UKSC 2016/0201

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON A REFERENCE BY THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND UNDER PARAGRAPH 33 OF SCHEDULE 10 TO THE NORTHERN IRELAND ACT 1998

BETWEEN:

(1) STEVEN AGNEW, (2) COLUM EASTWOOD, (3) DAVID FORD,
(4) JOHN O'DOWD, (5) DESSIE DONNELLY, (6) DAWN PURVIS,
(7) MONICA WILSON,
(8) THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE, AND
(9) THE HUMAN RIGHTS CONSORTIUM

Applicants

-And-

(1) HER MAJESTY'S GOVERNMENT
(2) THE SECRETARY OF STATE FOR NORTHERN IRELAND
(3) THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondents

-And-

THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Notice Party

CASE OF

THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Introduction

1. This submission addresses, primarily, the four devolution issues referred by the High Court of Justice in Northern Ireland, 'the High Court'[1]. The Attorney General for Northern Ireland acknowledges that the applicants have, out of concern for the common good in Northern Ireland, raised issues of great importance; his position is that all four questions (set out below in paragraph 21) should be answered negatively[2].

2. This submission also addresses, briefly, the decision of the Divisional Court, since it is likely that the approach taken by this Court to that decision will inform its approach to the devolution issues. In particular, a conclusion by this Court that an Act of Parliament was required as a condition of notice under Article 50 for reasons other than those contained in the first Devolution Issue would increase the importance of the second Devolution Issue.

3. This submission deals with the following matters:

    - Constitutional Context
    - The effect of notice under Article 50 TEU
    - The ECA 1972 and the European Union Act 2011
    - The Devolution Issues
    - The Northern Ireland Act 1998 and its interpretation
    - The Belfast Agreement
    - The British-Irish Agreement
    - The interpretive force of the Belfast Agreement
    - The Northern Ireland Act 1998 and the European Union

[1] In this submission the Northern Ireland High Court will be referred to as 'the High Court' while the Court formation composed of the Lord Chief Justice of England and Wales, the Master of the Rolls, and Lord Justice Sales will be referred to as 'the Divisional Court'.
[2] The position with respect to the second question is that it does not arise, but that it should be answered negatively, if contrary to the argument here presented, it does arise.

- If an Act of Parliament is required for a notice under Article 50 TEU, can such an Act of Parliament pass without the consent of the Northern Ireland Assembly?
- Does any provision of the Northern Ireland Act 1998 restrict the operation of the Royal Prerogative in relation to notice under Article 50 TEU?
- Does non-compliance with section 75 of the Northern Ireland Act 1998 by the Northern Ireland Office prevent notice being given under Article 50 TEU?
- *In re McCord*: the reference by the Court of Appeal in Northern Ireland

Constitutional Context

4. The shaping effect of judicial determinations on the constitution of the United Kingdom has historically been modest. Judges did not, for example, establish, by themselves, the principle of parliamentary sovereignty "and they cannot, by themselves, change it."[3]

5. A determination by the Government of the United Kingdom that the constitutional requirements of the United Kingdom are met if notification under Article 50 TEU is given under the Royal Prerogative is justiciable but, in light of the way in which our constitution has been made, this judgment should be regarded as constitutionally proper unless shown to conflict clearly with statute. Our constitution does not acknowledge Executive supremacy but it does acknowledge the present and historic capacity of the Executive (accountable as it is to Parliament) to shape our constitution. The English[4], Irish[5] and Scottish[6] constitutions, and the constitutions of Great Britain and now that of the United Kingdom have been shaped primarily by the

[3] Lord Bingham *The Rule of Law* (London, 2010) p. 167
[4] Before 1707
[5] Before 1801
[6] Before 1707

interplay between the Crown and representative institutions. Practice and convention are important elements of the United Kingdom constitution but yield to statute.

The effect of notice under Article 50 TEU

6. On the day after notice is given under Article 50 TEU the law of the United Kingdom will be the same as it was on the day before notice was given.[7] It is, of course, true, as noted by Maguire J in paragraph [105] of his judgment, "that in due course the body of EU law as it applies in the United Kingdom will, very likely, become the subject of change." The emphasis by Maguire J on potential or actual changes in law is conceptually preferable to the rights analysis by the Divisional Court. To say, as the Divisional Court does in paragraph 11 of its judgment "[t]he effect of the giving of notice under Article 50 on relevant rights is direct, even though the Article 50 process will take a while to be worked through" ignores or glides over the complete absence of effect that giving notice under Article 50 has on the law of the United Kingdom[8].

7. Assuming that the two year period prescribed by Article 50(3) TEU is not extended and assuming, as all of the applicants appear to do, the consequences for the three categories of rights in paragraphs 58 to 61 of the Divisional Court judgment[9], such consequences are not the result of notification under Article 50 but would be, on the applicants' case, consequences of leaving the European Union. The law cannot be changed save directly or indirectly by Act of Parliament yet the assumption – an unjustified assumption – on which the Divisional Court judgment rests is that any law *necessary* to avoid these consequences would not be made.

---

[7] Unless, of course, it has been otherwise changed.
[8] The only effect of giving notice under Article 50 is the consequential loss of Member State participation provided for by Article 50 (4).
[9] Category (i): rights capable of replication in UK law; category (ii): rights enjoyed in other members states of the EU; category (iii): rights that could not be replicated in UK law.

8. The nature of this assumption can be explored through the European Parliamentary Election Act 2002. As is well known, the next election to the European Parliament will be held in 2019. Insofar as there is a domestic law right in suitably qualified persons under the 2002 Act to stand for election to the European Parliament that right would not be taken away by the giving of notice under Article 50; if, depending on the timing of that notice, the events contemplated by Article 50(3) had not occurred before the date of the 2019 election to the European Parliament, anything that the 2002 Act required to be done would have to be done.

9. On the other hand no rights that are derived only from the 2002 Act alone are lost by withdrawal from the Treaties. If the Treaties cease to apply pursuant to Article 50(3) that does not mean that use of the Royal Prerogative has repealed or undermined the 2002 Act; it simply means that, with the inapplicability of the Treaties to the United Kingdom, the 2002 Act is no longer a particularly useful part of the statute book but it still remains a part of it.

10. Additionally, paraphrasing Professor Mark Elliot[10], the creation of EU electoral rights is a matter of EU law and the 2002 Act simply 'affords access to and regulates the exercise of such rights at the domestic level' and borrowing an analogy from Professor David Feldman (who described the dualist system in the United Kingdom operating by means of providing 'channels' so as to enable international law to have certain effects in domestic law and 'filters' that condition and limit the extent of those effects) Elliot added that "EU electoral rights are and remain distinctively EU law rights that are 'channelled' through the [2002 Act] and subject to those 'filters', or conditions, that the Act supplies. On this analysis, the [2002 Act] takes the form of a

[10] Mark Elliot, "Article 50, the royal prerogative, and the European Parliamentary Elections Act 2002" Public Law for Everyone: http://publiclawforeveryone.com/2016/11/21/article-50-the-royal-prerogative-and-the-european-parliamentary-elections-act-2002/

procedural mechanism that is relevant to the exercise of EU electoral rights when-or if-those rights fall to be exercised in the UK."

The ECA 1972 and the European Union Act 2011

11. In paragraph 41 of its decision the Divisional Court says "as a practical matter, by reason of the limits on its prerogative powers referred to at paragraph 25 above, the Crown could not have ratified the accession of the United Kingdom to the European Communities under the Community Treaties unless Parliament had enacted legislation." If by this sentence it is meant that in order for ratification to have domestic legal effect legislation was needed, then the sentence is, of course, a correct statement of the law. On the other hand, the Crown could have ratified the accession of the United Kingdom to the European Communities (like any other treaty) without an Act of Parliament. Such ratification would, without an Act of Parliament, have been without domestic legal effect and would, as is observed, in paragraph 42 of the Divisional Court decision have meant that the United Kingdom was in breach of its (then new) treaty obligations.

12. A corollary to the above statement of principle is that the ECA 1972 was itself insufficient to create rights and obligations under the Community Treaties; ratification by the United Kingdom was necessary for the creation of those rights and obligations (and ratification might not have occurred: the accession treaty ratified by the United Kingdom was signed (but not ratified) by Norway). No Act of Parliament was needed to enable the Crown to ratify the accession of the United Kingdom to the European Communities. When the ECA 1972 received Royal assent there were (to use the language of paragraph 51 of the Divisional Court decision) no "enforceable EU rights" under section 2(1). When enacted (and before ratification) section 2(1) did not have "any practical effect". What the Royal Prerogative gave (through ratification) it can take away.

13. Ratification of the Accession Treaty and completion of the process triggered by the giving of notice under Article 50 TEU both have effects on the quantity of what is available to operate domestically under section 2(1) but both of these international law acts lack direct domestic legal effect (this is, of course, even more clearly so in relation to the giving of notice under Article 50). Contrary to what the Divisional Court says in paragraph 66 of its judgment (in the context of the identified category (ii) rights) these are not rights created by Parliament; the rights are created in the Treaties and have Treaty effect as a result of ratification and can lose Treaty effect either by Treaty amendment or by the Treaty ceasing to apply (most obviously under Article 50 TEU).

14. The 1972 Act is the portal through which various rights and obligations under EU law have effect in the domestic legal order of the United Kingdom. These various EU rights and obligations are not created by the 1972 Act – they are creations of the EU legal order, and wax or wane with the corpus of EU legislation and jurisprudence.

15. The Treaty of Accession was signed on 22 January 1972. The ECA commenced on Royal Assent being given on 17 October 1972 but there were no treaties (and no rights derived from those treaties) for which the ECA could act as a portal until ratification was given.

16. Parenthetically (and by way of observation on paragraphs 55 and 56 of the Divisional Court decision), the Referendum Act 1975 was plainly enacted on the basis that the United Kingdom could validly (that is, without breaching international law) leave the European Communities.

17. The submissions above are confined to the effect of the ECA 1972 but the position that notification under Article 50(2) is a classic use of the

prerogative in international affairs is strengthened when the effect of the European Union Act 2011 is considered.

18. As is well known, the European Union Act 2011 puts in place a series of restrictions relating to amendments of TEU or TFEU and restrictions relating to other decisions under TEU or TFEU: see Part 1, and Schedule 1. Parliament did consider article 50 TEU and did impose a restriction in relation to article 50 TEU. It did so by adding article 50(3) to the list of treaty provisions in Schedule 1 to the 2011 Act. A referendum is required before a United Kingdom Minister could ratify any removal of the unanimity requirement in article 50(3). The 2011 Act does not, however, place any restriction whatsoever on the giving of notification under Article 50(2) TEU.

19. Ministerial power to make certain other decisions under TEU or TFEU is restricted either by the 2011 Act specifying that an Act of Parliament is needed, or in some cases an Act and approval by referendum. For example, Parliament has, by section 6(3), prevented a Minister of the Crown from giving notification under Article 4 of Protocol (No. 21) (on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice) annexed to TEU that it wishes to accept a measure which relates to participation by the United Kingdom in a European Public Prosecutor's Office unless an Act has been passed and the referendum condition is met. Parliament could similarly have enacted a restriction applicable to the giving of notice under Article 50(2) (for example, requiring approval by an Act of Parliament) but has not done so. That it has not done so is a powerful indication, firstly that the range of decisions specified in the 2011 Act could, but for the 2011 Act, be taken by Government without restriction, and secondly, that notification under Article 50(2) TEU, not having had a restriction imposed on it by the 2011 Act, can be given by Government without restriction.

20. Section 18 of the 2011 Act clarifies a distinction between the corpus of EU law, "that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972", and the recognition and availability of that law in the United Kingdom. The corpus of EU law exists by reason of the Treaties; its recognition and availability in the United Kingdom are derived from section 2 (1) ECA or other Act of Parliament. This is manifestly the case given that section 18 of the 2011 Act addresses "directly applicable" or "directly effective" EU law.

The Devolution Issues

21. The questions referred by the High Court are:

1. Does any provision of the Northern Ireland Act 1998 read together with the Belfast Agreement and the British-Irish Agreement have the effect that an Act of Parliament is required before notice can be validly given to the European Council under Article 50 (2) TEU?

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 Northern Ireland Act 1998 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 Northern Ireland Act 1998 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?

22. These are all questions about the constitutional law of the United Kingdom and, in particular, about the constitutional law of Northern Ireland. They cannot, rationally, be considered as giving rise to the least need for a reference to the CJEU.[11]

The Northern Ireland Act 1998 and its interpretation

23. Lord Bingham famously observed that the Northern Ireland Act 1998 "is in effect a constitution"[12], (*Robinson v. Secretary of State for Northern Ireland* [2002] UKHL 32 at paragraph 11). He immediately added, "[s]o to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue." Lord Bingham further suggested that these provisions should be interpreted "generously and purposively". It would appear that since 2002 a greater emphasis is properly to be placed, when interpreting constitutional provisions, on doing so "purposively" rather than "generously". See, for example, *Re Recovery of Medical Costs for Asbestos Diseases Bill (Wales)* [2015] UKSC 3 at [18] (Lord Mance) and, especially the observations of Lord Hope in *Re Local Government Byelaws (Wales) Bill 2012* [2012] UKSC 53 at [80]:

> "It [the Government of Wales Act] was, of course, an Act of great constitutional significance, and its significance has been enhanced by the coming into operation of Schedule 7. But I do not think that this description, in itself, can be taken to be a guide to its interpretation. The rules to which the court must apply in order to give effect to it are those laid down by the statute, and the statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory

[11] See *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport* [2014] 1 WLR 324 per Lord Reed at [79]

[12] Lord Hoffmann was bolder: he said [2002] UKHL32 paragraph [25] "The 1998 Act is a constitution for Northern Ireland …"

language, and it is proper to have regard to it if help is needed as to what the words mean."

24. A purposive interpretation respects the neutrality necessary for constitutional adjudication; a generous interpretation tends to beg the question about who is to benefit from the interpretive generosity. The "generous" interpretation sought in *Re Recovery of Medical Costs for Asbestos Diseases Bill (Wales)* (but which was not given by the Supreme Court) might have been so regarded by the Government of Wales; it would not have been so regarded by the interveners in that case.

The Belfast Agreement

25. The Belfast Agreement is the "agreement reached in the multi-party negotiations" and concluded on Good Friday (April 10) 1998. This agreement, while of great political significance, does not itself have the force of national or international law.

26. There are in the Belfast Agreement a number of references to the European Union. These are in paragraph 31 of Strand One, paragraph 3 (iii) and paragraph 17 of Strand Two as well as the 8th item of the Annex to Strand Two and paragraph 5 of Strand Three. The analysis offered here on paragraph 17 of Strand Two is applicable, *mutatis mutandis*, to these provisions also.

27. Paragraph 17 of Strand Two of the Belfast Agreement reads as follows:

> "The Council [that is, the North/South Ministerial Council] to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the

Council are taken into account and represented appropriately at relevant EU meetings."

28. Paragraph 17 of Strand Two undoubtedly assumes, as relevant background, that both the United Kingdom and Ireland will remain members of the European Union but the consideration referred to in paragraph 17 can continue to occur whether or not the United Kingdom remains in the European Union as long as Ireland does so. Paragraph 17 might be denuded of effect if both the United Kingdom and Ireland were to leave the European Union but so long as Ireland remains a member of the Union there will, in all likelihood, remain EU matters to discuss.

29. The two work streams under paragraph 17 of Strand Two for the North/South Ministerial Council (1. 'to consider ... and 2. 'arrangements to be made ...) are subject to a criterion of relevance and appropriateness respectively. Even if the United Kingdom were to withdraw from the European Union there could still be matters with a 'European Union dimension' relevant to discuss, and it could still be appropriate for the views of the Council to be represented at 'relevant EU meetings'.

The British-Irish Agreement

30. Also on April 10 1998 the Government of Ireland and the Government of the United Kingdom made an agreement, 'the British-Irish Agreement', consisting of four articles and two annexes. The British-Irish Agreement does not have the force of national law but is binding as a matter of international law now that the conditions for its entry into force (set out in Article 4) have been satisfied.

31. There is one reference to the European Union in the British-Irish Agreement. This is in its third recital which reads as follows:

"Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union"

32. None of the four substantive articles of the British-Irish Agreement contain anything that could be plausibly interpreted as a commitment to continued membership of the European Union by either or both State parties and while recitals can be relevant to the construction of international treaties there is nothing in the substantive content of the British-Irish Agreement which could be (even adventurously) construed, through the oblique reference in the third recital, as a commitment by the United Kingdom to remain in the European Union. Put simply, if the United Kingdom were to leave the European Union, its departure would not constitute a breach of the British-Irish Agreement.

The interpretive force of the Belfast Agreement

33. As a political agreement, the Belfast Agreement is not drafted as a statute but is a political text, hammered out after extensive multi-party negotiations. Its provisions are not invariably given expression in the Northern Ireland Act 1998 or any other statute. In *Robinson* Lord Hoffmann quotes at paragraph [26], without comment, from the Belfast Agreement: "The agreement provided that the Assembly was to be "the prime source of authority" in respect of devolved responsibilities and would exercise "full legislative and executive authority". These quotations are from paragraphs 4 and 3 of Strand One of the Belfast Agreement. These provisions of the Belfast Agreement are not given effect in the Northern Ireland Act 1998 and are, instead, contradicted by section 23 (1) of the Northern Ireland Act which provides "the Executive power in Northern Ireland shall continue to be vested in Her Majesty."

34. While the Belfast Agreement may, of course, be deployed appropriately as an aid to interpreting the Northern Ireland Act 1998 as indicative of the Act's purpose (as the long title makes clear) nothing in the Belfast Agreement serves to interpretively 'trump' the otherwise clear words of the 1998 Act.

The Northern Ireland Act 1998 and the European Union

35. While the constitutional status of Northern Ireland as part of the United Kingdom is given protection by section 1 of the Northern Ireland Act 1998, there is no protection in the 1998 Act for (or any provision even addressing) the continued membership by Northern Ireland (or any part of the United Kingdom) of the European Union. Consistently with its effect as a constitution for Northern Ireland, the Northern Ireland Act 1998 establishes a framework for devolved government in Northern Ireland and sets the limits for legislative and executive competence. While the Northern Ireland Act 1998 does confer certain duties and powers on the Secretary of State, no provision in the 1998 Act purports to limit, or has the effect of limiting, the powers of the United Kingdom government in international affairs. There is, in short, no provision of the 1998 Act or any part of the Belfast Agreement or the British-Irish Agreement, singly or collectively, imposing any 'constitutional requirement' which the United Kingdom government must satisfy before giving notice under Article 50 TEU.

36. The Northern Ireland Act 1998 can only be amended by, or under, an Act of Parliament. Notifying the European Council under Article 50 TEU will amend not even a comma or a full stop of the Northern Ireland Act 1998.

37. Section 6(2)(d) of the Northern Ireland Act 1998 limits the competence of the Northern Ireland Assembly; it says nothing about the exercise of

the Royal Prerogative in international affairs. Section 7(1) prevents the Northern Ireland Assembly from modifying certain enactments including (most of) the European Communities Act 1972; it says nothing about the exercise of the Royal Prerogative in international affairs. Section 12(1)(b) forms part of a provision that enables the Assembly to entertain 'second thoughts' about a Bill referred under section 11; it says nothing about the exercise of the Royal Prerogative in international affairs. Section 24(1)(b) limits the power of Northern Ireland Ministers; it says nothing about the exercise of the Royal Prerogative in international affairs. Section 27 gives power to a Minister of the Crown with regard to quotas for international law and union law purposes; it says nothing about the exercise of the Royal Prerogative in international affairs. The definition of union law in section 98 says nothing about the exercise of the Royal Prerogative in international affairs.

38. The claim that the Royal Prerogative is displaced by provisions of the Northern Ireland Act 1998 giving effect to the provisions of the Belfast Agreement including Part V of the Northern Ireland Act 1998, read with paragraph 31 of Strand One, paragraph 17 of, and the Annex to, Strand Two, and paragraph 5 of Strand Three of the Belfast Agreement and the third recital in the British-Irish Agreement, the provisions of the North/South Co-operation (Implementation Bodies) (NI) Order 1999, section 14(5)(a) and sections 26 and 27 of the Northern Ireland Act 1998 is defeated simply by reading those provisions.

39. It may be suggested that section 14(5)(a) of the 1998 Act entrenches international obligations. International obligations are not entrenched by section 14 (5)(a) nor by sections 26 and 27. All that these provisions do is to confer discretion on the Secretary of State to act with respect to an Assembly Bill or Ministerial or Departmental action. Examples of entrenchment are section 7 of the Northern Ireland Act

1998 (entrenchment as respects the Northern Ireland Assembly) and section 63A of the Scotland Act 1998 (a wider entrenchment). These provisions do not affect the Royal Prerogative in international affairs.

40. The nature and extent of the exceptions to the excepted matter in paragraph 3 of Schedule 2 to the Northern Ireland Act (international relations etc) defines an aspect of the contours of the legislative competence of the Assembly (and secondarily, of Ministerial competence); these do not speak to or affect the Royal Prerogative in international affairs.

41. Under section 6(2)(d) and section 24(1)(b) the content of the limitations on Assembly legislative competence and Ministerial power respectively arise from the substantive content of Union law, but those limitations take effect only as a result of an Act of Parliament. The corpus of the substantive law of the Union can wax or (less likely) wane but in either case that Union law has effect only by virtue of an Act of Parliament.

42. Section 6(2)(d) and section 24(1)(b) are, and each of them is, ambulatory. The content of Union law at the relevant time limits the legislative competence of the Northern Ireland Assembly and the power of Northern Ireland Ministers. Giving notice under Article 50 TEU changes neither the relevant content[13] of Union law (even if it did this would be legally irrelevant domestically) nor the effectiveness of sections 6 and 24 of the Northern Ireland Act 1998.

43. Nothing in the Northern Ireland Act 1998, read together with the Belfast and British–Irish agreements, displaces the exercise of the Royal Prerogative or requires that there be an Act of Parliament before notice can be validly given under Article 50 TEU.

[13] Giving notice under Article 50 (2) TEU does, of course, result immediately in the limited disabilities prescribed by Article 50 (4) TEU for the notifying State; these disabilities are not relevant for this litigation.

44. All of the factors discussed in paragraphs 35 – 43 above are relevant to any claim that the Royal Prerogative is limited by necessary implication. The analysis of the High Court in paragraphs [83] to [84] of the judgment is respectfully commended to the Court.

If an Act of Parliament is required for a notice under Article 50 TEU, can such an Act of Parliament pass without the consent of the Northern Ireland Assembly?

45. The Parliament of the United Kingdom came into being on January 1 1801 when the Union agreed, and given effect by the Parliament of Ireland through the Act of Union (Ireland) Act 1800[14] and the Parliament of Great Britain through the Union with Ireland Act 1800[15] came into force: see the first Article of the Union.

46. Between January 1 1801 and the coming into force of the Government of Ireland Act 1920, the Crown in Parliament possessed exclusive legislative power in Ireland. For successive periods under the Government of Ireland Act 1920, the Northern Ireland Constitution Act 1973 and now the Northern Ireland Act 1998 respectively there have been subordinate legislatures in Northern Ireland with extensive law-making powers. All three statutes have expressly made provision for the continued legislative authority of Parliament: section 75 of the Government of Ireland Act 1920, section 4(4) of the Northern Ireland Constitution Act 1973 and now section 5(6) of the Northern Ireland Act 1998.

47. Section 5 of the Northern Ireland Act 1998 confers legislative power on the Northern Ireland Assembly and also provides in section 5 (6) that

[14] A short title given by the Short Titles Act (Northern Ireland) 1951
[15] A short title given by the Short Titles Act 1896

"this section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland…".

48. The question of whether or not there is, notwithstanding the clear terms of section 5(6) of the 1998 Act, any limitation on the power of Parliament to make laws for Northern Ireland can only, however implausibly, arise in the context of what has become known as the Sewel convention. This convention has its origins[16] in the statement of Lord Sewel during the passage of the Bill that became the Scotland Act 1998 that Parliament would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. A similar – if less developed – convention existed in the relations between the Parliament of Northern Ireland and the Parliament of the United Kingdom 1920 – 1972[17].

49. In its current form the convention is found in paragraph 14 of the October 2013 Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee, 'the memorandum'. Although Lord Sewel naturally spoke only of Scotland during the passage of the Scotland Bill, paragraph 14 of the memorandum applies to all of the devolved legislatures.

"14. The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved

[16] And its name
[17] See Harry Calvert *Constitutional Law in Northern Ireland* (London and Belfast, 1968) pp. 86 - 94 and Brigid Hadfield *The Constitution of Northern Ireland* (Belfast, 1989) pp. 80 – 83.

administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government."

50. While the second sentence of paragraph 14 of the memorandum deals with legislation by Parliament, it says nothing about, and plays no part in, prerogative or other acts by the United Kingdom government alone, nor does it have any role in relation to Parliamentary action short of legislation such as the passing of an affirmative resolution.

51. The first footnote to the memorandum in the Northern Ireland context says that ['devolved' means] "any matter which is not an excepted or reserved matter under Schedules 2 and 3 to the Northern Ireland Act [1998]." The effect of this definition is to exclude the application of the memorandum to an Act of Parliament dealing with leaving the European Union. This is because international relations including the European Union are excepted matters by paragraph 3 of Schedule 2 to the Northern Ireland Act 1998[18].

52. It is true that Northern Ireland Assembly Standing Order 42A paragraph (10) deals with legislative consent motions (the device by which the consent of the Northern Ireland Assembly is expressed whenever this is required by the memorandum) in a way which suggests that a broader approach is to be taken to the meaning of 'devolution matter'. Paragraph (10) of Standing Order 42A reads as follows:

> "(10) In this order a "devolution matter" means—
>
> (a) a transferred matter, other than a transferred matter which is ancillary to other provisions (whether in the Bill

[18] Quite separately from the 'excepted matter' limitation, the European Communities Act 1972 is by section 7 of the Northern Ireland Act an 'entrenched enactment' which the Assembly cannot modify, subject to the, at present unimportant, exceptions in section 7 (2) of the 1998 Act.

or previously enacted) dealing with excepted or reserved matters;

(b) a change to—

(i) the legislative competence of the Assembly;

(ii) the executive functions of any Minister;

(iii) the functions of any department."

53. The meaning given to 'devolved matter' by (10)(b)(i) to (iii) of Standing Order 42A clearly diverges from the meaning of 'devolved' set out in the first footnote of the 2013 Memorandum.

54. Assembly Standing Order 42A cannot be relied on to extend the meaning of what would otherwise not be a devolved matter. The relevant convention is contained in the memorandum agreed by the parties to it. Reliance on the memorandum cannot be accompanied by reliance on a definition wider than that contained in the memorandum and, at least partly, inconsistent with it. The meaning of 'devolution matter' in the context of the memorandum comes from the memorandum and not from Assembly Standing Order 42A, a text to which the parties to the memorandum have not given assent.

55. It is not clear why Standing Order 42A (and the expanded meaning of 'devolved matter') came into being and, although determining the original source is not necessary for the resolution of this reference, the divergence between that Standing Order and the memorandum may find textual origins in the Cabinet Office's Devolution Guidance Note 8 (which appears to pre-date the 2013 memorandum). Paragraph 4 of DGN8 covers how legislative plans should be made[19] and divides Bills into three categories. The third category of Bill [set out in paragraph 4 III] is a Bill which "contains provisions applying to Northern Ireland and which deal with transferred matters (but not reserved or excepted

[19] This paragraph falls under the title 'Long Term legislative plans' – a title itself that does not suggest that questions of definition are in play.

matters) or which alter the legislative competence of the Northern Ireland Assembly or the executive functions of Northern Ireland Ministers or departments". Only Bills in this category are said (in paragraph 5 of DGN8) to be subject to the convention on seeking the agreement of the Northern Ireland Assembly. Nowhere in DGN8 is it indicated that there is an explicit extension to the Memorandum; DGN8 is designed as a guide to the implementation of the Memorandum yet paragraph 5 of DGN8 goes far beyond the definition in the first footnote in the Memorandum and any conventional approach to the meaning of 'devolved matter'.

56. DGN8, as a guide to United Kingdom officials, could not have relevantly altered the text of the memorandum which it preceded. In any event an analysis of paragraph 4 I – III of DGN8 read together tends to reinforce the view that (1) that there was no intention that DGN8 should attempt to expand the meaning of 'devolved matter' and, in any event, (2) a matter which is excepted or reserved does not fall within the meaning of that term.

57. If it is assumed (contrary to these submissions) that giving notice to the European Council under Article 50 TEU would change the legislative competence of the Assembly by removing one of the limits to that competence, that contained in section 6(2)(d) of the Northern Ireland Act 1998[20], then notification would appear to fall within paragraph (10)(b)(i) of Standing Order 42A but would still fall outside the definition of 'devolved' in the first footnote to the memorandum.

58. In addition to the submission that the definition in the memorandum is decisive about whether or not paragraph 14 of the memorandum

[20] In fact, while repeal of the 1972 Act would have a profound underlying affect on what the Assembly could properly legislate about, the formal relevant alteration of competence here would come from the repeal of section 6 (2) (d) itself – repeal of which falls outside Assembly competence, being 'excepted' under paragraph 22 of Schedule 2 to the 1998 Act.

applies, paragraph 18 of the memorandum provides, in relevant part, as follows:

> "18. As a matter of law, international relations and relations with the European Union remain the responsibility of the United Kingdom Government and the UK Parliament. …"

59. Paragraph 18 of the memorandum is inconsistent with any reading of the memorandum that, relying on paragraph 14 alone, would require the consent of devolved legislatures before an Act of Parliament providing for withdrawal from the European Union could be passed.

60. Even if, contrary to the analysis above, the relations between the United Kingdom and the EU were to be properly regarded as a devolved matter and as coming within the memorandum, this would not prevent Parliament from passing an Act providing for the United Kingdom to withdraw from the European Union even if the consent of the Northern Ireland Assembly had not been obtained or even sought.

61. As a matter of elementary constitutional law, a convention, even one framed in clear and unambiguous terms, cannot operate to deprive a statute of effect. The operation of section 5(6) of the Northern Ireland Act – the explicit preservation of Parliamentary sovereignty- cannot be affected by the terms of the memorandum.

62. The terms of paragraph 14 of the memorandum are, in any event, inapt to create any reliably enforceable expectation. The second sentence in paragraph 14 is a statement about present and future behaviour; it is not, and does not contain, a rule. Even if it were a rule, or contained a rule, the use, of the textual escape hatch 'normally' would render it unenforceable against a Government that could plausibly suggest that circumstances were not 'normal'.

63. The analysis of the use of 'normally' offered both at first instance in the Northern Ireland High Court by Kerr J (as he then was) and by the Northern Ireland Court of Appeal in *Re De Brun's Application*[21] is helpful. This application challenged the refusal by the First Minister to nominate the Health Minister and the Education Minister to attend relevant meetings of the North-South Ministerial Council.

64. Among the arguments advanced on behalf of the applicants was a claim that this refusal breached an obligation to comply with paragraph 5.1 of the Ministerial Code or, alternatively, that the refusal breached the substantive legitimate expectation of the applicants that they would be nominated.

65. Paragraph 5.1 of the Ministerial Code at that time provided: "In accordance with section 52(1) of the Northern Ireland Act 1998 (the Act), the First Minister and the deputy First Minister acting jointly must make such nominations of Ministers and junior Ministers (including alternative nominations where appropriate) as they consider necessary to ensure such cross-community participation in the North-South Ministerial Council and the British-Irish Council as is required by the Belfast Agreement. For each meeting, the First Minister and the deputy first Minister will normally nominate each Minister or junior Minister with executive responsibility in the areas to be considered at the meeting. If such a Minister is not nominated, an alternative nomination will be made. The First Minister and the deputy First Minister will also nominate such other Ministers or junior Ministers as they consider necessary to ensure such cross-community participation as is required by the Belfast Agreement."

66. Both submissions were rejected by Kerr J:

[21] [2001] NIQB 3

> "I do not accept either proposition. As to the first, the words of the paragraph are plain. The Minister with executive responsibility is normally to be nominated. It is clear that there may be a departure from the norm. There is nothing in the paragraph which compels the First Minister and the deputy First Minister to appoint the Minister with executive responsibility for the areas to be considered on every occasion. On the contrary it is clearly recognised that exceptions to this normal position may occur. Both the First Minister and the deputy First Minister disputed the claim that the applicants enjoyed a substantive legitimate expectation that they would be appointed. Both argued that the terms of paragraph 5.1 did no more than require the First Minister to take it into account before deciding whether to make the appointment. I accept this submission."[22]

67. Although the argument in *Re De Brun's Application*[23] based on an asserted substantive legitimate expectation was rejected by Kerr J, he went on to explain that "the most that could be demanded of the decision-maker in those circumstances is that he should have regard to what was stated to be the normal course and to have some reason for departing from it. There is nothing in the present case to indicate that the First Minister did not have regard to the undertaking contained in the Code and he has explained why he decided not to nominate the applicants."[24]

68. On appeal, the applicants renewed their argument about the obligatory character of paragraph 5.1 of the Ministerial Code. The Court of Appeal contented itself with a short analysis of the text of paragraph 5.1 in which it approved the conclusions of Kerr J: "We

[22] [2001] NIQB 3
[23] [2001] NIQB 3
[24] Ibid. The Applicants succeeded on the ground that the First Minister's discretion had been vitiated by a collateral purpose.

agree with the judge's conclusion that the terms of paragraph 5.1 of the Ministerial Code, by using the word "normally", carry the clear implication that it is not obligatory to nominate the Minister responsible for the topic to be discussed."[25]

69. By way of comparison, section 2 of the Scotland Act 2016 under the heading 'the Sewel Convention' inserts an eighth subsection into section 28 of the Scotland Act 1998. This new subsection reads as follows:

> "(8) 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 Scottish Parliament."

70. This is unusual content for an Act of Parliament insofar as it merely replicates the language of an administrative understanding about what is expected to happen rather than, as is normal for a legislative provision, making positive (or negative) provision for something to happen (or not happen). Section 28(8) of the Scotland Act 2016 does not prevent Parliament from legislating with respect to devolved matters. Section 28(8) 'recognises' that Parliament will 'normally' act in a particular way, but Parliament is not required by section 28 (8) to act in that way.

71. Further, section 28(7) provides (in a manner analogous to section 5(6) of the Northern Ireland Act 1998) that "this section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland." Section 28(8) does not diminish the effect of section 28(7); it merely adds a predictive expression about how it is expected to work in practice in normal circumstances.

[25] [2002] NICA 43

72. Paragraph 7 of Schedule 1 to the Scotland Act 1998 makes international relations including the European Union a reserved matter. It follows that even if section 28(8) were (contrary to any sober analysis of its text) to be taken to have the effect of restraining Parliament from legislating without the consent of the Scottish Parliament with respect to devolved matters, this would not prevent Parliament from enacting provisions for the giving of Article 50 TEU notification without consent because such provisions fall within the reserved matters in paragraph 7 of Schedule 1 to the Scotland Act 1998.

73. There is a standing order of the Scottish Parliament very similar to the terms of Standing Order 42A of the Assembly. However, the use of the term 'Sewel convention' in the 2016 Act means that the term 'devolution matter' must take its meaning from the memorandum rather than from any standing order[26].

74. While the present system of devolution in Northern Ireland constitutes a species of 'political federalism' insofar as a matter of constitutional practice the Government of the United Kingdom will normally not seek to give legal effect to policy cutting across transferred responsibilities without the consent of the Northern Ireland Assembly, there is no relevant restriction on the sovereignty of the Crown in Parliament. For example, although a key element in United Kingdom Government policy on combating organised crime, the National Crime Agency provisions of the Crime and Courts Act 2013, were not extended to Northern Ireland until a draft order for their extension had been approved by the Northern Ireland Assembly on February 3 2015[27],

[26] Importantly, during the passage of what became the Scotland Act 2016 the Advocate General for Scotland confirmed that the approach of the UK Government to the convention was to prefer the Memorandum to any apparent extension in DGH10 (the Scottish equivalent of DGN8).

[27] See the February 9 Ministerial Statement by the then Home Secretary http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm150209/wmstext/150209m0001.htm

Parliament could simply have extended the 2013 Act to Northern Ireland as a matter of elementary constitutional law but it was considered politically proper not to do so until consent had been obtained. It is, however, significant that provisions of the 2013 Act dealing with Northern Ireland were enacted without Assembly consent – consent was sought and obtained only for their coming into effect.

75. Finally, it is of note that Assembly consent is required under section 4(3) of the Northern Ireland Act 1998 before the Secretary of State lays before Parliament a draft Order in Council under section 4(2) providing for a reserved matter to become a transferred matter or for a transferred matter to become a reserved matter. That express provision is made for Assembly consent to a Parliamentary proceeding in section 4 of the Northern Ireland Act 1998 but not otherwise in that Act, suggests that it is only in section 4 that there is a legal requirement for Assembly consent for any Parliamentary proceeding and nowhere (even in section 4) in that Act is there a requirement for Assembly consent before an Act of Parliament is passed.

Does any provision of the Northern Ireland Act 1998 restrict the operation of the Royal Prerogative in relation to notice under Article 50 TEU?

76. No provision of the Northern Ireland Act 1998 whether read together with the Belfast Agreement and the British-Irish Agreement or otherwise operates as a restriction on the exercise of the prerogative power to give notice to the European Council under Article 50 (2) TEU. The discretion about whether or not or when to give notice under Article 50 TEU is a matter of high political judgement. This discretion is not justiciable. Alternatively, if formally justiciable, there is no basis for impeaching it. The decision of the High Court on this issue is correct.

Does non-compliance with section 75 of the Northern Ireland Act 1998 by the Northern Ireland Office prevent notice being given under Article 50 TEU?

77. Section 75 of the Northern Ireland Act 1998 does not prevent the prerogative power being exercised to give notice to the European Council under Article 50(2) TEU even if there has been non-compliance by the Northern Ireland Office with its obligations under that section (and the High Court was correct, in any event, to find at [144] that section 75 'has no purchase on this issue and is not engaged'). Section 75 of the Northern Ireland Act 1998 has no role to play in relation to the decision to give notice under Article 50 TEU as notification does not involve the exercise of a function relating to Northern Ireland by a designated public authority. Nor does section 75 have a role to play in the provision of advice in relation to such notice. Section 75 does not apply to the Secretary of State.

***In re McCord*: the reference by the Court of Appeal in Northern Ireland**

78. The Court of Appeal (but not the Attorney General for Northern Ireland) referred as a devolution issue the question of whether the triggering of Article 50 TEU by the exercise of prerogative power without the consent of the people of Northern Ireland impedes the operation of section 1 of the Northern Ireland Act 1998. This issue is addressed in this case for the convenience of the Court.

79. The constitutional status of Northern Ireland as part of the United Kingdom is addressed by section 1 of the Northern Ireland Act 1998. That provision has nothing to do with EU membership. A variety of factors will play a part in how persons may vote in any poll under section 1 of the 1998 Act but a factor that makes it more (or less) attractive to vote in one (or another way) does not "impede the

operation of section 1 of the Northern Ireland Act 1998." The answer to this question is 'no'.

Conclusion

80. It is submitted that this Court should answer the questions posed by the High Court negatively (including the second question if it arises) and remit the matter to the High Court for final disposal. This Court should also answer the question posed by the Court of Appeal in the negative for the reasons given in paragraph 79 above.

John F Larkin QC
Attorney General for Northern Ireland

Conleth Bradley SC

November 25 2016