FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 62
P1293/17

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

by

ANDY WIGHTMAN MSP AND OTHERS

Petitioners and Reclaimers

against

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondent

Petitioners and Reclaimers: O'Neill QC, Welsh; Balfour & Manson LLP
Respondent: Johnston QC, Webster; Office of the Advocate General

21 September 2018

The Issue

[1] Article 50 of the Treaty on European Union provides a mechanism whereby a member state may withdraw from the EU. This involves the state notifying the European Council of its intention. Once notification occurs, the Council is charged with concluding an agreement with the state which sets out the arrangements for withdrawal, taking into account the framework for the state's future relationship with the EU. The agreement requires the consent of the European Parliament and a qualified majority (72% of the

members of the Council representing 65% of the population) of the Council. Article 50 continues:

> "3. The Treaties shall cease to apply to the State…from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification…".

[2] On 23 June 2016, a referendum of the United Kingdom electorate (European Union Referendum Act 2015) produced a majority in favour of leaving the EU. Following *R (Miller)* v *Secretary of State for Exiting the European Union* [2018] AC 61, the European Union (Notification of Withdrawal) Act 2017 conferred power on the Prime Minister to notify the UK's intention to withdraw from the EU under Article 50. On 29 March 2017, the Prime Minister so notified the European Council.

[3] On 19 December 2017, this petition was lodged. The petitioners, who include members of the Scottish, United Kingdom and European Parliaments, seek a declarator specifying: "whether, when and how the notification…can unilaterally be revoked". The legal question, which the petitioners wish answered definitively, is whether the notification can be revoked in advance of the expiry of the two year period; with the effect that the UK would remain in the EU. The petitioners maintain that such an answer can only be given by the Court of Justice of the EU (CJEU). They therefore seek a reference to the CJEU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the EU.

[4] By interlocutor dated 8 June 2018, the Lord Ordinary declined to make a reference to the CJEU and refused the petition upon three grounds. In short, first, the issue was hypothetical as the UK Government had stated that they did not intend to revoke the notification. Secondly, the matter involved an encroachment on parliamentary sovereignty and was outwith the court's jurisdiction. Thirdly, the conditions for a reference had not been met, as the facts were not ascertainable and the issue was hypothetical.

[5] Matters have moved on once more with the passing of the European Union (Withdrawal) Act 2018. Section 13 of this Act sets out, in considerable detail, the means by which parliamentary approval is to be sought once the negotiations between the UK Government and the EU Council have been concluded. In particular, the withdrawal agreement can only be ratified if it, and the framework for the future relationship of the UK and EU, have been approved by a resolution of the House of Commons and been debated in the House of Lords. If no approval is forthcoming, the Government must state how they propose to proceed with negotiations. If the Prime Minister states, prior to 21 January 2019, that no agreement in principle can be reached, the Government must, once again, state how they propose to proceed. They must bring that proposal before both Houses.

[6] Meantime, on 15 May 2018 the Scottish Parliament refused to consent to what was then the European Union (Withdrawal) Bill as advised under the legislative consent (Sewel) convention (cf *R (Miller)* v *Secretary of State for Exiting the European Union* (*supra*) at para 150).

[7] At the expiry of the two year period, there may or may not be an agreement. If there is an agreement, Parliament will have to decide whether to approve it. If it is not approved, and nothing further occurs, the treaties will cease to apply to the UK on 29 March 2019. The stark choice is either to approve the agreement or to leave the EU with no agreement. The petitioners seek a ruling on whether there is a valid third choice; that is to revoke the notification with the consequence, on one view, that the UK would remain in the EU. If that choice were available, the petitioners argue, members of the UK Parliament could decide which of three options was preferable. They could not only elect to reject the agreement because it was, in their view, a worse deal than having no agreement at all, but also because both the agreement or the absence of an agreement were worse than remaining in the EU; a situation which could be achieved by revoking the notification. If such revocation were not

a legally valid option, the stark choice would be all that was left. The petitioners wish to have a definitive ruling, to enable them to make informed choices based on the options legally available.

The Lord Ordinary's Opinion (2018 SLT 657)

[8] The Lord Ordinary queried en passant whether it was competent for the court to issue what would be an advisory declarator, in the absence of an allegation of an excess or abuse of power (*West* v *Secretary of State for Scotland* 1992 SC 385 at 413). However, he went on to consider whether a reference was "necessary" in order to resolve a dispute (TFEU art 267). The Lord Ordinary reasoned, first, that there was no live proposal to revoke the notification. It was highly unlikely that it would be revoked, standing the referendum result and the Government's firm and consistent position. Following *Macnaughton* v *Macnaughton's Trs* 1953 SC 387 (at 392), the Lord Ordinary found that the question was hypothetical and therefore not justiciable. Revocation was contingent on a set of circumstances and a change in political will. A ruling on the validity of revocation was not required to enable the petitioners to fulfil their respective parliamentary roles.

[9] Secondly, the petitioners' reliance on certain statements made in the UK Parliament by Government ministers, which indicated a view that revocation was not an option, amounted to a breach of parliamentary privilege. Although the petitioners had departed from their former averments, to the effect that these statements demonstrated the Government's "position", the statements were still being relied upon as a basis for the contention that the Government had misdirected themselves in law. It was not for the courts to examine or to adjudicate upon what had happened in Parliament (*Adams* v *Guardian Newspapers* 2003 SC 425 at para [14]). It was for Parliament to decide what options

were available and what advice it wished to seek in the course of the legislative process. The resolution of the question was one for Parliament and not the court. Impeaching the validity of what had been said in Parliament was an encroachment upon parliamentary sovereignty.

[10] Thirdly, the Lord Ordinary determined, following *C62/14 Gauweiler* v *Deutsche Bundestag* [2016] 1 CMLR 1 (at paras 24-25) and *R* v *International Stock Exchange ex p Else* [1993] QB 534, that the test was whether the facts had already been found and a ruling on EU law was critical to the ultimate decision. The question remained hypothetical. The facts had not been ascertained, as they had not yet occurred.

Submissions

Petitioners

[11] The petitioners advanced four grounds of appeal. First, the Lord Ordinary erred in holding that the issues were academic or hypothetical; such that the court could not give a decision. The issue was of great constitutional importance. Votes upon it were required in the Scottish, European and UK Parliaments. The issue was directly relevant to the parliamentarians' decisions on how to vote. This had been said in briefing papers to MPs. If a decision to remain was available as a matter of EU law, the UK Parliament could pursue that option irrespective of Government policy. The Lord Ordinary's decision would mean that the parliamentarians would have to vote in ignorance of this. The existence of a "serious controversy" was sufficient to render an issue, including a future issue, justiciable (Clyde & Edwards: *Judicial Review* at para 13.07). A declarator could be granted on a question of law; the answer to which was required for a real and practical purpose, where that was desirable and no other remedy was appropriate (De Smith: *Judicial Review* (8th ed) at

paras 18-042-043). Revocability was a real, live question with practical and legal consequences.

[12] In the normal situation, where MPs were voting upon a change in domestic law, issues concerning the legality of their decisions would not arise because of the sovereignty of Parliament. Different considerations arose where EU law was involved. MPs were entitled to know whether their decision to vote, on the basis that the notification could be revoked, was sound in law.

[13] Secondly, the Lord Ordinary had erred in holding that the court could not provide an advisory declarator on the legality of future or contingent action. The petitioners were not attempting to press the court into putting forward a particular interpretation or interfering with parliamentary proceedings. They only sought to ascertain whether revocation was possible or whether a vote in favour of that course would be pointless. The Government's position on revocation was irrelevant. The question was not an academic one. In determining the issue, the court would be fulfilling its constitutional obligation to maintain the rule of law (*Walton* v *Scottish Ministers* 2013 SC (UKSC) 67 at para 90; *R (Miller)* v *Secretary of State for Exiting the European Union* (*supra*)). The court could make advisory declarators (*Law Hospital NHS Trust* v *Lord Advocate* 1996 SC 301). It would be unduly restrictive to confine the court to redressing individual grievances or disputes.

[14] Thirdly, the Lord Ordinary had erred in holding that referring to statements in Parliament was unconstitutional, unlawful or incompetent. The petition did not involve questioning what had been said in Parliament. The use of statements made in Parliament was permissible (*Toussaint* v *AG of St Vincent and the Grenadines* [2007] 1 WLR 2825 at paras 16-17, 23 and 31). Parliamentary privilege could not be invoked to prevent the court from exercising its supervisory jurisdiction (*Whaley* v *Lord Watson* 2000 SC 340 at 348-9).

[15] Fourthly, the Lord Ordinary had erred in determining that the CJEU would not entertain a reference. The CJEU considered itself to be in partnership with the national courts in order to ensure access to justice (*Minister for Justice* v *O'Connor (No 2)* [2018] 20 ITLR 692 at para 1.3). It was only in exceptional circumstances that the CJEU would decline a reference (*C-304/16 R(American Express Co)* v *HM Treasury Commissioners* [2018] 4 CMLR 22 at paras 31-34).

[16] Any reference should request the use of the expedited, rather than the urgent, procedure (cf *C-327/18 Minister for Justice and Equality* v *RO*, unreported, Opinion of the Advocate General to the CJEU, 7 August 2018).

Respondent

[17] The respondent replied, first, that the notification would not be revoked. Therefore, no genuine dispute about the proper construction of Article 50(2) arose. There was no real prospect of the Government seeking to revoke the notification. In terms of the 2018 Act, Parliament would be able to consider and vote on any negotiated withdrawal agreement and the framework for a future relationship. There was no need to resolve any legal uncertainty. Having looked at the interests of all the parliamentarians, the Lord Ordinary correctly held that no live practical issue arose. Although Parliament could, through legislation, direct the actions of the Government, any issue in that regard could only arise once Parliament had given such an instruction. Article 50(2) did not create rights in individuals but in member states. The issue of revocation would only arise at an international level if the Government purported to revoke the notification. There was no indication that Parliament intended to direct the Government to do so. The high threshold for advisory declarators was not met. The petition was thus incompetent.

[18] Secondly, Lord Ordinary had been correct in his understanding of the limitation on the court's ability to issue advisory opinions (*Law Hospital NHS Trust* v *Lord Advocate* (*supra*) at 309, citing *Macnaughton* v *Macnaughton's Trs* (*supra*) at 392). The Lord Ordinary did not attempt to determine the scope of the supervisory jurisdiction; but to distinguish between cases where it would be appropriate to issue declaratory judgments, such as those where issues of life and death were involved, and those where it would not. The Lord Ordinary did not purport to determine that, following *West* v *Secretary of State for Scotland* (*supra*) (at 413), the only purpose of the supervisory jurisdiction was to ensure that a decision maker did not exceed or abuse his powers. There was no such issue in this case.

[19] Thirdly, parliamentary proceedings were not justiciable (*Adams* v *Guardian Newspapers* (*supra*) at paras [13]-[17]; *Coulson* v *HM Advocate* [2015] HCJAC 49 at paras [11-14]. The principle of the separation of powers required the judiciary to refrain from interfering with, or criticising, proceedings in the legislature. Only in exceptional circumstances would the courts intervene (*Axa General Insurance* v *Lord Advocate* 2012 SC (UKSC) 122 at para 49). Privilege encompassed the non-justiciability of questions about the extent and nature of information which was needed by MPs to perform their duties. That was what the petitioners were seeking. The Lord Ordinary was correct to conclude that the attempt to have the court influence the debate or vote was a dangerous encroachment on the sovereignty of Parliament. The use of parliamentary material to draw inferences about Government policy, as distinct from demonstrating historical fact, was illegitimate (cf *Pepper* v *Hart* [1993] AC 593). *Toussaint* v *AG of St Vincent and the Grenadines* (*supra*) was an exceptional case concerning property rights and access to justice. Constitutionally, it was a matter for Parliament to decide what advice it required.

[20] The CJEU did not admit requests for purely hypothetical or advisory rulings (*C62/14 Gauweiler* v *Deutsche Bundestag* (*supra*) at para 25; *C-304/16 R(American Express Co)* v *HM Treasury* (*supra)* at paras 31 -34). There had to be a genuine dispute. The court had to have regard to the proper function of the CJEU when requesting a ruling (*C-470/12 Pohotovost' sro* v *Vašuta* [2014] 1 All ER Comm 1016 at para 29). If the court could resolve the issue itself, it did not need to refer (*R* v *Stock Exchange ex p Else* (*supra*) at 545). Here, no right was under threat (cf *Union Royale Belge des Societes de Football Association* v *Bosman* [1995] ECR I-4921 at paras 64-65). The factual basis had not been established. No determination was required to resolve any dispute (cf *Minister for Justice* v *O'Connor (No 2) (supra); C-327/18 Minister for Justice and Equality* v *RO* (*supra*)).

Decision

[21] The courts exist as one of the three pillars of the state to provide rulings on what the law is and how it should be applied. That is their fundamental function. The principle of access to justice dictates that, as a generality, anyone, who wishes to do so, can apply to the court to determine what the law is in a given situation. The court must issue that determination publicly. As Bankton (*Institute*, iv.xxiii.18 (p 602)) puts it:

> "... all persons may pursue, for the law ought to be open to all people, to make their claims effectual; since for every right there must be a remedy, and want of right and want of remedy are the same thing ...".

The traditional method of securing an answer to a legal question posed is by action of declarator. "[T]he general rule is, that any right may be ascertained by a declarator" (*Barbour* v *Grierson* (1827) 5 S 603 (rvsd 565), Lord Glenlee (with whom the other members of the court agreed) at 604; *Gifford* v *Trail* (1829) 7 S 854, Full Bench at 867-8; see also *Earl of Mansfield* v *Stewart* (1846) 5 Bell's App 139, Lord Brougham at 160). For the avoidance of

doubt, this jurisdiction is not one of *parens patriae*, which involves the court assuming the role of the Sovereign in relation to children or the incapable (*Law Hospital NHS Trust* v *Lord Advocate* 1996 SC 301, LP (Hope) at 313).

[22] For practical reasons, which are principally resource driven, there are limits to the general right to a legal ruling. One is that a court should not be asked to determine hypothetical or academic questions; that is those that will have no practical effect. In a case where there are no petitory conclusions, the declarator must have a purpose. There has to be some dispute about the matter sought to be declared. The declarator must be designed to achieve some practical result. This procedural limitation often overlaps with questions of title or interest. It was put thus by Lord Dunedin in *Russian Commercial and Industrial Bank* v *British Banks for Foreign Trade* [1921] 2 AC 438 (at 448, quoted in *Law Hospital NHS Trust* v *Lord Advocate* (*supra*), LP (Hope) at 309):

> "The rules that have been elucidated by a long course of decisions in the Scottish courts may be summarised thus: The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought."

All of that is sound, but its context has to be one in which the default position is that the issue is justiciable; ie the pursuer or petitioner has a right to have the question of law decided. The issue is correctly focused, as it is in this case, in a plea-in-law for a respondent or defender.

[23] The approach of Lord Dunedin in the related area of title and interest is set out in what was, until recently, the *locus classicus* of *D & J Nicol* v *Dundee Harbour Trs* 1915 SC (HL) 7. In *D & J Nicol*, Lord Dunedin confined (at 12-13) the necessary qualifying title to situations in which a person had "some legal relation" which created a right which was infringed or denied by his opponent. This approach is reflected, returning to academic

questions, in the celebrated *dictum* of the Lord Justice Clerk (Thomson) in *Macnaughton* v *Macnaughton's Trs* 1953 SC 387 (at 382) that:

> "Our Courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The Courts are neither a debating club nor an advisory bureau. Just what is a live practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case. I doubt whether any good purpose is to be served by trying to extract any general rule from the decided cases. Each case as it arises must be considered on its merits, and the Court must make up its mind as to the reality and immediacy of the issue which the case seeks to raise. Unless the Court is satisfied that this is made out, it should sustain the plea of incompetence, as it is only with live and practical issues that the Court is concerned."

[24] The merits, in terms of court time and parties' expense, of a restrictive approach which limits access to the courts may be clear, but they are inconsistent with the modern view on the functions of a court in the public law field set out by Lord Reed in *AXA* v *Lord Advocate* 2012 SC (UKSC) 122 (at para [159] *et seq*) having regard to: (i) the establishment of judicial review as a distinct procedure; (ii) *West* v *Secretary of State for Scotland* 1992 SC 385; and (iii) the increase in judicial review applications. Although referring specifically to judicial review, and distinguishing litigation under that heading from actions to enforce private rights, Lord Reed (at paras [169-171]) emphasised the need for an interests, rather than a rights, based approach in the area of public law as follows:

> "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 ... upon the context, and in particular upon what will best serve the purposes of judicial review in that context" (para [170]).

He emphasised the essential function of the courts as being "the preservation of the rule of law, which extends beyond the protection of individuals' legal rights" (para [169]).

[25] *Macnaughton* involved private succession rights and is far removed from the present case (cf *Clarke* v *Fennoscandia* 2008 SC (HL) 122, Lord Rodger at para [29]). Even then, the

Lord Justice Clerk in *Macnaughton* was careful to confine his general remarks to "the ordinary run of contentious litigation", even if they may have some resonance in a wider context. The Lord Ordinary (Guthrie), to whose interlocutor the court adhered, had carried out a review of the earlier authorities. Whilst stating (at 389) that the function of the court was not to advise parties on their future course of action or to answer a question which may never arise, he emphasised that the court would answer a question which was "neither academic or premature, but is both practical and of immediate urgency" (*Turner's Trs* v *Turner* 1943 SC 389, LP (Normand) at 398). He continued:

> "If in such circumstances a party is 'excusably uncertain' as to his rights, an action of declarator can be competently raised, in order to avert the consequences of his being compelled to test his rights by experiment - ... The recent practice of the Court is less strict than formerly as to the competency of actions of declarator, and 'the modern tendency appears to be to open the doors wider to such proceedings'" (*Turner's Trs* v *Turner* (*supra*), Lord Carmont at 394).

[26] This petition does not now seek to review the actings of any body. The focus has shifted from one which sought to challenge what was alleged to be Government policy to one seeking a declarator irrespective of the Government's position. The remedy sought, of reduction of a letter from the respondent, has gone. The contentions about the Government misdirecting itself or failing in relation to a duty of candour do not find their way into the remedies sought. There is no matter left to be reviewed. It may therefore be doubted whether the case falls within the supervisory jurisdiction of the court and thus within the scope of judicial review (RCS 58.3) as defined in *West* v *Secretary of State for Scotland* (*supra*) (LP (Hope), delivering the Opinion of the Court, at 412-413). However, the court's jurisdiction in public law matters is not confined to the review of decisions or failures to act. It may be that the case ought to have proceeded simply by way of an action of declarator

rather than a petition for judicial review. However, no procedural point in that regard is taken.

[27] It is clear, in terms of the European Union (Withdrawal) Act 2018, that MPs will be required to vote on whether to ratify any agreement between the UK Government and the EU Council. If no other proposal is proffered, a vote against ratification will result in the UK's departure from the EU on 29 March 2019; a date which is looming up. It seems neither academic nor premature to ask whether it is legally competent to revoke the notification and thus to remain in the EU. The matter is uncertain in that it is the subject of a dispute; as this litigation perhaps demonstrates. The answer will have the effect of clarifying the options open to MPs in the lead up to what is now an inevitable vote. Whatever the interest of MSPs and MEPs, MPs have an interest in seeing the matter resolved. On that basis the petition is competent at least at the instance of an MP.

[28] A declarator by this court, suitably advised by the CJEU, that it is competent to revoke the notification with the effect that the UK will remain a member of the EU, does not infringe the boundaries of parliamentary privilege. A declarator of the law, of the nature sought, does not criticise or call into question anything that has been said in Parliament. It does not fetter or otherwise interfere with the options open to the legislature. It does not challenge freedom of speech in Parliament or parliamentary sovereignty. The court is not advising Parliament on what it must, or ought to, do. It is not otherwise seeking to influence Parliament's direction of travel. It is merely declaring the law as part of its central function. How Parliament chooses to react to that declarator is entirely a matter for that institution.

[29] The introduction of parliamentary privilege in the answers to the original petition had been aimed at what, it was averred, had been said by Government ministers about the Government's policy or "position". Although there are remnants of these averments

remaining in the petition, they have ceased to be a central pillar in the case. The references are merely narrative of past fact. Nothing material in the petition as it now stands questions what was said in Parliament or the motives of the speakers. The petition does not seek to draw inferences from parliamentary proceedings in any way which could have a bearing on the remedies now sought (*Adams* v *Guardian Newspapers* 2003 SC 425, Lord Reed at para [13] *et seq*, citing (at para [16]) *Prebble* v *Television New Zealand* [1995] 1 AC 321).

[30] References by the Scottish courts to the CJEU have been rare. The Court of Session has been anxious, whenever possible, to resolve disputes which involve aspects of EU law without troubling the CJEU. Only about ten references have emerged from Scotland in some 45 years (eg *Scotch Whisky Association* v *Lord Advocate* [2014] CSIH 38, 2017 SC 465, cf *Sinclair Collis* v *Lord Advocate* 2013 SC 221, 2011 SLT 620). It would be disappointing if a rare request for assistance were to be met with a negative response. That would seem unlikely. In *C304/16 R (American Express Co)* v *HM Treasury Commissioners* [2018] 3 CMLR 1 at paras 31-32, the CJEU said:

> "It must first be borne in mind that it is solely for the national court hearing the case, which must assume responsibility for the subsequent judicial decision, to determine, with regard to the particular aspects of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it refers to the Court. Consequently, where the questions submitted concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling [*C62/14 Gauweiler* v *Deutsche Bundestag* [2016] CMLR 1 at] para 24).
>
> It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it [(*Gauweiler and Others* (*supra*), para 25)]."

[31] The reference in this case, which would be accompanied by a request for expedited procedure, would concern the operation of the withdrawal provisions in Article 50 of the TEU. The situation is not hypothetical or academic. Notification of withdrawal has been made. It may, in the absence of supervening events and perhaps in any event, take effect in about six months time. The court has been asked the question of "whether, when and how the notification ... can unilaterally be revoked" in advance of the expiry of the two year period. This can only be answered definitively by the CJEU. An answer would require to be provided before this court could grant the appropriate declarator. In these circumstances, reference to the CJEU for a preliminary ruling under Article 267 of the TFEU is "necessary".

[32] The court should accordingly recall the interlocutor of the Lord Ordinary dated 8 June 2018, repel the first, second, sixth and eighth pleas-in-law for the respondent, sustain the first, fourth and fifth pleas-in-law for the petitioners, and refer the matter to the CJEU for a preliminary ruling. Having regard to the manner in which the case was presented, the petitioners' third and sixth pleas and the respondent's third, fourth, fifth, seventh and ninth pleas would appear to be redundant and will be repelled for that reason.

[33] The reference requires to be prepared in terms of RCS 65 and Form 65.3. There are no disputed facts and no particular Scots law considerations. In those circumstances a relatively short reference has been drafted by the court and is appended hereto. The court will direct the parties to provide any submissions on the draft in writing within 14 days. It will then adjust the reference before transmission to the CJEU. On the reference being made, the case can be sisted meantime pending a remit to the Lord Ordinary to proceed in due course as accords on the issue of any final declarator (the petitioners' second plea).

APPENDIX

DRAFT

Form 65.3

Form of reference to the European Court

REQUEST

for

PRELIMINARY RULING
UNDER THE EXPEDITED PROCEDURE

of

THE COURT OF JUSTICE OF THE EUROPEAN UNION

from

THE COURT OF SESSION IN SCOTLAND

in the cause

ANDY WIGHTMAN MSP AND OTHERS

Petitioners and Reclaimers

against

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondent

[1] On 23 June 2016, a referendum of the United Kingdom electorate produced a majority in favour of leaving the European Union. The European Union (Notification of Withdrawal) Act 2017 authorised the Prime Minister to notify the UK's intention to withdraw from the EU under Article 50 of the Treaty on European Union. On 29 March 2017, the Prime Minister so notified the European Council.

[2] On 19 December 2017, a petition was lodged, in which the petitioners, who include members of the Scottish, United Kingdom and European Parliaments, seek a declarator specifying: "whether, when and how the notification…can unilaterally be revoked". The legal question, which the petitioners wish answered, is whether the notification can be revoked in advance of the expiry of the two year period; with the possible effect that the UK

would remain in the EU. The respondent's position has been that the question is hypothetical and academic, in the face of the UK Government's policy that the notification will not be revoked.

[3] By interlocutor and relative opinion dated 8 June 2018 (2018 SLT 657), the Lord Ordinary declined to make a reference to the CJEU and refused the petition upon three grounds. First, the issue was hypothetical in light of the UK Government's position. Secondly, the matter encroached upon parliamentary sovereignty and was outwith the court's jurisdiction. Thirdly, the conditions for a reference had not been met, as the facts were not ascertainable and the issue was hypothetical.

[4] Following upon the Lord Ordinary's decision, the European Union (Withdrawal) Act 2018 received Royal Assent. Section 13 of this Act sets out, in considerable detail, the means by which parliamentary approval is to be sought once the negotiations between the UK Government and the EU Council have been concluded. In particular, the withdrawal agreement can only be ratified if it, and the framework for the future relationship of the UK and EU, have been approved by a resolution of the House of Commons and been debated in the House of Lords. If no approval is forthcoming, the Government must state how they propose to proceed with negotiations. If the Prime Minister states, prior to 21 January 2019, that no agreement in principle can be reached, the Government must, once again, state how they propose to proceed. They must bring that proposal before both Houses.

[5] At the expiry of the two year period, there may or may not be an agreement. If there is an agreement, Parliament will have to decide whether to approve it. If it is not approved, and nothing further occurs, the treaties will cease to apply to the UK on 29 March 2019. In terms of the 2018 Act, MPs will be required to vote on whether to ratify any agreement between the UK Government and the EU Council. If no other proposal is proffered, a vote against ratification will result in the UK's departure from the EU on 29 March 2019.

[6] By interlocutor and relative opinion ([2018] CSIH 62) dated 21 September 2018, this court allowed a reclaiming motion against the Lord Ordinary's interlocutor, and acceded to the petitioners' request to make a reference under Article 267 of the Treaty on the Functioning of the EU. The court considered that it was neither academic nor premature to ask whether it is legally competent to revoke the notification and to remain in the EU. The matter is uncertain; it is, for example, the subject of this dispute. The answer will have the effect of clarifying the options open to MPs when casting their votes. Whatever the interest of MSPs and MEPs, MPs have an interest in the issue being determined.

[7] The court has been asked the question of "whether, when and how the notification ... can unilaterally be revoked" in advance of the expiry of the two year period. This can only be answered definitively by the CJEU. An answer would be required before this court could

grant the appropriate declarator. In these circumstances, reference to the CJEU for a preliminary ruling under Article 267 of the TFEU is "necessary".

[8] The preliminary ruling of the Court of Justice of the European Communities is accordingly requested on the following question:

"Where, in accordance with Article 50 of the TEU, a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the EU".

In light of the urgency of the issue in terms of parliamentary consideration and voting in advance of 29 March 2019, the President is requested to appoint this request to the expedited procedure under Article 105.1 of the Rules of Procedure.

Dated the day of 2018.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 62
P1293/17

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF LORD MENZIES

in the reclaiming motion

by

ANDY WIGHTMAN MSP AND OTHERS

Petitioners and Reclaimers

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SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondent

Petitioners and Reclaimers: O'Neill QC, Welsh; Balfour & Manson LLP
Respondent: Johnston QC, Webster; Office of the Advocate General

21 September 2018

[34] I am in complete agreement with the conclusions reached by your Lordship in the chair, with the reasoning leading to these conclusions, and with the disposal which your Lordship proposes. Standing the importance of the subject matter, I should like to add a few short observations of my own.

Is this an academic or hypothetical issue?

[35] It should be borne in mind that Lord Justice Clerk Thomson's well-known dictum in

Macnaughton v *Macnaughton's Trs*, quoted by your Lordship, was pronounced in what was very much a private law context, namely testate succession. The issue in that case was the interpretation of a forfeiture clause in a trust disposition and settlement in the event of all four of the testator's children electing to take legitim. The trustees called on the children of the testator to make their election between the provisions under the settlement and their legal rights. Just what that choice involved depended on the disputed interpretation of the settlement, as to which the trustees were unable to offer any guidance. The children brought an action for declarator of the proper meaning of the forfeiture clause and its effect. The court rejected the argument that the action raised a hypothetical question and was therefore incompetent. Having made the observations quoted by your Lordship in the chair, the Lord Justice Clerk went on to state (at pages 392/3):

> "The question of what is financially at stake for the electors seems to me to be dependent on the meaning of the settlement. As the issue of the meaning of the forfeiture clause is bound up with the evaluation of the option, the result is to make that issue a live and practical question in the sense which I have already discussed. It also falls to be observed that the question has the more immediacy as even delay in making an election may be fraught with serious legal results.
>
> It seems to me that in that situation the pursuers are entitled to know the proper legal meaning of the clause. That they can discover with certainty only by the admission of the interested parties or, in the absence of such admission, by judicial interpretation. As the necessary admission is withheld, it seems to me that those who withhold it are in no position to say that the pursuers must make up their minds on such legal advice as is available to them, and run the risk of that advice turning out to be wrong. This is a case where the practical choice between the values of the two rights is so closely bound up with the question of interpretation that that question becomes a real and immediate one and competent matter for decision in this action."

[36] There are two points to be made about this. First, as your Lordship observes, *Macnaughton* is far removed from the present case, which involves a constitutional question of considerable importance which may have an impact, not just on a group of four children

of a testator, but on a great number of individuals, companies and institutions in the United Kingdom. Secondly, there are some similarities between the arguments successfully advanced on behalf of the pursuers in *Macnaughton* and the arguments advanced on behalf of the petitioners here. Each case is concerned with an impending decision involving a choice; in each case it is contended that in order to make that choice the decision-makers need to know the proper legal meaning of a provision; and in each case the decision-makers argue that they are entitled to discover this with certainty by means of judicial interpretation. These arguments found favour with the court in *Macnaughton*. I find them persuasive in the circumstances of the present case.

[37] I do not consider that the issues raised by the present petition are hypothetical or academic. Indeed, they have been rendered less hypothetical since the decision of the Lord Ordinary, as a result of the coming into force of the European Union (Withdrawal) Act 2018, section 13 of which sets out the procedures necessary before any withdrawal agreement can be ratified. These procedures include approval by a resolution of the House of Commons and a debate in the House of Lords. There will have to be a vote, and it appears to me to be legitimate for those who are involved in that vote to know, by means of a judicial ruling, the proper legal meaning of Article 50, and in particular whether a member state which has given notification of its intention to withdraw from the EU may revoke that notification of intention unilaterally before the expiry of two years after the notification.

[38] The respondent submitted, both before the Lord Ordinary and before this court, that the United Kingdom Government has made it clear that its firm policy is that the notification under Article 50 will not be withdrawn, that the UK Government does not intend to seek to revoke the notification and Parliament has not instructed it to do so, and as a matter of fact there is nothing to suggest that it will; this submission found some favour with the Lord

Ordinary (see paras [27] and [47] of the Lord Ordinary's Opinion). However, this does not provide an answer to the petitioners' point, at least as it was developed before this court. Constitutionally, and in terms of the 2018 Act, it is a matter for Parliament to decide, not for the UK Government. The intention of the Government may be relevant by way of factual background, but it cannot be determinative of this issue.

[39] The legal interest or standing of MSPs and MEPs is not as clear to me as the interests of MPs in this matter, and I prefer to express no view on this. However, I consider that MPs have a clear interest in this issue, and are entitled to a judicial ruling as to whether a notice given by a member state in terms of Article 50 may competently be revoked unilaterally before the expiry of the two year period. It appears that there is no authority, in Scotland, England or the EU, directly in point on this issue, and it is therefore appropriate for this court to seek advice on it from the CJEU.

[40] I therefore conclude that this is not a hypothetical or academic issue, but a live, practical question, with which the court must engage.

Parliamentary privilege

[41] As originally drafted, and as argued before the Lord Ordinary, the petition placed some reliance on statements said to have been made in Parliament by Government ministers. However, the petition has been substantially revised since then, and although there are still passing references to statements of policy said to have been made by Government ministers, these appear to be by way of factual background and do not form a basis for the petitioners' submissions. I agree with your Lordship in the chair that the petitioners do not now seek to draw inferences from parliamentary proceedings, nor to impugn what was said in Parliament or the motives of the speakers. I am not persuaded

that it would be a breach of parliamentary privilege for this court, having received advice from the CJEU, to make a ruling on the issue of the competency of unilateral revocation of an Article 50 notice. This is a question of law, and of interpretation of an international treaty, and as such it is a question for the court. What to do once the answer to the question has been given is a matter for politicians, and the court should have no place in that. Frequently the answers to legal questions may have political consequences, but that fact cannot absolve the court from its duty to consider and, if possible, answer those legal questions.

Would the CJEU accept a preliminary reference on this issue?

[42] In light of the observations of the CJEU in *Gauweiler* v *Deutsche Bundestag* [2016] 1 CMLR 1 (particularly at paras 24 and 25) and *American Express Co* v *HM Treasury* [2018] 3 CMLR 1 (at paras 31 and 32), quoted by your Lordship in the chair at para [30] above, as well as the recent opinion of Advocate General Szpunar in *Case C-327/18 PPU Minister for Justice and Equality* v *RO* delivered on 7 August 2018 (particularly at paras 32-37), it seems to me unlikely that the CJEU would decline to give a preliminary ruling on this issue.

[43] For these reasons, as well as the other reasons given by your Lordship in the chair, I agree with the disposal outlined at paragraphs [32] and [33] above.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 62
P1293/17

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF LORD DRUMMOND YOUNG

in the reclaiming motion

by

ANDY WIGHTMAN MSP AND OTHERS

Petitioners and Reclaimers

against

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondent

Petitioners and Reclaimers: O'Neill QC, Welsh; Balfour & Manson LLP
Respondent: Johnston QC, Webster; Office of the Advocate General

21 September 2018

[44] I am grateful to your Lordship in the chair for setting out the factual background to this case. I agree with your Lordship that this court should request the Court of Justice of the European Union to answer the question suggested by the petitioners. My reasons for this conclusion are as follows.

The constitutional system of the United Kingdom

[45] It is a trite observation that United Kingdom does not have an express constitution.

Nevertheless, a number of constitutional principles and arrangements are of fundamental importance to the government of the country. Two of these are in my opinion of critical significance in the present case: first, the principle of Parliamentary sovereignty, and secondly, the function of the judiciary, including its constitutional independence from other branches of government.

[46] The principle of Parliamentary sovereignty is fundamental to the United Kingdom's constitution. It resulted from the constitutional conflicts of the 17th century, which concluded in the Revolution of 1688-90. Immediately thereafter the principle was recognized in a number of statutes, notably the Claim of Right 1689 and the Acts of Union of 1706 and 1707 in England and Wales and in Scotland respectively. In England and Wales, the Bill of Rights 1689 and the Act of Settlement of 1701 corresponded, functionally at least, to the Claim of Right in Scotland. The principle has been discussed recently by the UK Supreme Court in *R (Miller)* v *Secretary of State for Exiting the European Union*, [2018] AC 61, in particular at paragraphs [40]-[46]. The principle is described in the classic work on the subject, Dicey's *Introduction to the Study of the Law of the Constitution*, 8th ed (1915), at page 38:

> "the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law… as having a right to override or set aside the legislation of Parliament".

In *Miller* the majority of the court described Parliamentary sovereignty as "a fundamental principle of the UK constitution", and observed that the legislative power of the Crown is today exercisable only through Parliament. Thus Parliament, and Parliament alone, can effect changes in the law of the United Kingdom. Of course it is possible for an Act of Parliament to permit the making of subordinate legislation by the executive, and this is today an extremely common occurrence. Nevertheless, all subordinate legislation derives its effect from the underlying authority contained in an Act of Parliament.

[47] Likewise, European Union directives and regulations have effect within the United Kingdom, but that is through the mechanisms provided in the European Communities Act 1972 and subsequent legislation on the same topic. The decision in *Miller* is, put simply, a strong affirmation of the principle of Parliamentary sovereignty as it has existed since the end of the 17th century: the executive has no power to alter the law of the United Kingdom and its constituent jurisdictions without the specific authority of Parliament. That applies to European Union legislation as it applies within the United Kingdom just as much as any other area of law.

[48] The function of the judiciary and its constitutional independence of other organs of government is likewise of fundamental importance in the United Kingdom's constitutional system. The primary function of the courts is to decide the law as it now exists. Judges obviously develop the law, sometimes in important respects. This has always been a feature of the common law, both in Scotland and in England and Wales (where I use the expression "common law" to denote judge-made law, rather than to distinguish it from the civilian origins of systems such as Scots law). On occasion judicial development of the common law has been far-reaching in its effects; the development of the law of negligence and the law of judicial review during the 20th century are two obvious examples. Judicial decisions can also develop and modify the meaning of statutes, although in every case the judicial interpretation must find some basis in the terms of the statute itself. Nevertheless, the primary function of the courts is to declare the law as it presently exists, and where necessary to provide mechanisms to enforce that law.

[49] That function is independent of the constitutional functions of both Parliament and the executive. Judicial independence is fundamental to the constitutional arrangements of the United Kingdom, and indeed all other civilised nations. Determining the law as it now

exists is a function quite unsuited to a legislative body such as Parliament. Although many Members of Parliament have legal training and experience, overall there is an obvious lack of expertise. Furthermore, Members of Parliament are normally elected on the basis of party allegiance and a political programme. Although it has been said that a Member of Parliament should act in accordance with "his unbiased opinion, his mature judgment, his enlightened conscience", and should not sacrifice these to the will of his constituents, in practice Parliamentary votes tend to be cast along party or ideological lines. That is plainly an unsatisfactory way of determining the law; it lacks the total objectivity that is expected of judges in the exercise of their duties.

[50] The same can be said, with perhaps even greater force, of the executive. Ministers are normally Members of Parliament or Members of the House of Lords, and are expected to give effect to the policies and programme of the government. The total objectivity that is required in determining the present state of the law is, at best, uncertain, and may be absent. Furthermore, government policy is just that, and cannot have a bearing on the underlying question of what the relevant legal rights, obligations, powers and liabilities are at any particular time. In the argument presented on behalf of the Secretary of State considerable reliance was placed on the fact that it was the "firm and consistent policy of the Government" that the article 50 notice would not be withdrawn, and that the Government had the confidence of the House of Commons. These considerations are political matters, and they can have no bearing on the question that the petitioners wish to have resolved, whether the article 50 notification is legally capable of being withdrawn.

[51] The article 50 notice was of course issued under the Treaty on European Union, and its construction is obviously a matter of European Union law, having effect in the United Kingdom through the European Communities Act 1972 as modified by later statutes. In

construing the treaties that create the European Union and confer powers and responsibilities on it, the final court of appeal is the Court of Justice of the European Union. Consequently that is the only court that is able to give a definitive answer to the question whether the notice given under article 50 can be revoked subsequently. That in my view justifies a reference to that court.

The relationship of Parliament, the government and the judiciary

[52] Although the United Kingdom's constitutional system in large measure recognizes the separation of powers, especially in relation to the judicial function, it is in my opinion important to recognize that the three elements of government do not exist in separate spheres. They rather operate as a totality, with each element exercising a distinct function within an overall system. In relation to the construction and application of existing legislation, including European Union legislation, it is the courts, including the Court of Justice of the European Union, that exercise the relevant constitutional function. If it is necessary or desirable to determine what the existing law is, that is a matter for the courts, and their decision is binding on both Parliament and the government; that is an elementary application of the principle of the rule of law.

[53] In the present case the issue is the construction and application of existing law, in the form of article 50 of the Treaty on the European Union and any related general principles of European Union law. No change in the law is involved in the present proceedings, and accordingly what they seek to achieve is not a matter for Parliament. The fundamental argument for the petitioners is that, in casting their votes on the proposed withdrawal of the United Kingdom from the European Union, they should be properly advised as to the existing legal position. Their argument is, in essence, that in deciding what to do Members

of Parliament should be able to consider a range of options. It appears likely that the government will propose an agreement with the European Union and its remaining members, which may or may not be acceptable to a majority of members of Parliament. If the government's proposal is not acceptable, the default position currently appears to be that the United Kingdom would leave the European Union on a "no deal" basis. This would obviously have important implications; the law of the European Union at present covers large areas of legal practice, including international trade, customs and transport; financial services, regional aid, industrial policy, and trading standards (notably in chemicals and pharmaceutical products); employment rights; higher education; nuclear energy; agriculture and fisheries; criminal justice (notably extradition); immigration; asylum (through the Dublin Regulations, which involve return of asylum-seekers to the first country in which they are able to claim asylum); and the recognition of foreign judgments and other legal acts. The petitioners contend that members of Parliament should have a third option available to them, namely the revocation of the article 50 notification. Whether withdrawal is legally competent has been the subject of dispute, and it is to resolve this dispute that the present proceedings have been brought.

[54] In this connection, the decision of the UK Supreme Court in *R (Miller)* v *Secretary of State for Exiting the European Union*, *supra*, is important, as it makes clear that the final decision about the United Kingdom's withdrawal from the European Union and the arrangements that will replace the existing law are matters for Parliament, not the government in the exercise of the prerogative. This means that, at a practical level, it is important that Members of Parliament should be properly and authoritatively advised as to the existing legal position. The present law, however, is a matter for the courts alone, and in

so far as it relates to the construction of the Treaty on European Union it is a matter that can only be decided authoritatively by the Court of Justice of the European Union.

In domestic law, is the question raised by the present proceedings academic or hypothetical?

[55] As a matter of domestic Scots law, it is clear that the courts will not entertain a question that is merely academic or hypothetical. That proposition is vouched by a substantial number of cases. For present purposes it is sufficient to refer to *Macnaughton* v *Macnaughton's Trs*, 1953 SC 387, where LJC Thomson stated (at 392):

> "Our Courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs".

For the respondent it is contended that that principle was directly applicable to the present case: that the question raised, whether the article 50 notification can be revoked, is merely academic or hypothetical and has no practical application. In particular, it is said that in view of the government's declared position that the article 50 notification will not be revoked and the majority that it commands in the House of Commons (albeit with the support of a minority party), there is no realistic possibility that the notification will be withdrawn.

[56] While the government's position should be noted, for reasons that I have already discussed the executive's declared position cannot be binding as a matter of law. It is not the function of the executive to declare how the law stands at present; that is the function of the courts, and the courts alone. Consequently the fact that the government has apparently ruled out any revocation of the article 50 notification is not legally conclusive. Moreover, the

decision as to what sort of arrangement is to be reached as between the United Kingdom and the European Union is a matter that is ultimately under the control of Parliament as the supreme legislative body in the United Kingdom; that is the effect of the decision of the UK Supreme Court in *R (Miller)* v *Secretary of State for Exiting the European Union*, *supra*, and it is a proposition clearly vouched by a significant number of earlier cases which are cited in the majority opinion in *Miller*.

[57] As a matter of fact, the the government's declared position is clearly a statement of its present intention. Nevertheless, it is notorious that intentions may change for a wide range of reasons. This is particularly the case in the public sphere, where unforeseen developments or changes in circumstances may bring about a change of policy. That is merely the application of rational principles of decision-making to government; if circumstances change, policy may have to change in response. So far as withdrawal from the European Union is concerned, at this stage it appears impossible to be certain as to what will happen in the coming months. It is clear that European Union law is important in the legal systems of the United Kingdom, as indicated at paragraph [53] above. At present it appears to be uncertain whether any particular set of proposals for withdrawal from the European Union, whether put forward by the United Kingdom government or by others, will be acceptable both to the European Union and its member states and to a majority in the House of Commons. If no agreement can be reached, the default option at present appears to be withdrawal from the European Union without any sort of agreement. The legal consequences of such a move would clearly be immense, and viewed from a professional legal perspective they would appear to be very hard to predict. The petitioners, one of whom is a Member of Parliament, contend that the options open to Parliament should not be restricted to on one hand an agreement between the United Kingdom and the European

Union, which may fail to command a majority, and on the other hand the so-called "no-deal Brexit". In addition to those, the petitioners submit that a third option, revocation of the article 50 notification, is an option that should be available to Parliament if it is legally competent. Clearly this court cannot express an opinion on what Members of Parliament may or may not do in future; to do so would involve a quite unwarranted intrusion into an area that is constitutionally within the competence of Parliament and Parliament alone.

[58] Nevertheless, I find it impossible to hold that the question of the withdrawal of the article 50 notification is a matter that is irrelevant to Parliament's deliberations. It is, moreover, an option that some Members of Parliament appear to consider significant. If Members of Parliament are to cast their votes in a responsible manner, it is surely obvious that they should be properly advised as to the existing legal position so far as that may be relevant to their deliberations. I would emphasise the words "may be"; it is clearly not for the courts to tell Members of Parliament what considerations they should regard as relevant but it is for the courts, if they are requested to do so, to advise Members of Parliament as to what the law is. It is then up to individual Members of Parliament to make what they will of the courts' advice. In these circumstances it cannot be said in my opinion that the question of revocation of the article 50 notification is merely academic or hypothetical. It is a matter that may, in some circumstances, be relevant to the way in which some Members of Parliament cast their votes on a matter of fundamental importance to the future of the United Kingdom. Nor can it be said that the court is merely, in words used by the Lord Justice Clerk in *Macnaughton* v *Macnaughton's Trs*, *supra*, advising litigants as to the policy that they should adopt in ordering their affairs. It is true that the ultimate objective is to obtain advice as to the existing state of the law, but that advice is considered, by the petitioners at least, to be of vital importance in conducting the public affairs of the country

in a matter of obvious national importance. That is a wholly different matter from the situation contemplated by the Lord Justice Clerk.

[59] So far there has been very little case law in the courts on the consequences of the United Kingdom's referendum vote to leave the European Union. This applies in particular to the question of whether at present the consequences are a matter of no more than hypothetical interest. In a sense, at this stage any such question involves rights and powers, and corresponding obligations and liabilities, that will only become effective in future. Nevertheless the courts have generally been quite willing to consider the legal consequences at this stage; *R (Miller)* v *Secretary of State for Exiting the European Union*, *supra*, is an obvious example. This is hardly surprising. The consequences of leaving the European Union are plainly a matter of enormous importance for the United Kingdom, constitutionally, economically and in numerous other ways. There is uncertainty about the sort of arrangements that might be reached in future between the United Kingdom and European Union; departure from the European Union using the mechanism in article 50 involves venturing into completely new territory. In these circumstances, ascertaining the legal principles that apply to the use of article 50 and its consequences are a matter of great practical importance; to suggest otherwise appears to me to be manifestly absurd. The present situation should be contrasted with the position before article 50 was invoked, when the consequences of that act and the possibility of revoking it were truly hypothetical. Furthermore, many of the consequences of the article 50 declaration will become material as soon as the two-year time limit specified in that declaration comes into effect, on 29 March 2019. After that, the possibility of revocation will plainly be hypothetical. If the rights and powers of interested parties cannot be determined before that date, the country, and its

legislature and executive, will be, metaphorically, sleepwalking into the consequences. That is plainly an impractical and undesirable result.

In European Union law, is the question raised by the present proceedings academic or hypothetical?

[60] At a European Union level, a number of cases are coming before the Court of Justice to determine the consequences of the article 50 declaration. The fullest discussion to date is perhaps that found in the opinion of Advocate General Szpunar in Case C-327/18 PPU, *Minister for Justice and Equality* v *RO*, 7 August 2018. The facts of that case are not of particular importance for present purposes; it concerned the question of whether the European arrest warrant system continues in existence during the period between the article 50 notification and the United Kingdom's departure from the European Union. The Irish High Court referred the matter, through a series of specific questions, to the Court of Justice of the European Union. In his opinion, the Advocate General suggested that during the two-year period following the article 50 notification European Union provisions, including the European arrest warrant system, remain fully in force, and should be given effect accordingly: paragraphs 47-49. The admissibility of the reference was considered at paragraphs 32-37, where the Advocate General stated:

> "32. At the outset, it should be stressed that there is no issue as to the admissibility of this case.
>
> 33. The Court's jurisdiction to give preliminary rulings pursuant to article 267 TFEU relates to the interpretation of the Treaties and the validity and interpretation of the acts of the institutions.
>
> 34. The questions themselves [asked by the Irish High Court] referred to Article 50 TEU. Together with the clear explanations and outline of the legal issues the referring court sees itself faced with, this is enough for the case to be admissible. In particular, the case at issue is not hypothetical in the sense of the Court's relevant case-law, given that Article 50 TEU already displays legal effects.

> 35. Moreover, should matters stay exactly as they are at present,… as a consequence of Article 50(3) EU law will cease to apply to the United Kingdom as of 29 March 2019. This date lies in the foreseeable future and, at any event, at a moment when the post-surrender provisions of the Framework Decision [the principal European arrest warrant legislation] still deploy their effects.
>
> 36. Therefore, while the request for a preliminary ruling, such as the present one, is not hypothetical in nature, this does not mean that we cannot work on assumptions, even if these assumptions are that, in legal terms, things will stay as they currently are.
>
> 37. The referring court is seeking an answer from the Court which it considers necessary in order to determine whether to execute an arrest warrant. An answer should be given".

The foregoing passage displays, if I may say so, the typical focus of European Union law on practicality and effectiveness. At a practical level, it is surely obvious that the consequences of the article 50 notification are anything but hypothetical at this stage. The same is true of the corresponding test in domestic Scots law, as found in cases such as *Macnaughton* v *Macnaughton's Trs*, *supra*: at a practical level, the question asked by the petitioners is not academic or hypothetical.

[61] The opinion of the advocate general in Case C-327/18 PPU, *Minister for Justice and Equality* v *RO*, *supra*, obviously relates directly to European Union law, as to whether a question relating to the consequences of the United Kingdom's article 50 notification would be considered hypothetical at this stage. It is a clear indication that it would not be regarded in that manner. For the reasons discussed in relation to domestic Scots law, I am of opinion that it is unlikely that the Court of Justice would reject the questions proposed by the petitioners on that basis.

[62] Whether those questions are admissible is, however, a matter for the Court of Justice of the European Union, not for this court; it has power to reject a reference as inadmissible. For this reason, even without the guidance provided by Advocate General Szpunar, I would

have held that the question of admissibility at European Union level is a matter for the Court of Justice of the European Union.

Parliamentary privilege

[63] It is contended for the respondent that putting the proposed questions to the Court of Justice with a view to guiding Parliamentary debates would involve an infringement of Parliamentary privilege. The subject matter of the petition, it was said, involved an encroachment on Parliamentary sovereignty and was therefore not justiciable. In my opinion this contention must be rejected.

[64] Parliamentary privilege serves two main purposes. The first of these is to avoid the risk of interference with free speech in Parliament and the ability of Members of Parliament to vote as they wish on legislative proposals or other subjects of debate. The second is an aspect of the separation of powers: courts should not interfere with or criticize the legislature. The relevance of Parliamentary privilege to any particular question must in my view be judged against those purposes. In the present case, what is sought by the petitioners is a ruling by the courts on the state of the existing law, in particular article 50 of the Treaty on European Union. As I have sought to explain, that is peculiarly the function of the courts; under the constitutional arrangements of the United Kingdom, only the courts can give authoritative guidance on the meaning and application of the existing law. To state what the existing law is, or how it applies, does not involve any interference with free speech in Parliament; Members of Parliament are free to comment as they wish on the court's opinion. Nor does the court's opinion compel Members of Parliament to vote in any particular way; they are free to vote as they wish, taking account of the opinion or ignoring it as they think fit.

[65] Nor does the court's opinion involve interference with or criticism of the legislature. It is simply a statement of the existing law, which is precisely the constitutional function of the courts. Moreover, the doctrine of separation of powers goes further than this. It is axiomatic that the courts should not interfere in Parliamentary proceedings. Equally, Parliament (and the government) should not interfere with the courts' performance of their own constitutional duties. The courts must decide and apply the law in a totally fair and objective manner, and any attempt by parliamentarians to interfere with that is just as objectionable from the constitutional standpoint as an attempt by the courts to interfere in the deliberations of Parliament. Each body has its own constitutional functions, and each must respect the other. That seems to me to be fundamental to the British constitution. In effect, what is involved is a principle of mutual respect among the three elements of government – Parliament, the executive and the courts. The three work together in ensuring the good government of the country, but they perform different tasks. In performing those tasks, they must display due respect towards the powers and duties of the other elements of government.

The supervisory jurisdiction of the Court of Session

[66] The last important question is the scope of the supervisory jurisdiction of the Court of Session. For the respondent it was contended that the present proceedings lay outwith the scope of that jurisdiction. I would reject that contention, for the following reasons.

[67] The fundamental purpose of the supervisory jurisdiction is in my opinion to ensure that all government, whether at a national or local level, and all actions by public authorities are carried out in accordance with the law. That purpose is fundamental to the rule of law; public authorities of every sort, from national government downwards, must observe the

law. The scope of the supervisory jurisdiction must in my opinion be determined by that fundamental purpose. Consequently I would have no hesitation in rejecting any arguments based on procedural niceties, or the detailed scope of previous descriptions of the supervisory jurisdiction, if they appear to stand in the way of the proper enforcement of the rule of law.

[68] The present case is a somewhat unusual example of the supervisory jurisdiction, in that the court is ultimately asked to request the Court of Justice of the European Union to answer a question on the scope of article 50 of the Treaty on European Union. That is not a form of procedure found in traditional administrative law within the United Kingdom. Moreover, the function of the question is to enable certain persons, notably Members of Parliament, to be properly informed about the present state of the law in relation to article 50. Nevertheless, while the form of the proceedings and their effect is different from the traditional application of the supervisory jurisdiction, the underlying purpose is to ensure that those charged with voting on issues of vital importance to the United Kingdom are properly advised on the existing state of the law. That in my opinion falls squarely within the fundamental purpose of the supervisory jurisdiction.

[69] There is, moreover, a clear analogy with the use of a declarator to advise a public body or authority as to what the law is or how it applies in a particular situation. Declarator has frequently been used as a remedy in the field of public law; its utility is obvious. In relation to European Union law, however, it is not the Court of Session that can grant an authoritative declarator as to the state of the law but the Court of Justice of the European Union. In order for that to happen, the Court of Session must pose questions to the Court of Justice. The answers to those questions, however, are functionally equivalent to a declarator issued by the Court of Session. Consequently I am unable to discover any procedural reason

for not using judicial review procedure in such a way as to make a reference to the Court of Justice in order to obtain its opinion. For these reasons I would reject the argument that this petition for judicial review is procedurally or jurisdictionally incompetent.

Conclusion

[70] For the foregoing reasons I agree with your Lordship in the chair that this court should request the Court of Justice to answer the question posed by the petitioners.