UKSC 2016/0201

IN THE SUPREME COURT OF THE UNITED KINGDOM

on a reference from the High Court of Justice in Northern Ireland pursuant to paragraph 33 of Schedule 10 to the Northern Ireland Act 1998

of devolution issues arising in the case of

STEVEN AGNEW and OTHERS

Applicants

-and-

(1) THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION
(2) THE SECRETARY OF STATE FOR NORTHERN IRELAND

Respondents

and

THE ATTORNEY GENERAL FOR NORTHERN IRELAND
(at whose requirement the present reference was made)

WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANTS IN THE JUDICIAL REVIEW PROCEEDINGS

INTRODUCTION

1. By proceedings for judicial review commenced in the High Court in Northern Ireland, the applicants in the above-proceedings[1] challenged the proposed means on the part of Her Majesty's Government (HMG) by which it would notify the European Council of the United Kingdom's intention to withdraw from the European Union under Article 50(2) TEU. HMG's public stance has made clear that its intention is to provide notification from the relevant Secretary of State, in purported exercise of royal prerogative and without Parliamentary authority contained in legislation, that the whole of the United Kingdom intends to leave European Union. The question is whether that is lawful.

2. The applicants in the judicial review proceedings fall into three categories. A number of them are Members of the Legislative Assembly in Northern Ireland and prominent politicians[2]. A second group comprises those with close associations to the voluntary and community sector in Northern Ireland. The third is two well-respected human rights organisations operating in Northern Ireland.

[1] Although the applicants on whose behalf this written case is provided are technically respondents to the reference, for convenience they are referred to as 'the applicants' throughout this case.

[2] Drawn from Green Party, the Social and Democratic Labour Party, the Alliance Party and Sinn Féin respectively; and including three party leaders and a number of former Ministers of the Northern Ireland Executive.

Their shared concerns which have led them to adopt common cause in these proceedings are that the process following the EU referendum should comply with the requirements of law (including that Parliament should have the final say on whether an Article 50 notice is given); and that Northern Ireland's particular circumstances should be recognised and properly taken into account.

3. The applicants advanced four main arguments in the High Court[3], namely:

(1) That an Act of Parliament is required before HMG may lawfully give notice under Article 50 authorising the giving of such notice;

(2) If that is so, that a legislative consent motion (LCM) from the Northern Ireland Assembly should also be (at the very least) sought in advance of the laying of such a Bill.

(3) That, in the alternative, if the applicants were wrong that an Act of Parliament was required, there nonetheless remained constraints on the lawful exercise of the royal prerogative imposed by UK constitutional law, including the requirement to take relevant considerations into account before using the power (those considerations including Northern Ireland's particular position and any possible alternatives to full exit from the EU for the entirety of the UK); and

(4) That, before an Article 50 notice is served, the Northern Ireland Office must undertake an equality proofing exercise pursuant to section 75 of the Northern Ireland Act 1998 so that it properly understands the impact of this step on persons in Northern Ireland and can provide advice to HMG accordingly.

4. Maguire J in his judgment in the court below[4] referred to the four issues identified above as Issues 1 to 4 respectively[5]. In respect of Issue 1, the applicants' case that the prerogative had been displaced by statute was based upon the terms and effect of a number of statutory provisions, including the European Communities Act 1972 (ECA): see the applicants' ground 4(2)(a)(i)[6]. The High Court declined to hear argument on the effect of the ECA and stayed that ground, contrary to the submissions of the applicants, on the basis that that argument was being addressed by the Divisional Court in England and Wales in the *Miller* litigation[7]. Accordingly, Issue 1 in the court below focussed only on the effect of the Northern Ireland Act 1998 (NIA) and related legislation[8]. The applicants' ground which squarely overlaps with the claimant's case in *Miller* remains stayed.

5. Before the proceedings below were heard the High Court in Northern Ireland issued a devolution notice under paragraph 5 of Schedule 10 to the NIA and RCJ[9] Order 120, rule 3. The Attorney

[3] The applicants' skeleton argument from below is contained in the Appendix at pages 97-121 [App/97-121] and consideration of that skeleton (in addition to this written case) is respectfully commended to the Court.
[4] [2016] NIQB 85.
[5] In the judgment in the court below there was a further issue, Issue 5, which was argued on behalf of another applicant for judicial review whose case was heard alongside the Agnew application, Mr McCord. That issue was not advanced by the Agnew applicants.
[6] [App/74].
[7] *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).
[8] In particular, the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999, as amended. See generally the applicants' grounds 4(2)(a)(ii) and (iii) [App/74-5].
[9] Rules of the Court of Judicature (Northern Ireland) 1980, as amended.

General for Northern Ireland (AGNI) thereafter entered an appearance in the proceedings. After judgment had been given but before the court made any final order in the proceedings, the AGNI – given the constitutional significance of the issues raised in the proceedings and in the absence of certification by Maguire J for a leapfrog appeal – required the High Court, by virtue of the power conferred on him by paragraph 33 of Schedule 10 to the NIA, to refer to the Supreme Court four issues which were set out in a notice from the AGNI to the Court dated 8 November 2016. By order dated 14 November 2016 the High Court so referred those issues.

6. The four issues referred for decision by the Supreme Court at the AGNI's instigation are plainly designed to reflect, in broad terms, the four issues addressed in judgment of the Court below[10]. They are as follows:

   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 validly be 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 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?

7. Argument is addressed to each of these issues below on behalf of the applicants; and summary answers suggested by the applicants are set out at the conclusion of this written case. Pending the decision of the Supreme Court on these issues, the High Court proceedings are stayed[11].

FACTUAL POSITION AS REGARDS NORTHERN IRELAND

8. There is no significant factual controversy in this case. As the Court is aware, a referendum on EU membership was held on 23 June 2016. In the UK as a whole, the result was 51.89% leave to 48.11% remain. However, in Northern Ireland, the electorate voted 55.8% remain to 44.2% leave.

9. Notwithstanding the preference in Northern Ireland to remain within the EU, and the particular impact which leaving the EU will have in Northern Ireland, HMG's position, as understood from

[10] Although the questions were formulated by AGNI and not by the applicants. Had they been drafted by the applicants, it is likely that the questions would have been framed differently.

[11] This is the effect of RCJ Order 120, rule 9 and the absence of any provision in the High Court's order of 14 November 2016 making contrary provision. In any event, the applicants' ground 4(2)(a)(i) remained stayed; and costs in the proceedings generally have been reserved pending the outcome of the reference to the Supreme Court and its decision on the appeal in the *Miller* case.

public statements, is that there will be no special status for Northern Ireland. An Article 50 notification will simply be provided to the effect that the United Kingdom (that is to say, the entirety of the United Kingdom, including Scotland and Northern Ireland) intends to leave the EU[12].

10. However, leaving the EU will affect Northern Ireland – particularly in its relationship with the Republic of Ireland – in ways which are very specific to Northern Ireland and (it is submitted) more severe than is the case in any other part of the UK. Northern Ireland is the only part of the UK which, after Brexit, will share a land border with the EU. It is part of the UK where its citizens are entitled to Irish passports and where many have only Irish, and not UK, passports. Its close relationship with the Republic of Ireland – geographically and politically – is unique to Northern Ireland.

11. Some of the issues of serious concern to Northern Ireland in particular in the context of Brexit have been raised in correspondence from the First Minister and Deputy First Minister to the Prime Minister of 10 August 2016[13]. Others have been identified and discussed in the House of Commons Northern Ireland Affairs Committee report entitled '*Northern Ireland and the EU referendum*' ('the NIAC report')[14]. The NIAC report noted that "*there are good reasons why Northern Ireland warrants special attention in the EU referendum*". It is "*the part of the UK whose economy is most dependent on EU trade*"; and "*it will be the only part of the UK that has a land border with a Member State which will, in effect, become the external frontier of the EU*". The NIAC report also noted that the ability of the Governments to undertake continued cooperation in a range of areas is "*fundamental to the potential impact on Northern Ireland*"[15]. The report concluded by noting that there were major concerns in respect of the impact of Brexit in Northern Ireland in the fields of trade and commerce, agriculture and the border and cross-border issues (including cross-border policing cooperation).

12. Many more such concerns are referred to in the affidavit evidence of the applicants in the *Agnew* case (and the related *McCord* case[16]). These include:

(a) A likely hardening of the border between Northern Ireland and the Republic[17];
(b) Effects on the identity of citizens in Northern Ireland[18];
(c) Reduction in financial support and resources provided by the EU, particularly in the form of peace funds and EU programmes[19];
(d) A loss of fundamental rights under EU law, enforceable in Northern Ireland[20];
(e) Reduced cooperation with the Republic of Ireland in a variety of fields but including in relation to tackling terrorism and organized crime[21];

[12] See Cassidy 1, §§19-22; and 35 [App/219 and 222].
[13] [App/434-435].
[14] First Report of Session 2016-17 (HC 48).
[15] See paragraph 5 of the Introduction to the NIAC report.
[16] In particular, the applicant McCord was concerned about the effect of Brexit on political stability generally in Northern Ireland: see McCord, §§3 and 9.
[17] McCord, §6 ; and McKeown (CAJ), §5 [App/210].
[18] McCord, §8 ; and McKeown (CAJ), §5 [App/210].
[19] McCord, §§3 and 7 ; Purvis, §5 [App/205]; and McKeown (CAJ), §5 [App/210].
[20] McCord, §3 ; Purvis, §5 [App/205]; McKeown (CAJ), §5 [App/210]; and Hanratty, §5 [App/213].
[21] Ford, §5 [App/197].

(f) The effect on families who have relied upon, or wish to rely upon, free movement rights[22]; and

(g) Reduced effectiveness in advancing equality issues which are particularly important in Northern Ireland[23].

13. By reason of what is at stake, the applicants consider that, if Brexit is to occur, it should obviously be achieved lawfully; but also only after proper consideration. That consideration should be conducted in Parliament; or, if the applicants are wrong in their primary case and it made be conducted by the executive, only after due analysis.

THE REFERENDUM

14. In the court below, the respondents relied heavily on the fact and outcome of the EU referendum. They made a number of evidential assertions in their skeleton argument about the nature of the referendum, which were and are not accepted by the applicants; and which were not appropriate to be made simply in the course of legal submissions. In particular, the respondents asserted[24] that (i) HMG's policy was unequivocal that the outcome of the referendum would be respected; and, more importantly, (ii) that Parliament enacted the EU Referendum Act 2015 "*on this clear understanding*". There was simply no evidence provided in the proceedings to substantiate that statement. However, crucially, that assertion is not borne out by – indeed, if anything, it is contradicted by – the terms of the 2015 Act itself.

15. The purpose of the respondents' submissions in this regard was plainly to seek to support a further submission that the '*decision*' mentioned in Article 50(1) TEU has been taken by means of, and is embodied in, the referendum result. But this is incorrect as a matter of law:

(a) The European Union Referendum Act 2015 ('the 2015 Act') was simply "*an Act to make provision for the holding of a referendum … on whether the United Kingdom should remain a member of the European Union*"[25]. It was not an Act to make provision for taking the decision for the purpose of Article 50(1) TEU.

(b) The referendum for which the 2015 Act provided was a 'normal' or 'run of the mill' referendum, within the meaning of Part VII of the Political Parties, Elections and Referendums Act 2000: see section 3 of the 2015 Act. Such a referendum is simply a "*poll*" on a "*question*": see section 101(2) of the 2000 Act[26]. That is to say, it is a snapshot of public opinion on a particular question at that time. The significance of the EU referendum is no greater (and no less) than that of any other referendum held under the 2000 Act.

(c) Where a referendum is to be binding, and there is some obligation to give effect to the result, this will be made clear in the Act providing for the holding of the referendum. An obvious example is a border poll under section 1(2) of the Northern Ireland Act 1998. A

[22] Donnelly 1, §5.
[23] Wilson, §5 [App/208]; and McKeown, §5 [App/210].
[24] At paragraph 2 of their skeleton argument [App/124].
[25] See the long title of the 2015 Act.
[26] ""referendum" means a referendum or other poll held, in pursuance of any provision made by or under an Act of Parliament, on one or more questions specified in or in accordance with any such provision."

further example is found in section 8 of the Parliamentary Voting System and Constituencies Act 2011 which (a) *required* the Prime Minister to give effect to the referendum result; and (b) set out in advance the statutory text required to give effect to the referendum result in that event.

(d) Moreover, the English Court of Appeal in the *Shindler* case made clear that the referendum was only *part of* the UK's constitutional requirements in order to make a *"decision*" for the purposes of Article 50(1)[27]. It was certainly not itself sufficient to do so.

16. As a matter of both law and of fact, it does not follow that, as a result of the referendum, Parliament (or even the executive) was *legally obliged* to give an Article 50 notification or that the formal decision to withdraw had been made. If HMG has proceeded on that basis, it will have proceeded on an error of law.

17. That being so, the Article 50 notification is not (as the respondents submitted below) a mere "*administrative act*", predestined by the referendum. The giving of the notice is *either* the giving of effect to a substantive decision that the UK will leave the EU which the executive arm has made *after* the referendum; *or* it will in fact be the making of the decision and the giving of notice in one step. The English Divisional Court (EDC) in *Miller* correctly held the referendum was advisory in nature only[28]. That finding is not disputed in the government's case in the *Miller* appeal. This being so, the referendum, whilst undoubtedly of momentous political significance, has little bearing on the legal questions before the Court.

THE EFFECT OF AN ARTICLE 50 NOTIFICATION

18. The effect of giving notice under Article 50(2) TEU is to put in train a process whereby the EU Treaties "*shall*" cease to apply to the UK: see Article 50(3). This cessation will either be from the date of a negotiated withdrawal agreement or, "*failing that*" (*viz.* in the event that there is no withdrawal agreement or it is not concluded in time) two years after the notification. In the latter case, the cessation of the Treaties' application occurs unless the European Council – in agreement with the member state concerned – unanimously agrees to extend the period. In either event, however, at the end of the period, the Treaties "*shall cease to apply*".

19. The important point is that what happens after the giving of the notification is beyond the control of the United Kingdom authorities, including Parliament. If the Union proposes an agreement that simply cannot be accepted (or members of the Council fail to agree a withdrawal package by qualified majority which could even be put to the UK), it is submitted that the United Kingdom cannot stop the process unilaterally.

20. In the *Miller* litigation, it was common ground that an Article 50(2) notice cannot be withdrawn once it has been given and cannot be framed in conditional terms[29]; and the Government (in its case in the *Miller* appeal) asks this Court to proceed on the same basis. The applicants in the present case consider that the better construction of Article 50 is that an Article 50(2) notification is

[27] *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 at paragraphs [13] and [19].
[28] See paragraphs [105]-[108] of the judgment.
[29] See paragraph [10] of the judgment in *Miller*.

indeed irrevocable without the consent of all other member states[30], although other interpretations are at least arguable. If the Court feels that anything might turn on this issue having heard the arguments in this reference, plainly it is an issue of EU law which should be referred to the Court of Justice of the European Union (CJEU) on a preliminary reference under Article 267 TFEU.

21. The EDC in *Miller* correctly appreciated the significance of the giving of an Article 50(2) notification: see, in particular, paragraph [11] of its judgment. The respondents contended in their pre-action correspondence in the present case that "*the giving of a notification under Article 50(2) would not by itself take away any legal rights from UK citizens*". That is a gloss. The notification will, by itself, take away legal rights from citizens. Although perhaps not immediately so, nothing more is required for the Treaties to cease to have effect. The reality is that the giving of such notice is the commencement of a process (which is irreversible as far as UK authorities acting alone are concerned) which will inevitably take away legal rights from UK citizens, including those in Northern Ireland. This issue is a significant element of the Court's consideration of Issue 1 in this case (as it is in the consideration of the claim in *Miller*).

EXCURSUS ON THE UNITED KINGDOM CONSTITUTION

22. Before turning to the detail of the argument on the questions referred, it is submitted to be important to set out an appropriate understanding of the current state of the United Kingdom constitution and the place of the Northern Ireland Act, and its relationship to European Union law, within that constitution. The applicants submit that the submissions of the Government in *Miller* are based on flawed premises and an outmoded view of constitution of the UK, which undermines their credibility generally.

23. The applicants accept, and rely upon, the doctrine that the Queen in Parliament is at the centre of the constitutional architecture of the United Kingdom. Politically, the peoples of the United Kingdom are sovereign; but *legally* the way in which they express this sovereignty is through the structures of representative democracy, not popular democracy. With some important but limited possible exceptions[31], Parliament can do what it wishes, including changing the constitutional architecture and the type of constitution that operates from time to time in the United Kingdom, or in any part of the United Kingdom. Its final legislative power is reflected in, *inter alia*, section 5(6) of the Northern Ireland Act 1998, which provides that the legislative powers of the Northern Ireland Assembly do "*not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland*".

24. However, there are two competing models of constitutionalism at issue in these proceedings. That advanced by the Government in its case in *Miller* is (it is submitted) an over-simplistic and anachronistic view of the state of the modern British constitution. It has been radically re-balanced by, first, the enactment of the European Communities Act and, secondly, the later devolution statutes.

[30] See paragraphs 20-23 of the applicants' skeleton argument below [App/103-104].
[31] Such as are mentioned in *R (Jackson) v Attorney General* [2006] 1 AC 262.

25. Prior to 1972 and 1998, the constitution of the United Kingdom might best be described as encompassing a unitary state (with the exception of Northern Ireland between 1922 and 1972), with a dualist understanding of the distinction between national law and international law. The unitary state primarily operated in such a way as to concentrate and centralize power in Westminster and Whitehall; and the interests of Scotland, Wales and Northern Ireland were represented at the centre through the establishment of Departments of (central) government and membership in the Cabinet of the Secretaries of State of these Departments. In this pre-1972 model of UK constitutionalism, international affairs were left to the Executive, exercising powers that remained under the royal prerogative, whilst any international agreements that were entered into under the prerogative could have direct effects in national law only where Parliament enacted incorporating legislation.

26. Since 1972, with the enactment of the ECA, and since 1998, with the enactment of the statutes devolving powers to the Scottish Parliament and the Northern Ireland and Welsh Assemblies, Parliament has overseen a transformation of the United Kingdom constitution, whilst preserving its ultimate authority. One major effect of these changes has been to create a multi-level system of government, in which there is a complex relationship between the institutions of the devolved nations, central government, and the European Union.

27. The effect of these constitutional changes has gone beyond the creation of new institutional structures, and has also embedded what might be termed 'constitutional pluralism' at the heart of the United Kingdom constitution. This means that Parliament has accepted that several differently constituted legal systems not only operate over the same territory in different subject areas, but that they also claim legitimacy on their own terms. The constitution of the United Kingdom incorporates constitutional pluralism because it accepts that different constitutional understandings can co-exist, without the necessity of having to choose between these different constitutional understandings. In the *Jackson* case, Lord Steyn gave implicit recognition to such ideas when he spoke of EU membership and devolution giving rise to a "*divided sovereignty*" in the UK[32].

28. This constitutional pluralism is evident in practice both (a) in the operation of EU law in the UK and (b) in the legal and practical operation of the devolution settlements in the UK. Each of these areas are relevant to the questions referred to the Court in these proceedings.

THE EU DIMENSION

29. Looking first at the operation of EU law, the constitutional pluralism referred to above is manifested in two particular respects of central importance to this case. First, in the European Communities Act 1972, Parliament has accepted, for the time being, the understanding of the relationship between EU law and UK law articulated from time to time by the CJEU under the various Treaties of the European Community and now the European Union. As was stated pithily by Lord Bridge in the *Factortame* case[33], the United Kingdom accepted all of the obligations of EU membership when it acceded to the (then) Communities, including the case law of the CJEU. Of critical importance, this includes an understanding that rejects the idea of EU law as simply

[32] See [2006] 1 AC 262, at 302.
[33] [1991] 1 AC 603, at 658-9.

'international' law – a point which was made by the CJEU long before the UK acceded to the Communities: see Case 26/62, *Van Gend en Loos*[34]. From the perspective of EU law – a perspective that is accepted by United Kingdom courts, *per Factortame* – EU law is a *sui generis* body of supranational law that has profound constitutional implications both for the national laws of its member states and for the rules of international law: see Cases C-402 and 415/05, *Kadi v Council and Commission*[35].

30. In joining the European Union, Member States did more than simply accede to another international treaty. The analogy to international treaties against double taxation used by the Government and others seems inapt. The EU makes extraordinary unmediated claims on the Member State legal systems, including as regards direct effect, supremacy, autonomy, citizenship, democracy, and the protection of the fundamental rights of all individuals. What is more, the EU has a complex institutional structure that produces legislation, and a Court of Justice that is woven into the very fabric of domestic adjudication. All this demands a *domestic constitutional transformation* for Member States who wish to join and a continuing duty of fidelity to the EU for so long as membership continues.

31. The profound significance of EU law for the constitutional law of the Member States is also clear from several elements in the EU Treaties themselves:

(a) In Declaration 17 on the primacy of EU law, Member States declare their acceptance of the CJEU's jurisprudence deriving the doctrines of supremacy and direct effect from the Treaty.

(b) The reference procedure in Article 267 TFEU is central to the EU, allowing (and in some cases requiring) courts in Member States of the EU to communicate directly with the CJEU.

(c) Article 22(1) TFEU allows every EU citizen to vote for, and stand as, a candidate in local elections in the Member State in which he or she resides.

(d) Article 4(2) requires that the EU "*respect*" the Member States' "*national identities inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*." However, at the same time, the "*duty of sincere cooperation*" contained in Article 4(3) requires that the Member States as well as the Union "*shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*." Finally, Member States, in turn, must "*take any appropriate measure, general or particular*" to ensure fulfilment of their obligations under the Treaty or acts of the Union, and "*shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives*."

32. Even if the full extent of this transformation was not apparent at first sight, the significance of the ECA, as a constitutional statute that gives domestic effect to the elements of EU law, is today beyond doubt. Whether it was changing the general rule of implied repeal to shield EU law from later acts of Parliament (*Thoburn*[36]), changing the constitutional rules that once prohibited courts from enjoining an act of Parliament (*Factortame*), or introducing the reference procedure to the

[34] [1963] ECR 1.
[35] [2008] ECR I-6351.
[36] *Thoburn v Sunderland City Council* [2003] QB 151.

CJEU, the resulting alterations to the British constitutional landscape as a result of EU membership (legally brought about, in part, by the ECA) were profound. There is simply no equivalent international agreement that has resulted in the restructuring of the domestic constitutional architecture in the manner that is required by the UK's membership of the EU.

THE DEVOLUTION DIMENSION

33. Second, the devolution statutes, in different ways, embedded a recognition of the different nations of the United Kingdom as, to a degree, sharing legislative and governmental powers with Westminster and Whitehall, and allowing for an evolution of constitutional relationships within these islands based on the consent of the peoples of the different nations, expressed primarily through their representative legislative assemblies. The Westminster Parliament has retained ultimate legal authority, but it has adopted several self-limiting measures, partly through a statutory distribution of powers and competences under a number of "*constitutional statutes*", and partly though other constitutional norms, including constitutional conventions.

34. The devolved institutions in Northern Ireland – as those in Scotland and Wales – are recognised by the Courts as having a particular democratic legitimacy and importance. This point was perhaps made most forcefully in the *Axa* case[37], which involved a challenge to the *vires* of an Act of the Scottish Parliament. While the Supreme Court noted that the Scottish Parliament is not legally sovereign, Lord Hope nevertheless observed that it "*takes its place under our constitutional arrangements as a self-standing democratically elected legislature*" with a *"democratic mandate to make laws for the people of Scotland [which] is beyond question*", so that, "*Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority*". He continued:

> *"… the elected members of a legislature of this kind are best placed to judge what is in the country's best interests as a whole. A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate."*[38]

35. The genius of the United Kingdom Constitution has been to accommodate these differing constitutional European and national understandings by establishing such interconnecting, multi-level arrangements that are subject always to the one unchanging principle of the sovereignty of Parliament. This meant that the constitutional pluralism embedded after 1972 and 1998 was itself subject to the overriding principle of Parliamentary sovereignty. The United Kingdom *could* leave the EU and revert to interacting with the EU merely on the basis of international law; and the UK *could* reassert a unitary state and abolish the devolved assemblies. In both cases, however, this can only be accomplished, legally, by Parliament, not the Executive. Equally importantly, it could only be accomplished by Parliament acting according to its own self-imposed manner and form requirements, provided it had not chosen to abolish these requirements. This is why the European

[37] *Axa General Insurance v Lord Advocate* [2012] 1 AC 868.
[38] See paragraphs [46]-[49] of Lord Hope's opinion: [2012] 1 AC 868, at 911-3. See also, to like effect, Lord Reed's comments at 943-944).

Communities Act 1972 and the devolution Acts are rightly termed "*constitutional*" statutes, and for as long as they remain the Executive is bound by them.

THE NORTHERN IRELAND CONSTITUTION

36. Before turning to consider whether the government will have complied with the UK's constitutional requirements if it proceeds to serve an Article 50 notice in the exercise of its prerogative powers, it is appropriate to consider some of the constitutional documents which set out the particular constitutional arrangements for Northern Ireland. The constitution of Northern Ireland is made up of a range of constitutional norms which apply across the United Kingdom generally (discussed above) and those which are more specifically related to Northern Ireland (either regulating the exercise of public power within Northern Ireland or as between its administration and institutions on the one hand and those in Westminster on the other).

37. The primary statutory source of constitutional norms for Northern Ireland is the Northern Ireland Act 1998 (NIA). In the *Robinson* case[39], Lord Bingham commented[40] that: "*The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution*". Accordingly, as with other constitutional statutes, it should be "*interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody*". This approach to construction is important since, as discussed below, one of the constitutional values forming the background to the NIA is membership of the European Union.

38. Also in that case, Lord Hoffman[41] made clear that, in construing the NIA, a court must have regard to the *background* to its enactment. He said that, "*The 1998 Act is a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast*". As appears further below, the applicants contend that giving of an Article 50 notice, and consequent withdrawal from the EU, would be to upset the "*continuing form of government*" envisaged and provided for in the Belfast Agreement and the NIA.

39. In another case – *McComb*[42] – Kerr J (as he then was) said that the Belfast Agreement is important when interpreting and applying statutory provisions made under its aegis[43]. That would plainly include the NIA. The same point was made by Lord Hoffman in *Robinson* at paragraph [33]:

> "*According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible background for the construction of the Act just as much as the Revolution, the Convention and the Federalist Papers are the background to construing the Constitution of the United States.*"

40. In light of these observations, it is appropriate to have careful regard to the Belfast Agreement, and the related British-Irish Agreement between the governments of the United Kingdom and of the

[39] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] NI 390.
[40] At paragraph [11] of his opinion.
[41] At paragraphs [25] and [33] of his opinion.
[42] *Re McComb's Application* [2003] NIQB 47.
[43] See paragraph [31] of the decision in *McComb*.

Republic of Ireland (which is appended to the Belfast Agreement), before turning to the text of the NIA itself.

THE BELFAST AGREEMENT

41. The House of Commons Library Briefing Paper on the Impact of Brexit across policy areas specifically says that, "*The status of the UK and Ireland as EU Member States is woven throughout the [Belfast] Agreement*"[44]. This is an entirely correct summary. The Belfast Agreement proceeds on the basis that the UK will continue to be a member of the EU. Indeed, its proper implementation requires that to be so. The NIA must be read in this light.

42. As the Court will be aware, the Agreement contains three strands. Strand One provides for new democratic institutions in Northern Ireland. Strand Two provides for the creation of a North/South Ministerial Council and North/South Implementation Bodies. Strand Three provides for new East/West institutions (a British-Irish Council and British-Irish Intergovernmental Conference). *Each* strand at least envisages continued membership of the EU on the part of the United Kingdom; and Strand Two in particular requires this.

43. The Declaration of Support in the Agreement notes that the participants in the talks, including the two Governments, are "*committed to partnership… as the basis of relationships… between North and South, and between these islands*"[45]. As discussed further below in the context of the British-Irish Agreement, this partnership was expressly understood by the two Governments to be as "*partners in the European Union*". It continues[46] as follows:

> "*… we will endeavour to strive in every practical way towards reconciliation and rapprochement within the framework of democratic and agreed arrangements. We pledge that we will, in good faith, work to ensure the success of each and every one of the arrangements to be established under this agreement. It is accepted that all of the institutional and constitutional arrangements – an Assembly in Northern Ireland, a North/South Ministerial Council, implementation bodies, a British-Irish Council and a British-Irish Intergovernmental Conference… - are interlocking and interdependent and that in particular the functioning of the Assembly and the North/South Council are so closely inter-related that the success of each depends on that of the other."*

44. Within Strand One, provision is made for the relationship between the Assembly and other institutions. Paragraph 31 of Strand One states that: "*Terms will be agreed between appropriate Assembly representatives and the Government of the United Kingdom to ensure effective co-ordination and input by Ministers to national policy-making, including on EU issues*."

45. Within Strand Three, a British-Irish Council (BIC) is to be established "*under a new British-Irish Agreement to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands*"[47]. The BIC is, amongst other things, to "*reach*

[44] House of Commons Briefing Paper Number 07213, 26 August 2016 (contained within Authorities Bundle).
[45] See paragraph 3 of the Declaration of Support.
[46] At paragraph 5.
[47] See paragraph 1 of Strand Three.

agreement on co-operation on matters of mutual interest" within the competence of the relevant Administrations. Suitable issues for early discussion in the BIC – that is to say, obvious candidates for areas of co-operation – include "*approaches to EU issues*"[48].

46. The requirement for both the United Kingdom (Northern Ireland) and the Republic of Ireland to both remain EU members is most apparent, however, in Strand Two, dealing with the North/South Ministerial Council (NMSC) and its related implementation bodies. Paragraph 1 of Strand Two requires the NMSC to be established in legislation for the following purpose:

> "*… to bring together those with executive responsibilities in Northern Ireland and the Irish Government, to develop consultation, co-operation and action within the island of Ireland – including through implementation on an all-island and cross-border basis – on matters of mutual interest within the competence of the Administrations, North and South.*" [underlined emphasis added]

47. The NMSC is therefore a joint executive body which is required to implement action on an all-island basis. This is further emphasised by paragraph 11 of Strand Two which explains that this will be effected on the ground through cross-border implementation bodies:

> "*The implementation bodies will have a clear operational remit. They will implement on an all-island and cross-border basis policies agreed in Council*."

48. Crucially, those policies which must be implemented North and South, on an all-island and-cross border basis, include EU policies and programmes. This is put beyond doubt by the text of paragraph 17 of Strand Two to the Agreement:

> "*The 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*." [bold and underlined emphasis added]

49. Put shortly, there is an obligation in the Belfast Agreement that the NMSC and its related implementation bodies *will* implement EU policies and programmes *North and South of the border*, on an all-island and cross-border basis[49]. This is simply impossible if Northern Ireland is no longer part of the EU. A central function of the NSMC – indeed, a requirement placed upon it – simply falls away.

50. This is no minor or ancillary commitment. Not only does the text of the Belfast Agreement emphasise that *all* of the institutions it creates are interlocking and must stand or fall together[50]; paragraph 10 of Strand Two provides that:

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[48] See paragraph 5 of Strand Three.

[49] See also paragraphs 8 and 9 of Strand Two emphasizing the steps which must be taken to ensure that "co-operation and implementation for mutual benefit will take place" and that there must be agreement of areas were "co-operation will take place". To similar effect, see paragraph 5(iv) which requires the NMSC to take decisions "on policies and action at an all-island and cross-border level to be implemented by the [implementation] bodies…".

[50] See paragraph 43 above. See also paragraph 13 of Strand Two: "It is understood that the North/South Ministerial Council and the Northern Ireland Assembly are mutually inter-dependent and that one cannot successful function without the other."

"*The two Governments will make necessary legislative and other enabling preparations to ensure, **as an absolute commitment**, that these [implementation] bodies, which have been agreed as a result of the work programme, function at the time of the inception of the British-Irish Agreement…"* [underlined and bold emphasis added]

51. The remainder of Strand Two also makes clear that continued membership of the EU is necessary for the institutions to operate as the Belfast Agreement requires and intends:

(a) Since the NMSC must consider the EU dimension of relevant matters, and identify EU policies and programmes to be implemented on a cross-border basis, it is also required (by paragraph 3 of Strand Two) to meet "*in an appropriate format to consider institutional or cross-sectoral matters including in relation to the EU) and to resolve disagreement*".

(b) Paragraph 17 of Strand Two further requires that, "*Arrangements [are] to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings*". Put bluntly, in the event that Northern Ireland is no longer a member of the EU, the views of its representatives in the NMSC (as distinct from a solely Irish position) are of no significance or interest whatsoever to the EU institutions.

(c) Many of the areas for North-South co-operation identified in the Annex to Strand Two are heavily influenced by EU law or EU programmes (including, for instance, agriculture, transport planning, the environment, fisheries and marine matters, etc.). One areas specifically mentioned, however, is as follows: "*Relevant EU Programmes such as SPPR, INTERREG, Leader II and their successors*".

THE BRITISH-IRISH AGREEMENT

52. The British-Irish Agreement (BIA) is the agreement in which the British Government agreed to give effect to the Belfast Agreement. The text of the BIA is itself an Annex to the Belfast Agreement; and the '*Validation and Implementation*' section of Strand Three notes[51] that there will be a new BIA "*embodying understandings on constitutional issues*" and affirming the Governments' commitment to, and implementing, the Belfast Agreement.

53. In its Preamble, the British Government welcomed "*the strong commitment to*" the Belfast Agreement by each government and the other participants (the political parties). It noted that the Belfast Agreement was an opportunity for a new beginning "*in relationships within Northern Ireland, within the island of Ireland and between the peoples of these islands*". It then contained the following important recital:

"*The British and Irish Governments:*

…

[51] At paragraph 1 of that section.

> *Wishing to develop still further the unique relationships between their peoples and the close co-operation between their countries as friendly neighbours and **as partners in the European Union**; …*
>
> *… Have agreed as follows: …*" [bold and underlined emphasis added]

54. This intention to develop co-operation with the Republic of Ireland as partners in the EU is one of the "*understandings on constitutional issues*" which the BIA was to embody (as *per* paragraph 1 of the '*Validation and Implementation*' section of Strand Three of the Belfast Agreement). In turn, it is one of the values which the constitutional provisions in the NIA are intended to embody (*per* Lord Bingham in *Robinson*). Remarkably, Maguire J, in his judgment below, fails to advert to this important recital in the BIA, notwithstanding that it was opened to him. Indeed, he deals with the BIA peremptorily (in paragraph [41] of his judgment) simply by noting that, "*It does not require specific discussion for the purpose of this judgment*".

55. Article 1 of the BIA deals with the principles of consent and self-determination. Article 2 is the operative provision in terms of giving effect to the institutions to be established pursuant to the Belfast Agreement. In Article 2 the two Governments affirm their solemn commitment to support and implement the Belfast Agreement; and agree that:

> "*… there shall be established in accordance with the provisions of the Multi-Party Agreement immediately on the entry into force of this Agreement, the following institutions:*
>
> *(i) a North/South Ministerial Council;*
> *(ii) the implementation bodies referred to in paragraph 9(ii) of the section entitled "Strand Two" of the Multi-Party Agreement;*
> *(iii) a British-Irish Council; …"* [underlined emphasis added][52]

56. Accordingly, the British Government committed itself (as a matter of international law) to establish the agreed institutions described in the Belfast Agreement, "*in accordance with the provisions of*" the Belfast Agreement, and set out its clear understanding that this was in the context of the UK and Ireland developing their relationship "*as partners in the European Union*".

THE NORTHERN IRELAND ACT 1998

57. In the Belfast Agreement the UK Government committed to introducing and supporting "*such legislation as may be necessary to give effect to all aspects of this agreement*"[53]. In the UK, this was effected principally, although not exclusively, in the provisions of the Northern Ireland Act 1998.

58. Unsurprisingly, given the importance of continued EU membership in the Belfast Agreement and the BIA, when the NIA was enacted, EU law was given a central position within the constitutional arrangements for Northern Ireland; and the continuing ongoing application of EU law within Northern Ireland was provided for.

[52] Article 4(1)(c) provides that it shall be a requirement for entry into force of the BIA that such legislation shall have been enacted as is required to establish the institutions referred to in Article 2.
[53] See paragraph 3 of the 'Validation and Implementation' section of Strand Three.

59. Indeed, the operation of EU law became one of the pillars of the constitution of Northern Ireland as expressed in that Act. In particular, EU law is used:

(1) To constrain and define the competence of the Northern Ireland Assembly (in section 6 of the Act); and

(2) To constrain the use of executive power, and the making of subordinate legislation, by Northern Ireland Ministers and Departments (in section 24 of the Act).

60. The NIA also contains a number of additional provisions which clearly show that the intention of the Act is that authorities in Northern Ireland should play their part in the observance and implementation of EU law obligations in the context of continued membership of the EU.

61. In addition, the NIA establishes – in accordance with the provisions of the Belfast Agreement (and to be read in light of those provisions) – the institutions referred to in Article 2 of the BIA, which have as central purposes cooperation between the authorities in the islands in relation to EU issues; and, more particularly, the implementation of EU programmes on a cross-border basis throughout the island of Ireland, North and South.

62. More detailed consideration of the role of EU law within the Northern Ireland Act is set out in the following section.

THE PLACE OF EU LAW IN THE NORTHERN IRELAND ACT 1998

63. EU law is provided with its own statutory definition in the NIA. Section 98(1) provides that:

> "*"EU law" means —*
>
> *(a) all rights, powers, liabilities, obligations and restrictions created or arising by or under the EU Treaties; and*
>
> *(b) all remedies and procedures provided for by or under those Treaties*"

64. It is of interest – and significance – that Parliament did not simply replicate the definition of EU law which is found in section 2(1) of the ECA. The NIA is a separate vehicle by which EU law enters into the law of the United Kingdom, and thus it needs to be analysed separately:

(a) The ECA refers to EU law encompassing "*All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties…*". In contrast, the NIA does not include the phrase "*from time to time created or arising*", upon which the Government heavily relies[54]. This difference may not ultimately be significant for the purposes of this case because of the meaning which the applicants submit is to be

[54] In this respect, the NIA definition also differs from those contained in section 126(9) of the Scotland Act 1998 and section 158(1) of the Government of Wales Act 2006.

attributed to the phrase "*from time to time created or arising*" in the ECA (discussed further below[55]). However, it *is* significant that Parliament chose not to include those words in the definition of EU law for the purposes of the NIA in contrast to the formulation used in the ECA and other devolution statutes. If, contrary to the applicants' subsequent submissions, the Government is correct in its assertion that the phrase "*from time to time created or arising*" is of critical importance in establishing the supposedly 'ambulatory' nature of the operation of EU law under the ECA, then, on its face at least, the operation of EU law in the Northern Ireland constitution is not 'ambulatory' in the way in which the Government contends is the case under the ECA.

(b) The ECA distinguishes between directly effective EU law (section 2(1)) and non-directly effective EU law (section 2(2)), requiring the latter to be further recognized by statutory rules and orders, whereas the NIA appears to incorporate both directly effective as well as not directly effective provisions of EU law for certain purposes without further ado. The effect, therefore, is to make non-directly effective EU law immediately effective insofar as the limits on the Northern Ireland Assembly (and Executive) are concerned.

(c) The NIA definition refers to "*EU Treaties*" but does not further identify what these are. It is assumed that the relevant Treaties are those specified in section 1 of the ECA, as amended from time to time.

65. As discussed below, what is of considerable importance is that EU law has been explicitly recognized in the NIA as having constitutional significance in the Northern Ireland context, in setting the limits to the competence of the Northern Ireland legislative and executive bodies. In doing so, it brings together two of the most significant dimensions of constitutional pluralism in the United Kingdom: the EU, and devolution, illustrating the complex interrelationship between the multi-level structures of government.

66. The pillars of the Northern Ireland constitution which define and constrain the powers of the devolved administration include EU law, in addition to other fundamental elements defining and constraining the exercise of devolved executive and legislative powers such as rights under the ECHR[56], the constitutional prohibition on political and religious discrimination[57] and the distinction between transferred and excepted matters[58]. The operation of EU law in this way is apparent from the following:

(a) Section 6(1) and 6(2)(d) of the NIA provides that a provision is outside the competence of the Northern Ireland Assembly to legislate by Act and "*is not law*" if "*it is incompatible with EU law*". The legislative competence of the Assembly is thus defined by reference to the operation of EU law.

(b) The NIA contains mechanisms for scrutiny by the Supreme Court of the competence of Bills in the Assembly and it is expressly recognised that a reference for a preliminary ruling by the Court of Justice of the European Union (CJEU) under Article 267 TFEU may be made in

[55] See paragraph 103 below.
[56] See sections 6(2)(c) and 24(1)(a).
[57] See sections 6(2)(e) and 24(1)(c) and (d).
[58] See sections 6(2)(b) and 23(2).

connection with such a devolution reference (see sections 11 and 12, particularly at section 12(1)(b) and 12(3)(a)).

(c) Section 7(1)(a) provides that the ECA shall not be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Northern Ireland Minister. It is an entrenched enactment as a matter of the Northern Ireland constitution.

(d) By virtue of section 24(1)(b), "*A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act… is incompatible with EU law.*" The executive and law-making powers of Ministers and Departments are therefore limited by reference to EU law also.

(e) Section 83 of the NIA also gives rise to an interpretative obligation that Acts of the Assembly and subordinate legislation shall be read in a way so as to avoid a conflict with EU law rendering the provision outside legislative competence or invalid. This interpretive obligation is consistent with that which is imposed by EU law, whereby national legislation is to be read and interpreted in the light of norms of EU law.

67. In short, none of the devolved institutions are permitted to act in contravention of EU law. This is a specific protection built into Northern Ireland's constitutional arrangements (in part, as a core element of the delineation of competences of the Assembly and Ministers); and one which confers important rights on Northern Ireland citizens who may rely upon these provisions in challenging unlawful actions or legislation on the part of the Northern Ireland administration. In any such litigation, the meaning and effect of the EU Treaties is a matter of EU law in respect of which the Courts of Northern Ireland may, and under certain circumstances must, refer questions to the CJEU for authoritative interpretation.

68. In addition to conferring rights enforceable in public law on individuals against the Northern Ireland Assembly, Ministers and Departments where they have acted in breach of EU law, the NIA also confers a wide power upon the Secretary of State for Northern Ireland (SSNI)[59], by order, to make such provision as he considers necessary or expedient in consequence of any provision of an Act of the Assembly which is not, or may not be, within the legislative competence of the Assembly by reason of being in breach of EU law and/or any purported exercise by a Minister or Northern Ireland department of his or its functions which is not, or may not be, a valid exercise of those functions by reason of being in breach of EU law.

69. The NIA also contains a number of additional provisions which clearly show that the intention of the Act is that authorities in Northern Ireland should play their part in the observance and implementation of EU law obligations in the context of continued membership of the EU. The provisions dealing with the dichotomy between excepted and transferred matters is one such instance. By virtue of section 4(1), an excepted matter is any matter falling within a description specified in Schedule 2 to the NIA; and a transferred matter is any matter which is not an excepted or reserved matter.

70. Paragraph 3 of Schedule 2 to the NIA provides that the following is an excepted matter:

[59] See section 80 of the NIA.

"*International relations, including relations with… the European Union (and their institutions)… but not —*

…

(c) observing and implementing… obligations under EU law." [underlined emphasis added]

71. Observing and implementing obligations under EU law is not an excepted matter (nor a reserved matter) and, so, is a transferred matter. Crown prerogative powers in relation to Northern Ireland as respects the observance and implementation of obligations under EU law is, accordingly, exercisable on Her Majesty's behalf by Northern Ireland Ministers and Departments: see section 23(2).

72. Section 27 of the NIA provides UK Ministers with powers to require Northern Ireland Ministers or Departments to bear Northern Ireland's share of EU requirements imposed on the UK as a whole where the obligation is to achieve a result by reference to a quantity.

THE NORTH/SOUTH INSTITUTIONS AND IMPLEMENTATION BODIES

73. In addition, the NIA establishes – in accordance with the provisions of the Belfast Agreement (and to be read in light of those provisions) – the institutions referred to in Article 2 of the BIA. These are provided for in Part V of the NIA. In particular:

(a) Provision is made in respect of the North-South Ministerial Council (NMSC) and British-Irish Council (BIC) in section 52A. This includes provision to *ensure* that Northern Ireland Ministers attend and participate at all relevant meetings[60].

(b) A Northern Ireland Minister participating in the NMSC or BIC may make an agreement or arrangement at the Council and, if they do so, the Northern Ireland Assembly is empowered to give effect to the agreement or arrangement, including by transferring functions exercisable by Northern Ireland Ministers or Departments to any other body (including a body in the Republic of Ireland) and/or transferring to a Northern Ireland Minister or Department any function which would be exercisable by any authority outside Northern Ireland (including the Republic of Ireland): see section 53(1)-(2).

(c) Such agreements or arrangements may well relate to "*implementation bodies*". Where that is so, the agreement or arrangement must be approved by the Assembly (section 52(4)). The phrase "*implementation body*" means "*a body for implementing, on the basis mentioned in paragraph 11 of Strand Two of the Belfast Agreement, policies agreed in the North-South Ministerial Council*": see section 53(5) and 55(3).

74. Further provision about implementation bodies is made in section 55 of the NIA, which empowers the Secretary of State to make an order about any body which he considers is an implementation body. Such an order may, in particular, confer legal capacity on the implementation body and

[60] See, for instance, sections 52A(5) and 52B(1)

confer functions on it which the SSNI considers necessary or expedient for the purpose for which it is established.

75. The SSNI made such an order in the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999[61] ('the Implementation Bodies Order'). It gave effect to, and scheduled, a further British-Irish Agreement establishing a number of implementation bodies with remit to implement agreed policies in a variety of fields. One such body is the Special EU Programmes Body (SEUPB)[62]. All of the implementation bodies are to "*operate in accordance with the provisions of the Multi-Party Agreement*", i.e. the Belfast Agreement[63]. The SEUPB's functions[64] include the administration of current EU initiatives (such as INTERREG and PEACE) and a variety of functions in relation to *future* EU structural funding. These functions include advising the NMSC and the two Departments of Finance (in Northern Ireland and the Republic of Ireland) on negotiation with the EU Commissions; preparing for both administrations detailed programme proposals for successor EU initiatives; grant-making and managerial functions for North-South elements of EU initiatives within the framework of programme parameters "*agreed between the two administrations and with the EU Commission*".

76. In short, all of the implementation bodies were to give effect to NMSC agreements or arrangements as to the implementation of EU policies and programmes in their particular field; and the SPEUB was given specific responsibility, on a continuing basis, for administering special EU programmes on a cross-border basis, North and South. This is obviously impossible in the event that Northern Ireland is no longer a member of the EU and so will not benefit from special EU programmes.

77. There have been a number of amendments to the Implementation Bodies Order which relate to the SPEUB's functions, in orders of 1999[65] and 2007[66], approved by resolution of each House of Parliament. These orders reflect further agreements between the Governments of the UK and Ireland respectively[67] which make clear that it was the joint intention of the two Governments that the SPEUB would have functions in relation to "*any successor*" to the EU initiatives mentioned in the original agreement. The effect of these amendments is that the SEUPB is plainly intended to have a continuing and ongoing, indefinite role in engaging with the EU Commission and advising each of the two Governments *in the context of their continued membership of the EU* as to how EU funds made available to Northern Ireland (as a region of the EU) should be administered and spent.

[61] SI 1999/859.
[62] See article 14 of the Implementation Bodies Order and Article 1(d) of the further British-Irish Agreement.
[63] See Article 3(1) of the further British-Irish Agreement and the relevant provisions of the Implementation Bodies Order providing that Article 3(1) applies to each body established by the Order.
[64] Set out in Part 4 of Annex 1 to the further British-Irish Agreement, contained within Schedule 1 to the Implementation Bodies Order.
[65] See the North/South Co-operation (Implementation Bodies) (Amendment) (Northern Ireland) Order 1999 (SI 1999/2062).
[66] See the North/South Co-operation (Implementation Bodies) (Amendment) (Northern Ireland) Order 2007 (SI 2007/1719).
[67] In each instance effected by an exchange of letters scheduled to the relevant order.

ISSUE 1: THE NEED FOR AN ACT OF PARLIAMENT

78. Section 18 of the European Union Act 2011 ('the 2011 Act') provides that:

> "*Directly applicable or directly effective 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) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.*" [underlined emphasis added]

79. The ECA is, of course, the most obvious Act requiring EU law to be recognised and available in law in the United Kingdom; but it is not the only such Act. Another important Act which requires EU law to be recognised and available in law is the Northern Ireland Act 1998. For reasons discussed above, the NIA also plainly envisages the continuing application of EU law in Northern Ireland, and ongoing membership of the EU for Northern Ireland, as part of the constitutional arrangements established by the Belfast Agreement and the BIA, which are implemented in the NIA.

80. The applicants submit that the NIA plainly displaces the prerogative power to provide notification under Article 50(2) TEU for the following reasons:

(a) The effect of the notification would be to deprive Northern Ireland citizens of rights granted (or given effect to) by the NIA and it is a long-established principle that the Crown cannot by its prerogative remove rights granted by Parliament.

(b) The effect of the notification would be to alter the distribution of powers between the Northern Ireland Assembly and the UK Parliament by eliminating the constitutive role that EU law currently plays in the definition of competences under the NIA.

(c) The effect of the notification would, additionally, frustrate the purpose and intention of the NIA (or be contrary to the scheme of the Act), which includes:

(i) the continued application of EU law within Northern Ireland, particularly as one of the pillars of Northern Ireland's constitution; and

(ii) continued membership of the EU in the context of North-South and East-West relations, including in particular cross-border cooperation between Northern Ireland and the Republic of Ireland.

THE RELATIONSHIP BETWEEN STATUTE AND THE PREROGATIVE

81. There are a number of well-known authorities which deal with the relationship between statute and the prerogative. These were opened in some detail to Maguire J at the first instance hearing out of which this reference arises.

82. The barest summary is that, since the time of the Glorious Revolution to the present, statute trumps the prerogative. Discussion of the relevant principles usually begins with the *Case of*

Proclamations (1610) which held that, "*The King by his proclamation… cannot change any part of the common law, or statute law, or the customs of the realm*". This statement of principle – which was opened to Maguire J by the applicants orally and in writing[68] – has been developed in later authority but remains good law, upon which the applicants rely. There are a number of principles which the applicants contend are established by the authorities, as appear below.

83. First, it is important to understand that the prerogative is a mere residue of what remains of Crown powers after statutory intervention. In the *Bancoult* case, Lord Hoffman made this clear. Over the centuries, the scope of the royal prerogative has been steadily eroded and it cannot today be enlarged. He quoted with approval a dictum from *Burmah Oil v Lord Advocate* in 1965 to the effect that, even then, "*the prerogative is really a relic of a past age…".*

84. When it is understood that the prerogative is merely the residue of what is left after Parliament has acted, it becomes clear that the Government's reliance – accepted by Maguire J at paragraph [83] of his judgment – on authorities such as *Morgan-Grenfell*[69] about necessary implication is misplaced. That was a case about fundamental human rights, where the implied provision in the statute had to be entirely necessary in order to displace the fundamental human right at issue. The royal prerogative is, of course, not a fundamental human right. It is not (as the respondents would propose) something which withstands all but the clearest statutory attack. On the contrary, it is the mere residue of what is left, after Parliament has acted.

85. Second, it is clear that the royal prerogative cannot be used to take away the rights of citizens conferred by statute (or common law). This appears, *inter alia*, from the judgment of Lawton LJ in *Laker Airways*[70]: "*Now rights given by statute can only be taken away by statute"*. And later:

> *"The Attorney-General's answer to that question was that the Secretary of State was empowered to act in this way because there was nothing in the Act of 1971 which curbed the prerogative rights of the Crown in the sphere of international relations. Far from curbing these powers, by section 19(2)(*b*) Parliament recognised that the Crown had them. This is so; but the Secretary of State cannot use the Crown's powers in this sphere in such a way as to take away the rights of citizens: see* Walker v Baird *[1892] A.C. 491. By withdrawing designation this is what in reality, if not in form, he is doing."*

86. Third, the principle that the prerogative powers cannot be used to change or override statute applies where the exercise of prerogative power would frustrate the will of Parliament in the sense of contravening the statutory scheme. This is made clear, in particular, in the judgment of Lord Browne-Wilkinson in the *Fire Brigades Union* case, where he said it would be "*most surprising if… prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament as expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme*".

87. The *Fire Brigades Union* case is particularly instructive, since in that case the relevant statutory scheme had not been brought into force. The question was whether the exercise of prerogative

[68] Contrary to the assumption contained in paragraph [104](2) of the decision of the EDC in *Miller*.
[69] *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2002] UKHL 21; [2003] 1 AC 563.
[70] [1977] QB 643, at 725 and 728.

powers would frustrate the will of Parliament, or be inconsistent with purpose and intention of legislation, simply because there was a power to bring into force (and thus a duty to consider bringing into force) a variety of statutory provisions which did not, at that time, have the force of law.

88. The 'frustration principle' may be breached in a variety of situations[71]. This may be where the exercise of the prerogative is inconsistent with the statutory scheme either expressly (an obvious case) or by implication; or inconsistent with the purpose and intention of the statutory provision construed as a whole. Where the exercise of the prerogative purports to remove rights granted by statute, this will be a particularly obvious example. However, it is far from the only instance where the operation of statute will have excluded the exercise of prerogative powers. In the court below, the applicants submitted that a simple test may be whether the exercise of prerogative power cuts against the grain of the statute. If so, the use of the prerogative in that way will be unlawful.

89. Different descriptions of the legal principle are given in the authorities, depending on the facts of each case. But the question, ultimately, is a very simple one: is the use of the prerogative *inconsistent with the Act or the statutory scheme*. That is what was said by Lord Browne-Wilkinson in *Fire Brigades Union* case[72]; and what is said in *Alvi*[73]: "*Any exercise of a prerogative power in a manner, or for a purpose, which is inconsistent with the statute will be an abuse of power*". The principle that the exercise of the Royal Prerogative must not be allowed to frustrate an Act of Parliament is all the more powerful where such an Act is constitutional in nature.

LOSS OF RIGHTS WITHOUT PARLIAMENTARY SANCTION

90. The *Agnew* applicants contended below – and contend now – that the giving of an Article 50(2) notification will have the effect of removing rights from them, and citizens in Northern Ireland generally, which are granted by the NIA (in addition to the ECA). This is because, as analysed above, the inevitable effect of the giving of such notice (unless the notice is revoked within two years with the consent of the other Member States) is that the Treaties shall cease to apply; whereas as matters stand at present, the NIA permits Northern Ireland citizens to rely on EU law against the institutions of government in Northern Ireland.

91. There is a wide range of rights afforded to Northern Ireland citizens under EU law (including under the Charter of Fundamental Rights) upon which they can rely against the organs of government in Northern Ireland. The operation of sections 6 and 24 of the NIA are such that these rights can be relied upon directly against the Northern Ireland administration in Northern Ireland courts. In the terminology adopted by the EDC in *Miller* these are principally category (i) rights; but include category (iii) rights (as evidenced by the reference in the NIA to the use of the Article 267 TFEU reference to the CJEU) and also category (ii) rights[74].

[71] See generally J King and N Barber, 'In Defence of Miller', UK Const L Blog (22 November 2016).
[72] *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, at 552-554.
[73] *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208, at paragraph [28], *per* Lord Hope.
[74] Insofar as these rights prohibit Northern Ireland authorities from placing impediments in the way of the exercise of those rights.

92. The respondents' riposte[75] is that the rights so conferred are not true *statutory* rights, but are rights in international law, with relevant domestic legislation acting merely as a 'conduit' for such international rights as happen to apply from time to time (as a matter of international law, which is properly the product of the exercise of prerogative powers).

93. There are a number of reasons why this analysis cannot withstand scrutiny. It is a triumph of legal form over substance. Northern Ireland citizens could not rely on EU law rights unless and until they have been given effect by a national Act of Parliament such as the NIA (or ECA). These rights are given effect *by statute* and are properly to be viewed as rights granted by statute. Using the words of Lawton LJ in *Laker Airways,* they are "*given by statute*"; and their removal by means of the exercise of prerogative powers would be to take them away *"in reality, if not in form*".

94. It is also wrong to suggest that there is no distinction in principle between on the one hand the alteration or removal of some rights and the removal of all EU rights on the other. The purpose of the ECA – and the relevant provisions of the NIA discussed above – was to provide rights in the context of continued EU membership.

95. The Government's case is also, to sum it up, simply to deny that there has been the profound constitutional shift that has been described earlier, and that the royal prerogative operates in the context of EU law to the full extent that it would have operated prior to 1972. There are four elements in the Government's attempt to cast doubt on the submission that these changes have had a profoundly restrictive effect on the exercise of the royal prerogative in these contexts.

96. The first strand of the Government's argument is simply to assert that the constitutional pluralism which was initiated by Parliament and is discussed above has not occurred, and that we continue to live in a unitary state in which traditional dualism persists unchanged. This approach is particularly evident in the Government's assertion that EU law is mere international law, no different from other Treaty obligations, from the perspective of UK law. This claim lacks credibility and contradicts a consistent theme of UK jurisprudence, best expressed in the *Factortame* judgment, that the United Kingdom must abide by the EU rules of the game for as long as it remains a member, and the EU approach is clearly that EU law is not simply international law. Thus, for example, it is wrong to equate the EU doctrine of 'direct effect' with the self-executing nature of certain international treaties, given EU law's claim of supremacy and the institutional architecture that is established, especially the reference procedure to the CJEU, which uniquely accompanies EU law.

97. The High Court decision in Northern Ireland and the EDC decision in London were diametrically opposed on this issue. Whereas the Northern Irish court treated EU law simply as a fact referenced in an ordinary statute (the NIA), the English Divisional Court (correctly) treated EU law as having become an integral part of the law of the land by virtue of the constitutional act (the ECA). This basic difference in vision of the two courts had tremendous consequences. For the Northern Irish court, this meant the royal prerogative could only be pre-empted expressly or by absolutely necessary interpretation of what it viewed as an ordinary statute, which simply happened to reference the fact of EU membership. For the Divisional Court, this meant that the use of the royal

[75] As understood from its printed case in its appeal in the Miller litigation.

prerogative must be fundamentally compatible with the workings of a constitutional statute of the UK which made EU law part of UK law; and that this meant that it was severely constrained in what could be done under it. On this issue, we submit that the Divisional Court was correct.

98. The Government suggests, secondly, that Parliament *intended* that the royal prerogative should operate in the context of EU law to the full extent that it would have operated prior to 1972, and that it is therefore entirely compatible with the basic rule of recognition stated above. But had Parliament been minded to make the 2016 referendum binding, even binding politically, there was no shortage of examples it could have drawn on to make this clear. One prominent example is in the Northern Ireland Act 1998, referred to at paragraph 15(c) above, in which the referendum provided for in order to determine the wishes of the people of Northern Ireland as regards remaining in the United Kingdom or joining the Republic of Ireland, does generate legal effects. Section 1(2) provides for a specific obligation on the Secretary of State to bring forward legislation, in the event of a result in which a majority voted to exit the UK. Of perhaps even greater significance for the purpose of this case, however, even where the referendum has binding effects, the issue still goes to Parliament for action.

99. Indeed, the relatively few referenda held in the United Kingdom demonstrate a remarkably clear pattern of practice: either a referendum has no binding quality to it and the results are advisory, or where it does have binding effects the Executive is given responsibility to bring proposals to Parliament. As far as we are aware, Parliament has never delegated to the Government direct authority to implement even a legally binding referendum without further Parliamentary involvement. To assert that a *non-binding* referendum can be given effect without the need for further Parliamentary approval is simply unprecedented.

100. In any event, it is unclear what precise weight is accorded the referendum in the Government's argument. If the Government is right in its basic argument, and notification to the Council is simply a matter of exercising the royal prerogative, then presumably the Government could have notified the European Council of its intention to withdraw even in the absence of any referendum. The Government is not suggesting that the European Union Referendum Act of 2015 is the source of its prerogative power or otherwise provides legal authorization to the Government to notify the European Council. Accordingly, if the Government is right, and notifying the European Council (or making the decision to withdraw) is a matter of royal prerogative, any Government since 1972 could have surprised the British public on any given morning over the past several decades with a simple announcement that EU law in the UK was to be no more. It is more than improbable to imagine that Parliament in 1972 would have enacted a constitutional statute, which reworks the UK legal landscape to allow EU law to have direct effect and primacy subject to the interpretation of the CJEU and which takes away the power of implied repeal from future Parliaments, all the while leaving it to the Government alone to expunge EU law from the UK at will.

101. The Government argues, however, that Parliamentary intention to permit the Executive so to act is to be inferred from its omitting to provide for Parliamentary involvement in exiting the EU, in legislation in which it provided for its involvement in amendments to future European Treaties. It is submitted that this is plainly unconvincing. The reason why Parliament sought involvement when Treaty amendments were in issue, and not in the case of exiting the Union, was because what was driving political concerns was the fear that the EU would expand its powers through Treaty amendments. This was a concern because Parliament feared that the Government would

specifically use the ECA as authority for approving such expansionary moves. Parliament's intention, therefore, was to ensure that it became involved wherever there was a danger of the *expansion* of Union competences and powers. It is submitted that Parliament was simply not thinking about withdrawal from the Union at that time. It was not, therefore, a case that Parliament did not want to become involved were withdrawal to take place: it was that, politically speaking, the expansion of the EU was what was on the political radar at that time, rather than exiting the Union.

102. The Government argues, thirdly, that the Executive may create and destroy EU rights in the United Kingdom, though the exercise of the Royal Prerogative in the negotiation of Treaties in the European Council and in the creation of secondary EU legislation in the Council of Ministers. The applicants accept that particular EU rights may indeed change "*from time to time*" according to the usual procedures and workings of EU law. The applicants do not accept, however, that the Executive may also initiate action that withdraws *all* EU rights without further Parliamentary authority. It is, we submit, a category error to assert, as the Government does, that the ability to create, limit or destroy *particular* rights without further Parliamentary procedures being required necessarily entails that the Executive has the power under the royal prerogative to engage in the wholesale extinction of *all* EU rights. Membership in the EU provides 'the right to have rights' within the EU (to borrow the phrase originally coined by Hannah Arendt), whether those rights be the rights of individuals or corporations, or of Member States themselves. The whole is greater than the sum of its parts. The power to extinguish any one part does not entail the power to extinguish the whole.

103. Furthermore, rather than the phrase "*from time to time arising under the Treaties*" having the meaning which the Government attributes to it, in the applicants' submission it has precisely the opposite meaning. The phrase does not suggest that membership in the Treaties themselves is also contingent on the exercise of continuing Executive discretion alone, or "*ambulatory*," to use the term adopted by the Government. Rather, the phrase "*from time to time*" indicates that Parliament anticipated that there would be a *continuing* relationship between the UK and the EU. The elimination of UK membership prevents this continuing relationship and is therefore inconsistent with the intention of Parliament, as evidenced by the phrase "*from time to time*".

104. The Government also argues, fourthly, that the effect of triggering Article 50 is not to change the nature, scope or effectiveness of EU rights in the United Kingdom, until the amendment or repeal of the ECA. It is submitted that this is incorrect, in two significant respects. First, it is clear that if the UK triggers Article 50 and is unsuccessful in securing agreement from the other member states to the finalization of an exit treaty or a reprieve within two years, all rights will be extinguished, with Parliament having no control over the issue. This has the effect that the remedies currently available for the enforcement of EU rights in, for example, the CJEU or by resorting to the European Commission would also be extinguished. Second, the argument that triggering Article 50 has no effect, assumes that "*a right to do x*" is the same as "*a right to do x, for two years only, unless all Member States agree to extend that right*". The triggering of Article 50 is equivalent to enacting legislation providing for EU rights to have a sunset clause attached to each of them. The applicants submit that the nature of the right in the first case is valued differently from that in the second case.

ALTERING THE CONSTITUTIONAL SETTLEMENT: POWERS OF THE DEVOLVED ADMINISTRATION

105. However, in addition to the removal of rights enjoyed by Northern Ireland citizens, the giving of an Article 50(2) notice – with the inevitable effect of the EU Treaties ceasing to apply – is inconsistent with the statutory purpose of the NIA in two further ways. First, it will remove EU law as a pillar of the Northern Ireland constitution and, in turn, alter the competence of the Northern Ireland Assembly and the executive power of Northern Ireland Ministers and Departments (each of which is defined, in part, by virtue of the operation of EU law[76]).

106. As we have seen above, it is of considerable importance that EU law has been explicitly recognized in the NIA as having constitutional significance in the Northern Ireland context, in setting the limits to the competence of the Northern Ireland legislative and executive bodies. In doing so, it brings together two of the most significant dimensions of constitutional pluralism in the United Kingdom: the EU, and devolution, illustrating the complex interrelationship between the multi-level structures of government.

107. This relationship is of particular significance in terms of the effect of triggering Article 50 on the constitutional arrangements established under the NIA. This is because the Northern Ireland Act is centrally concerned with the distribution of competences between the Northern Ireland institutions and those of the central government in London. The competences of the Assembly are demarcated on the basis of the three-way distinction between "*transferred*", "*reserved*", and "*excepted*" matters. In relation to those transferred matters that are within the competence of the Assembly, section 6, in particular, places limits on the Assembly's plenary legislative powers. The constraints include those set by the need to observe EU law.

108. In the case of Northern Ireland, therefore, the availability of EU law is a matter of constitutional competence. It would be incorrect, therefore, to consider that the only way in which the competences of the Assembly are affected is through changing the nature of what is "*transferred*", if the role of EU law is also directly affected. To the extent that EU law is removed from the scheme of the Act, this directly and explicitly affects the competence of the Assembly as expressly delineated in the competence provisions of the NIA. Constraints which previously existed on the exercise of devolved powers are removed. This cannot be done except through Parliamentary action because it involves – in substance – amendment of the constitutional settlement provided for in the Northern Ireland Act.

109. To allow the Executive, through use of the royal prerogative, to use the results of a legally non-binding referendum to un-pick this carefully constructed constitutional pluralism, which was the subject of detailed Parliamentary debate, amendment and approval, would be to condone a constitutional revolution, in which the results of a non-binding referendum combined with Executive power undermined the basic rule of recognition of the United Kingdom constitution.

[76] See paragraphs 63-71 above.

ALTERING THE CONSTITUTIONAL SETTLEMENT: IMPEDING CROSS-BORDER COOPERATION

110. The second way in which the giving of an Article 50(2) notice – with the effect of Northern Ireland leaving the EU – is inconsistent with the NIA is that it will impede and undermine, and indeed in some cases halt, the proper operation of the North-South institutions created by Part V of the NIA.

111. As discussed at paragraphs 72-76 above, a key part of the new constitutional arrangements agreed in the Belfast Agreement and given effect to in the British-Irish Agreement and then the Northern Ireland Act is North/South co-operation through the NMSC and related implementation bodies. The Belfast Agreement makes clear that it will be the function of the NMSC and implementation bodies to, *inter alia*, implement EU programmes and policies on a cross-border and all-island basis. This is only possible in the event that Northern Ireland continues to remain part of an EU member state.

112. The process of withdrawing the UK (including Northern Ireland) from the European Union fundamentally undermines the project of developing closer co-operation and partnership between Northern Ireland (and the UK more generally) and the Republic of Ireland.

113. Brexit is completely and utterly contrary to the purpose and intention behind part V of the NIA. Paragraph B3.9 of the Memorandum of Understanding[77] between the UK Government and the Northern Ireland Administration, in relation to North/South arrangements, correctly describes the position:

> "*As required by the Belfast Agreement, the North/South Ministerial Council brings together those with executive responsibilities in Northern Ireland and the Irish Government to develop consultation, co-operation and action within the island of Ireland on matters of mutual interest within the competence of the administrations. This includes consideration of the European Union dimension of relevant matters, including the implementation of EU policies and programmes. The Special EU Programmes Body has a clear operational remit as set out in the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999. This concordat applies to the Northern Ireland Executive Committee's participation in North/South arrangements. In accordance with paragraph 17 of Strand II of the Belfast Agreement, arrangements are to be made to ensure that the views of the North/South Ministerial Council are taken into account and represented appropriately at relevant EU meetings.*"

114. The Government must understand that this is how the NIA is designed and intended to operate; yet it appears to be completely ignoring these important aspects of the Northern Ireland constitutional settlement in it plan to proceed to give notification under Article 50(2).

[77] Within the 'Concordat on Co-ordination of European Union Policy Issues'.

ALTERING THE CONSTITUTIONAL SETTLEMENT: CEASING EU MEMBERSHIP

115. In their submissions below, the respondents expressly conceded that the Northern Ireland Act 1998 "*assumes*" ongoing membership of the EU on the part of the UK[78]; although it was further contended that it did not *require* ongoing membership.

116. For the reasons given above, the applicants contend that, read and construed fairly and as a whole, the NIA – unless and until properly altered by Parliament itself – *does* require ongoing membership of the European Union on the part of the United Kingdom. It uses EU law as a pillar of the Northern Ireland constitution; and creates North/South institutional architecture which is founded upon the principle of mutual co-operation in areas which include the implementation of EU policies and programmes in each jurisdiction. This applies in relation to many of the areas of cross-border cooperation; but is perhaps most clear in relation to the Special EU Programmes Body which (the Belfast Agreement and BIA make clear) is interlocking and interdependent with all of the other institutions established pursuant to them. It simply does not work in the absence of EU membership on the part of Northern Ireland. To remove the sub-strata of these arrangements through use of the prerogative is to render a dead letter the work of this important implementation body; and that is to infringe the principle that use of the prerogative should not be inconsistent with the law as made by Parliament.

117. Even taking the respondents' case at its height – namely that EU membership is only 'assumed' by the NIA – such a fundamental assumption represents an integral element of the scheme of the Act; and the prerogative may not be used in such a manner as to frustrate the scheme of such an Act without Parliamentary authorisation.

COMMENT ON MAGUIRE J'S TREATMENT OF THESE ISSUES

118. Unfortunately, Maguire J's treatment of these issues (at paragraphs [104] to [108] of his judgment) is superficial. While the judge noted that the applicants had emphasised the unique nature of Northern Ireland's constitutional structures, he did not explain satisfactorily why these should not be considered to displace the prerogative in light of the analysis discussed above. Maguire J instead adopted a narrow approach whereby he asked whether "*the prerogative has become unavailable by reason of any necessary implication arising out of any (sic) the statutory provisions read in the light of their status and background*" (paragraph [103]). In answering that question, the judge observed that the prerogative power in question was the power to engage in international relations and that there was nothing in the NIA which either expressly placed that power in abeyance, or which did so by implication. However, in reaching this conclusion, the judge was heavily influenced by the view that the triggering of Article 50 would not have any immediate implications for rights under EU law, and that Parliament would be able to legislate in the intervening period to address the implications of leaving the EU. This approach ignores the fact that the provision of rights in national law 'mimicking' rights presently recognised in EU law – even assuming that such replication will occur – is qualitatively different from the from enjoyment of such rights as a matter of EU law (as the EDC correctly held in *Miller* at paragraph [64]); and that the enjoyment of such rights as a matter of EU law would inevitably end as a result of the Article

[78] See paragraph 7(b) of the respondents' skeleton below [App/126].

50(2) notification. It is submitted that, on these issues, the reasoning and conclusions of the EDC in *Miller* are to be preferred.

119. Parenthetically, the *Agnew* applicants take strong issue with the comments included in paragraph [104] of the English Divisional Court in the *Miller* judgment which suggest – expressly or impliedly – that the argument before Maguire J on these issues was such as to mislead him as to the correct starting point or to inadequately to highlight the relevant legal principles. Any such suggestion was, we submit, poorly informed and unfair. Maguire J rejected the submissions made to him – as he was entitled to do – on the basis of the reasoning set out in his judgment; but not in circumstances where the position outlined above was inadequately argued before him. A more detailed response to the comments of the EDC in paragraph [104] of the *Miller* judgment is contained in an appendix to this written case, should the Court wish to be further informed about how the case was actually put forward in the High Court.

ISSUE 2: THE NEED FOR A LEGISLATIVE CONSENT MOTION

120. If the applicants are correct in their assertion that an Act of Parliament is required to authorise the giving of an Article 50(2) notification – or, indeed, if the claimant in *Miller* is successful to like effect – a further question arises. It is whether the Government should be obliged to seek a legislative consent motion (LCM) from the Northern Ireland Assembly before proceeding to lay a Bill before Parliament for this purpose. A further question is what the effect may be of a failure to obtain such an LCM either (a) for the executive; or (b) for the Westminster Parliament. This latter question is complex both as a matter of domestic constitutional law and EU law. The Court may wish to focus, at this stage, on the former question.

121. The *Agnew* applicants submit that the Government should be obliged – at the very least – to seek an LCM from the Northern Ireland Assembly ('the Assembly') before proceeding. That it should do so is a requirement of constitutional convention.

122. The Government's principal objection to the applicants' contention in this regard is that any relevant constitutional convention is merely convention and is not binding. However, this is to ignore both the importance and normative nature of conventions in the United Kingdom constitution. At the very least, the Court has a role in declaring that a convention exists and applies in the circumstances of a particular case. The important Canadian case of *Re A Resolution to Amend the Constitution*[79] is an example of a court declaring the existence and parameters of a constitutional convention of great significance and giving a ruling on whether it was engaged in the particular case (even though the consequences of non-compliance were political, not legal).

123. However, the applicants also submit that the obligation on the United Kingdom in Article 50(1) TEU to comply with "*its own constitutional requirements*" embraces constitutional requirements which are wider than simply hard-edged constitutional *law*. The Canadian case referred to in the preceding paragraph makes plain that a constitutional convention may be "*fundamental requirement of the constitution*" and yet be "*nowhere to be found in the law of the constitution*"; and that "*… while they are not laws, some conventions may be more important than some laws*"[80].

[79] [1981] 1 SCR 753.
[80] See generally the discussion at 876-883.

In the context of the United Kingdom, Leyland comments that, "*… a distinguishing feature of the UK constitution is that so much of its constitutional practice is governed by conventions*". Noting that "*Conventions are a particularly important source of the UK constitution…*", he describes them as the "*source of the non-legal rules of the constitution"*[81].

124. It is submitted that the reference in Article 50 to the Member State's "*own constitutional requirements*" means more than that the EU has no view whatsoever on the internal legality of a Member State's decision to leave. The UK's obligation to follow its own constitutional requirements is itself a matter of EU law. (It is noteworthy that a proposed amendment to the draft Article which became Article 50[82] would have omitted the words "*in accordance with its own constitutional requirements*", partly on the grounds that: "*It cannot be for the Union to assess whether the government of the Member State which wishes to abandon the Union respects its own constitution*" [translation]. This amendment was *not* accepted.) That is the applicants' submission, but, in the absence of a reference of this issue to the CJEU, it is far from clear what view that Court might take on the matter. At the very least, however, it is a matter of EU law whether the reference to constitutional "*requirements*" goes beyond constitutional *law* and embraces other constitutional norms, which might be set out – particularly in an unwritten constitution such as that of the UK – in constitutional convention. Some of the other language texts of the TEU – using formulations such as "*normas constitucionales*" (Spanish), "*règles constitutionnelles*" (French), "*norme costituzionali*" (Italian) and "*normas constitucionais*" (Portuguese) – suggest that constitutional rules, norms or standards which are not hard law must be observed.

125. It is obvious that this issue has the potential to give rise to extremely important consequences including, for instance, whether the European Council would accept a purported (but constitutionally deficient) withdrawal decision as triggering the withdrawal process. In the first instance, it is submitted that this Court has a proper role in construing whether the constitutional convention which the applicants rely upon is engaged in this case. In the event that it was not complied with, the UK might be seen as violating Article 50 TEU and the duty of sincere cooperation under Article 4(3) TEU by attempting to give notice to the European Council (separate and apart from whether the European Council would later have the legal power or duty to accept or reject such a notification).

126. The 'Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee' ('the MOU') sets out "*the principles that will underlie relations*" between HMG at Westminster and the Northern Ireland administration[83]. There is an express commitment in the MOU – in Part 1, paragraph 14 – on the part of the UK Government in the following terms:

> "*The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide whether to make use 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 administrations will be responsible for seeking such agreement as may*

[81] See Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Hart, 2007) at 20 and 25.
[82] Included in the Authorities Bundle.
[83] See the MOU, Part I, paragraph 1 [App/273-332].

be required for this purpose on an approach from the UK Government."
[underlined and bold emphasis added]

127. There are four actors whose roles are described in this provision; and it is important to bear in mind the separate constitutional role of each:

(a) First, there is the UK Parliament. It retains authority to legislate on any issue and it is for it – Parliament – to decide whether it will legislate with regard to a devolved matter. The convention is that it will not normally do so without agreement of the relevant devolved legislature.

(b) Second, there is the UK Government, distinct from the UK Parliament. It – the executive – has committed itself to proceed in accordance with the view that Parliament will not normally legislate with regard to devolved matters without the agreement of the devolved legislature. It is this commitment which is centrally relevant to the applicants' case on Issue 2.

(c) Third, there is the devolved legislature, which will have the role of giving consent (or not) where that consent is sought by a devolved administration (*i.e.* a devolved executive).

(d) Fourth, there is the devolved executive, which is responsible for seeking the consent of the devolved legislature where this is required. That will be prompted by an approach from the UK Government.

128. The important point is that[84] it is not for the UK Government to pre-judge whether or not Parliament will choose to legislate with regard to a devolved matter without consent. That is a decision only for Parliament itself. As far as the UK Government is concerned, it "*will proceed*" on the basis that Parliament will *not* normally legislate without such consent. The outworking of this commitment is that the UK Government must – where Westminster legislation with regard to devolved matters is proposed – seek the consent of the devolved legislature. The UK Government has committed to proceed on the basis that Parliament will generally not legislate without such consent and so it (the UK Government) must seek to procure it. If such consent is given, Parliament will be able to observe the convention. If such consent is not given, Parliament will be able to decide, on an informed basis, whether to (exceptionally) depart from the convention.

129. The consent of the Northern Ireland Assembly in respect of an Act of Parliament authorising the giving of an Article 50(2) notification is at the very least, therefore, required to be *sought* if such authorisation constitutes legislation "*with regard to*" devolved matters.

130. It is important to have in mind a clear understanding of what is, and what is not, a devolved (transferred) matter and a non-devolved (excepted) matter for this purpose. As has already been noted above at paragraph 69, pursuant to paragraph 3 of Schedule 2 to the NIA, there are certain elements of international relations which are expressly *not* excepted matters and, so, are transferred (devolved matters). These include:

[84] As paragraph 14 of the MOU makes clear.

(a) co-operation between the Police Service of Northern Ireland and the Garda Síochána with respect to certain matters, including joint investigations;

(b) the exercise of legislative powers to give effect to agreements or arrangements entered into in the context of the NSMC or in relation to any of the implementation bodies under Strand Two of the Belfast Agreement;

(c) observing and implementing international obligations, including those under the British-Irish Agreement; and

(d) observing and implementing obligations under EU law.

131. The observation and implementation of EU law – in all of the areas within devolved responsibility which it touches – is therefore a devolved matter; *including* where these functions involve international relations (albeit not "*relations with… the EU*"). The observation and implementation of all aspects of the British-Irish Agreement is also a transferred matter.

132. These provisions offer a striking example of the complex nature of government in Northern Ireland: international relations, including relations with the EU, may generally be an excepted matter, but an exception is made on a North-South basis where EU law will often be central to "*international*" co-operation within the framework of the NMSC. Moreover, observing and implementing international obligations under both the British-Irish Agreement itself and under EU law are *not* excepted matters. They are of very real importance and consequence to the Northern Ireland devolved administration.

133. The phrase "*with regard to devolved matters*" in the MOU should plainly not be given a narrow or technical meaning. This textual formulation is designed to embrace a range of relationships between the legislation proposed and devolved matters concerned. Constitutional comity requires that the phrase "*with regard to devolved matters*" be given a broad and purposive construction.

134. In addition, it is necessary to bear in mind that there is not a watertight distinction between devolved and non-devolved matters generally. These categories are not hermetically sealed. Certainly, the distinction between *membership* of the EU and the *operation and implementation of EU law*, which influences virtually every area of devolved powers, is not clear-cut. The very purpose of membership is to avail of, and submit to, EU law.

135. The lack of clear definition between these two concepts finds expression in a number of places in the MOU and in a number of phrases which demonstrate the overlap between relations with the EU and the operation of EU law on the other. For instance:

(i) Paragraph 18 of the MOU reads: "*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. However, the UK Government recognises that the devolved administrations will have an interest in international and European policy making in relation to devolved matters, notably where implementing action by the devolved administrations may be required. They will have a particular interest in those many aspects of European*

Union business which affect devolved areas, and a significant role to play in them" [underlined emphasis added] .

(ii) Paragraphs 20, 21 and 24 of the MOU variously provide: "*The UK Government will involve the devolved administrations as fully as possible in discussions about the formulation of the UK's policy position on all EU and international issues which touch on devolved matters*"; "*The devolved administrations are responsible for observing and implementing international, European Court of Human Rights and European Union obligations which concern devolved matters*"; and that the governments should "*consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities*".

(iii) A variety of other formulations are used to reflect the fact that devolved and non-devolved matters plainly overlap. See, by way of example, paragraph A1.6 ("*policy responsibility straddles both devolved and non-devolved matters*"; paragraph A1.9 ("*EU issues which affect devolved matters*"); paragraph B3.5 ("*EU matters which touch on devolved areas (including non-devolved matters which impact on devolved areas…*"); and paragraph B4.3 ("*formulation of the UK's policy position on all issues which touch on matters which fall within the responsibility of the devolved administrations*"[85].

136. In the *Agnew* applicants' submission, the giving of authorization to withdraw Northern Ireland from the EU would plainly be legislation "*with regard to*" devolved matters. The removal of EU rights and obligations will radically alter the legal landscape in every devolved department (especially in relation to agriculture but also such matters as the environment, procurement, employment law, equality law, etc.). It will radically alter relations with the Republic of Ireland, in particular the operation of the Strand Two institutions discussed above. The withdrawal of EU peace and structural funding will also have significant effects on many areas of administration in Northern Ireland which are devolved, including regeneration and infrastructure projects. In these areas, among others, withdrawal from the EU will directly impact and touch on devolved matters: that would be Parliament legislating "*with regard to*" devolved matters.

137. Accordingly, even if one takes the "*narrow view*" of the circumstances in which an LCM is required to be sought (as Maguire J did[86]) it ought to be sought in circumstances where an Act is seeking authorisation for the giving of an Article 50(2) notification.

138. There is, however, a broader view of the circumstances when an LCM will be required. The Lord Advocate provided written submissions in the *Agnew* proceedings in the High Court in Northern Ireland in support of this wider view (and in response to submissions on the part of the Attorney General for Northern Ireland advancing the narrow view). The broader approach arises from the text of Devolution Guidance Note 8 (DGN8); and is also reflected in Order 42A of the Standing Orders of the Northern Ireland Assembly. Paragraph 10 of that Order reads:

> "*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 or*

[85] There are further similar examples at paragraphs B4.7, B4.10 and B4.13.
[86] See paragraph [119] of his judgment.

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."

139. In light of the impact which the cessation of the operation of EU law would have on the Northern Ireland Assembly's legislative competence and Ministerial executive functions in Northern Ireland (when the constraints on those powers imposed by reference to EU law in sections 6 and 24 of the NIA respectively are removed), this is a further basis on which an LCM would plainly be required.

140. In the applicants' submission, there is no good reason why the reference to legislation which is "*with regard to devolved matters*" should be given a narrow meaning. In light of the emergence of devolved autonomy as a constitutional value and the democratic legitimacy of the Northern Ireland Assembly as a devolved legislature, there is no good reason why Parliament should not at least wish to be informed of the devolved legislature's position. Albeit in a different context (the Parliamentary override of fundamental human rights), Lord Hoffman in the *ex parte Simms* case[87] said that:

> "*The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost…. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.*"

141. In like manner, if the Westminster Parliament wishes to legislate on EU withdrawal in the teeth of opposition from a devolved legislature (should that be the outcome of a request for an LCM), it should squarely confront what it is doing and accept the political cost. More fundamentally, it should not be deprived of the opportunity of doing so by a failure on the part of the Executive to recognise that an LCM is properly called for.

142. Moreover, the Westminster Government purports to be committed to involving the devolved administrations as fully as possible. Thus, the MOU states[88] that, "*The UK Government will involve the devolved administrations as fully as possible in discussions about the formulation of the UK's policy position on all EU and international issues which touch on devolved matters*"[89]. These sentiments were echoed by political statements made by the Government shortly after the referendum result was known[90]. In short, there is no good reason why the devolved legislatures

[87] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115.
[88] At Part 1, paragraph 20.
[89] See also Part II, paragraph A1.9 ("*the Government's own wish to involve the devolved administrations as fully as possible in discussions on the formulation of UK policy positions*…"); paragraph B3.5, especially on EU issues ("… *wishes to involve the NI Executive Committee as directly and fully as possible in decision-making on EU matters*…"); and, to similar effect, paragraph B4.3.
[90] Mr Letwin said, "*We are obviously keen to see the maximum possible engagement with each of the devolved Administrations as we go forward in this process*" [App/238]. Prime Minister Cameron said that, "W*e will fully involve the Scottish, Welsh and NI governments*" and "*[bring] our devolved administrations into the process for determining the decisions that need to be taken*" [App/252]; and the present Prime Minister has made comments about the there needing to be an agreed approach [App/260].

should not be asked, formally, to indicate their view on whether or not they consent to the proposed legislation authorising withdrawal.

143. In light of the above, the Court is asked to make plain that, in the event that an Act of Parliament is required in order to authorise the giving of notification under Article 50(2) TEU, compliance with the UK's constitutional requirements (in this case, constitutional convention) requires that a legislative consent motion be sought from the Northern Ireland Assembly in relation to the proposed legislation.

144. A question of greater constitutional significance arises in the event that such consent is sought from the Northern Ireland Assembly but is refused. As a matter of domestic law, would then the Westminster Parliament be dis-empowered from overriding that refusal to consent? Traditional constitutional analysis would say not, relying simply on the doctrine of Parliamentary sovereignty. However, observations in recent years by judges of this Court on the nature and extent of the doctrine of Parliamentary sovereignty, some of which are discussed above, make plain that such a contention is certainly arguable. Parliamentary sovereignty is a doctrine of the common law and is not immutable. It may yet require to yield to fundamental requirements of the rule of law; but also to other fundamental pillars of our constitution, which now provides for divided sovereignty between the UK government and the devolved nations such that (in Lord Steyn's words in *Jackson*) a "*pure and absolute*" version of the doctrine of Parliamentary sovereignty "*can now be seen to be out of place*" in the modern UK and, more pertinently in the present context, in contemporary UK constitutional law. Thus, in "*exceptional circumstances*" the Supreme Court may have to consider whether there are some "*constitutional fundamentals*" which even Parliament cannot abolish. The continued membership on the part of Northern Ireland of the European Union in light of the principles set out in the Belfast Agreement and British-Irish Agreement discussed above, in circumstances where the Northern Ireland Assembly refused to give consent to withdrawal from the EU, could be considered such a constitutional fundamental.

145. Perhaps more intriguingly, given the already established principle of the supremacy of EU law, could an Act of Parliament authorising withdrawal from the EU which was passed without legislative consent from the Northern Ireland Assembly be held, as a matter of EU law, to be an Act which failed to comply with the UK's constitutional requirements? These issues arise only if, in the event Court agrees with the applicants' analysis that an LCM should be sought, such an LCM is refused by the Assembly. For the reasons given above, an Act passed without even *seeking* an LCM runs a much higher risk of such a conclusion. Accordingly, the Court is asked to make plain, in the first instance, that the seeking of an LCM is part of the relevant constitutional requirements.

ISSUE 3: CONSTRAINTS ON THE EXERCISE OF THE PREROGATIVE

146. The applicants raised an issue which would only be required to be considered by the High Court, and indeed this Court, in the event that their primary case (that an Act of Parliament authorising the triggering of Article 50 was required) was rejected. In those circumstances, even if HMG was permitted to give notice under Article 50(2) in the exercise of prerogative powers, that power is not legally unconstrained.

147. In the *Laker* case, Lord Denning (in the Court of Appeal) made clear that, even where the exercise of prerogative power is concerned, the law "*can intervene if the discretion is exercised improperly*

or mistakenly. This is a fundamental principle of our constitution." This view has come to be viewed as legal orthodoxy. In the Northern Irish case of *Re Downes' Application*[91], Kerr LCJ (as he then was) said that, "*It is well settled that the exercise of prerogative power is subject to judicial review on established principles*". That includes judicial review where relevant considerations have been left out of account. In *Bancoult (No 2)*[92], Lord Hoffman said that: "*I see no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.*" Where prerogative *legislation* can be reviewed on ordinary judicial review principles, it is plain that other exercises of prerogative power can also be reviewed on those principles.

148. In summary, there is nothing in the *source* of the power which renders it immune from the supervisory jurisdiction of the courts on normal judicial review principles. The only basis on which such immunity might arise is if the subject matter is such that the exercise of prerogative power is non-justiciable.

149. *Youssef v Foreign Secretary*[93] makes clear that judicial review of the prerogative is available even in the field of international relations. This is particularly so where the exercise of the power would have implications for the rights of individuals. The question whether a decision is justiciable depends upon its context and what is required in the light of "*modern conditions*" (see *Re McBride's Application*[94], *per* Carswell LCJ).

150. As submitted above, the 'decision' to leave the EU was not (as a matter of law) made by the referendum, as the Government sometimes seeks to suggest. For practical purposes, that decision will be made when the Article 50(2) notice is given. The applicants simply asked the Court to confirm that, before exercising any prerogative power in that regard, all relevant considerations must be properly taken into account. This includes Northern Ireland's unique position when it comes to Brexit (both geographically and constitutionally); the serious effects which Brexit will have on Northern Ireland; and, crucially, whether there are any alternatives to Brexit, including alternatives which may see some special status for Northern Ireland.

151. If the Court were to make clear that such matters require careful consideration before the decision to leave is finally given effect to by service of the Article 50(2) notice, it is to be hoped that HMG might approach the issues in respect of Northern Ireland more reflectively; and otherwise than by taking the starting point that Brexit must occur and must include Northern Ireland.

ISSUE 4: SECTION 75 OF THE NIA

152. Issue 4, like Issue 3, arises in the event that an Act of Parliament is not required and the decision whether and when to give an Article 50(2) notification falls simply to the Executive in the exercise of prerogative powers. In that event, the applicants contend that the Northern Ireland Office should conduct an equality screening exercise (and likely thereafter an equality impact assessment) in order to determine what the likely effects of a UK withdrawal from the EU would have on the need to promote equality of opportunity on persons with protected characteristics.

[91] *Re Downes' Application* [2009] NICA 26, at paragraph [14].
[92] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2009] 1 AC 453.
[93] [2016] UKSC 3; [2016] 2 WLR 509.
[94] [2003] NI 319, at 334.

153. This obligation arises from section 75(1) of the NIA which provides, in material part, as follows:

> "*A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity —*
>
> *(a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;*
> *(b) between men and women generally;*
> *(c) between persons with a disability and persons without; and*
> *(d) between persons with dependants and persons without.*"

154. In Northern Ireland, public authorities which are subject to section 75 duties are obliged to have an 'equality scheme' which sets out in detail how it will comply with these obligations in a structured way. The requirements for such a scheme are set out in Schedule 9 of the NIA. Critically, public authorities must set out in their equality scheme their arrangements "*for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity*"[95]. Having conducted an appropriate assessment, the public authority must also:

> "*… state the aims of the policy to which the assessment relates and give details of any consideration given by the authority to —*
>
> *(a) measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity; and*
>
> *(b) alternative policies which might better achieve the promotion of equality of opportunity.*"[96]

155. When making any decision with respect to a policy adopted or proposed to be adopted by it, the public authority must then take into account the assessment and consultation which it is required to carry out in relation to the policy[97]. The purpose of these obligations is, self-evidently, to ensure that public authorities in Northern Ireland carefully consider and seek to understand the effect of policy positions they adopt on the people of Northern Ireland and to do so, in particular, where a policy is likely to have a disproportionate effect on vulnerable people, a discriminatory effect and/or an effect which raises tensions on political or racial grounds. The authority must not only seek to appreciate the effects of the policy position it adopts but must carefully weigh what might be done to seek to mitigate adverse impacts and consider alternative approaches.

156. The NIO has an Equality Scheme which fairly reflects the requirements of the NIA but which has not been complied with in this case, notwithstanding that it quite properly notes that its scope is to be of the widest application[98]:

[95] NIA, Schedule 9, paragraph 4(2)(b).
[96] NIA, Schedule 9, paragraph 9(1).
[97] NIA, Schedule 9, paragraph 9(2).
[98] See paragraph 4.1 of the scheme.

> *"In the context of Section 75, 'policy' is very broadly defined and it covers all the ways in which we carry out or propose to carry out our functions in relation to Northern Ireland. In respect of this equality scheme, the term policy is used for any (proposed/amended/existing) strategy, policy initiative or practice and/or decision, whether written or unwritten and irrespective of the label given to it, for example, 'draft', 'pilot', 'high level' or 'sectoral'."*

157. The *Agnew* applicants are concerned that HMG has not followed such an approach in relation to its consideration of the way forward following the EU referendum; and that, more particularly, the Northern Ireland Office – whose job it is to speak up for Northern Ireland in central government on such issues – has also failed to conduct any appropriate analysis before adopting a position.

158. It ought to be common case that it is a function of the Secretary of State for Northern Ireland that he is "*responsible for ensuring that the interests of [Northern Ireland] in non-devolved matters are properly represented and considered*"[99]. He is said to "*represent Northern Ireland interests in all matters within Cabinet, as well as retaining responsibility for… constitutional matters affecting Northern Ireland*"[100]. This role on the part of the SSNI, of representing Northern Ireland interests in the UK Cabinet, is also set out in the Belfast Agreement[101]. If anyone is to speak for Northern Ireland within the UK Executive in these matters, it should be Secretary of State.

159. In doing so, the SSNI is obviously supported by his Department, the NIO, which will conduct the empirical research and analysis, and undertake any necessary equality screening and assessment, to enable this role to be carried out properly. Indeed, the NIO's Equality Scheme recognises that it has its *own* function of representing Northern Ireland's interests in Westminster. That is a defined function of the NIO, which is a designated authority for the purposes of section 75 of the NIA: see Schedule 1 to the Northern Ireland Act 1998 (Designation of Public Authorities) Order 2000 (SI 2000/1787).

160. The applicants' (modest) contention is that, in representing Northern Ireland's interests at Westminster, the NIO must take a position on whether Brexit is good or bad for Northern Ireland; and that, before it does so, it should appropriately appraise itself. It is respectfully submitted that it is plain that Brexit will have severe implications for many in protected groups; and for good relations. Any decision on whether the Executive should use Prerogative powers to trigger Article 50(2) should be fully informed, including by a clear statement from the NIO as to whether, in Northern Ireland's interests (and in light of the result of the referendum in Northern Ireland), an Article 50(2) notification should, or should not, be given.

161. The respondents' response on this issue in pre-action correspondence was curious, noting simply that the SSNI was "*fully aware of the reach of the Section 75 obligations and [that], to the extent a duty arises, he will ensure that any relevant duty is discharged*"[102]. His skeleton argument disclosed that he has not provided any advice to the Cabinet on whether an Article 50 notification should be given[103]. The applicants' concern is that the Government may simply want to get on with serving an

[99] See, for instance, the MOU, Part I, paragraphs 1 and 22 [App/276 and 281].
[100] See Devolution Guidance Note 5 (DGN5), Summary [App/333].
[101] Strand One, paragraph 32(c) [App/354].
[102] [App/424].
[103] See paragraph 51 of the respondents' skeleton argument below [App/143].

Article 50 notice without thinking the issues through because of an erroneous view that it *must* trigger Article 50(2) by reason of the referendum resort and/or through lack of consideration of other options, which might involve a special status for Northern Ireland.

162. The applicants accept that the *Neill* judgment indicates that a complaint to the Equality Commission for Northern Ireland (ECNI) under Schedule 9 of the NIA about a public authority's breach of its equality scheme is the usual and presumptive route by which such a complaint should be pursued. However, that authority also recognises that there will be exceptional cases where it will be appropriate for the Court to deal with the matter in the exercise of its supervisory jurisdiction. This case is such an instance. The NIO's failure is not merely a procedural defect; it is a complete failure to undertake any analysis whatsoever in order to inform its position. The SSNI is also at the apex of that complaints structure established by Schedule 9. He is the ultimate enforcement authority under that regime where a public authority has failed to comply with its equality scheme. However, it is in our submission obviously not appropriate for him to adjudicate in this case, where the complaint is about a failure of his own Department to properly appraise itself so that it can exercise its (and assist him in his) role to represent Northern Ireland's interests in Westminster. Further, the respondents have made clear that they wish all of the issues raised by the applicants to be dealt with urgently, which militates against a complaint to the ECNI and in favour of the Court making an appropriate declaration.

163. The respondents' case on this issue below was to assert that the SSNI is not subject to section 75 – which is correct, but is no answer given that the NIO *is* subject to section 75 and has its own role of representing Northern Ireland interests to central government – and to contend that any section 75 assessment is in any event premature, since the effects of Brexit cannot yet be known. These matters, it was contended, would be assessed as the process goes along; but no such assessment needs to be carried out at this stage. However, the point is that the giving of an Article 50(2) notification is the *decisive* stage because, once Article 50 has been triggered, there is no way back if the analysis suggests that it should never have been triggered in the first place[104].

CONCLUSION

164. In light of the above submissions, the Court is respectfully urged to answer the questions posed in the reference from the High Court of Justice in Northern consistently with the following summary:

(a) Question 1: The royal prerogative has been displaced by the Northern Ireland Act 1998 and/or related legislation, which must be read and construed in light of the Belfast Agreement and related British-Irish Agreement, to which they give effect. The effect of this is that an Article 50(2) TEU notification may be lawfully sent by Her Majesty's Government only if authorised by an Act of the Westminster Parliament.

(b) Question 2: Before the Westminster Parliament is asked to enact legislation authorising the giving of an Article 50(2) notice, HMG must at least first seek a Legislative Consent Motion from the Northern Ireland Assembly.

[104] See paragraphs 18-21 above.

(c) Question 3: In the event that an Act of the Westminster Parliament is not required to trigger Article 50(2) TEU, any exercise of the royal prerogative in that regard is constrained by various provisions of Northern Ireland constitutional and public law, which include the obligation to have regard to Northern Ireland's unique position within the UK.

(d) Question 4: Statutory duties arising from section 75 of the Northern Ireland Act 1998 require that, in the event that Parliamentary authorisation (and therefore scrutiny) is held not to be required, the Northern Ireland Office is nonetheless required properly to investigate and assess the equality impacts of serving an Article 50(2) notice on the citizens and residents of Northern Ireland in order to represent effectively the interests of Northern Ireland on this issue to Her Majesty's Government.

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25 November 2016

Response to comments in paragraph [104] of *Miller* judgment

1. The observations below seek to clarify a number of points about the applicants' submissions in *Re Agnew and Others' Application* (reported as *Re McCord's Application* [2016] NIQB 85) in light of comments made in paragraph [104] of the judgment of the English Divisional Court (EDC) in *Miller*. It seems clear that the EDC differed from Maguire J in its analysis of the extent of the Crown's prerogative powers, the interpretation of the ECA 1972 and the effect of giving notice under Article 50 TEU. It inferred that this difference "*reflected the way the case appears to have been argued*" before Maguire J. In part, this is correct: since the core of the argument in *Miller*, relying on the ECA 1972 as having displaced the prerogative, was not permitted to be argued in the *Agnew* case. However, where there was an overlap between the issues in *Miller* and those addressed within 'Issue 1' in the *Agnew* case, the EDC appears to have assumed that the argument before Maguire J on these issues was such as to mislead him as to the correct starting point or to inadequately highlight the relevant legal principles. It is hoped that the clarification set out below will provide the Supreme Court with some further background to the *Agnew* ruling which might dispel those assumption.

2. In paragraph [104](1) of its judgment, the EDC states that:

> "*At [67] the judge notes that it is implicit in the argument of the applicants in the case before him that, were it not for the displacement of the prerogative by the Northern Ireland Act 1998, the use of prerogative power to give notice under Article 50 would be unobjectionable and affirms that position as the appropriate starting point for his analysis. But it is not the appropriate starting point, because a prior question is the effect of the ECA 1972 on domestic law and the Crown's prerogative powers.*"

3. The applicants have always contended that there is a prior (or concurrent) question of the effect of the ECA on domestic law and the Crown's prerogative, in addition to their reliance on the Northern Ireland Act. Indeed, the applicants' first particularised ground of challenge[105] relied upon the ECA as having displaced the prerogative. Paragraph [67] of Maguire J's judgment simply reflects the fact that the *Agnew* applicants were not permitted to advance this ground in the hearing before him. The High Court in Northern Ireland stayed that ground[106], on the application of the respondents but in the face of opposition from the applicants[107], in light of the fact that it would be dealt with by the EDC in *Miller*. The applicants did not at any stage contend that the NIA was the *only* legislative scheme which displaced the prerogative in this case. On the contrary, submissions on the effect of the ECA would have formed the starting point for the applicants' case in *Agnew* had that been permitted by the Court.

[105] See ground 4(2)(a)(i) in the applicants' Amended Order 53 statement [App/74].
[106] See the Court's order of 27 September 2016 [App/123].
[107] See paragraph 10 of the applicants' submissions of 21 September 2016 [App/86].

4. In paragraph [104](2) of its judgment, the EDC states that:

> "*At [70] the judge refers to* The Case of Proclamations*, but only for the principle that "the King hath no prerogative, but that which the law of the land allows him". The judgment does not however address the principle that the Crown cannot through its prerogative power change any part of the law of the land; nor is reference made to the Bill of Rights: see paragraphs 28-29 above. Further, counsel for the applicants in the Northern Ireland case argued that there was no need to establish an intention on the part of the legislature to limit the prerogative (see [82]), which was very different from the submission presented to us. We therefore do not find it surprising that the judge was able to reject the overly broad submission made to him. It follows that when the judge gave consideration to the case law, he did so without having the proper starting point identified."*

5. There are three points here: (a) the partial citation of the principle in the *Case of Proclamations*; (b) non-reliance on the Bill of Rights; and (c) an overly broad submission as to legislative intention. As to the first of these, whilst it is correct that Maguire J referred to the *Case of Proclamations* only in a limited way, the applicants relied on the case for its broader proposition. The second part of the quotation from the *Case of Proclamations* (which the EDC considered to be of significance) was both set out in the applicants' skeleton argument[108] and opened in the applicants' oral argument. The detailed examination of the NIA and related legislation which was undertaken in submissions before the Court below[109] was precisely because of the applicants' reliance on the principle that the prerogative could not alter the law of the land. This aspect of the applicants' submissions embraced the argument – which the EDC upheld but Maguire J did not – that the prerogative could not be used to remove rights provided by statute[110].

6. As to the observation that the ruling in *McCord* did not make mention of the Bill of Rights, this is correct. This omission is wholly understandable from the point of view of Irish legal history, as the majority of expert legal opinion is that the Bill of Rights does not apply in Northern Ireland (the Bill having never been brought into law in Ireland[111]). While the matter has previously been left open by the Northern Ireland High Court[112], *Agnew* would not have been a suitable case in which to advance submissions about the Bill of Rights' historical status. This was unnecessary. The applicants' primary concern was to establish whether the prerogative had been displaced by various Acts of Parliament, and that matter can be determined by reference to the common law as expounded in authorities such as the *Case of Proclamations*, *De Keyser*, *Laker Airways* and *Fire*

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[108] See paragraph 57 [App/113].

[109] See, for instance, the reference at paragraphs [91]-[92] of the judgment.

[110] To this effect see the applicants' skeleton argument below at paragraphs 54 and 57-59 [App/112-114]; and the reference to this argument in the judgment of Maguire J at paragraphs [88] and [90] (which he dismissed on the basis of his assessment of the limited effect of the giving of an Article 50(2) determination at paragraphs [105]-[107]).

[111] See, for instance, Osborough, 'Constitutionally Constructing a Sense of Oneness: Facets of Law in Ireland After the Union', 37 Irish Jurist 227 (2002); Osborough, 'Executive Failure to Enforce Judicial Decrees: a Neglected Chapter in Nineteenth Century Constitutional History', in McEldowney and O'Higgins (ed), *The Common Law Tradition - Essays in Irish Legal History* (Irish Academic Press, Dublin, 1990) at 85; Osborough, 'The Failure to Enact an Irish Bill of Rights: A Gap in Irish Constitutional History', 33 Irish Jurist NS 392 (1998); and *People (Attorney General) v O'Callaghan* [1966] 1 IR 501, at 518, *per* Walsh J.

[112] See *Re W's Application* [1998] NI 19, at 31, *per* Girvan J.

Brigades Union, each of which was relied upon and opened to the Court. Submissions about the applicability (or not) of the Bill of Rights in Ireland is likely only to have detracted from Court time and not to have proven determinative.

7. It is unclear precisely how the reference to the *Agnew* applicants arguing that "*there was no need to establish an intention on the part of the legislature to limit the prerogative*" may have arisen. It is assumed that this may arise from a note of a submission which was made in reply to the respondents' case (which was to the effect that a statutory provision could displace an established prerogative only in limited, and clear, circumstances[113]). In their oral reply, the applicants submitted that none of the cases which considered this issue said that there had to be a "*conscious choice*" on the part of Parliament to displace the prerogative; and that, if that was what the respondents were submitting, there was no support for it. The applicants' submission went on, however, to note that Parliamentary intention is to be discerned objectively from the text of the Act in question. Whereas an Act could *expressly* displace the prerogative, that is not necessary. The core issue (as identified in paragraph [28] of *Alvi*) was whether the use of the prerogative was inconsistent with the Act or the statutory scheme, including inconsistency with its purpose. This remains the applicants' position.

8. At paragraph [104](3) of its judgment, the EDC noted that:

> "*Finally, at [104]-[108] it is evident that the judge did not have the benefit of the careful analysis of the effect of Article 50 addressed to us. It is therefore again unsurprising that his conclusion at [105] that notification under Article 50 will only "probably" ultimately lead to changes in United Kingdom law was arrived at without knowledge it had been accepted before us on all sides that it necessarily will have that effect. The same must be said of his observation that at the point when the application of EU law in the United Kingdom changes, "the process necessarily will be one controlled by parliamentary legislation, as this is the mechanism for changing the law in the United Kingdom." Before us the Secretary of State's positive case was that, if the Crown is entitled to give a notice under Article 50, then when it takes effect to withdraw the United Kingdom from the European Union the effect of existing EU law under the relevant EU Treaties will cease and sections 2(1), 2(2) and 3(1) of the ECA 1972 will be stripped of their effect in domestic law without any requirement of further primary legislation."*

9. The applicants in *Agnew* do not accept – if it is suggested – that there was any deficiency in the analysis of Article 50 which they presented in their submissions. Not only did Maguire J have before him detailed written submissions about the effect of Article 50 TEU[114] (which were to similar effect as the submissions made on that issue by the applicants before this Court) but the applicants' oral submissions on the law began with an analysis of this very issue (only after having addressed the legal significance of the referendum). The applicants submitted below that the Article 50 notification was irreversible and would inevitably take away legal rights from UK citizens. The difference in the approach of Maguire J to the EDC on this central issue is more likely, it is

[113] See, for instance, paragraph 7(g) of the respondents' skeleton argument below: "*The Royal Prerogative to make and withdraw from treaties is only subject to limitations that are clearly imposed by statute.*" [App/127].
[114] See the applicants' skeleton argument below at paragraphs 1, 11 and 20-23 [App/97-98, 101 and 103-104].

submitted, to have arisen from the absence of the fulsome concessions on the part of the Secretary of State for Exiting the EU which he made in the *Miller* proceedings[115].

10. In summary, as noted at paragraph 119 of the applicants' written case on this reference, Maguire J rejected the submissions made to him – as he was entitled to do – on the basis of the reasoning set out in his judgment; but not, it is submitted, in circumstances where the contentions which the applicants continue to advance were inadequately argued before him.

[115] Although his counsel, Dr McGleenan QC, did accept that, after notification, it was inevitable that EU law would be severed from national law.