UKSC 2016/196

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

BETWEEN:

THE QUEEN
on the application of

(1) GINA MILLER
(2) DEIR TOZETTI DOS SANTOS

Respondents

-and-

THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Appellant

-and-

(1) GRAHAME PIGNEY AND OTHERS
(2) AB, KK, PR AND CHILDREN

Interested Parties

-and-

(1) GEORGE BIRNIE AND OTHERS
(2) THE LORD ADVOCATE
(3) THE COUNSEL GENERAL FOR WALES
(4) THE INDEPENDENT WORKERS UNION OF GREAT BRITAIN
(5) LAWYERS FOR BRITAIN LIMITED

Interveners

APPELLANT'S CASE ON THE DEVOLUTION ISSUES

I. INTRODUCTION AND SUMMARY

1. The Appellant ("**the Secretary of State**") provides in this supplemental Case a response to those interventions seeking to oppose his appeal by reference to the content of the devolution legislation: i.e. the Scotland Act 1998; the Government of Wales Act 2006 and the Northern Ireland Act

1998. The submissions of the Government in the separate but related *Agnew* and *McCord* cases from Northern Ireland are set out in a distinct printed Case, and this document does not deal with them. The position of Northern Ireland will be referred to insofar as it mirrors the Secretary of State's response to the submissions made by the Lord Advocate and the Counsel General for Wales. The Secretary of State agrees with the analysis of the Attorney General for Northern Ireland in the *Agnew* case in relation to the devolution issues, and notes the very considerable differences of analysis between the law officers of the respective devolved administrations.

2. The submissions set out here are a supplement to, and not a replacement for, those in the Secretary of State's principal printed Case of 18 November 2016 (**"the principal Case"**). They do not repeat submissions made in the principal Case, and adopt the same defined terms.[1] The principal Case did not deal with the devolution legislation because the DC did not consider it necessary to reason by reference to those points (Judgment, §102). With the greatest of respect to the Lord Advocate and the Counsel General, the DC was right to conclude that points arising from or in relation to the devolution legislation, or from Scots law, add nothing material to the issues in this appeal.

3. The Secretary of State submits that none of the devolution issues alter the answer given in the principal Case, for the following reasons in summary:

   (1) In all three cases, the devolution legislation expressly does not give competence to the devolved legislatures or administrations over the conduct of foreign affairs, including relations with the EU. The

[1] The considerable repetition by the Lord Advocate and Counsel General of submissions made by the Respondents is not addressed in this Case, which is concerned with the devolution issues alone.

prerogative power to withdraw from treaties is deliberately unaffected.

(2) In general, EU law is defined and treated in the devolution legislation in the same manner as in the ECA and in other legislation of the Westminster Parliament. EU law is recognised to be ambulatory, and references to it assume but do not require membership of the EU.

(3) No issue concerning the Sewel convention arises in this case because there is no legislation before the Court. This case concerns the proper use of the prerogative. In any event, any such issue would be non-justiciable.

(4) There is no principle or provision unique to Scots law which requires any different answer to this appeal. Scots law recognises the Government's prerogative powers just as English law does.

(5) The Court is being invited by the Lord Advocate and the Counsel General to stray into areas of political judgment rather than legal adjudication. The Court should resist that invitation, particularly where the underlying issue is one of considerable political sensitivity.

II. THE DEVOLUTION LEGISLATION AND ITS RELEVANCE

The Conduct of Foreign Relations

4. The conduct of foreign relations is a matter expressly reserved in the devolution legislation such that the devolved legislatures have no competence over it.

(1) In Scotland, s. 30(1) of the Scotland Act 1998 gives effect to Schedule 5 as defining "*reserved matters*". Sections 29(1)-(2)(b) define the

legislative competence of the Scottish Parliament as excluding provisions so far as they relate to reserved matters. Paragraph 7(1) of Schedule 5 to the Scotland Act 1998 includes within the list of reserved matters over which competence is reserved exclusively to the Westminster Parliament and UK Government: "*International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters*" (emphasis added).

(2) The Northern Ireland Act 1998 is in materially identical terms. The legislative competence of the Assembly is restricted in s. 6(2)(b) where a provision deals with an "*excepted matter*". Excepted matters are defined in s. 4(1) as those listed in Schedule 2, paragraph 3 of which excepts "*International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations and extradition, and international development assistance and co-operation*".

(3) In Wales, legislative competence is defined, in s. 108(3)-(4) of the Government of Wales Act 2006, as a provision which "*relates to one or more of the subjects listed under any of the headings in Part I of Schedule 7*". The conduct of foreign relations, including with the EU, is a not a matter listed in Schedule 7[2].

[2] As a matter of terminology, it is more accurate in the context of the Welsh model to refer to devolved or non-devolved matters, rather than reserved or non-reserved matters. For ease, a reference to reserved matters should be read accordingly when applied to the Welsh context. Similarly, because of different model adopted in the Government of Wales Act 2006, the Westminster Parliament did not expressly reserve international relations; rather it consciously chose not to devolve competence. There is no material difference when the devolution legislation is considered together.

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5. These reservations are fatal to reliance on the devolution legislation as giving rise to any necessary implication, or any other indication, that the Government cannot exercise its foreign affairs and treaty prerogative in the ordinary way. Not only does the devolution legislation not occupy the field, it deliberately declines to enter the field at all.

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6. In these circumstances, the Secretary of State submits that the devolution legislation cannot add to the arguments against his Case in any material way. Nothing in the legislation abrogates the prerogative. The Westminster Parliament could have allocated competence over foreign affairs to the devolved administrations but it expressly reserved that issue. The devolution legislation is accordingly of a piece with the statutes referred to in §§24-35 of the principal Case: yet further examples of where the Westminster Parliament has made a conscious decision not to limit the Government's foreign affairs and treaty prerogative to withdraw from treaties.

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Express references to EU Law in the devolution legislation

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7. That there are various provisions in the devolution legislation which envisage the application of EU law is undoubtedly correct but adds nothing to the arguments already addressed in the Case. The legislation assumes that the UK is a member of the EU but does not require it to be so and does not become unworkable as a result of the commencement of the process of withdrawal. As the Lord Advocate rightly puts it at §66 of his Printed Case, the references to EU law in the devolution legislation "*simply reflected the fact that, by the time that the devolution statutes were enacted, EU law had become the law of the land in each of the UK's jurisdictions*".

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8. It is of importance that EU law is defined in the devolution legislation in an equivalent ambulatory fashion to that set out in s. 2(1) ECA. Section 126(9) of the Scotland Act 1998 adopts the following definition:

> "*(a) all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, and*
>
> *(b) all those remedies and procedures from time to time provided for by or under the EU Treaties,*
> *are referred to as "EU law.""*

9. Precisely the same definition is used in s. 158(1) of the Government of Wales Act 2006.[3] Materially equivalent wording is adopted in s. 98(1) of the Northern Ireland Act 1998.[4]

10. The Secretary of State's case is accordingly the same in respect of EU law as applied under the devolution legislation as it is under the ECA. The devolution legislation are further conduits by which EU law, such as it is at any given time, is given effect. The rights and obligations remain contingent upon continued membership of the EU, a matter which is expressly not allocated to the competence of the devolved legislatures.

11. This is why reference to provisions permitting devolved competences to be altered by Order in Council – ss. 30 and 63 of the Scotland Act 1998; ss. 58 and 109 of the Government of Wales Act 2006; s. 4 of the Northern Ireland Act 1998 – does not assist: a competence (or restriction on

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[3] The Counsel General makes the telling point in fn19 of his Printed Case that "*EU Treaties*" in s. 158(1) is "*clearly intended to mean the treaties to which the UK is a party*" (emphasis added). The phrase does not require specific treatment as it is defined in Schedule 1 to the Interpretation Act 1978 by reference to s. 1 ECA.

[4] The words "*from time to time*" do not appear in the equivalent of (a), but this cannot have been intended to have the effect that the Northern Irish Assembly is concerned only with EU law as it stood in 1998.

competence) related to EU law is contingent upon continued membership of the EU, absent further legislative provision.[5]

12. Reliance is placed upon the restrictions on the competence of the devolved legislatures to legislate contrary to EU law (see: s. 29(2)(d) of the Scotland Act 1998; s. 108(6)(c) of the Government of Wales Act 2006; and s. 6(2)(d) of the Northern Ireland Act 1998) and of the devolved administrations to act contrary to EU law (see: s. 57(2); s. 80(8); and s. 24(1) respectively). These restrictions say nothing about the exercise of the prerogative in foreign affairs. Moreover, such restrictions were, as a matter of law, strictly unnecessary. Regardless of whether the devolution legislation so mandated it, neither the legislatures nor the administrations are entitled to act contrary to EU law: that is the effect of the supremacy of EU law on the *vires* of a devolved legislature and administration. The constraint emanates from EU law itself (just as EU law constrains the UK Government and the Westminster Parliament). Withdrawal from the EU will remove that constraint. Put another way, provisions of the devolution legislation which prohibit action contrary to EU law are intended to ensure that institutions of government in the UK comply with the international obligations of the UK under EU law; they do not require that the UK continues to be bound by those obligations.

13. The devolution legislation contains provisions concerning references to the CJEU. These provisions do not, however, confer a <u>right</u> to a reference; rather, they prescribe particular procedural steps in particular sorts of cases where a reference has been made <u>by a court</u>. See: s. 34 of the Scotland Act 1998; s. 113 of the Government of Wales Act 2006; and s. 12 of the Northern Ireland Act 1998. Whether or not a reference should be

[5] As the Attorney General for Northern Ireland notes at §75 of his Printed Case, the existence of consent requirements from the devolved legislatures in those alteration provisions further undermines any reliance on there being some legal principle of legislative consent in respect of primary legislation: see further below.

made is determined by art. 267 TFEU and not domestic statute. There is no requirement that any such reference will ever be made (and none has yet been made in the circumstances described in these provisions). Withdrawal of the UK from the EU so that no such reference will be made in the future does not conflict with these provisions; they simply become unnecessary. This highlights a more general point. Just because circumstances, including Government action, render a provision of primary legislation unnecessary or irrelevant, constitutional principles are not thereby violated. Arcane pieces of legislation which have fallen into disuse are regularly identified for repeal by the Law Commission long after they have ceased to have any possible practical function.

14. The tortuous attempt by the Counsel General in §§42-43 of his Printed Case to generate some relevance of EU law to s. 154(2) of the Government of Wales Act, on interpretation of devolved legislation, is a telling sign of the paucity of his examples. Section 154(2), which does not mention EU law at all, could not possibly be said to be deprived of purpose upon withdrawal from the EU.

15. Other instances of references to EU law or institutions within the devolution legislation would be unaffected by withdrawal in any event. For example, s. 2(5B)(b) of the Scotland Act 1998 prohibits the holding of a general election to the Scottish Parliament on the same day as a European Parliamentary election. That provision would continue to be effective after withdrawal.

16. EU legal instruments appear within the lists of reserved matters. For example, paragraph B2 of Schedule 5 to the Scotland Act 1998 and paragraph 40 of Schedule 3 to the Northern Ireland Act 1998 both define as a reserved matter the subject-matter of Directive 95/46/EC (the data protection directive). Such delineation of competences is perfectly capable of having continued effect after withdrawal from the EU, even if the

instrument in question is not retained in domestic law by the Great Repeal Bill. The Government's intention is to retain the EU law '*acquis*', where possible and appropriate, by the Great Repeal Bill

Other effects of withdrawal from the EU

17. Both the Counsel General (in §10 of his Case) and the Lord Advocate (in §§45-48) seek to emphasise the effect of the UK's withdrawal from the EU with reference to a range of EU secondary legislation, some of which results in specific functions being exercised by the devolved administrations. The short answer to these examples are that neither Case disputes the proposition in the Secretary of State's principal Case that the Government may act under the foreign affairs prerogative so as to bring about the repeal of any EU secondary legislation through negotiating and voting in the Council of Ministers. It is therefore not disputed that each and every one of the EU instruments relied upon could be revoked by the EU institutions as a result of the Government exercising prerogative powers. Even if (which is not accepted) it were the case that the inevitable effect of giving notice under Article 50 is to remove the effect of all of those instruments, no reason is advanced why that exercise of the foreign affairs prerogative should be treated any differently.

18. The Lord Advocate also seeks to identify legislation made by the Scottish Parliament or Government which, it is said, depends upon the continuing application of EU law or membership of the EU (§49). He fails to appreciate that much domestic legislation implementing EU law is "freestanding" and does not depend upon the existence of the international obligations which it was originally intended to implement.

19. The various examples given by the Counsel General and the Lord Advocate of areas in which EU law has an important effect is merely a

further indication of the undisputed scale of withdrawing from the EU. It is precisely because of that scale that a referendum was held to ascertain the will of the people prior to the Government taking the decision to withdraw from the EU.

Constitutional status of devolution legislation

20. There is no dispute that the devolution statutes comprise very significant pieces of legislation. But nothing in the issue of Article 50 notification, or indeed withdrawal from the EU altogether, alters the existence of the devolved legislatures or the essential structure and architecture of the devolution settlements.

21. Much emphasis is laid by the various intervening parties on the supposed status of the devolution legislation as constitutional statutes. As explained in the Appendix to the principal Case in respect of the ECA, designation or otherwise as a "constitutional statute" by the common law tells one nothing about the intention of the Westminster Parliament or its relevance to prerogative powers. The designation under the common law is solely by way of protection from implied repeal: it is a common law rule effective in cases of competing provisions of primary legislation. That issue does not arise in this case, either by reference to the ECA or the devolution legislation. Whether or not they are constitutional statutes in this sense does not assist.

III: THE SEWEL CONVENTION

22. The Sewel convention takes its name from the statement of Lord Sewel, Minister of State in the Scotland Office, during the second reading of the Scotland Bill on 21 July 1998 in which he said:

"*…as happened in Northern Ireland earlier in the century, we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament*" (Hansard, HL Debates, vol. 592, 21 July 1998, col. 791).

23. Although Lord Sewel was speaking in the particular context of the establishment of the Scottish Parliament, an equivalent convention applies in relation to the Welsh and Northern Irish Assemblies: see the Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive (October 2013). The Government has repeatedly accepted and affirmed the appropriateness of the principle as a political convention.

24. The legal irrelevance of the Sewel convention is expressly accepted by the Counsel General at §70 of his Printed Case: he makes clear that he is not arguing that the Welsh Assembly has a legally enforceable right to veto any Westminster legislation authorising Article 50 to be triggered, but only that the use of the prerogative to trigger Article 50 would circumvent the application of the convention. The Lord Advocate does, however, maintain that a legislative consent motion (**"LCM"**) of the Scottish Parliament is a "constitutional requirement" within Article 50, alongside an Act of the Westminster Parliament, before a valid decision that the UK should withdraw from the EU may be taken pursuant to Article 50(1) (eg §85(b)).

25. With regard to LCMs, the Sewel convention in fact says nothing about the practice by which consent might be sought and obtained. Although LCMs are the currently preferred procedure, that is a matter for the devolved legislatures in accordance with their internal Standing Orders. Seeking an LCM is commenced and controlled entirely within the devolved legislature. If the devolved legislature wished to indicate its consent in

some other form it could do so. The focus of the Lord Advocate on LCMs is accordingly unhelpful and irrelevant to the effect of the convention itself.

26. It is submitted that the Sewel Convention cannot provide any argument against the Secretary of State's position in the present challenge for a number of powerful reasons.

The Issue is Moot

27. **First**, and critically, this case does not concern the passage of legislation. Whether consent of the devolved legislatures might or might not be required before the Westminster Parliament passes legislation concerning withdrawal from the EU can say nothing about the legality of the Government using prerogative powers to commence the process of withdrawal from the EU, which is the only issue arising on the appeal. This is a complete answer to the surprising suggestion of the Lord Advocate that there is an issue "*properly in dispute between the parties*" (at §84 of his Printed Case). There is not. The point is entirely moot and the Court should decline to express any view on the matter.

The Non-Justiciability of the Terms of the Convention

28. **Second**, and in any event, the convention does not purport to prescribe an absolute rule. Its content is only that "*Westminster would not <u>normally</u> legislate*" (emphasis added). Whether circumstances are 'normal' is a quintessential matter of political judgment for the Westminster Parliament and not the courts. There are no judicial standards by which to measure such a question in the context of a political convention.

29. Were such an issue to arise in legal proceedings, as it does not in this case, the effect would be to seek a remedy which prevented the Westminster

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Parliament from passing a particular piece of legislation, and/or restrained a Member of Parliament from introducing a Bill into the House. Any such order would be a flagrant breach of Article 9 of the Bill of Rights, as the Lord Advocate implicitly accepts when conceding that no Act passed in purported breach of the convention could thereby be invalidated (at §86 of his Printed Case). This only underlines the non-justiciability of the convention as a matter of high constitutional principle.

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The Convention is not Legally Enforceable

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30. **Third**, the Sewel convention – in any form and regardless of its internal caveat – is a political convention concerning the legislative functions of the Westminster Parliament. It is not, and has never been intended to be, a justiciable legal principle. In the Inner House, Lord Reed correctly described the convention as a "*political restriction on Parliament's ability to amend the Scotland Act unilaterally, [but] there have nevertheless been many amendments made*": *Imperial Tobacco Ltd v Lord Advocate* [2012] CSIH 9, 2012 SC 297 at §71 (emphasis added). Precisely the same point was made by Lord Reid in the context of the right of the Westminster Parliament to legislate for Rhodesia in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 722-723: the equivalent convention "*had no legal effect in limiting the legal power of Parliament*".

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31. The correct legal position, that the Westminster Parliament is sovereign and may legislate at any time on any matter, is specifically set out in the devolved legislation itself: s. 28(7) of the Scotland Act 1998, s. 5(6) of the Northern Ireland Act 1998 and s. 107(5) of the Government of Wales Act 2006. Any attempt to enforce the convention directly or indirectly would be a straightforward impingement on that sovereignty.[6]

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[6] The Lord Advocate is plainly wrong as a matter of constitutional law to assert, at §30 of his Printed Case, that "*the freedom of the UK Parliament is constrained…by the*

32. Accordingly, it is no answer to cite *Attorney General v Jonathan Cape* [1976] QB 752, in which it was held that the parameters of a well-established cause of action, namely breach of confidence, could be informed on the facts of the case by the existence of a political convention. The use of a convention to consider whether there was understood to have been a relationship of confidence as between Cabinet Ministers is very long way from using a convention to abrogate a well-established prerogative power.[7] It would, for example, be entirely inconsistent with both *De Keyser* and *Madzimbamuto*. It would be inconsistent with Parliamentary sovereignty, which was not an issue which arose in *Jonathan Cape*. Unsurprisingly, no authority is cited for the proposition.

33. Nothing in that analysis is affected by the amendment of s. 28 of the Scotland Act 1998 (by s. 2 of the Scotland Act 2016) to include: "*(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament*". (Similarly, nor will an equivalent amendment to the Welsh legislation alter matters there <u>if</u> it is eventually passed by the Westminster Parliament.)

34. All s. 28(8) does is to recognise the terms of the political convention in legislation. That does not render the application of it in any particular instance a justiciable matter for the courts. It is trite that legislation may include provisions which do not give rise to justiciable legal issues. The

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constitutional conventions which apply when Parliament legislates with regard to devolved matters".

[7] Nor does *R (States of Guernsey) v Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 1847 assist. While the existence of constitutional conventions (of a not dissimilar nature to the Sewel convention at §4) are referred to in passing, Jay J made no attempt to define their scope or give them legal effect and the parties did not ask him to do so: at §§4, 8, 13, 20 and 33.

content of s. 28(8) is the same as that of the convention, save that its purely political nature is further emphasised by (a) the opening wording that it is "*recognised*", and (b) its placement immediately after s. 28(7) which affirms the unconstrained legislative competence of the Westminster Parliament. The Secretary of State does not address the issues raised on the scope of s. 28(8) of the Lord Advocate's Printed Case at §80, which do not arise and are not justiciable in any event.

The Application of the Convention to the Article 50 Notification

35. Should it be necessary, the **fourth** reason why the Sewel convention is irrelevant to this appeal is that the conduct of foreign affairs, including with the EU, is a matter reserved to the Government. Legislation authorising the issue of the Article 50 notification would not be legislation "*with regard to devolved matters*" in any event. That is the conclusion which was reached by Maguire J in *McCord* at §121.

36. It is particularly noteworthy, as the Annex to the Lord Advocate's Printed Case helpfully confirms, that no legislative consent was sought or required from the devolved legislatures for the passage of: the European Communities (Amendment) Act 2002; the European Parliamentary Elections Act 2002; the European Union (Amendment) Act 2008; the European Union Act 2011; or the European Union Referendum Act 2015.

37. The Lord Advocate's contrary position is not accepted. However, any dispute about the scope of the convention would also be non-justiciable for the same reasons as already outlined.

The Lord Advocate's Argument from Article 50

38. It appears to be submitted by the Lord Advocate that constitutional conventions, including the Sewel convention, are "*constitutional requirements*" within the meaning of Article 50 TEU and must therefore

apply to the giving of notice under Article 50 (eg Case, §20). The answers to this argument are effectively the same as to any more general reliance on the convention.

(1) It does nothing to render the issue any less moot, given that the question on the appeal is whether the Government has a prerogative power, rather than what constraints may be placed on the Westminster Parliament.

(2) The Lord Advocate makes no effort to explain how a convention which provides in terms that it does not apply as a rule in all cases could be a "*requirement*".

(3) Similarly, the Lord Advocate fails to explain how a convention could sensibly be termed a constitutional "*requirement*" when he accepts that breach of the convention could not invalidate an Act of the Westminster Parliament providing for Article 50 notification (§86 of his Printed Case).

(4) Even if it were a requirement, that would not transfigure the convention into a justiciable matter for the Court to determine. The Lord Advocate bases his argument that the convention falls within the terms of Article 50(1) on observations from various learned authors that constitutional conventions form part of constitutional law. So they do, but as the passage he quotes from Dicey at §20 of his Written Case also emphasises, they "*are not in reality laws at all since they are not enforced by the Courts*".

The Counsel General's Argument as to Avoidance of the Sewel Convention

39. The Counsel General's rather different argument is that the prerogative cannot be used to give notice under Article 50 because it would "short

circuit" the Sewel Convention (on the grounds that giving notice would affect the competences of the Welsh Assembly). That argument, in contrast to that of the Lord Advocate, at least has the merit of focusing on the issue of use of the prerogative, which is the issue before the Court. However:

(1) If the convention cannot be enforced in law in circumstances which might appear to fall within its purview, where there is a Bill of the Westminster Parliament which might affect devolved competences, it cannot possibly determine the legal validity of a decision (to invoke prerogative powers) to which it has no application at all.

(2) The convention would not apply to legislation authorising the issue of the Article 50 notification in any event because that is a reserved and not a devolved matter, so the convention is not being 'avoided' by use of the prerogative.

(3) Any dispute about this would not be justiciable, both because compliance or not with the convention is not justiciable and because complaints about the use (as opposed to the existence) of a prerogative power to withdraw from a treaty are not justiciable.

(4) Even if the giving of notice under Article 50 was within the scope of the convention, the convention's own "*normally*" exception might be invoked and that too would be a matter outside the purview of legal challenge.

40. In the circumstances, and given in particular, the entirely moot nature of the point, it is both unnecessary and inappropriate to consider the wider functioning of the convention. The evident political nature of it is only emphasised by the references to matters such as the Standing Orders of the devolved legislatures and the Government's Devolution Guidance

Notes.[8] None of that alters the lack of relevance to this case, or the simple legal answer that the Sewel convention is not a matter for the courts.

IV: SCOTS LAW

41. There is no basis upon which to conclude that particular elements of Scots law[9] could require any different answer to the principal issue on this appeal as between Scotland and the rest of the United Kingdom.[10] It would be astonishing if they did.

42. The equivalence in the law of Scotland and England concerning the control and exercise of prerogative powers was specifically accepted by the House of Lords in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, in which the Crown had been sued in Scotland in relation to an exercise of its war prerogative in Burma which impacted on the rights of a Scottish company. Lord Reid held at pp.98-99 that "*it does not appear that as regards [the issues on the appeal] there is any material difference between the law of Scotland, the law of England and the law of Burma*".[11] As Lord Hodson noted at p.139, this was not surprising "*seeing that the Crown, in and out of Parliament, occupies the same position and performs the same duties in each of the two realms*". Lord Upjohn echoed this, arguing that "*it would be most astonishingly inconvenient if, notwithstanding that England and*

[8] The former of which could not unilaterally determine the scope of the convention even if they were admissible before a Court, and the latter of which make no reference to the present type of issue.

[9] Still less Scottish history as relied upon by the Fourth Intervener.

[10] Sales LJ emphasised the absence of any additional point arising out of the Acts of Union in an exchange with counsel for Mr Pigney, who accepted that Scots law had no different effect on the exercise of prerogative powers than English law: Day 2, pp.19-20, lines 6-9.

[11] See too: Viscount Radcliffe at p.114; Lord Pearce at p.146; Lord Upjohn at p.163.

Scotland have been united since 1707, the Crown had the right to seize and use the property of its subjects on the suspected approach of the enemy if they landed on the south bank of the Tweed on terms different from those if they chose to land on the north bank": p.164. Lord Reid noted that there was little Scottish authority (p.107), but in considering Scottish writers he concluded that it was equally true in Scotland that "*When the prerogative took shape it was that part of sovereignty left in the hands of the King by the true Sovereign, the King in Parliament*" (p.108; see too Lord Pearce at p.147). The Lord Advocate appears to accept this same principled approach at §52 of his Printed Case.[12]

43. Nothing in the Claim of Right 1689 has any additional relevance to any issue in this appeal, over and above the reliance of other parties on the Bill of Rights. The Claim of Right does not purport to control the foreign affairs prerogative in any respect. To the extent that reliance is placed upon it only in order to explain the different constitutional history of the Scottish Crown, that cannot and does not provide this Court with any assistance in resolving the issues on this appeal.

44. Reliance on Article XVIII of the Acts of Union by any of the parties would be similarly misplaced (and it is noteworthy that the Lord Advocate does not seriously attempt to argue its relevance).

V. CONCLUSION

45. For these reasons, it is submitted that the appeal should be allowed, for the following amongst other **REASONS**:

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[12] The faint suggestion of the Lord Advocate at §§51 and 53 of his Printed Case that Scots law may not always be the same as English law concerning the prerogative does not purport to suggest that there is in fact any difference relevant to this case, even if there could "*conceptually*" be one. Cases on Crown immunity (*British Medical Association v Greater Glasgow Health Board* 1989 SC (HL) 65) do not readily read across into this area, and the relevance of a challenge to the Crown's prerogative to print Bibles in *King's Printers v Buchan* (1826) 4 S 559, in which the Court of Session did not find there to be a difference between the jurisdictions, is hard to divine.

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1) For the reasons given in the principal Case, the Divisional Court erred in law.

2) The additional issues raised by the Counsel General and the Lord Advocate do not provide any tenable basis on which to uphold the Divisional Court's decision. B

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HER MAJESTY'S ATTORNEY GENERAL

HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

D

JAMES EADIE QC

JASON COPPEL QC E

GUGLIELMO VERDIRAME

F

TOM CROSS

CHRISTOPHER KNIGHT G

30 November 2016