IN THE COURT OF SESSION

SPEAKING NOTE FOR THE PETITIONERS
FOR
THE PERMISSION HEARING

in the Petition of

ANDREW WIGHTMAN MSP and others

PETITIONERS

for

Judicial review on the issue of the unilateral revocability of Article 50 of the Treaty on European Union

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Introduction

1. The function of the permission filter is to keep out weak and vexatious claims. It is a low threshold (*JOO v. Home Secretary* [2016] CSOH 20, 2016 SLT 545 at §§ 37-38; *EC (Gambia) v. Home Office* [2017] CSIH 26 at § 3).

2. Against that threshold this court can be satisfied (per Section 27B(2) of the Court of Session Act 1988[1]) that, notwithstanding the declared policy of the respondent, Her Majesty's Government (HMG), that the United Kingdom (UK)'s notification under Art 50(2) Treaty on European Union ("TEU") "*will* not be withdrawn", the petitioners in the present case "can demonstrate a sufficient interest in the subject matter of the application" in this judicial review which has "real prospects of success" in this judicial review.

3. This being the only issue before the court for its decision at this stage, [2] the court should now grant permission under and in terms of Section 27B(1) of the Court of Session Act 1988 for this petition to proceed.

The subject matter of this application

4. The subject matter of this application is encapsulated in Statement 19 of the Petition as follows:

   (1) The petitioners submit that the current Article 50(2) TEU notice can, as a matter of European Union (EU) law, be revoked unilaterally by the UK acting in good faith.

   (2) The petitioners acknowledge that, being an unresolved point of EU law, this issue can only authoritatively be determined by the Court of Justice of the European Union (CJEU).

   (3) The petitioners therefore request this court to make the necessary Article 267 of the Treaty on the Functioning of the EU (TFEU) preliminary reference to the CJEU.

There is a genuine dispute which would be recognised as such by the CJEU

5. The petitioners, of course, accept that in Case 104/79 *Foglia v. Novello (No. 1)* [1980] ECR 745 and Case 244/80 *Foglia v Novello (No. 2)* [1981] ECR 3045, the Court of Justice (as it was then called: "ECJ") ruled that it has no jurisdiction under Article 267 TFEU[3] to reply to questions from national courts where its answers are not "necessary to enable them to settle genuine disputes which are brought before them": (*Foglia* 1 at § 11).

6. The ECJ found in *Foglia* that "French law provided appropriate remedies" for any dispute that existed (*Foglia* 2 at § 32). It was accordingly not "necessary" for the ECJ to decide on the questions put to it on the preliminary reference. By contrast, in the present case there are no remedies available to the petitioners other than a reference to the CJEU via the petition procedure.

7. The CJEU has no jurisdiction to provide a merely *advisory* opinion, in the sense of one which is not *binding* on the national referring court.[4] But that is not what is being sought here. Instead, the petitioners seek a final and authoritative ruling on an unresolved point of EU law which this court would be *legally obliged* to apply.[5] Such a final and authoritative ruling can only be given by the CJEU; and the

petitioners' *only* means of access to the CJEU is by reference from the national court under Article 267 TFEU.

8. In *Foglia*, the ECJ considered that if it allowed parties to bypass the French courts this would "jeopardize the whole system of legal remedies available to private parties": (*Foglia* 1 at § 11). No such considerations apply in the present case. No other national courts are being by-passed by this application.

9. In *Foglia*, the ECJ found there to be no "genuine dispute" because "the parties *took the same view* as to the lawfulness of the French legislation at issue" (*Foglia 2* at § 32), had artificially contrived the 'dispute' by inserting a clause into their contract in order to induce the Italian court to give a ruling on the point (*Foglia 1* at § 10) and were "in agreement as to the result to be attained" (*Foglia 1* at § 10).

10. But the same cannot be said in the present case, because:

    (1) HMG does *not* take the same view as the petitioners on the unilateral revocability of the Article 50(2) TEU. Instead it says repeatedly that it does not admit the petitioners' legal arguments;[6]

    (2) And HMG does *not* agree with the petitioners "*as to the result to be attained*", (namely that this court should make an Article 267 TFEU reference to the CJEU on the unilateral revocability of the Article 50(2) TEU, and thereafter pronounce an order giving effect to the CJEU ruling). Instead, the position of HMG is that this application should

        (i) either be *dismissed* without any inquiry (on the grounds that the petitioners' averments are said to be irrelevant and/or lacking in specification: respondent's Plea in Law 6);

        (ii) or *refused* (on the basis that such material claims that it makes are said to be "unfounded in fact": respondent's Plea in Law 7).

11. HMG nevertheless insists (at Answers 78, 79, 90, 99, 104) that:

    "[I]n the light of the Government's stated policy that the United Kingdom's Article 50(2) TEU notification will not be withdrawn there is no genuine dispute *as to the proper construction of Article 50(2) TEU.* There is no justification for the admission of the supervisory jurisdiction."

12. This position cannot however be consistently maintained by HMG, in the light of their general denials in the pleadings and the terms of their pleas in law 6 and 7.

13. Separately, the HMG position that there is no genuine dispute over Article 50(2) TEU is unsustainable for at least the following reasons:

(1) HMG is subject to the authority of Parliament and "the judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament": AV Dicey *Introduction to the Study of the Law of the Constitution*, 8th ed. (1915) at page 57.

(2) The UK constitution requires that HMG *withdraws* the Article 50(2) TEU notice if so instructed by Parliament, in exercise of its legislative authority.

(3) HMG's claim that the UK's Article 50(2) TEU notification *will* not be withdrawn *cannot* therefore be a complete (and accurate) statement of Government policy.

(4) It could only be an accurate statement of Government policy if HMG were making either or both of two *legal* claims as follows:

(i) either that HMG has independent authority under the UK constitution to maintain the Article 50(2) TEU notice, even against the legislative instruction of Parliament; and/or

(ii) that, in any event Parliament, does *not* have the power unilaterally to instruct HMG to withdraw the Article 50(2) TEU notice.

(5) The petitioners dispute the validity of the first of these legal propositions, noting instead that "no person or body is recognised by the law ... as having a right to override or set aside the legislation of Parliament": AV Dicey *Introduction to the Study of the Law of the Constitution*, 8th ed. (1915) at page 38.

(6) The second position can only be a claim founded upon on EU law, since "it is common ground that ... there is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen. The European Communities Act 1972, which confers precedence on EU law, is the sole example of this": *R (Miller) v Secretary of State* [2016]

EWHC2768 (Admin) [2017] 2 WLR 583 at § 20. But for all the reasons set out in the petition, the petitioners dispute the correctness of this interpretation of EU law, which in any event can only be determined by the CJEU via the preliminary reference under Article 267 TFEU.

(7) Faced with the answers given by HMG, the petitioners contend that the HMG policy statement is either untrue as a matter of fact or, if true, it is unlawful.

14. Further and in any event, the petitioners have averred at Statement 22 that HMG's refusal to confirm outside Parliament the position as stated by its Ministers therein "*that the decision can be reversed ...is not available to us*" (Statement 11(1)) and "*Article 50 is not revocable*" (Statement 11(2)):

- "appears to be intended both to keep matters in a state of legal uncertainty and separately to seek to prevent this court from carrying out its constitutional role of ensuring the maintenance and protection of the rule of law"

- that "such refusal is intended to mislead, or foreseeably has the effect of misleading, both the Parliaments of the United Kingdom and the British public and, as such, is unlawful"

- and that, "in these circumstances, the court has the power and duty to intervene to ensure that the Respondent (and any other Minister of the Crown) carries out his or her duty" or otherwise "give appropriate legal redress".

These submissions are met with a blanket denial by HMG in Answer 22.

15. There are therefore matters in live dispute between the parties in relation to Article 50(2). But the final authoritative resolution of all these matters is dependent on the court exercising its power to request a preliminary ruling from the CJEU.

Judicial review in public law

16. In any event, *esto* there is no "dispute" between the parties to this court as to the proper construction of Article 50(2) TEU (which is denied) the proper construction of Article 50(2) TEU is nevertheless a matter which requires to be authoritatively resolved by the court as a matter of the rule of law, so as to allow the petitioners to carry out their constitutional duties, all as more fully specified in the affidavits

lodged by the First and the Seventh Petitioners (and as repeated most recently in the House of Lords debate on 31 January 2018 by Lord Browne of Ladyton [7]). If HMG feels unable to argue the issue, the court can of course, in the exercise of its case management powers when faced with a case with no parties *in dispute*, appoint an *amicus curiae* (see e.g. *Salvesen v. Riddell* [2013] UKSC 22, 2013 SC (UKSC) 236) or to permit intervenors to enter the process to act as contradictor (*Wilson v. First County Trust (No. 2)* [2003] UKHL 40 [2004] 1 AC 816).

17. In any event and contrary to the claims of HMG, the existence of a "dispute" between two or more competing parties is *not* a necessary precondition to this court's exercise of its supervisory jurisdiction in public law matters. In any cause where there is an issue involving a question of public law the court may exercise its supervisory jurisdiction, even without any *lis* to resolve between disputing parties: *R v SSHD ex p Salem* [1999] 1 AC 450 per Lord Slynn at 457. As Sedley noted in *R. v. Somerset County Council ex part Dixon* [1998] Env LR111 at 121,

> "public law is not at base about rights... *it is about wrongs* - that is to say misuses of public power. ... If an arguable case of such misuse can be made out on an application for leave, the court's only concern is to ensure that it is not being done for an ill motive".

18. The present application is based on HMG having got the law wrong. Where the CJEU's authoritative ruling is needed to resolve the legal matters at issue brought before the national court, its Article 267 TFEU jurisdiction can be invoked by that national court, even if specific decisions have yet to be taken: Case C-62/14 *Gauweiler and Others* EU:C:2015:400 §§ 27-28. An Article 267 TFEU reference is competent in cases before the national courts in which a purely declaratory remedy is sought in anticipation of possible future events not yet applying to the parties: Case C-415/93 *Union Royale Belge des Sociétés de Football Association (ASBL) v Bosman* [1995] ECR I-4921 at § 65.

19. The petitioners raise matters which directly involve the rule of law: *Walton v Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67 per Lord Reed at § 90 and *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46; 2012 SC (UKSC) 122 per Lord Reed at § 173. In this petition, the petitioners call upon this court to exercise its constitutional function of protecting the rule of law by pronouncing appropriate effective remedies. These may include, in the circumstances, the court making the requested Article 267 TFEU reference and thereupon pronouncing a

binding order of general application, definitively declaring and thereby giving effect to the law within this jurisdiction.[8]

The Petition has a real prospect of success

20. At Answer 90, HMG states that:

> "the petition does not demonstrate a real prospect of success. No decision or policy position of the Government is identified, whether in fact, lawfully or relevantly, giving rise to a genuine dispute as to the proper construction of Article 50(2) TEU.

21. In the light of all the foregoing argument, the HMG's declared policy that the UK's notification under Art 50(2) TEU will not be withdrawn *cannot* be said to have any impact on the petitioners' prospect of success in the subject matter of this petition.

22. The petitioners submit that they have real prospects of success before the CJEU on the basis of the substantive arguments more fully set out in the petition. HMG has set out no argument against these arguments in its answers. Therefore, at this stage, the court is bound to accept their strength. In the whole circumstances, the only conclusion open to the court at this stage is that the requirements of Section 27B (2) (b) have undoubtedly been met.

The Petitioners can demonstrate a sufficient interest

23. In public law judicial review, an applicant has to have sufficient interest: that is to say, an interest which is sufficient to justify his bringing the application before the court: *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 per Lord Hope at § 62 and per Lord Reed at § 170 in which the UK Supreme Court clarified the approach which should be adopted to the question of standing to bring an application to the supervisory jurisdiction. In doing so, it intended to put an end to an unduly restrictive approach which had too often obstructed the proper administration of justice: an approach which presupposed that the only function of the court's supervisory jurisdiction was to redress individual grievances, and ignored its constitutional function of maintaining the rule of law: *Walton v Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67 per Lord Reed at § 90.

24. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing,

depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context: *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46; 2012 SC (UKSC) 122 per Lord Reed at § 170.

25. A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent: *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46; 2012 SC (UKSC) 122 per Lord Hope at § 63. In the present case, the petitioners are all elected members of legislatures representing Scottish constituencies in the Westminster Parliament, the European Parliament and the Scottish Parliament. They each assert their standing/sufficient interest to make this application to this court against the background that the function of this court's supervisory jurisdiction is not simply to redress individual grievances, but has a constitutional function of maintaining the rule of law. All and each of the Petitioners have sufficient interest and therefore standing to make this application to this court's supervisory jurisdiction to seek an authoritative ruling from the CJEU to establish the lawfulness of the UK's position on the unilateral revocability - which HMG does not admit - of the notice sent under and in terms of Article 50(2) TEU and to give appropriate relief by way of declarator and/or reduction.

26. In its Answers, HMG accepts both this court's jurisdiction (Answer 3) and the petitioners' standing (Answer 1), which is to say the petitioners have an interest sufficient to justify their bringing this application before the court.

Further procedure

27. There is no need for any further procedural hearing. Instead, the petitioners submit:

(1) no further period of adjustment is needed to the pleadings. The respondents have had the petition for more than one month, and were granted an extended *induciae*. They have had ample opportunity to obtain complete instructions and access all relevant information for the drafting and lodging of their answers. Issues are now focussed between the parties. In any event

> "[T]he degree of precision and detail in written pleadings that has traditionally been looked for in other forms of action in Scotland is not to be looked for in petitions for judicial review (Clyde and Edwards, *Judicial Review*, para 23.19). The core requirement is simply this. The factual history should be set out succinctly and the issues of law should be clearly identified. The aim is to focus the issues so that the court can

reach a decision upon them, in the interests of sound administration and in the public interest, as soon as possible." [9]

(2) *Esto*, any further period of adjustment be sought by HMG the adjustment period should be limited to one week (Friday 9 February 2018).

(3) Parties should at the same time and, in any event, be ordained to exchange drafts notes of argument and draft list of authorities between themselves within one week (Friday 9 February). Final notes of argument (adjusted in the light of the other's drafts) should be lodged with the court by close of business on Wednesday 14 February) and agreed bundle of joint authorities should be lodged with the court by close of business on Friday 16 February 2018.

(4) The matter should then be put out for a substantive hearing of between 2 and 3 days at the earliest available opportunity.

(5) Thereupon this court should make a reference to the CJEU pursuant to Rule 65(2) of court and Article 267 TFEU on the issue of the unilateral good faith revocability of the Article 50(2) TEU notice as set out in statement 115 of their petition. Given the timing noted at statement 108 of the petition and in their affidavits of the first and seventh petitioners, the matter is urgent so the expedited/accelerated procedure before the CJEU should be invoked as it was in Case C-370/12 *Pringle v. Ireland* ECLI:EU:C:2012:756

28. It should be noted that the expedition procedure before the CJEU has most recently been invoked by the Irish Supreme Court in *Minister for Justice v O'Connor* [2018] IESC 3 (1 February 2018) in its Article 267 TFEU reference on the question whether Ireland must refuse - or may postpone pending greater clarity about post-Brexit legal regime the finalisation of - a request from the UK under the European Arrest Warrant for surrender of a fugitive EU national. The question is expressly said to be prompted by: the triggering of the Article 50(2) TEU notice by HMG; the uncertainty as to the arrangements which will be put in place between the EU and UK to govern their mutual relations post-Brexit; and the consequential uncertainty as to the extent to which the fugitive, Mr. O'Connor would, in practice, be able to enjoy his rights under the Treaties, the Charter or relevant legislation, should he be surrendered to the United Kingdom and remain incarcerated after Brexit. This reference from the Irish courts indicate precisely how the uncertainty surrounding Brexit (including whether the Article 50(2) might be revoked) is already directly affecting individuals' rights and the State's powers.

[1] Section 27(B) of the Court of Session Act 1988 provides as follows:

> "(1) No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed.
>
> (2) Subject to subsection (3), the Court may grant permission under subsection (1) for an application to proceed only if it is satisfied that—
>
> (a) the applicant *can demonstrate a sufficient interest in the subject matter of the application*, and
>
> (b) the application has *a real prospect of success* ..."

[2] The note attached to the court's interlocutor of 24 January 2018 which "set out the concerns which are to be addressed at the hearing" per paragraph 12 of Court of Session Practice Note No. 3 of 2017 Judicial Review) states:

> "The matter to be addressed at the hearing is whether the requirements for permission in s.27B of the Courts Reform (Scotland) Act are satisfied, *in light of the UK Government's declared policy that the UK's notification under Art 50(2) will not be withdrawn.*"

[3] Article 267 TFEU provides, so far as relevant, that:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon."

[4] Case C-346/93 *Kleinwort Benson* EU:C:1995:85 [1996] QB 57 at § 24

[5] In Opinion 2/13 *Re accession of the EU to the ECHR* ECLI:EU:C:2014:2454 21, the Full Court CJEU confirmed at §§ 174-6:

> "174 ... [T]he Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.
>
> 175 In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law.
>
> 176 In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in art.267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".

[6] "There is no difference in effect between denying and not admitting an allegation. The distinction is merely a matter of emphasis, a denial being more emphatic than a non admission": N Bullen, Leake, Jacobs *Pleadings* 12th edition at page 80 (approved in *N Goodwin Design (Pty) Limited v Vladislav Moscak*, 1992 (1) SA 154 *per* Van den Heever J. at 163H.

In *Wilson v South African Railways and Harbours*, 1981 3 SA 1016 Vos J at 1018D confirmed that it is not competent to plead a non-admission without more. Instead, the pleader, in accord with its duty of candour, must state that the *reason* for the non-admission, for example its lack of knowledge.

In Scotland "a duty of candour is incumbent on all litigation parties, and incumbent above all on public authorities engaged in judicial review proceedings and their legal representatives": *Shetland Islands Council v. Anderson* [2014] CSOH 23 per Lord Stewart at § 44. Further "the duty of candour exists at all times... to serve both the court and the parties" such that "blanket denials or skeletal defences are not an acceptable starting point in the pleadings": Court of Session *Practice Note (No.4 of 2017)* at § 7.

In Scottish practice this duty of candour is reflected in the pleading "not known and not admitted" and the rule that a bare averment of "not admitted" or "no admission made" is otherwise *deemed* to be an admission, at least in relation to averments of fact within the defender's knowledge: *Annotations to the Rules of the Court of Session* at § 18.1.3.

[7] Lord Browne of Ladyton at
https://hansard.parliament.uk/lords/2018-01-31/debates/6E9F9C26-27A7-4157-B6FF-115044A62448/EuropeanUnion(Withdrawal)Bill

> "As a relevant aside, what is "a meaningful vote"? The proposed withdrawal agreement and implementation Bill may provide a vote on the agreement but, given Article 50, can it be meaningful? If Parliament likes the deal and votes for it, the deal is implemented and the UK leaves. If Parliament does not like the deal and votes against it, Article 50 operates and on 29 March, two years after the notification of our intention to leave, unless there is an agreed extension, the treaties cease to apply and the UK leaves. *Does a meaningful vote depend on the flexibility or the reversibility of Article 50? Perhaps the Minister will address that point in winding up. If that is the Government's position, we should know.*"

[8] See *e.g.*

- *Davidson v. Scottish Ministers*, 2006 SC (HL) 42 for a declarator that both (interim) interdict or an (interim) order for specific performance could be granted against the Crown in public law judicial review;

- *Beggs v. Scottish Ministers*, 2007 SLT 235, HL for a declarator on the conditions necessary for a finding of contempt of court against Government departments; *Smith v. Scott*, 2007 SC 345, a declarator that the maintenance of blanket ban on voting by convicted prisoners was Convention incompatible;

- *Napier v. Scottish Ministers*, 2005 SC 307, IH for a declaratory that the appropriate standard of proof in claims of breach of Article 3 ECHR is proof on a balance of probabilities;

- *R (Equal Opportunities Commission) v. Secretary of State for Employment* [1995] 1 AC 1 where the House of Lords declared that the threshold provisions for unfair dismissal protection for part-time workers set out in the Employment Protection (Consolidation) Act 1978 were incompatible with EU law;

- *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No. 1)* [2013] UKSC 25 where notwithstanding that the Government conceded breach of the NO^2 limits laid down in Article 13 of Directive 2008/50 the Supreme Court granted a declaration of breach of EU law, such an order being "appropriate both as a formal statement of the legal position, and also to make clear that.... the way is open to immediate enforcement action at national or European level";

- *Docherty v. Scottish Ministers* [2011] CSIH 58, 2012 SC 1250 holding that a declarator of breach of Convention rights might be necessary in order to accord just satisfaction, even where there had been a public acknowledgement of the violations complained of;

- *Doogan v Greater Glasgow Health Board*, 2015 SC (UKSC) 32 2013 SC 496 for declarators on the extent of the the right of conscientious objection under section 4(1) of the Abortion Act 1967.

[9] *Somerville v. Scottish Ministers*, 2008 SC (HL) 45 *per* Lord Hope at § 65