the United Kingdom. Section 107 of GOWA provides, so far as material that:
>
> "Acts of the Senedd
>
> 107(1) The Senedd may make laws, to be known as Acts of Senedd Cymru or Deddfau Senedd Cymru (referred to in this Act as "Acts of the Senedd").
>
> (2) Proposed Acts of the Senedd are to be known as Bills; and a Bill becomes an Act of the Senedd when it has been passed by the Senedd and has received Royal Assent.
>
> …..

(5) This Part does not affect the power of the Parliament of the United Kingdom to make laws for Wales.

(6) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Senedd."

10. The extent of the legislative competence of the Senedd is defined by section 108A of GOWA which provides, so far as material, that:

"(1) An Act of the Senedd is not law so far as any provision of the Act is outside the Senedd's legislative competence.

(2) A provision is outside that competence so far as any of the following paragraphs apply—

(a) it extends otherwise than only to England and Wales;

(b) it applies otherwise than in relation to Wales or confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales;

(c) it relates to reserved matters (see Schedule 7A);

(d) it breaches any of the restrictions in Part 1 of Schedule 7B, having regard to any exception in Part 2 of that Schedule from those restrictions;

(e) it is incompatible with the Convention rights or in breach of the restriction in section 109A(1).

…

(6) The question whether a provision of an Act of the Senedd relates to a reserved matter is determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances."

11. So far as the restriction in section 108A(2)(c) of GOWA is concerned, schedule 7A to GOWA sets out those matters that are reserved to the United Kingdom Parliament. The Senedd does not have competence to make laws in relation to those reserved matters. Part 1 of Schedule 7A sets out general reservations where the Senedd does not have legislative competence, such as certain matters to do with the constitution, the Civil Service or issues relating to courts and tribunals. Part 2 sets out specific reservations where certain matters are reserved to the United Kingdom Parliament but there are exceptions where the Senedd also has legislative competence. By way of example, in the area of consumer protection, the enforcement of

certain consumer legislation and product labelling are both reserved matters but in each case there is an exception in relation to food and food products (see paragraphs 76 and 80 of Schedule 7A to GOWA).

12. So far as the restriction in section 108A(2)(d) is concerned, Schedule 7B provides that a provision of an Act of the Senedd cannot modify specified areas of law (such as private law) or specified enactments. "Modifications" include amendments, repeals and revocations (see section 158 of GOWA). The material paragraph is paragraph 5 which provides that:

> "5(1) A provision of an Act of the Senedd cannot make modifications of, or confer power by subordinate legislation to make modifications of, any of the provisions listed in the table below:

Enactment	*Provisions protected from modification*
Government of Wales Act 1998	Section 144(7).
Human Rights Act 1998	The whole Act
Civil Contingencies Act 2004	The whole Act
Energy Act 2008	Section 100 and regulations under that section
The European Union (Withdrawal) Act 2008	The whole Act other than any excluded provision
The United Kingdom Internal Market Act 2020	The whole Act

13. The reference to [UKIMA] was inserted in paragraph 5 by section 54(2) of [UKIMA].

14. The person in charge of a Bill must state, on or before the introduction of the Bill, that in his or her view the provisions of the Bill would be within the Senedd's legislative competence. The Presiding Officer of the Senedd must also decide whether in the view of that officer the provisions of the Bill would be within the Senedd's legislative competence and state that decision. See section 110 of GOWA.

15. There is provision for scrutiny of Bills by the Supreme Court before the giving of Royal Assent. Section 112(1) of GOWA provides that:

> "The Counsel General or the Attorney General may refer the question whether a Bill, or any provision of a Bill, would be within the Senedd's legislative competence to the Supreme Court for decision."

[UKIMA]

16. Section 1 of [UKIMA] sets out the purpose of Part 1 of the Act which is to promote the continued functioning of the internal market for goods in the United Kingdom by establishing what are described as market access principles. These are the principles of mutual recognition of goods and non-discrimination in relation to goods. Section 1(3) of [UKIMA] provides that:

> "Those principles have no direct legal effect except as provided by this Part."

17. Section 2 of [UKIMA] deals with the mutual recognition principle for goods. It provides, so far as material, that:

> "(1) The mutual recognition principle for goods is the principle that goods which—
>
> (a) have been produced in, or imported into, one part of the United Kingdom ("the originating part"), and
>
> (b) can be sold there without contravening any relevant requirements that would apply to their sale,
>
> should be able to be sold in any other part of the United Kingdom, free from any relevant requirements that would otherwise apply to the sale."

18. "Relevant requirements" are, broadly, statutory requirements, including those contained in Acts of the Senedd, adopted after [UKIMA] came into force, which prohibit the sale of goods and which fall within the mutual recognition principle. Such requirements will, broadly, fall within the scope of that principle if they relate to the characteristics, presentation, or production of the goods or certain other specified matters. A requirement will not fall within the principle if it relates to the manner of sale of goods (that is, the circumstances or manner in which the goods are sold such as where, when, by whom or to whom, or the price or terms on which it may be sold) unless, amongst other things, it appears to be designed artificially to avoid the operation of the mutual recognition principle. See, generally, sections 3 and 58 of [UKIMA].

19. Section 2(3) of [UKIMA] deals with the effect of the mutual recognition principle and provides that:

> "Where the principle applies in relation to a sale of goods in a part of the United Kingdom because the conditions in

> subsection (1)(a) and (b) are met, any relevant requirements there do not apply in relation to the sale."

> 20. Section 5 of [UKIMA] deals with the non-discrimination principle for goods and provides at section 5(3) that a relevant requirement "is of no effect in the destination part if, and to the extent that, it directly or indirectly discriminates against the incoming goods". The concepts of direct, and indirect discrimination are further defined.

The Decision of the Divisional Court

12. The reasoning of the court is set out at [28] to [33]:

> "28. … the issue underlying this case will arise if and when the Senedd proposes legislation which is said to conflict with the provisions of [UKIMA]. Only then will the question arise as to the correct interpretation and effect of [UKIMA] on the provisions of that proposed legislation, and whether any of its provisions are outside the legislative competence of the Senedd. The effect of [UKIMA] on the proposed legislation may, as a minimum, be likely to be influenced or affected by the terms of the proposed legislation and the context in which it comes to be proposed. No legislation has yet been proposed, considered or passed by the Senedd. The issue of the effect of [UKIMA] on the provisions of such legislation has not yet arisen. Similarly, in relation to ground 2, the Secretary of State has not proposed, still less made, any regulations under the relevant powers conferred by [UKIMA] and the issue of their meaning and validity has not yet arisen.
>
> 29. As a general rule, the courts do not deal with claims for judicial review in such circumstances as the claim will be premature. The general position is set out in the judgment of the Divisional Court in *Yalland* at paragraphs 23 to 25…
>
> 30. …This a case where the relevant legal events have not yet arisen. The answer to the question of whether, and to what extent, the provisions of any legislation made by the Senedd would conflict with section 2 (or any other provision) of [UKIMA] has not arisen. That issue, and the question of how, precisely, any such conflict is to be resolved may well depend on, or be influenced by, the content of such legislation. The same is true of any regulations made under the powers conferred by [UKIMA].
>
> 31. Some examples were canvassed by way of example in oral argument. The claimant has indicated potential areas of concern in relation to food standards and environmental protection. Again, until legislation is proposed in relation to food standards, it will not be clear whether that proposed legislation,

properly interpreted, falls within a reserved matter or an exception to it. Similarly, in relation to proposed environmental legislation, such as restrictions on the use of single use plastic, the issues that arise are likely to be influenced by the precise terms of the legislation and the context in which it is made. They will frame the issues that arise. Analysis of the relevant provisions of the legislation may determine whether they involve a restriction on the sale of goods or whether they involve a permitted restriction on the manner of sale. Furthermore, even if there were a conflict, the method of resolving that conflict may be more appropriately or properly addressed by means of a restrictive interpretation of relevant provisions of sections 2 or 3 of [UKIMA] rather than seeking to read words into Schedule 7B to GOWA. Furthermore, it may be that a particular proposed provision may not, on analysis, be one that was previously within the legislative competence of the Senedd (as it may, for example, have involved a breach of EU law prior to the end of 2020 and so would have been outside the legislative competence of the Senedd by reason of section 108A(2) of GOWA prior to its amendment). If so, that may be relevant to consideration of the claimant's argument that the operation of section 2 of [UKIMA] involves removing an area of the Senedd's legislative competence and in some way a re-reservation of matters to the United Kingdom Parliament. Similarly, the precise terms of any regulations made by the Secretary of State are likely to be relevant to the question of whether those regulations are ultra vires because they involve substantive modification of the provisions of [UKIMA].

32. For that reason alone, it is better and more appropriate for the issues concerning the effect of the provisions of [UKIMA] on the legislative competence of the Senedd, and the appropriate means of resolving any conflict between the two, to be considered in the specific legal and factual context of particular provisions of proposed Senedd legislation rather than by making abstract rulings shorn of any legal or factual context. As has been observed in a very different context, one "danger is that the court will enunciate propositions of principle without full appreciation of the implications that these will have in practice" (per Lord Phillips M.R. in *R (Burke) v General Medical Council* [2006] Q.B. 273 at paragraph 21). The same is true in relation to ground 2.

33. None of the arguments put forward by Ms Mountfield justify departing from that general approach in the present case. It may well be that the issues raised will prove to be ones of importance. But that does not justify seeking to deal with them in the abstract without a proper legal and factual context to assess the relevant issues. The fact that the Counsel General, and the Welsh Government, would wish to know the extent of the

> Senedd's legislative powers before the Senedd considers proposed legislation does not justify the granting of advisory declarations either generally or in this particular case. Legislatures, and governments, must inevitably form a view as to whether proposed legislation is, for example, compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The courts may, ultimately, be asked to rule on whether or not a particular provision is compatible with a Convention right. That exercise occurs after the legislation has been enacted not before. Neither ministers, officials nor members of the legislature seek advisory declarations in advance as to what legislation may or may not be compatible with Convention rights. The same is true of Acts of the Senedd. The promoter of a Bill, and the Presiding Officer, will have to take a view as to whether proposed legislation is within legislative competence. The Counsel General may have to decide whether there is a question as to whether the provisions are within legislative competence and whether it is appropriate to refer a question to the Supreme Court. That has occurred on a number of occasions. However, neither the Counsel General, the Presiding Officer, nor members of the Senedd seek advisory declarations prior to the passing of Bills. The reason is that the role of the courts is to adjudicate on issues and determine questions of law which have arisen: not to give advisory declarations in the abstract."

13. At [35] the Divisional Court considered the appropriateness of routes for dealing with proposed legislation namely reference to the Supreme Court under Section 112 of GoWA or a claim for judicial review. It expressed no view as to which should be preferred. At [36] and [37], the Divisional Court concluded its reasoning as follows:

> "36. Finally, Ms Mountfield submitted that there was no factual issue here that needed to be identified. First, even if correct, that would not, of itself, justify entertaining the claim in the present case. The legal context, and the precise terms of any proposed Senedd legislation, would still be relevant, and likely to be influential, in determining the issues that arose and how they should be resolved. Secondly, in any event, there would be likely to be a factual context in which the proposed legislation was intended to operate and that may be relevant to an understanding of the proposed legislation and its relationship with [UKIMA].
>
> 37. For all those reasons, individually and cumulatively, we consider that this claim for judicial review is premature. In accordance with the general position, a claim concerning the meaning or effect of provisions of Senedd legislation, or whether the legislation is properly within the Senedd's legislative competence, is better addressed in the context of specific legislative proposals. It is inappropriate to seek to address such

> issues in the absence of specific circumstances giving rise to the arguments raised by the claimant and a specific legislative context in which to test and assess those arguments. Similarly, it is inappropriate to seek to give general, abstract rulings on the circumstances in which the power to make regulations amending [UKIMA] may be exercised."

14. Having determined that the claim for judicial review was premature, the Divisional Court considered it unnecessary and unwise to express views on the arguability or otherwise of the arguments raised by the appellant.

Appellant's submissions

15. The appellant contends that the issue is solely one of statutory construction as one statute, UKIMA, appears to amend the earlier statute, GoWA, but has not done so expressly or clearly. Section 54(2) of UKIMA has the effect of extinguishing the practical effect of devolved competence in areas which include food standards and environmental protection. The question is whether the Senedd retains any competence to legislate within the mutual recognition principle identified in Section 2 UKIMA. The construction is concerned with the interaction of UKIMA and GoWA, and is not reliant on any putative piece of Senedd legislation.

16. It is submitted that the effect of Section 2 UKIMA is that any Act passed by the Senedd which imposes restrictions on things sold in Wales can be passed but the provisions are disapplied in respect of sales relating to products which were produced in or imported into a UK territory other than Wales. There is therefore a power to legislate in Wales but not to enforce the legislation in Wales, insofar as it contradicts Section 7B of UKIMA. Section 7B does not formally amount to a reservation but the effect of Section 2 and Section 54(2) UKIMA and Section 108(4) GoWA renders the passing of any legislation in that field unenforceable therefore there is no legislative power. Such provisions would breach the rights of Welsh producers and importers as under Article 1 Protocol 1 of the ECHR, read with Article 14, they would be disadvantaged in that they would be subject to Welsh legislation but other producers in the UK would not be so affected.

17. It is the appellant's case that an important and material distinction exists between restrictions in Schedule 7B of GoWA and reservations in Schedule 7A of GoWA. The UK Parliament is not to be taken to have introduced a reservation in Schedule 7A of GoWA by imposing a new restriction in Schedule 7B of GoWA (*UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill* [2018] UKSC 64, [2019] AC 1022 [51]). A restriction introduced into Schedule 7B of GoWA cannot impliedly amend Schedule 7A of GoWA, as GoWA is a constitutional statute. The legality principle operates as a tool of statutory construction to preclude Section 54(2) UKIMA impliedly amending the ambit of devolved competence in GoWA other than by the use of express statutory language (*Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 [62]-[63]).

18. It is the appellant's contention that determination by the Court of Appeal would be cost effective and expeditious and thus in the public interest. A referral to the Supreme Court pursuant to Section 112 of GoWA would require the drafting of legislation, full

consultation and determinations by the Presiding Officer and the person in charge of the Bill as to competence (Section 110 GoWA) before any such referral could be made.

19. The appellant raises the issues of delay and submits that waiting until a specific Act was passed by the Senedd to bring this challenge creates a real risk that such a claim will be held to be time barred pursuant to CPR 54.5: *R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [1998] EnvLR 415.

20. Further, awaiting specific legislation would create undesirable uncertainty for any business wishing to operate in Wales. It would also lead to significant costs in relation to the preparation of legislation, all of which could be avoided by determining the point of principle in these proceedings.

Respondent's submissions

21. It is the respondent's case that this is an abstract claim and is akin to a request for an advisory opinion from the court. The court could resolve the alleged conflict between UKIMA and GoWA but that should only be done in exceptional circumstances. There is a complex interrelationship between the two Acts and it would be unwise at this stage to seek to resolve technical difficulties in the absence of specific legislation. Any future legislation may well or could have an impact on the court's decision. The Divisional Court at [31] identified how the terms of the Senedd Act might affect the analysis in any subsequent claim raising these issues. The declaration sought in its present form might require caveats, for example, the extent to which the legislative competence of the Senedd was previously restricted by EU law before the European Union (Withdrawal Agreement) Act 2020. UKIMA simply continues that position.

22. The respondent contends that there is a statutory mechanism pursuant to Section 112 of GoWA to permit such a determination and a constitutional reason to abide by the identified Parliamentary process.

23. As to delay, given the respondent's position in response to this claim (namely that it is premature), he argues that any such argument could not be advanced.

24. Upon the issue of the unarguability of the claim, the respondent contends that the substantive provisions of UKIMA do not create a new competence control on the devolved legislatures. Part 1 operates as a new regime on the sale of goods in the UK. The control on the Senedd's legislative competence under GoWA imposed by UKIMA is that which protects UKIMA itself from being modified by the Senedd (Section 54(2) UKIMA and para 5(1) of Schedule 7B GoWA). This distinction preserves the ability of the Senedd to legislate effectively for goods controls which do not engage the UK's internal market. UKIMA's provisions are express and clear. Parliament is entitled to legislate on any matter and in any terms it considers appropriate. This include legislation which affects, and is intended to affect, the activities of the devolved legislatures and administrations within the UK (Section 107(5) GoWA)

Discussion and Conclusion

25. I accept that the court does have jurisdiction to determine a challenge as to the correct interpretation and effect of UKIMA upon the legislative competence of the Senedd in

the absence of specific legislation in this case. I do not consider this is the appropriate course for the following reasons:

> 1) the general rule, identified in *R (Yalland) v Secretary of State for Exiting the EU* [2017] EWHC 630 (Admin), is that the court is concerned in proceedings for judicial review with adjudicating on issues of law that have already arisen for decision where the facts are established. Jurisprudence suggests a cautious approach on the part of a court to grant an advisory declaration, shorn of a factual and legal context, which reflects an acceptance that the issues which fall for determination may depend in part on factual matters or future events;
>
> 2) there is no reason to be concerned as to an issue of delay in this case in respect of future proceedings;
>
> 3) Parliament has created a route to address issues of competence in the light of specific legislation proposed by the devolved administrations (Section 112 GoWA).

Is it appropriate to decide the issue of law now?

26. The general rule set out in *Yalland* at [23]-[25] is premised on the basis that it will rarely be appropriate for the court in proceedings for judicial review to consider and determine issues of law which may depend in part on factual matters or future events until the facts are established or the events occur, as the court will not be in a position to know with sufficient certainty what issues do arise in a particular case. When matters may depend upon or be affected by future legislation, it would generally not be appropriate to make rulings on questions of law until the precise terms of any legislation are known. In the event that the court did grant an advisory declaration, the court should proceed with caution.

27. The dangers which can arise when issues are divorced from a factual context which requires determination were identified in in *R(Burke) v General Medical Council* [2005] EWCA Civ 1003, [2006] QB 273 [21]:

> "There are great dangers in a court grappling with issues… when these are divorced from a factual context that require their determination. The court should not be used as a general advice centre. The danger is that the court will enunciate propositions of principle without full appreciation of the implications that these will have in practice, throwing into confusion those who feel obliged to attempt to apply those principles in practice."

28. The application of this approach to potential issues of legislative competence under the devolution settlement has been endorsed by the Inner House of the Court of Session in *Keatings v HM Advocate General* [2021] CSIH 25, 2021 SC 329. This concerned an attempt to obtain declaratory relief as to the competence of the Scottish Parliament to legislate for an independence referendum, without there being any legislation enacted or introduced. The Outer House declined to entertain the claim because it was premature and hypothetical and the Inner House dismissed the appeal. At [51] the Inner House, in an opinion of the court, accepted that the principle of access to justice requires as a generality that anyone can apply to the court to determine what the law is in a given

situation but recognised the limits, one of which is that the court will not determine hypothetical or academic questions the answers to which have no practical effect. At [52] the court identified a 'good reason' for not intervening as being that it would be to usurp or encroach upon a function which has been specifically conferred upon Parliament.

29. The appellant, in support of his argument that the court has previously acted in respect of an abstract challenge, has relied upon two authorities in particular. *R(Associated Newspapers Ltd) v Lord Justice Leveson* [2012] EWHC 57 (Admin) was a challenge to the legality of a direction made by the Chair of a public inquiry, which set out the approach in principle which he proposed to take in respect of a specific issue. In that application, the court accepted the challenge was to that decision of principle. In *R(Alconbury Development Ltd) v Secretary of State for Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, where a number of planning disputes gave rise to the issue of whether or not the Secretary of State could compliantly with Article 6 ECHR take certain types of planning decisions. The Secretary of State had indicated his intention to make a decision. The issue was whether he could lawfully do so. It was not an abstract case. Neither authority is analogous to this application which is inviting the court to review in the abstract the interaction between UKIMA and GoWA in general terms.

30. At [31] the Divisional Court recognised that the terms of an identified Act of the Senedd will or might affect the analysis in any subsequent claim so as to render consideration appropriate only in a specific factual and legal context. The Divisional Court noted that: a) the terms of legislation will affect the resolution of whether it falls within a Schedule 7A reservation, or within an exception to that reservation, such that it is in principle within legislative competence; b) the terms of legislation will affect whether a relevant requirement prohibited by Section 2 is in fact imposed or whether, for example it constitutes a permitted 'manner of sale' requirement; c) the terms of the legislation may affect the extent to which the court can consider addressing any supposed conflict between UKIMA and GoWA through a particular interpretation of Sections 2 and 3 of UKIMA; d) the degree to which the imposed requirement would have been prohibited by EU law, when EU law applied to protect the internal markets. This would be relevant to any argument as to whether UKIMA does in fact impose any new limitations on the Senedd. The reasoning of the court is sound.

31. I do not accept that the principle of legality undermines the reasoning which underpins the general approach of the courts as set out in *Yalland*. On the contrary, the court is respecting the principle of legality by requiring a decision on actual facts.

32. As to the point taken by the appellant regarding A1P1 of the ECHR read with Article 14 ECHR and whether a particular provision is discriminatory, this requires appreciation of the specific terms of any legislation enacted. It cannot be done in the abstract. This is particularly so where it might engage issues as to the competence of the Senedd before and after the passing of the EU (Withdrawal Agreement) Act 2020.

33. In my judgment, it would be unwise for the court to attempt to resolve technical difficulties as between restrictions and reservations in the abstract as legislation is likely to have an impact on the court's decision. The actual legislation will frame the issue of principle. It will provide the framework and the context within which the issue can be decided. Further, any determination at this stage would be unwise because ultimately it

would not assist in the absence of specific detail. A declaration would be subject to at least one caveat, namely an acknowledgement of the extent to which the legislative competence of the Senedd was previously restricted by EU law. If practical guidance cannot be given, no useful purpose would be served by making a declaration now.

Could future proceedings be affected by an allegation of delay?

34. Time will only begin to run for the purpose of any claim of judicial review when an attempt is made to pass legislation which is or could be inconsistent with the provisions of UKIMA. This is because it is only when a Bill is proposed which would or might be inconsistent with the provisions of UKIMA, that the provisions of UKIMA would affect the claimant. Given the respondent's stance in these proceedings, no delay objection could successfully be taken in any future challenge. Further, the time limits which provide for a referral to the Supreme Court pursuant to Section 112 of GoWA would not be infringed if a declaration was not granted in this case.

Is Section 112 GoWA the better way to resolve issues of competence?

35. The structure of the reference procedure provided by Section 112 GoWA permits the Supreme Court to decide issues of competence in the light of specific legislation. Devolution issues should and have been addressed by the Supreme Court, *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016. This is the route created by Parliament to address competence concerns. The Supreme Court has never refused jurisdiction over a reference even when it has gone on to hold that the Bill is in fact within competence. There is a good constitutional reason to abide by the parliamentary process. It is set out in primary legislation. Further, it is efficient because it permits either party to go directly to the Supreme Court.

36. The arguability of the appellant's claim as it relates to the provisions and effect of UKIMA should also await determination in the context of specific legislation.

37. Accordingly, for the reasons given and subject to the views of the Master of the Rolls and Lord Justice Dingemans, I would dismiss this appeal.

Lord Justice Dingemans :

38. I agree with both judgments.

Sir Geoffrey Vos, Master of the Rolls :

39. I agree with Lady Justice Nicola Davies's judgment.

40. When one drills down into the alleged inconsistency between the restriction that says the Senedd cannot amend UKIMA on the one hand, and the reservations that imply that the Senedd can legislate for non-reserved matters on the other hand, one always end up needing to know precisely what the Senedd wants to legislate about before one can determine whether there is an inconsistency. That is why I think that it is inappropriate and serves no purpose for the court to determine whether there is a possible inconsistency in advance of concrete Senedd legislation. Moreover, the existence of an inconsistency may also turn on the extent that the EU had the competence that the Senedd seeks to exercise before the EU (Withdrawal Agreement) Act 2020.

41. I too would dismiss this appeal.