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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McCord's (Raymond) Application [2016] NIQB 85

IN THE MATTER OF AN APPLICATION BY RAYMOND McCORD

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF ARTICLE 50 OF THE TREATY OF THE

EUROPEAN UNION

AND IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY

(1) STEVEN AGNEW

(2) COLUM EASTWOOD

(3) DAVID FORD

(4) JOHN O'DOWD

(5) DESSIE DONNELLY

(6) DAWN PURVIS

(7) MONICA WILSON

(8) THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE

(9) THE HUMAN RIGHTS CONSORTIUM

AND

(1) HER MAJESTY'S GOVERNMENT

(2) THE SECRETARY OF STATE FOR NORTHERN IRELAND

(3) THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondents

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MAGUIRE J

Introduction

[1] The court has before it two applications for judicial review which substantially relate to the same subject matter – the intention of the Government, following the result of the referendum held in the United Kingdom on 23 June 2016 and in the light of the result, where a majority of those who voted, voted in favour of the United Kingdom leaving the EU – to use the Royal Prerogative to invoke Article 50 TEU to trigger the process by which withdrawal from the EU is effected.

[2] The first application has been made by Raymond McCord, who is a man of 62 years of age. He describes himself as a British and European citizen and as a resident of Northern Ireland. He has, as his Order 53 relates, acted as a victims' campaigner following the murder of his son, Raymond, by Loyalist paramilitaries on 9 November 1997.

[3] The second application has been made by multiple applicants and will be referred to herein as Agnew and Others. The majority of the applicants are politicians, including several who are members of the Northern Ireland Assembly. In addition, there are applicants who have close associations with the voluntary and community sector in Northern Ireland. This group of applicants also includes concerned human rights organisations: the Committee on the Administration of Justice (an independent human rights organisation with a cross community membership in Northern Ireland) and the Human Rights Consortium (a charity with over 160 member organisations from across all communities in Northern Ireland).

[4] The intended respondents are variously described in the Order 53 Statements. In essence, the applications are directed at Her Majesty's Government for the United Kingdom. A number of Secretaries of State are expressly referred to: in particular, the Secretary of State for Exiting the European Union and the Secretary of State for Northern Ireland.

[5] As, in the view of the court, the applications raised devolution issues for the purpose of Order 120 of the Rules of the Court of Judicature, the court served devolution notices on the Attorney General, the Attorney General for Northern Ireland and others. In response, the Attorney General for Northern Ireland entered an appearance and has provided to the court written and oral representations in respect of the devolution issues.

[6] The applications for judicial review have been considered together. Because of their urgency, the court has dealt with them under an expedited timetable. The hearing before the court has taken the form of a rolled up hearing so that the court technically has before it both the issue of leave to apply for judicial review and the issue of appropriate relief in the event that leave to apply for judicial review is granted.

[7] Mr Ronan Lavery QC and Mr Conan Fegan BL appeared for Mr McCord. Mr David Scoffield QC and Mr Christopher McCrudden BL and Mr Gordon Anthony BL appeared for the applicants in Agnew and Others. Mr Tony McGleenan QC and Mr Paul McLaughlin BL appeared for the intended respondents in each case. As already noted, the Attorney General for Northern Ireland, Mr John Larkin QC, entered an appearance and made written and oral submissions. The court is grateful to all counsel for their submissions and for their assistance in enabling the proceedings to be brought to hearing quickly.

Case Management

[8] Apart from the issue of the urgency of these applications, a matter which the court has had to consider is the relationship these proceedings should bear to similar proceedings which, at the time these applications were brought, were already underway in the jurisdiction of England and Wales. The English proceedings, R (Miller) and others v Secretary of State for Exiting the European Union, also is concerned with the means by which Article 50 TEU is to be triggered and the question of the displacement of prerogative executive power by statute. In that litigation, at centre stage is the question of whether the statutory provisions which have the intention of providing for EU law in the United Kingdom limit the operation of prerogative power, the archetypal example being the European Communities Act 1972. While this issue also has been raised in the challenges before this court, this court also has before it a range of specifically Northern Irish constitutional provisions which are said to have the same or a similar impact on the means of triggering Article 50.

[9] In view of the overlap between the respective challenges the court, on the application of the intended respondents, sought to avoid these proceedings simply duplicating those in England and Wales. Accordingly the court has stayed the consideration of the central issues which the English courts will deal with. Instead, these proceedings have sought to concentrate on the impact of Northern Ireland constitutional provisions in respect of notice under Article 50 and it is with this subject that this judgment is concerned. With the co-operation of the parties, the grounds of challenge which will be dealt with in Millar and others (in particular, grounds 3(b) and (c) in McCord and ground 4(2)(a)(i) in Agnew and others) have been held over pending the outcome of the English litigation.

The background to the applications

[10] It is unnecessary to go into great detail about the background to these challenges. It will suffice to say that the issue of withdrawal by the United Kingdom from the EU has, for some time, been a feature of the political agenda. It was not, however, until relatively recently that the Government at Westminster determined that there should be a referendum held on the question of whether the United Kingdom should remain a member of the EU. The Government's intention to hold a referendum on EU membership was announced in January 2013.

[11] In 2015 the European Union Referendum Act was passed. This made provision for such a referendum. Section 1(4) set out the question which was to appear on the ballot paper as follows:

> "Should the United Kingdom remain a member of the European Union or leave the European Union?"

The alternative answers to the above question appearing on the ballot papers were (as per Section 1(5)):

> "Remain a member of the European Union
> Leave the European Union."

[12] The 2015 Act also provided for the publication of a report which contained a statement in relation to the outcome of negotiations relating to the United Kingdom's request for reforms to address concerns over the United Kingdom's membership of the EU and the opinion of the Government of the United Kingdom on what had been agreed (see Section 6(1)). Other information also had to be published (see Section 7).

[13] Part VII of the Political Parties, Elections and Referendums Act 2000 applied to the referendum (see: Section 3 of the 2015 Act). This defined the term "referendum" as "a referendum or other poll held, in pursuance of any provision made by or under an Act of Parliament, on one or more questions specified in or in accordance with any such provision".

[14] The referendum took place on 23 June 2016. Its result was that 51.89% of the valid votes were cast in the United Kingdom in favour of leaving the European Union while 48.11% were in favour of remaining. In Northern Ireland, 55.8% of the valid votes were in favour of remaining in the European Union, while 44.2% were in favour of leaving.

[15] On 24 June 2016, in a public statement, the Prime Minister (David Cameron MP) accepted the result of the referendum and indicated that it would be for a new Prime Minister to decide when to trigger Article 50 TEU.

[16] Pre-action correspondence between each of the applicants and the Crown Solicitor's Office began in July 2016. In the McCord case the initial letter of claim was dated 27 July 2016 and was responded to on 5 August 2016. In the case of Agnew and others the initial correspondence was dated 22 July 2016 and this also was responded to on 5 August 2016. In both cases, the contention was advanced that Article 50 could not be triggered by the use of prerogative power and that legislation (or other mandate from Parliament) was required for this purpose. In each case, the Government's response was that Parliament's express authorisation was not needed to commence the Article 50 process.

[17] On 11 August 2016 the McCord application for leave to apply for judicial review was filed. This was followed up within days – on 19 August 2016 – by the application for judicial review in the name of Stephen Agnew and others being filed.

The grounds of judicial review

[18] There are substantial areas of commonality between the two applications. But there are also some areas of material difference. Each Order 53 statement has been the subject of amendments since originally being filed. In the course of the provision of skeleton arguments to the court and in the development of the arguments orally, a clearer picture of the main grounds of challenge has emerged. It appears to the court that the following broad description can be provided in relation to the grounds of challenge.

[19] The principal grounds are:

(a) The contention that the prerogative power cannot be exercised for the purpose of notification in accordance with Article 50(2) TEU and the allied contention that this is because it has been displaced by the Northern Ireland Act 1998 read along with the Belfast Agreement and the British-Irish Agreement and other constitutional provisions. In these circumstances it is contended that an Act of Parliament is required to trigger Article 50(2), though in the case of McCord this argument is taken a step further, as appears hereafter. This issue will be referred to hereafter as "Issue 1".

(b) The contention that if an Act of Parliament is required, there is a requirement for a Legislative Consent Motion to be granted by the Northern Ireland Assembly before such legislation could be passed authorising notification in accordance with Article 50(2) TEU. This issue will be referred to hereafter as "Issue 2".

(c) The contention that there are a variety of public law restraints on any exercise of prerogative power in any event. These include issues about the requirement to take all relevant considerations into account and not to give excessive weight to the referendum result. This issue will be referred to hereafter as "Issue 3".

(d) The contention that there has been a failure by the Northern Ireland Office to comply, prior to notification being given under Article 50, with the terms of section 75 of the Northern Ireland Act

1998 and with the terms of its own equality scheme. This issue will hereafter be referred to as "Issue 4".

(e) The contention in the McCord case that Article 50 TEU cannot be triggered without the consent of the people of Northern Ireland. Moreover it is asserted that the Good Friday Agreement has created a substantive legitimate expectation that there would be no change in the constitutional status of Northern Ireland without the consent of the people of Northern Ireland. This issue will be referred to hereafter as "Issue 5".

Article 50 TEU

[20] The above is the key provision which is at the centre of these proceedings. This provision, dealing with withdrawal of a Member State from the EU, appeared for the first time in 2008 following the negotiation of the Lisbon Treaty. Until that time, there had been no express provision, the court has been told, dealing with this subject. In the absence of same, the matter fell to be regulated by the Vienna Convention on the Law of Treaties.

[21] The terms of Article 50, are largely self-explanatory, and the court will therefore record the provision in full below:

"Article 50

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

> 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

[22] These judicial review applications are concerned with notification of intention by a Member State which decides to withdraw, here the United Kingdom. This involves the European Council being advised of that intention. This, in the scheme of the provision, initiates a process by which there is a negotiation with a view to an agreement being concluded with the withdrawing State. This agreement will set out the arrangements for withdrawal, taking account of the framework for the withdrawing State's further relationship with the Union. The agreement will be between the withdrawing State and the Council. The consent of the European Parliament has to be obtained in respect of it prior to it being concluded. There is then a timetable which comes into operation in accordance with Article 50(3). This stipulates when the Treaties shall cease to apply to the withdrawing State. This may be (a) from the date of entry into force of the withdrawal agreement, or (b) failing that, two years after the notification unless the European Council, in agreement with the Member State concerned, unanimously decides to extend the period.

[23] It appears to the court that a feature of the arrangements is that once notification by the withdrawing State is given, save for some exceptional circumstance, which is not expressly provided for in the provisions, the parties, the withdrawing State and the Union are on a set course which leads to the Treaties ceasing to apply to the withdrawing State.

[24] The reference in Article 50(1) to withdrawal being in accordance with "its own constitutional requirements" appears to be a reference to the withdrawing State's own constitutional requirements and not a reference to the requirements of EU law. This was the view of the Court of Appeal in England and Wales in Shindler v Chancellor of the Duchy of Lancaster [2016] EWCA Civ. 469 (see, in particular paragraph [16]) and the contrary has not been argued in this court.

Salient features of the Northern Ireland constitutional landscape

[25] It is necessary in these cases to provide some contextual information about how the constitutional arrangements in Northern Ireland operate after the advent of the Good Friday Agreement. It is also necessary to cite in this judgment a substantial number of legal and other provisions which relate to the operation of the governmental institutions in Northern Ireland. This is of importance because it is contended for the purpose of Issue 1 that statutory provisions, and other materials which aid their interpretation, represent a corpus of law which has the effect of excluding the use of prerogative power for the purpose of triggering Article 50(2). In order to assess this argument, the precise terms of many of the provisions being relied on by the applicants will need to be set out.

The Good Friday Agreement

[26] The Good Friday Agreement, officially referred to as the Belfast Agreement, was the product of extensive multi-party negotiations. It was published in April 1998 in a command paper presented to Parliament. It contained a range of elements but, most importantly, it provided for the establishment of democratic institutions in Northern Ireland (Strand 1); the establishment of a North/South Ministerial Council (Strand 2); and the operation of a British Irish Council and British-Irish Intergovernmental Conference (Strand 3).

[27] In the Declaration of Support, with which the Agreement begins, the participants in the multi-party negotiations dedicate themselves to "the achievement of reconciliation, tolerance and mutual trust and to the protection and vindication of human rights" (paragraph 2). Likewise the participants commit themselves to "partnership, equality and mutual respect" (paragraph 3). At paragraph 5 it is stated that:

> "It is accepted that all of the institutional and constitutional arrangements - an Assembly in Northern Ireland, a North/South Ministerial Council, implementation bodies, a British-Irish Council and a British-Irish Intergovernmental Conference and any amendments to British Acts of Parliament and the Constitution of Ireland - are interlocking and interdependent and that in particular the functioning of the Assembly and the North/South Council are so closely inter-related that the success of each depends on that of the other."

[28] Under the heading "Constitutional Issues" the Agreement referred to a new British-Irish Agreement replacing the Anglo-Irish Agreement. In such a new Agreement, there would be recognition of the legitimacy of whatever choice is freely exercised by a majority of people in Northern Ireland with regard to its status *i.e.* "whether they prefer to continue to support the Union with Great Britain or a sovereign United Ireland". The Agreement would also affirm that, "if in the future, the people of the island of Ireland, exercise their right of self-determination … to bring about a United Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish". Effect to the above was given in British legislation: of which see below Section 1 of the Northern Ireland Act 1998. Changes to the Irish Constitution were also to be made.

[29] As regards Strand 1 provision was made for a democratically elected Assembly in Northern Ireland. This was to be capable of exercising executive and legislative powers, subject to safeguards which included arrangements to ensure that all sections of the community could participate and work together successfully in the operation of the new institutions and arrangements to ensure that key decisions were taken on a cross-community basis. Special provision was to be made for parallel consent to be achieved on some issues and weighed majorities on some other issues.

[30] The operation of the Assembly was provided for at paragraphs 6-13 of Strand 1. In respect of executive authority, this was to be discharged on behalf of the Assembly by a First Minister and Deputy First Minister and up to ten Ministers with departmental responsibilities. The former were to be jointly elected into office by the Assembly whereas the Ministers would be allocated to parties on the basis of the d'Hondt system by reference to the number of seats each party had in the Assembly. The First Minister and Deputy First Minister, *inter alia*, had the duty of co-ordinating the work of the Executive Committee. All Ministers, including the First Minister and Deputy First Minister, were obliged to affirm the terms of a Pledge of Office.

[31] The Assembly was, in accordance with paragraphs 26-29, to be given authority to pass primary legislation for Northern Ireland in devolved areas.

[32] The first mention of the EU in Strand 1 is paragraph 31 where it is stated that:

> "Terms will be agreed between appropriate Assembly representatives and the Government of the United Kingdom to ensure effective coordination and input by Ministers to national policy-making, including on EU issues."

[33] A continuing role for Secretary of State was provided for at paragraph 32 where it was stated that he/she was to be responsible for non-devolved matters; was to represent Northern Ireland interests in the United Kingdom Cabinet; and was to lay legislation before Westminster on reserved matters.

[34] Various functions of the Westminster Parliament were set out at paragraph 33. These should be viewed against the backdrop that Parliament's powers to legislate for Northern Ireland would remain unaffected. Westminster, in particular, was to legislate for non-devolved issues and was to ensure that the United Kingdom's international obligations were met in respect of Northern Ireland. Westminster was also to be the forum for parliamentary scrutiny of the responsibilities of the Secretary of State.

[35] Strand 2 of the Agreement dealt with the North/South Ministerial Council. It was intended to bring together those with executive responsibilities in Northern Ireland and the Irish Government. The object was to "develop consultation, co-operation and action within the island of Ireland … on matters of mutual interest within the competence of the Administrations". The Council was to meet in different formats: plenary, specific sectoral formats and an appropriate format to consider institutional or cross-sectoral matters, including in relation to the EU, and to resolve disagreement. What was envisaged was the exchange of information and discussion and consultation with a view to co-operation on matters of mutual interest within the competence of both Administrations, north and south. Best endeavours were to be used to reach agreements on the adoption of common policies in areas where there was a mutual cross-border and all island benefit within the competence of both Administrations. It was also provided that the Ministerial Council could take decisions by agreement on policies and action on an all island and cross-border level. Each side, however, was to remain accountable to the Assembly and Oireachtas respectively. Provision was to be made for appropriate mechanisms for co-operation in each separate jurisdiction and for co-operation which would take place through agreed implementation bodies on a cross-border or all island level. Such implementation bodies were to have a clear operational remit and would implement on an all island and cross-border basis policies agreed in the Council. The Council was to be supported by a standing joint secretariat. At paragraph 17 of this section of the Agreement, reference was made to the Council considering the European Union dimension of relevant matters including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements were to be made to ensure that the views of the Council were taken into account and represented appropriately at relevant EU meetings.

[36] In an annex to this section of the Agreement the following areas for north-south co-operation and implementation are stated as ones which may be considered:

> "1. Agriculture - animal and plant health.
> 2. Education - teacher qualifications and exchanges.
> 3. Transport - strategic transport planning.
> 4. Environment - environmental protection, pollution, water quality, and waste management.
> 5. Waterways - inland waterways.
> 6. Social Security/Social Welfare - entitlements of cross-border workers and fraud control.
> 7. Tourism - promotion, marketing, research, and product development.
> 8. Relevant EU Programmes such as SPPR, INTERREG, Leader II and their successors.
> 9. Inland Fisheries.
> 10. Aquaculture and marine matters.
> 11. Health: accident and emergency services and other related cross border issues.
> 12. Urban and rural development.

Others to be considered by the shadow North/ South Council."

[37] Strand 3 of the Agreement relates to the British-Irish Council. Its object was "to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands". Membership was to comprise of representatives of the British and Irish Governments, devolved institutions in Northern Ireland, Scotland and Wales, when established and, if appropriate, elsewhere in the United Kingdom together with representatives of the Isle of Man and the Channel Islands". As with the North/South Council, the British/Irish Council was to operate in different formats and was to endeavour to reach agreement by co-operation on matters of mutual interest within the competence of the relevant administrations. Suitable issues for early discussion could, it was noted, include transport links, agricultural issues, environmental issues, cultural issues, health issues, educational issues and approaches to EU issues.

[38] The British/Irish Council was normally to operate by consensus.

[39] A further institution provided for in Strand 3 was the new British-Irish Intergovernmental Conference dealing with the totality of relationships. This was to subsume earlier similar institutions. Its object was to promote bilateral co-operation at all levels in matters of mutual interest within the competence of both Governments. All decisions were to be made by agreement between both Governments without any derogation from the sovereignty of either Government. There were to be regular meetings of the conference concerned with non-devolved Northern Ireland matters. Provision was made for members of the Northern Ireland Executive being involved in meetings of the Conference and in reviews of the working of the machinery and institutions which had been established.

[40] Apart from the establishment of the institutions already referred to, the Good Friday Agreement also referred to proposals in specific subject areas, which it is not necessary to summarise here. There are substantial sections of the Agreement dealing with Rights, Safeguards and Equality of Opportunity featuring the incorporation of the European Convention on Human Rights into Northern Ireland law; a statutory obligation on public authorities in Northern Ireland to carry out their functions with due regard to the need to promote equality of opportunities; the establishment of a Human Rights Commission and other initiatives. Equally important topics which were afforded attention in the agreement included such matters as security, decommissioning of arms, policing and justice, and prisoners.

[41] As a result of the Good Friday Agreement a new British-Irish Agreement was established dated the same date as the Agreement itself. It does not require specific discussion for the purpose of this judgment.

The Northern Ireland Act 1998

[42] The Northern Ireland Act 1998 was enacted to implement the Good Friday Agreement. Its long title states that it is "an Act to make provision for the Government of Northern Ireland for the purpose of implementing the Agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3883".

[43] The 1998 Act, while not setting out all of the constitutional provisions applicable to Northern Ireland, has been described as "in effect a constitution" (see Lord Bingham in Robinson v Secretary of State for Northern Ireland and Others [2002] NI 390 at 398 paragraph [11]). In Lord Bingham's view, in accordance with the above, its provisions "should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values

which the constitutional provisions are intended to embody" (*ibid*). This was also the view of Lord Hoffman in the same case. At paragraph [25] in his speech, he noted that the Act was passed to give effect to the Belfast Agreement concluded on Good Friday 1998. As he put it: "This Agreement was the product of multi-party negotiations to devise constitutional arrangements for a fresh start in Northern Ireland". The Act was a constitution for Northern Ireland "framed to create a continuing form of Government against the background and history of the territory and the principles agreed in Belfast".

[44] No party before the court contested these descriptions and the court will proceed on the basis that it is correct to approach issues of the interpretation of the 1998 Act in the way described.

[45] The language used in the Act, nonetheless, remains important and it is therefore necessary to set out some of the key provisions below.

[46] The court begins with Section 1 of the Act which deals with the status of Northern Ireland. It reads:

> "(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.
>
> (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a United Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland."

The detailed provisions relating to a poll for the purposes of Section 1 are found at Schedule 1 to the Act.

[47] Section 4 of the Act deals with transferred, excepted and reserved matters. A transferred matter is any matter which is not either an excepted or reserved matter. It is therefore a residual category. Excepted matters are matters falling within a description specified in Schedule 2 whereas reserved matters are any matter falling within a description specified in Schedule 3.

[48] Schedule 2 paragraph 3 is relevant to these applications. It provides a description of certain excepted matters as follows:

> "International relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organisations … but not …
>
> (c) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under Community law."

[49] Section 5 of the Act deals with Acts of the Northern Ireland Assembly. The starting point is that "subject to Sections 6 to 8, the Assembly may make laws, to be known as Acts". However, a notable provision is found at Section 5(6) of the Act. It states:

> "(6) This section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland …"

[50] Section 6 relates to the subject of legislative competence. Under Section 6(1) a provision of an Act is not law if it is outside the legislative competence of the Assembly. Section 6(2) explains that a provision is outside that competence if any of the following paragraphs apply. There are then stated six outside competence paragraphs including:

> "[If the provision] deals with an excepted matter and is not ancillary to other provisions (whether in the Act or previously enacted) dealing with reserved or transferred matters.
> …
> [If the provision] is incompatible with Community law".

[51] Section 7 entrenches certain enactments from modification by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department. Of relevance to this case is:

> "(a) The European Communities Act 1972."

[52] Section 7(2) goes on to say that sub-section (1) does not prevent an Act of the Assembly or subordinate legislation modifying certain particular provisions in the European Communities Act 1972. These provisions are of a minor nature.

[53] Section 8 of the Act refers to the Secretary of State's consent being required in relation to Bill which contains –

(a) a provision which deals with an excepted matter and is ancillary to other provisions dealing with reserved or transferred matters; or

(b) a provision which deals with a reserved matter.

[54] Under Section 11, the Attorney General for Northern Ireland may refer to the Supreme Court a question of whether a provision of a Bill would be within the legislative competence of the Assembly.

[55] Section 12 relates to the particular situation where a reference has been made to the Supreme Court under Section 11 but where the Supreme Court has referred, for a preliminary ruling, a matter arising to the European Court of Justice.

[56] The next provision which the court draws attention to is Section 24. Section 24(1) establishes that:

> "A Minister or Northern Ireland Department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act …
>
> (b) Is incompatible with European Union law."

[57] Section 27 deals with quotas for the purpose of international obligations. It provides:

> "(1) A Minister of the Crown may make an order containing provision such as is specified in subsection
> (2) where—
>
> (a) An international obligation or an obligation under Community law is an obligation to achieve a result defined by reference to a quantity (whether expressed as an amount, proportion or ratio or otherwise); and
>
> (b) the quantity relates to the United Kingdom (or to an area including the United Kingdom or to an area consisting of a part of the United Kingdom which is or includes the whole or part of Northern Ireland).
>
> (2) The provision referred to in subsection (1) is provision for the achievement by a Minister or Northern Ireland department (in the exercise of his or its functions) of so much of the result to be achieved under the international obligation or obligation under Community law as is specified in the order."

[58] Part V of the Act is that part dealing with the North-South Ministerial Council and the British-Irish Council. Of particular interest is Section 55 which is concerned with the subject of implementation bodies. Such a body is a "body for implementing, on the basis mentioned in paragraph 11 of Strand 2 of the Belfast Agreement, policies agreed in the North-South Ministerial Council" (see Section 55(3)). Paragraph 11 deals with policies agreed in the Council for implementation on an all-island and cross border basis

[59] Section 98 is an interpretation provision. It contains a definition of "community law" for the purpose of the Act. It means:

"(a) all rights, powers, liabilities, obligations and restrictions created or arising by or under the Community Treaties; and

(b) all remedies and procedures provided for by or under those Treaties."

The North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999

[60] Under the proposals for the North/South Ministerial Council the prospect of implementation bodies coming into existence was plainly recognised. Those bodies could be on a cross border or all island basis. A further Agreement was made between the United Kingdom and the Government of Ireland in respect of this matter on 8 March 1999. This agreement provided for the establishment of implementation bodies and the above Order was made by the Secretary of State legally to provide for them.

[61] The Order envisages and establishes a number of such bodies. The body of most relevance to these proceedings is called the "Special EU Programmes Body". Its functions were provided for at Part 4 of Annex 1 of the Agreement. It was described in the following way:

"A body with the following functions:

Until the conclusion of the current Community Initiatives

- the central secretariat, monitoring, research, evaluation, technical assistance and development roles currently exercised jointly in respect of INTERREG and PEACE by the Department of Finance and the Department of Finance and Personnel.

- administration of certain sectoral sub-programmes under INTERREG and PEACE (interest rate subsidy and cross border co-operation between public bodies)

In relation to post 1999 Structural Funds

- advising North/South Ministerial Council and the two Departments of Finance on negotiation with the EU Commission of post 1999 Community Initiatives and of Common Chapter

- preparing for the approval of the two administrations in the Council and in close consultation with the two Departments of Finance and other relevant Departments, detailed programme proposals under the new Community Initiatives (likely to be INTERREG III, LEADER III and EQUAL, and possibly a successor to PEACE)

- central secretariat, monitoring, research, evaluation technical assistance and development roles in respect of these initiatives

- grant making and other managerial functions in respect of INTERREG III and of north/south elements of programmes under other initiatives, within the framework of the relevant overall policies of North and South respectively, and subject to the expenditure allocations and specific programme parameters agreed between the two administrations and with the EU Commission;

- monitoring and promoting implementation of the Common Chapter, which would have a budgetary allocation"

[62] The above functions were to be exercised in accordance with Part 4 of Annex 2 which dealt with the current Community Initiatives and also post-1999 structural funds.

[63] The court does not doubt that the intention of both governments was that the approach taken would apply to future equivalent or substitute Community Initiatives. That this is so can be seen from the terms of letters exchanged between the respective governments subsequently. For an example, see the Schedule to the North/South Co-operation (Implementation Bodies) (Amendment) (Northern Ireland) Order 2007.

[64] There is nothing, however, in any of the instruments which entrenches the arrangements in respect of Implementation Bodies. The instruments can be viewed as being consistent with the existence of an implicit assumption that membership of the EU, on the part of both countries, would continue.

Issue 1

[65] The central issue in these applications relates to the legal authority upon which Notice is to be given by the United Kingdom Government to the European Council for the purpose of Article 50(2) TEU. As the opening sentence of Article 50(2) indicates:

> "A member state which decides to withdraw shall notify the European Council of its intention."

This notice triggers the arrangements provided for in the remainder of Article 50.

[66] It is the government's view that notification is properly to be viewed as an executive action taken under prerogative power. However, the applicants' dispute this. They argue that prerogative power cannot be used to effect notification because that power has been displaced by statute. In these circumstances, they submit, notification must be effected by a process which involves authority for this action being given by Act of Parliament. The issue, therefore, it can be said, is concerned with the legal underpinning of any such notification. The reason why the applicants say that prerogative power cannot be deployed for this purpose is that it has been displaced by reason of the terms of the Northern Ireland Act 1998 when interpreted, as they say they must be, in the light of the Good Friday Agreement and consequential arrangements.

[67] It is implicit in the applicants' argument that were it not for the displacement of the prerogative in the way described, the use of the prerogative for present purposes would be unobjectionable. That this is correct is consistent with a range of legal authorities such as Council of Civil Service Unions v Minister for the Civil Service [1984] 3 WLR 1174 and Blackburn v Attorney General [1971] 2 AER 1380. The court will therefore regard this position as an appropriate starting point.

[68] Those before the court all accepted that there are circumstances in which prerogative power must give way to statutory power so that only the latter can be lawfully used for a particular purpose. The argument before the court was not about the principle of law involved but about how the principle is to operate in this case.

[69] It seems to the court that two central questions arise. Firstly, the court must seek to ascertain what test is to be applied when determining the issue. Secondly, the court must then apply the test to the alleged displacing provisions.

[70] As regards the test to be applied, the court inevitably must consider the approaches to this issue which can be discerned from the cases in which this principle of law has been discussed. In this regard the court has been directed by the parties to the key authorities in this area, beginning with the reminder from the Case of Proclamations (1611) 12 Co Rep 74 that "the King hath no prerogative, but that which the law of the land allows him".

[71] The most significant of the cases cited to the court is that of Attorney General v De Keysers' Royal Hotels Ltd [1920] AC 508. As a senior judge later remarked "the relevant principles upon which the courts have to determine whether prerogative power has been fettered by statute were exhaustively considered by the House of Lords in "De Keyser" (see Roskill LJ, as he then was, in Laker Airways Limited v Department of Trade [1997] 1 QB 643 at 719(e)). De Keyser concerned the taking over of a hotel for housing administrative staff of the flying Corps during the First World War. An issue subsequently arose as to the payment of compensation for the use of the hotel. This depended on whether the taking–over had been under statute or by reason of prerogative power. The House of Lords decided that the taking-over was under statutory power with the result that compensation was payable. While the statutory scheme existed, the prerogative had been superseded.

[72] It is worthwhile to set out below the key passages in the speeches of their Lordships in De Keyser. Lord Dunedin stated at page 526:

> "The prerogative is defined by a learned constitutional writer as 'the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.' In as much as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed."

Lord Atkinson at page 539 stated:

> "It is quite obvious that it would be useless and meaningless for the legislature to impose restrictions and limitations upon, and attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might heretofore have done by virtue of the prerogative, the prerogative is merged in the statute. I confess I do not think the word "merge" is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm is passed, it abridges the royal prerogative while it is enforced to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same – namely, that after the statute has been passed, and while it is enforced, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the royal prerogative may theretofore have been."

Lord Moulton, dealing with the same issue, at page 554 asked:

> "What effect has this course of legislation upon the royal prerogative? I do not think it can be said to have abrogated that prerogative in any way, but it has given the Crown statutory powers which render the exercise of that prerogative unnecessary, because the statutory powers that have been conferred upon it are wider and more comprehensive than those of the prerogative itself. But it has done more than this. It has indicated un-mistakenly that it is the intention of the nation that the powers of the Crown in these respects should be exercised in the equitable manner set forth in the statute, so that the burden shall not fall on the individual but shall be borne by the community … this being so, when powers covered by this statute are exercised by the Crown it must be presumed that they are so exercised under the statute and therefore subject to the equitable provision for compensation which is to be found in it."

At page 561 Lord Sumner said:

> "I do not think that the precise extent of the prerogative need now be dealt with. The legislature, by appropriate enactment, can deal with such a subject matter as that now in question in such a way as to abate such portions of the prerogative as apply to it. It seems also to be obvious that enactments may have this effect, provided they directly deal with the subject matter, even though they enact a modus operandi for securing the desired result, which is not the same as that of the prerogative … there is no object in dealing by statute with the same subject matter as is already dealt with by the prerogative, unless it be either to limit or at least vary its existence, or to provide an additional mode of attaining the same object."

Finally, Lord Parmoor at page 576 stated that:

> "The principles of construction to be applied in deciding whether the royal prerogative has been taken away or abridged are well ascertained. It may be taken by or abridged by express words [or] by necessary implication … I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a royal prerogative right, such right can no longer be enforced."

He also stated at page 575:

> "The constitutional principle is that when the power of the executive to interfere with the property or liberty of subjects has been placed under Parliamentary control and directly regulated by statute, the executive no longer derive its authority from the Royal Prerogative of the Crown but from Parliament … ".

[73] The issue of the prerogative giving way to statute law arose before the Court of Appeal in England and Wales in the case of Laker Airways in 1977.

[74] This was a case of some little complexity but it essentially involved a consideration of the relationship between a statutory scheme – under the Civil Aviation Act 1971 – which expressly dealt with the granting of a licence by the UK authorities under the Act to the plaintiff airline – and a treaty based arrangement involving the United States of America and the United Kingdom for, *inter alia*, the granting of a designation under which an airline could operate on a transatlantic route. The plaintiff airline, prior to a change of United Kingdom Government policy, had been enjoying the benefit of a statutory licence and was on the way to achieving designation under the Bermuda Agreement of 1946. But this, on the change of policy, soon changed. The United Kingdom government, by issuing "guidance", sought successfully to induce a revocation of the statutory licence but the court later held this to be unlawful. Notwithstanding this the government sought then to rely on the non-designation of the airline under the Bermuda arrangements which were based on prerogative power. The court held that reliance on the prerogative power was defeated by the existence of the statutory right.

[75] The principles informing where the line between the prerogative and statute should be drawn were not, however, the subject of extensive consideration. As already noted, Roskill LJ (as he then was) considered that there had been exhaustive consideration of the issue of principle in De Keyser. In the case before him he applied the opinions in De Keyser. Lord Denning focussed more broadly on the wider issues of abuse of power disclosed by the case and said little about the issue now under discussion. Lawton LJ took the view that "by necessary implication" the Act should be construed so as to prevent the government from rendering licences useless by the withdrawal of designation when the Secretary of State could not procure the authority lawfully to revoke them nor lawfully do so himself: see page 728 (c)-(d). An aspect of the matter commented upon by Lawton LJ was that there was nothing in the Act which curbed the use of the prerogative in the sphere of international relations but, in his view, the provisions of the Act regulated all aspects of the revocation of licences with the consequence already described.

[76] The next case involving the line to be drawn between statute and prerogative power is that of R v Secretary of State for Home Department ex parte Fire Brigades Union and others [1995] 2 AC 513. This case concerned schemes for criminal injury compensation. Parliament in 1988 had legislated for a new statutory scheme in the Criminal Justice Act 1988 but this scheme was not commenced. Instead, the Secretary of State decided to introduce a fresh scheme in its place using prerogative power. This latter scheme brought in a series of tariff provisions under which compensation was to be calculated as against the more generous compensation arrangements contained in the 1988 Act. The issue which arose was whether it was lawfully open to the Secretary of State to use prerogative power in this way while, albeit not commenced, the scheme under the 1988 Act remained on the statute book. The Court of Appeal held that the Secretary of State's use of the prerogative power to establish the tariff scheme was unlawful and by a majority of 3/2 the House of Lords agreed. In the Court of Appeal Sir Thomas Bingham MR stated at page 522 (e)-(f):

> "The leading cases to which our attention was properly drawn, Attorney General v De Keyser's Hotel Limited and the Laker Airways case … did not concern statutory provisions not brought into force and so provide no direct answer to this question. It must therefore be approached as an issue of principle. Again, as it seems to me, the Secretary of State's argument gives too little weight to the overriding legislative role of Parliament. It has approved detailed provisions governing the form which, underpinned by statute, the scheme should take. Sections 108-117 and Schedule 6 and 7 are not a discussion paper but a blueprint approved in the most solemn form for which our constitution provides. It was, of course, open to the Secretary of State to invite Parliament to repeal the provisions … [h]e could have sought enactment of provisions giving effect to the tariff scheme in substitution for the 1988 provisions; or if the 1988 provisions were simply repealed he could have exercised his prerogative powers to introduce the tariff scheme, the field then being once more unoccupied by statute. What in my judgment he could not lawfully do, so long as the 1988 provisions stood un-repealed as an enduring statement of Parliament's will, was to exercise prerogative powers to introduce a scheme radically different from that Parliament had approved."

[77] In the House of Lords, in a passage often later cited, Lord Browne-Wilkinson at page 553 (d)-(g) said:

> "My Lords, it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme even though the old scheme had been abandoned. It is not for the executive, as the Lord Advocate accepted, to state as it did in the White Paper (paragraph 38) that the provisions of the Act of 1988 "will accordingly be repealed when a suitable legislative opportunity occurs". It is for Parliament, not the executive, to repeal legislation. The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body. The prerogative powers of the Crown remain in existence to the extent that Parliament has not expressly or by implication extinguished them. But under the principle in Attorney General v De Keyser's Royal Hotel Limited … if Parliament has conferred on the executive statutory power to do a particular act, that act can only thereafter be done under the statutory powers so conferred: any pre-existing prerogative powers to do the same act is pro tanto excluded."

[78] A further case to which the court was referred was R v Secretary of State for the Home Department ex parte Northumbria Police Authority [1989] QB 26. The subject matter of this case was the supply of equipment to police forces. A circular made by the Secretary of State under prerogative powers had provided that riot control equipment could be made available to police forces, irrespective of the approach taken by police authorities. This was challenged

by the Northumbria Police Authority on the basis that it had to approve any provision of equipment in accordance with the terms of the Police Act 1964, save in a situation of grave emergency. A Divisional Court dismissed the Police Authority's judicial review, a decision later upheld by the Court of Appeal.

[79] At pages 44-45 Croom-Johnston LJ explained the position as follows:

> "It is clear that the Crown cannot act under the prerogative if to do so would be incompatible with statute. What was said here is that the Secretary of State's proposal under the circular would be inconsistent with the powers expressly or impliedly conferred on the Police Authority by Section 4 of the 1964 Act. The Divisional Court rejected the submission for reasons with which I wholly agree; namely that Section 4 did not expressly grant a monopoly, and that granted the possibility of an authority which declines to provide equipment required by the Chief Constable there is every reason not to imply a Parliamentary intent to create one."

Purchase LJ at page 63 said:

> "It is well established that the courts will intervene to prevent executive action under prerogative powers in violation of property or other rights of the individual where this is inconsistent with the statutory provisions providing for the same executive action. Where the executive action is directed towards the benefit of protection of the individual, it is unlikely that its use will attract the intervention of the courts. In my judgment, before the courts will hold that such executive action is contrary to legislation, express and unequivocal terms must be found in the statute which deprive the individual from receiving the benefit of protection intended by the exercise of prerogative power. In the present case the Secretary of State contended that if he does not have the power to make equipment available to police forces under the Act, he must have this power under the royal prerogative for the purpose of promoting the efficiency of the police. In order to dispute this the police authority had to contend that the combined effects of Section 4(1) and 41 is to prevent the Secretary of State from supplying equipment unless it is requested by the police authority. These sections have already been considered in this judgment. Even if I am not justified in holding that these sections afford positive statutory authority for the supply of equipment, they must fall short of an express and unequivocal inhibition sufficient to abridge the prerogative powers, otherwise available to the Secretary of State, to do all that is reasonably necessary to preserve the peace of the realm.

[80] Finally, in the case of R (Alvi) v Secretary of State for the Home Department (Joint Council for the Welfare of Immigrants Intervening) [2012] 1 WLR 2208, in the context of considering an issue of whether a form of Home Office guidance should have been dealt with under Immigration Rules, Lord Hope, as background to his consideration, noted the general position in respect of the operation of prerogative powers as follows:

> "The exercise of a prerogative power may however be suspended, or abrogated, by an Act of Parliament: Attorney General v De Keyser's Royal Hotel Limited

> … per Lord Atkinson. So a statute which operates in the field of prerogative may exclude the possibility of exercising prerogative powers. Where a complete and exhaustive code is to be found in the statute, any powers under the prerogative which would otherwise have applied are excluded entirely … Any exercise of a prerogative power in a manner, or for purpose, which is inconsistent with the statute will be an abuse of power …"

The submission of the parties on the appropriate test

[81] Both Mr Scoffield for the applicant in Agnew and others and Mr McGleenan for the respondents were in general agreement that there was no single and universal test which could be said to apply in this area, having regard to the authorities, which would precisely delineate the point of which prerogative power must give way to statute. Inevitably much would depend on the circumstances.

[82] Counsels' postures on this issue tended to reflect their respective client's interest in this case. Accordingly, Mr Scoffield argued for a broad and flexible approach to the test to be applied. There was, he argued, no need to establish an intention on the part of the legislature, or even a conscious choice, to limit the prerogative. Nor was there any requirement that the restriction of the prerogative power be formal or express. It was enough, counsel argued, that statutory power operates in the context of the prerogative and was inconsistent with it. On the other hand, Mr McGleenan placed emphasis on the need for a narrow approach to this issue. In his submission, the correct approach should recognise that only in limited circumstances should a recognised prerogative power cease to be available to the executive. This may occur where, in his formulation:

> "Parliament has intended that it should cease to be available either by expressly legislating to this effect or where this result arose by way of necessary implication from statute".

The court's view

[83] It is the court's view that the test which should be applied will reflect a series of factors and cannot be reduced to a single bright line rule which governs every case. The fact that there is no express language found in the statute specifically limiting the operation of the prerogative will be highly relevant, as an obvious way of setting aside or limiting prerogative power would be for the statute concerned to expressly say so. It also seems to the court that there is support in the authorities for the view that, absent express provision being made, abridgment of the prerogative by a statute or statutory scheme must arise by necessary implication. In this context the court accepts that the approach to this term found in R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2002] 2 WLR 1299 at paragraph [45] is an appropriate one. Lord Hobhouse stated that:

> "It is accepted that the statute does not contain any express words that abrogate the tax payers' common law right to rely on legal professional privilege. The question therefore becomes whether there is a necessary implication to that effect. A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in B (A Minor) v Director of Public Prosecutions [2000] 2 AC 428, 481. A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

[84] Other factors to be considered, it appears to the court, include:

- That the statute must occupy the specific ground hitherto occupied by the prerogative. The statute, in other words, must empower the doing of the very thing which the prerogative has dealt with up to the point of statutory intervention.

- That the intervention by the statute must be direct in its effect on the subject matter in question and not the result of a side wind.

- That the juxta position of the parallel sources of authority must be such as it can be said that the use of the prerogative power would be incompatible or inconsistent with the relevant statutory provision.

[85] What the court must do now is to apply the approach outlined above to the provisions in the Northern Ireland Act 1998 read against its constitutional background in order to conclude whether the effect of these in this case displaces prerogative power in relation to the function of notification for the purpose of Article 50(2) of TEU.

[86] On this issue the applicants' case has been put both in general ways and by reference to specific provisions.

[87] In respect of the former, it has been suggested that the Northern Ireland Act 1998 has been "inextricably interwoven" with the United Kingdom's continued membership of the EU and this "outworking of the model of democracy" should be viewed as protected from change on the facts of this case.

[88] It is also submitted that Parliament has not authorised any action under Article 50 and that to allow Article 50 to be triggered without an Act of Parliament authorising it would "automatically result in the removal or abrogation of rights" currently enjoyed by United Kingdom citizens. To achieve such a result, therefore, requires the legislative sanction of Parliament.

[89] Additionally, it was asserted that notification under Article 50 involved, in effect, "the beginning of a far reaching process of amending the 1998 Act" which would cut across domestic, EU and international dimensions. This would upset "the delicate constitutional balance" established as a result the Good Friday Agreement and the 1998 Act.

[90] Put another way, the operation of EU law should be viewed as a building block of Northern Ireland's constitutional protections and continued membership is a necessary element of the North-South and East-West structures and the relationships which form the kernel of the constitutional arrangements for Northern Ireland in modern times. This was illustrated especially in respect of cross border activities over a wide range of subject matters and, if these were interfered with by the triggering of Article 50, this would have momentous consequences for the rights granted to individuals and for society as a whole. Among the consequences for society would be the weakening of constitutional protections, such as those under the European Convention on Human Rights, by the removal of the underpinning provided for it in EU law.

[91] In respect of reliance on specific provisions the court was shown a large number of provisions which, it was contended, detailed the direct damage which notification would have to Northern Ireland's constitutional framework. This damage was the greater because of the interlocking nature of the major elements in the arrangements.

[92] Particular emphasis was placed on the following:

(i) The loss of EU law as a limit to the Assembly's power to legislate and as a constraint on the use of executive power (section 6(2)(b) and Section 24(1)(b)).

(ii) The loss of EU law in connection with the operation of the North/South Council and the implementation bodies established in connection with it. The main example in this area was in connection with the operation of the Special EU Programmes Body whose remit has been referred to earlier in this judgment. Part of the day to day functioning of this body involved on-going consideration of issues of EU law and its administration in both parts of Ireland. It was contended that the nature of this body was a good example of the requirement that there should not be change to the position of Northern Ireland as part of the EU.

[93] The applicants accepted (at least in the Agnew and others case) it could not be said any of the specific provisions referred to expressly superseded the prerogative but, it was submitted, the territory dealt with in many of the provisions of the 1998 Act demonstrated an undermining of prerogative power in a manner fatal to its continued use.

[94] The retort of the intended respondents to the applicants' claims above was in broad terms that there was nothing in the provisions relied upon by the applicants that either expressly or by necessary implication had the effect of curtailing the ability of the executive to use prerogative power for the purpose of Article 50(2).

[95] In this regard, the intended respondents pointed out that the terms of the EU Referendum Act did not specify what steps the Government was required to take in the event of a vote in favour of leaving the EU. The matter, it was suggested, was left to the executive to decide and no case could be made that it was any part of the statutory intention, as now claimed, that there would have to be a further Act of Parliament before Article 50(2) could be triggered.

[96] Nor, it was contended, could it be said that any of the provisions of the 1998 Act or its contextual surroundings could properly be viewed as having this effect. The Act was not directed at this issue. There were statutory provisions in other areas where a clear intention to replace prerogative power by an exercise of statutory power could be plainly identified, for examples the European Union (Amendment) Act 2008 sections 5, and the European Union Act 2011 section 2, but nothing remotely similar arose in the present case. In this regard, the words of Lloyd J (as he then was) were quoted from his judgment in R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg [1994] 2 WLR 115 at page 124, where he said:

> "When Parliament wishes to fetter the Crown's treaty-making power in relation to community law, it does so in express terms, such as one finds in section 6 of the 1978 Act [European Parliamentary Elections Act 1978]".

[97] The most which could be said in this area, according to the intended respondents, was that the Good Friday Agreement and the provisions made subsequently in the 1998 Act were written against the context then prevailing, including the United Kingdom's membership of the EU. The provisions made were a recognition of a day to day feature of government but it was no part of the arrangements made that any guarantee was being offered or provided about possible departure by the United Kingdom or Ireland from the EU at some date in the future. On the contrary, there was a working assumption that both states were likely to remain in the EU, but at that stage, no-one had in mind that at a later date one or other might (by a vote of the people in a referendum) decide to leave.

[98] The language found in the provisions quoted by the applicants reflected, in the intended respondents' submission, no more than that EU law and policy was an aspect of governance which affected the functioning of the various governmental bodies and agencies within their respective jurisdictions.

[99] The Attorney General supported the arguments of the intended respondents. As he put it: the triggering of Article 50(2) "will amend not even a comma or full stop of the Northern Ireland Act 1998". Moreover, the provisions cited by the applicants said nothing about the exercise by the Government of the prerogative in respect of international affairs, including the making of treaties.

[100] The limits to the competence of the Assembly and Executive found in the 1998 Act were simply a function of the substantive content of EU at a given point in time as given effect to by legislation. Triggering Article 50(2) had no direct impact on this situation. Citizens in the United Kingdom would continue to enjoy whatever rights Parliament provided for from time to time, whether their origin derived from the EU or another source.

[101] Moreover, there was nothing in any of the agreements preceding the 1998 Act which involved any guarantee of continued membership of the EC or which stipulated any requirement about how leaving the EU, if that became a policy goal, would be effected.

The Court's Assessment

[102] While the court has had opened to it a wide range of provisions relating to the 1998 Act, and the agreements which preceded it, the court cannot identify any particular provision which expressly has sought to limit or alter the prerogative power of the executive in the context of notification under Article 50(2). In the court's view, Mr Scoffield's concession on this point is properly made.

[103] The issue therefore becomes, in accordance with the test the court favours, whether the prerogative has become unavailable by reason of any necessary implication arising out of any the statutory provisions read in the light of their status and background.

[104] There are two aspects to the court's consideration which it believes have to be kept firmly in mind. First of all there is the need to keep focus on the subject matter of the prerogative power which is in question. This is the power to notify for the purpose of withdrawal from the EU in accordance with Article 50(2). Secondly, the alleged displacing provisions have to be read in context. This is important because the meaning of the provisions cannot be divorced from their surroundings.

[105] In the present case, it seems to the court that there is a distinction to be drawn between what occurs upon the triggering of Article 50(2) and what may occur thereafter. As the Attorney General for Northern Ireland put it, the actual notification does not in itself alter the law of the United Kingdom. Rather, it is the beginning of a process which ultimately will probably lead to changes in United Kingdom law. On the day after the notice has been given, the law will in fact be the same as it was the day before it was given. The rights of individual citizens will not have changed – though it is, of course, true that in due course the body of EU law as it applies in the United Kingdom will, very likely, become the subject of change. But at the point when this occurs the process necessarily will be one controlled by parliamentary legislation, as this is the mechanism for changing the law in the United Kingdom.

[106] At this point in the analysis the context of the various statutory or other provisions must be considered. In this connection, the court has difficulty in affording such provisions any role concerned with displacing prerogative power for the purpose here at issue. What the various provisions here at issue are concerned with is not the limitation of prerogative powers but the operation of the new institutions in circumstances where an on-going reality of life, in accordance with the then existing law, was membership of the EU. The devolved institutions, to a greater or lesser extent, within the area transferred to them will be administering EU provisions and considering the future development of EU law in relevant subject areas. The same will be true of North/South and East/West institutions and implementation bodies, again all within the limits of their respective jurisdictions. It would be strange if it were otherwise. This sort of activity is consonant with the terms of the Good Friday Agreement and the 1998 Act. The roles referred to in the Agreement involve such matters as the input by Northern Ireland Ministers to national policy making in the area of EU issues; the consideration of the EU dimension in the North/South Council; and approaches to EU issues in the British/Irish Council (see paragraphs [32], [35] and [37] *supra*). The same pattern emerges from a consideration of relevant portions of the 1998 Act. The role of the devolved institutions is in the area of "observing and implementing obligations" under community law (Schedule 2 paragraph (3)(c)); providing a means for certain community law obligations to be given effect in Northern Ireland (section 27(1) and (2)); and enabling implementation bodies to carry out certain functions in respect of community law initiatives. But it is a different matter to portray the position as being one in which it is accurate to say that a cornerstone of the new institutions, without which the various edifices would crumble, is continued membership of the EU. The devolved institutions and the various North/South and East/West bodies do not as their *raison d'etre* critically focus on EU law. Their concerns and functions are much wider than this. This is not to say that the United Kingdom leaving the EU will not have effects at all but it is to say at the least it is an over-statement to suggest, as the applicants do, that a constitutional bulwark, central to the 1998 Act arrangements, would be breached by notification. This would be to elevate this issue over and beyond its true contextual position.

[107] It is therefore, in the court's opinion, inapt for the applicants to talk in terms of notification changing the rights of individuals or of the operation of institutions becoming transformed by reason of the invocation of Article 50(2). This simply will not happen by reason of the step of notification *per se*. The reality is, at this time, it remains to be seen what actual effect the process of change subsequent to notification will produce. In the meantime, sections 6 and 24 of the 1998 Act will continue to apply; the North/South and East/West institutions will continue to operate; and the work of implementation bodies will go on. While the wind of change may be about to blow the precise direction in which it will blow cannot yet be determined so there is a level of uncertainty, as is evident from discussion about, for example, how Northern Ireland's land boundary with Ireland will be affected by actual withdrawal by the United Kingdom from the EU.

[108] The court is not persuaded, for the purpose with which this judicial review is concerned, prerogative power has been chased from the field or that statutory power (in the form of the 1998 Act) has displaced it in accordance with the test described above. Rather, it is the court's view the prerogative power is still operative and can be used for the purpose of the executive giving notification for the purpose of Article 50. This, however, is said without prejudice to the issues which have been stayed and which are under consideration in the English courts.

Issue 2

[109] As the court has held that the intended respondents are entitled to proceed to notify under Article 50(2) using prerogative power and that an Act of Parliament is legally unnecessary for this purpose, the second issue, strictly, does not arise for consideration.

[110] However, the court will consider it, in case it is wrong in its conclusions in respect of Issue 1 and an Act of Parliament is required for pulling the Article 50 trigger.

[111] In respect of Issue 2, the case which is made on behalf of the applicants in Agnew and others, where the issue is pleaded (unlike in the case of McCord where it is not pleaded but appears in this applicant's skeleton argument), is that in the event of an Act of Parliament being required for Article 50(2) purposes, there is an obligation on the intended respondents to seek and receive the consent of the Northern Ireland Assembly to such legislation by obtaining from it the passage of a Legislative Consent Motion authorising such legislation.

[112] It is argued by the applicants that the failure to seek and procure such a consent would be in breach of a constitutional convention "whereby the consent of the Northern Ireland Assembly will be obtained for Westminster legislation affecting the devolved powers of the Assembly" (see paragraph 4(2)(b) of the Order 53 Statement in Agnew and others). The matter is explained further at paragraph 46 *et seq* of the Agnew and others skeleton argument. This reads:

> "…As regards devolution, a constitutional convention has evolved, and is now clearly established, whereby Westminster legislates with regard to transferred matters only with the consent of the Northern Ireland Assembly. This derives from two sources. The first source is the practice which evolved between 1921 and 1970, in which a constitutional convention to similar effect evolved at Westminster *vis a vis* the Parliament of Northern Ireland… The second source is the practice that has evolved more generally in the United Kingdom between

> Westminster and the devolved legislatures, not only in Northern Ireland but also in Scotland and Wales. Sometimes called the "Sewel" Convention after the Scottish Office Minister in the House of Lords who set out the terms of the convention during the second reading debate on the Scotland Bill…there are also written commitments to this effect in, for instance, the Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee…paragraph 14 of which states: "…the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regards to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government".

[113] The approach of the intended respondents to Issue 2 has not been to deny the existence of a convention in the terms described but to submit that it has no application on the facts of this case. Moreover, and in any event, they submit that such a convention is not legally enforceable and is, in reality, a matter of politics not law.

[114] The crucial legal provision, they contend, is section 5 (6) of the 1998 Act whose terms have been set out earlier in this judgment. Under this provision the Westminster Parliament is free to make laws for Northern Ireland and this is unaffected by the onset of devolution under the 1998 Act. In other words, it is contended that, as a matter of law, the Parliament of the United Kingdom can pass any law in relation to Northern Ireland and is uninhibited by the need to obtain a Legislative Consent Motion.

[115] In any event, the intended respondents say, any Act of Parliament of the nature envisaged, to trigger Article 50(2), does not fall within the terms of the convention. This is because such an Act would constitute legislation on an excepted matter for the purpose of the scheme of devolution whereas the convention is about obtaining the consent of the Northern Ireland Assembly to Westminster legislation which falls into the devolved category.

[116] Finally, the intended respondents point out that the terms of the convention clearly envisage that there would be occasions where, notwithstanding the convention, Parliament may choose to legislate for Northern Ireland without seeking consent despite the fact that the legislation may be in respect of a transferred matter. The use of the word "normally" in the formulation of the convention enables such to occur and any debate about the propriety of such a step, it is submitted, should be reserved to the world of political debate.

[117] On this issue, the Attorney General for Northern Ireland strongly supported the submissions of the intended respondents. In his view the subject matter of any legislation at Westminster to trigger Article 50(2) would be an excepted matter for the purpose of the 1998 Act so that the convention would not apply to it. The Attorney General for Northern Ireland drew attention to inconsistencies in the way in which the convention had been stated in some of the publications in this area, especially in respect of what constituted devolved matters. In his submission, the correct view of the convention's intersection with devolved powers was that found at paragraph 14 of the Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive. The terms of this have already been referred to in the quotation taken from the applicants' skeleton argument in Agnew and others as referred to above (see paragraph [111] *supra*). This formulation, he noted, was also consistent with the terms of the Sewel convention, a point also relied on by the applicants, as the above quotation shows. In fact the Sewel Convention, in the terms in which it has been referred to above, has now been recognised by statute law in Scotland: see section 2 of the Scotland Act 2016. In effect the test for the application of the convention in Northern Ireland, the Attorney General for Northern Ireland submitted, was whether the United Kingdom Parliament was legislating for Northern Ireland "with regard to devolved matters". In

the Attorney General for Northern Ireland's view there existed a linkage between this expression and the legislative scheme of devolution found in the 1998 Act. Hence when the scheme of legislative competence was applied, any Act of Parliament which had the object of giving notification for the purpose of Article 50(2) would not be legislation with regard to devolved matters. The alternative formulation which the Attorney General for Northern Ireland did not support but drew attention to was that found in two documents from different sources: the first was Devolution Guidance Note 8 and the second was Standing Order 42A of the Northern Ireland Assembly's Standing Orders. In both sources the terms of the convention appear to have been widened to include legislation which dealt with change to the legislative competence of the Assembly and legislation which changed the executive functions of a Minister or any Department. It was the Attorney General's view that the Assembly's Standing Order may have had its textual origin in the Guidance Note which appears to have been published before the latest version of the Memorandum which4 is dated 2013. Interestingly when the Guidance Note is studied it can be seen that in that part of it referred to as "General" the narrower view of the convention is referred to whereas the wider view appears in a later section of it entitled "Long Term legislative plans". Another matter raised by the Attorney General related to the terms in which the convention was written, particularly the use of the word "normally" in the usual formulation of the convention. This, in his opinion, was significant and rendered the convention unenforceable in practice. In this regard, he drew the court's attention to how a similarly worded provision in the Ministerial Code was interpreted by both the High Court and the Court of Appeal in the Northern Ireland constitutional case of Re De Brun's and another's Application [2001] NIQB 3 (High Court) and [2001] NI 442 (Court of Appeal). In that case, at both levels, it was held that the use of the word "normally" in the relevant formulation in the Code made it clear that the normative step was not to be regarded as obligatory.

[118] On the issue of the width of the convention the Attorney General for Northern Ireland provided the court with a note he had received from the Lord Advocate, Scotland's senior law officer, in respect of his written submission. This note took issue with the Attorney General for Northern Ireland's view of the scope of the Legislative Consent convention in Scotland. From this note it is clear that the Lord Advocate's view of the convention in Scotland is supportive of the wider interpretation referred to above which he viewed as the correct interpretation in line with provisions relating to legislative competence in the Scotland Act; Devolution Guidance Note 10 (which relates to Scotland); and the Standing Orders of the Scottish Parliament.

The Court's Assessment

[119] For the purpose of this judgment the court will assume that a convention exists in Northern Ireland along the lines of the narrower of the two views expressed above. This is consistent with the passage quoted from the skeleton argument of the applicants in Agnew and others as set out above. It is also consistent with what these applicants have described as the sources of the convention. The first of these was said to be practice in the operation of devolved government under the Government of Ireland Act 1920. While the matter was never free from difficulty, it was often said during that period, which stretched to the early 1970s, there was in operation a convention that Westminster would not legislate for Northern Ireland within the transferred field without the consent of the Government of Northern Ireland (see, for example, Calvert, Constitutional Law in Northern Ireland (1968) at pages 89 *et seq* and Hadfield, The Constitution of Northern Ireland (1989) page 80 *et seq*). The practice in question, however, did not go beyond that just described. The second source referred to by the applicants – the Sewel convention – was confined in a similar way, as has already been referred to. Neither of these sources can be associated with what has been described above as the wider view, bringing into the scope of the convention legislation for the purposes already described. In these circumstances, the court would be slow to presume the existence of an alleged convention which has been broadened in the manner described, is contested and does not reflect consistent practice and usage. The main question for the court is whether that convention which the court will assume does exist is in play on the facts of this case.

[120] This requires the court to decide whether such legislation as the United Kingdom Parliament may pass for the purpose of giving notice under Article 50(2) comes within the scope of the above convention, as it applies in Northern Ireland. The appropriate test, having regard to the position of the applicants and the intended respondents and the Attorney General for Northern Ireland, is whether the Westminster legislation at issue is "with regards to devolved matters".

[121] In the court's view, the answer to the above question lies in a consideration of the scheme for the distribution of legislative competence found in the 1998 Act. When this legislation is examined, it is the court's view that applying Schedule 2 to the 1998 Act, the better view is that any legislation for the purpose of notification under Article 50(2) would be legislation relating to an excepted matter *i.e* it would be legislation concerning relations with the European Communities and their institutions. It would not, in the court's view, be legislation "with regards to devolved matters", even if one was to adopt a broad approach to the meaning of this phrase. Accordingly, the convention has no application to the scenario with which Issue 2 is concerned.

[122] Even if the court was wrong in its view above, the court has great difficulty in seeing how this convention could, in any event, be viewed as enforceable *via* legal proceedings given its status as a convention, where such a status is associated with unenforceability in a court of law, the use of the word 'normally' in the provision, the essentially political nature of the decision which would then be at issue, and the clear terms of section 5(6) of the 1998 Act. The situation may, of course, be different in Scotland, a matter this court will leave for the Scottish courts to decide.

Issue 3

[123] This issue arises in the context of how the intended respondents should go about exercising prerogative power for the purpose of notifying under Article 50(2). It therefore assumes that the court will not find in favour of the applicants on Issue 1.

[124] The theme of this ground is that the intended respondents are obliged to exercise prerogative power in accordance with the principles of public law.

[125] A number of particular grounds of challenge are made. Firstly, it is claimed that the prerogative may only be exercised in a way which is not inconsistent with Northern Ireland's unique constitutional place in the United Kingdom. Secondly, it is asserted that the prerogative may only be exercised after properly having taken into account and having enquired into all relevant alternatives to the entirety of the United Kingdom exiting the EU. Thirdly, it is submitted that the prerogative may lawfully be exercised only if the Government has not given excessive weight to the result of the referendum held on 23 June 2016. Fourthly, it is put forward that the prerogative must be exercised in a manner which upholds EU law for so long as it remains effective in the United Kingdom. Fifthly, it is claimed that the prerogative must be exercised in a manner which respects obligations of the United Kingdom such as those arising under the British-Irish Agreement.

[126] The intended respondents have offered various responses to the above grounds. They point to a level of overlap between some of the matters raised and Issue 1. Further, they allege that some of the grounds put forward are really challenges to the decision to withdraw from the EU rather than challenges which concern the mechanism of Article 50(2), which is the focus of this judicial review challenge. Some of the challenges made, it is also contended, are in the abstract and are not based on evidence. Finally, it is objected that the substance of the challenge enters into forbidden territory and is not justiciable.

The court's assessment

[127] It seems to the court that there is a substantial area of overlap between some of the grounds put forward under this issue and those which have been dealt with at Issue 1 above. In this regard the matters referred to at one and five in the list referred to above appear to duplicate the argument at Issue 1 which the court has already ruled on. But even if this wrong or if there is a remainder left over, the court confesses to having some difficulty in appreciating how grounds of the broad nature of these grounds are to be assessed by it. Much of what underlies the propositions which have been put forward appear to the court to depend on assessments within government which are wide ranging and multi-factoral and beyond the abilities of the court to assess.

[128] For example, the second argument made refers to the extent of the enquiries which it is alleged the Government should carry out into possible alternatives to withdrawal from the EU and how these should be taken into account. The court has little or no evidence about these matters. But even if it did have such evidence, it is difficult to see how, given the context in which these matters have arisen, the court would set about carrying out its own assessment of them.

[129] Much the same can be said regarding allegations about the weight to be given by the Government to the referendum result. The obvious answer to the ground referring to this issue is that the weight to be given to this factor is a political judgment for the government of the day and that on grounds of lack of expertise the court has no standing in respect of it.

[130] The fourth issue raised above appears to assert an abstract proposition without any evidential sub-stratum.

[131] The court has grave doubts about the justiciability of much of the ground covered under this heading. While the time has long gone when it could be said that the manner in which prerogative power is used is beyond the power of the court to inquire into, there still remain some exercises of prerogative power which are viewed as inappropriate for judicial review because of their subject matter. The landmark judgment in Council of Civil Service Unions v Minister for the Civil Service [1984] 3 WLR 1174 says as much. A passage in the speech of Lord Roskill in which he refers to a list of instances of the use of prerogative power which could not be the subject of judicial review should not be overlooked. He said:

> "Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another" (see page 1203).

[132] This has been the approach to be taken on this issue since CCSU. While there have been particular prerogative powers which have since been held subject to judicial review or particular contexts in which judicial review of a particular aspect of the prerogative, for example, in respect of foreign affairs, has occurred, a reason for viewing a matter as non-justiciable has been where high policy has been involved. In R v Secretary of State for Foreign and Commonwealth Affairs ex p Everett [1989] 1 AER 656, a case in which a prerogative power (to issue passports) was viewed as being open to judicial review, Taylor LJ nonetheless noted at page 660):

> "At the top of the scale of executive functions under the prerogative are matters of high policy…making treaties, making law, dissolving Parliament, mobilising the armed forces. Clearly those matters, and no doubt a number of others, are not justiciable".

[133] In the court's view, it is difficult to avoid the conclusion that a decision concerning notification under Article 50(2) made at the most senior level in United Kingdom politics, giving notice of withdrawal from the EU by the United Kingdom following a national referendum, is other than one of high policy. Accordingly, it seems to fit well into the category of prerogative decisions which remain unsuitable for judicial review, referred to by Lord Diplock, in CCSU:

> "Such decisions will generally involve the application of government policy. The reasons for the decision maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, needs to be weighed against one and other – a balancing exercise which judges by their upbringing and experience are ill-equipped to perform" (see [1984] 3 WLR at page 1027).

[134] For the reasons the court has already given, such a decision does not lend itself to the process of judicial review and remains an example of the sort of decision which properly should be viewed as non-justiciable.

[135] In reaching this conclusion the court wishes to indicate that it has considered cases such as Youssef v Foreign Secretary [2016] 2 WLR 509, R (Sandiford) v Foreign Secretary [2014] 1 WLR 2697 and R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2009] 1 AC 453, but, in the court's estimation, none of those cases reach the heights of the high level policy which underpins the present case.

[136] In the light of the various factors set out above, the court does not consider that any of the arguments advanced under this issue are well made and it rejects them as grounds of challenge.

Issue 4

[137] This is a discrete issue. In respect of it, the applicants contend that before a notification is provided under Article 50(2) a necessary preliminary step in the process is that the Northern Ireland Office ("NIO") must comply with section 75 of the 1998 Act and its own equality scheme.

[138] Section 75 provides, in its material part, as follows:

> "(1) A public authority shall in carrying out its functions in relation to Northern Ireland have due regard to the need to promote equality of opportunity:
>
> (a) Between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
>
> (b) Between men and women generally;
>
> (c) Between persons with a disability and persons without; and
>
> (d) Between persons with dependants and persons without.
>
> (2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group."

[139] The detail of the argument is that the NIO is a public authority for the purpose of the 1998 Act – as demonstrated by its inclusion in the Northern Ireland Act 1998 (Designation of Public Authorities) Order 2000 and must, for the purpose of Schedule 9 of the 1998 Act assess the impact on equality of opportunity of policies adopted in the exercise of its functions. There is, it is said, no statement from the NIO indicating that its obligations have been taken into account in relation to any advice the Secretary of State has given or might be minded to give in the context of the triggering of Article 50(2). There is therefore a *prima facie* case of breach of section 75 and of the NIO's Equality Scheme in respect of consultation, screening and the production of an equality impact assessment.

[140] The intended respondents have sought to meet this issue in a variety of ways.

[141] The following particular points were made as alternatives to each other:

(i) It was submitted that section 75 was not engaged on the facts of this case. The means by which it is said to enter the case is in respect of alleged advice given to Her Majesty's Government by the Secretary of State for Northern Ireland, either in the past or to be given in the future in relation to the subject of triggering Article 50(2). However, the Secretary of State is not a designated public authority for the purpose of section 75, a point clear from the list of public authorities to which section 75 applies. This has also been recognised by the courts as is shown by the case of Re Murphy's Application [2001] NI 425 at 435 where Kerr J (as he then was) stated:

> "Only those bodies and agencies specified in s75 (3) of the Act are to be public bodies for the purpose of the section. The fact that the Secretary of State was performing a function that, in other circumstances, might have been carried out by the Assembly, could not bring him within the provision. In this context it is worthy of note that s76 (7) provides that a public authority shall include a Minister of the Crown. If it had been intended that the Secretary of State should be subject to section 75, that could have readily been made clear, as it has been in s.76" (see page 435).

In these circumstances Parliament must be viewed as having deliberately excluded the Secretary of State from the reach of section 75.

(ii) Consistently with (i) above, the NIO are not involved in performing any duty in relation to Northern Ireland which is relevant for present purposes. But even if this was wrong, any complaint with regard to a failure to act consistently with its own Equality Scheme should be dealt with by means of the tailor-made provisions of Schedule 9 to the 1998 Act (which refers to the subject of "Enforcement of Duties" and from paragraph 10 deals with complaints of a failure by a public authority to comply with an approved equality scheme). This was the view which, subject to exceptions, was taken by the Court of Appeal in Northern Ireland in Re Neill's Application [2006] NI 278: see, paragraph [26] for the view of Girvan J (as he then was) at first instance and paragraph [28] for the view of Kerr LCJ (as he then was) speaking for the Court of Appeal. Notably, he said:

> "It would be anomalous if a scrutinising process could be undertaken parallel to that for which the [Equality] Commission has the express statutory remit. We have concluded that this was not the intention of Parliament. The structure of the statutory provisions is instructive in this context. The juxtaposition of ss75 and 76 with contrasting enforcing mechanisms for the respective obligations contained in those provisions strongly favour the conclusion that Parliament intended that, in the main at least, the consequence of a failure to comply with s.75 would be political, whereas the sanction of legal liability would be appropriate to breaches of the duty contained in s.76".

This is not a case, argue the intended respondents, where the court should permit the complaint put forward by the applicants to be litigated by way of judicial review.

(iii) Another reason why this issue should be rejected by the court is the stage at which this issue is being raised, *i.e.* prior to notification of the intention to withdraw from the EU. On this aspect, it was argued that the Government is only at the outset of a process which has a long way to go. At this stage the outcome of the process is unclear with the consequence that there would not be sufficient information on which to base any impact assessment for the purpose of section 75. In short, no sensible assessment could be made at this stage. Support for rejecting a claim of this sort for this reason could, it was submitted, be found in such cases as R (Nash) v Barnet LBC (Capita plc and others, interested parties) [2013] LGR 515 at [80]; R (Bailey) v Brent LBC [2012] LGR 530 at paragraph [104]; and R (Fawcett Society) v Chancellor of the Exchequer [2010] EWHC 3522 Admin at paragraph [15].

[142] In a short submission the Attorney General for Northern Ireland supported the intended respondents' position. In his written submission he put the matter thus:

> "…section 75 does not have any application with respect to the giving of notification by the Prime Minister, by the United Kingdom government collectively, or by the Foreign Secretary. Secondly, section 75 does not have any application with respect to the content of cabinet discussions engaged in by the Secretary of State. Thirdly, while section 75 applies to any policy that the Northern Ireland Office would propose to adopt, it does not apply to interim advice".

The court's assessment

[143] The court agrees with the submissions of the intended respondents and the Attorney-General for Northern Ireland and would reject the applicants' arguments on this issue.

[144] Its primary reason for doing so is that it seems to the court that the nature of the impugned decision *viz* the notification of an intention on the part of the United Kingdom as a Member State of the EU to withdraw from it cannot properly be regarded as the carrying out a function relating to Northern Ireland. In contrast, it seems to the court that the function being carried out is a function relating to the United Kingdom in its capacity as a Member State of the European Union. It is a function being carried out by the Prime Minister or the Secretary of State for Exiting the European Union or, perhaps, the Secretary of State for Foreign Affairs, and is not a function being carried out by the Secretary of State for Northern Ireland or by the Northern Ireland Office. Consequently, in the court's view, section 75 has no purchase on this issue and is not engaged.

[145] If the court is wrong about this issue and section 75 is engaged on the facts of this case, the court is of the view that the claim now being advanced of breach of section 75 is premature. This is because the point at which consultation, screening and impact assessment may be viewed as being required is yet to occur. There is strength in the intended respondents' point that the invocation of Article 50(2) represents the start of a lengthy process which lies ahead and that it would be much too early to seek to subject the process to the sort of analysis referred to. The simple fact is that the effects which would have to be considered are far from clear at this stage.

[146] While the court need not decide the point, given the conclusions it has already reached, it would be minded to adopt the posture taken by the Court of Appeal in Neill, which would mean that if this argument is to be addressed the forum in which it should be addressed is by the use of the procedure set out in Schedule 9 of the Northern Ireland Act 1998. Recent cases on this issue in this court have followed the general approach of the Court of Appeal in the Neill case: see Re BMA's Application [2012] NIQB 90 and Re McCotter's Application [2014] NIQB 7.

Issue 5

[147] This issue arises from an amended amended Order 53 Statement in the McCord case and involves submissions which go considerably wider than those already discussed. Expressly it is contended that as a matter of law Article 50 cannot be triggered without the consent of the people of Northern Ireland. This, it is asserted, is because the Northern Ireland people are said to have a legitimate expectation that there would be no change in the constitution of Northern Ireland without their consent. Withdrawal from the EU would, the argument contends, be such a change.

[148] Mr Lavery QC for Mr McCord submitted that the requirement for the consent of the people of Northern Ireland derived from the terms of the Good Friday Agreement and the Northern Ireland Act 1998 and that these sources attenuated the operation of the doctrine of parliamentary sovereignty.

[149] In support of this argument reference was made to authorities which recognise the importance of the Good Friday Agreement and the 1998 Act such as Robinson which is referred to above at paragraph [43]. Such authorities should be interpreted as introducing a federal structure governing the relationship between the constituent parts of the United Kingdom. Attention was also drawn to a number of statements from senior Judges in the United Kingdom which cast doubt on the authority of the traditional view of parliamentary sovereignty. Such opinions had been expressed both in court (see, for example, the views of Lord Steyn and Lord Hope in R (Jackson and others) v Attorney General [2005] 1 AC 262 at paragraphs [100]–[112] and [104]–[107]) and out of court (see, for example, Lady Hale, The Supreme Court in the Constitution, Legal Wales 2012). In addition, reference was made to a number of academic articles and to a number of Canadian constitutional cases. In the former category, the court read with interest the work of Mark Elliot entitled "The Principle of Parliamentary Sovereignty in Legal, Constitutional and Political Perspective", which is found at Chapter 2 of The Changing Constitution, 8th Edition edited by Jowell, Oliver and O'Cinneide. In the latter category, the court considered three Canadian constitutional cases: Reference Re Secession of Quebec [1998] 2 R.C. 217; Reference Re Senate Reform [2014] 1 S.C.R. 704 and Reference Re Supreme Court Act [2014] I. S. C. R. 433.

[150] The intended respondents urged the court to reject Mr Lavery's submissions which, it was claimed, went well beyond the immediate issue of the legal underpinning for notification pursuant to Article 50(2).

[151] The following specific submissions were made:

(a) The status of Northern Ireland which formed the subject matter of provision in the Good Friday Agreement and the later section 1 of the 1998 Act was concerned with the question only of whether Northern Ireland was either to remain in the United Kingdom or join a united Ireland. This is express in the relevant passages. There was, in contrast, no reference anywhere to the need for the consent of the people of Northern Ireland to any particular change in the arrangements for government. Nor could any such restriction be implied.

(b) The sovereignty of the United Kingdom Parliament was preserved in the new constitutional arrangements for Northern Ireland, as is clear from the terms of section 5 (6) of the 1998 Act. It followed that there was no legal impediment of the sort contended for to the ability of the United Kingdom to withdraw from the European Union.

(c) No domestic authority had been cited by the applicant to support the contention that it is now the case that the consent of the people of Northern Ireland was required for the purpose of withdrawing from the EU. The constitutional relationship between the United Kingdom Parliament and a devolved area had recently been the subject of extensive discussion by the Supreme Court in the case of Axa General Insurance Ltd and others v HM Advocate and others [2012] 1 AC 868 and there had been no suggestion that the devolved arrangements entailed any such requirement or had the effect of limiting the power of the United Kingdom legislature.

(d) In the face of the existing and well recognised constitutional provisions in respect of devolution there was an absence of material which could establish a legitimate expectation of the sort now contended for.

(e) The doctrine of legitimate expectation was not appropriate, in any event, to a situation where what was being alleged was a commitment or promise to the population or a section of the population at large. A statement at a macro-level, especially in the realm of politics, was not enforceable by the court: see, for examples, the judgment of Richards LJ in R (Wheeler) v Office of the Prime Minister and another [2008] EWHC 1409 (Admin) at paragraph [44] and R v Secretary of State for Education and Employment [2000] 1 WLR 1115 *per* Laws LJ at pages 1130-113.

(f) There could be no basis for suggesting the Government does not remain committed to the peace process.

The court's assessment

[152] The court is not aware of any specific provision in the Good Friday Agreement or in the 1998 Act which confirms the existence of the limitation which the applicant contends for and which establishes a norm that any change to the constitutional arrangements for the government of Northern Ireland and, in particular, withdrawal by the United Kingdom from the EU, can only be effected with the consent of the people of Northern Ireland. Nor can the court identify material which would cause it to imply any such limitation. This is not, in the court's estimation, surprising as if such a limitation exists, it would be reasonable to have expected this to have been highlighted in the run up to the referendum held in June of this year. The proposition for which the applicant contends would, it seems, have the most unusual result of requiring a second referendum on the issue of EU membership to be held in Northern Ireland within a short time of the people of Northern Ireland having gone to the polls in respect of the same issue in a national referendum where the national outcome was in favour of withdrawal.

[153] While it is correct that section 1 of the 1998 Act does deal with the question of the constitutional status of Northern Ireland it is of no benefit to the applicant in respect of the question now under consideration as it is clear that this section (and the relevant portion of the Good Friday Agreement) is considering the issue only in the particular context of whether Northern Ireland should remain as part of the United Kingdom or unite with Ireland. The very fact that the issue is dealt with in this way, it seems to the court, makes it unlikely that the applicant's wider view as to the meaning of these provisions can be correct.

[154] It further seems to the court that in this area it is difficult to see how the court can overlook the importance of the terms in which the 1998 Act are cast or to deviate from what to date has been plain, namely that the United Kingdom Parliament has retained to itself the ability to legislate for Northern Ireland (see section 5(6)) without the need to resort to any special procedure, save in so far as that might be required for the purpose of section 1 of the 1998 Act (a matter about which the court need not dilate upon).

[155] In the court's view, any suggestion that a legitimate expectation can overwhelm the structure of the legislative scheme is not viable.

[156] The court acknowledges that on the issue of the doctrine of parliamentary sovereignty (in the Diceyan sense that Parliament can make or unmake any law whatsoever and that no-one can override or set aside the legislation of Parliament) there are differing views about the extent to which the doctrine may be reconciled with, in particular, the rule of law, but this does not mean that a first level judge is free to disregard the doctrine or sweep it away. If that task is to be undertaken it will fall to the highest court to do so in an appropriate case, as Lord Steyn in Jackson recognised. Finally, while the academic writings and Canadian cases demonstrated that there was no lack of possible approaches to constitutional development this, in itself, is not a reason why constitutional orthodoxy must be set aside.

[157] Essentially, for the reasons advanced by the intended respondents the court rejects the applicant's submissions in this area.

Conclusion

[158] As the hearing has been a rolled up hearing the court indicates that in respect of Issues 1, 2, 3 and 4 it is prepared to grant leave but not in respect of Issue 5. In respect of all issues the court dismisses the applications.