IN THE SUPREME COURT OF THE UNITED KINGDOM

ON A REFERENCE BY THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND PURSUANT TO PARAGRAPH 33 of SCHEDULE 10 OF THE NORTHERN IRELAND ACT 1998

STEPHEN AGNEW AND OTHERS

APPLICANTS

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

ON A REFERENCE BY HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND PURSUANT TO PARAGRAPH 9 OF SCHEDULE 10 OF THE NORTHERN IRELAND ACT 1998

RAYMOND McCORD

APPLICANT

And

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

RESPONDENTS

CASE FOR THE SECRETARIES OF STATE

I. Introduction.

1. On 28th October 2016 Mr Justice Maguire gave judgment in two judicial review applications *McCord* and *Agnew and others* [2016] NIQB 85

("*McCord*"). These applications raised one issue in respect of the European Communities Act 1972 that was identical to that raised in the *Miller* proceedings.[1] On the application of the Respondents the Court agreed to stay that issue pending the resolution of the *Miller* litigation. This issue ("the stayed issue") remains to be finally determined by the High Court in Northern Ireland following the conclusion of the *Miller* case.

2. In addition to the "stayed issue" the *McCord* and *Agnew* proceedings raised a number of overlapping issues, specific to Northern Ireland, which did not feature in the *Miller* litigation. The applications in respect of these Northern Ireland-specific issues were heard at a "rolled up" hearing on an expedited basis by Mr Justice Maguire on 3-4 October 2016. In advance of the hearing, following an intervention by the Attorney General for Northern Ireland, the Court issued devolution notices pursuant to Schedule 10, Paragraph 5 Northern Ireland Act 1998 in respect of both applications.

3. The learned judge considered the applications together and identified five core issues at paragraph 19 of the judgment. These issues were:

    a. *Issue One.* Whether the prerogative power can be exercised for the purpose of notification in accordance with Article 50(2) TEU or whether this power has been displaced by the Northern Ireland Act reading in conjunction with the Belfast Agreement, the British-Irish Agreement and other constitutional provisions with the effect that an Act of Parliament is required before notification.

[1] Ground 3(b) in the *McCord* Order 53 statement and ground 4(2)(a)(i) in the *Agnew* Order 53 statement. See

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b. *Issue Two.* In the event that an Act of Parliament is required there is a requirement for a Legisative Consent Motion ("LCM") to be granted by the Northern Ireland Assembly before any Bill could be passed authorising notification pursuant to Article 50(2) TEU.

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c. *Issue Three.* Whether there are a range of other public law constraints on the exercise of the treaty prerogative in any event to include the requirement to take all relevant considerations into account and not to give excessive weight to the result of the referendum.

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d. *Issue Four.* Whether there has been a failure by the Northern Ireland Office to comply, prior to notification being given under Article 50(2), with the terms of section 75 of the Northern Ireland Act 1998.

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e. *Issue Five.* Whether the effect of section 1 of the Northern Ireland Act 1998 is that Article 50 can only be triggered with the consent of the people of Northern Ireland and whether the Belfast Agreement created a legitimate expectation that there would be no change in the constitutional status of Northern Ireland without the consent of the people of Northern Ireland.[2]

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4. The Court granted leave in respect of issues one to four, but refused leave in respect of issue five. The judgment of the High Court was handed down on 28th October 2016. Following judgment, but before a final Order issued, the Attorney General for Northern Ireland required the Court to refer the devolution issues in the *Agnew* case to the Supreme Court pursuant to the power in Schedule 10 paragraph 33 of

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[2] This issue was raised only in the *McCord* application. See paragraph 3(e) Order 53 statement.

the Northern Ireland Act 1998.[3] The reference encompasses, broadly, issues 1-4 in the judgment of Mr Justice Maguire.[4] The Attorney General did not require the Court to refer any of the issues arising in the *McCord* challenge to the Supreme Court.

5. On 9th November 2016 the applicant in the *McCord* challenge brought a Notice of Appeal before the Northern Ireland Court of Appeal and invited the Court to refer the issues in the appeal to the Supreme Court pursuant to the power in Schedule 10 paragraph 9 of the Northern Ireland Act 1998. The Court of Appeal stayed the appeal in respect of issues 1-4 on the basis that these matters were the subject of the reference in the *Agnew* case. The Court of Appeal made the reference in respect of issue 5. The terms of that reference are:

> *" Does the giving of notice pursuant to Article 50(2) TEU impede the operation of section 1 of the Northern Ireland Act 1998?"*

6. The procedural history of these proceedings has the following consequences:

   a. The High Court proceedings in respect of the stayed issue in both *McCord* and *Agnew* remain stayed pending the outcome of the *Miller* appeal to this Court;

[3] Paragraph 33 Schedule 10 "..the Attorney General for Northern Ireland ….may require any court or tribunal to refer to the Supreme Court any devolution issue which has arisen in proceedings before it to which he is … a party."

[4] Issue three does not raise an issue under the Northern Ireland Act 1998 and cannot properly be characterised as a devolution issue. It does not feature in the reference from the High Court. The *Agnew* applicants address argument to this issue – which is not properly before the Supreme Court – and we respond to it below without making any concession as to the propriety of its inclusion in the printed case.

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b. The High Court proceedings in *Agnew* remain open pending the reference pursuant to Schedule 10 paragraph 33 of the Northern Ireland Act 1998;

c. The *McCord* proceedings have concluded in the High Court with a final Order in respect of Issues 1-5.

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d. There is an extant appeal before the Northern Ireland Court of Appeal in respect of issues 1-5 in *McCord.*

e. The appeal in respect of Issues 1-4 of the *McCord* appeal have been stayed and the Court has made a reference to the Supreme Court pursuant to Schedule 10 paragraph 9 of the Northern Ireland Act 1998 in respect of Issue 5.

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f. Upon the conclusion of the proceedings in the Supreme Court on both references the *Agnew* case can be remitted to the High Court and the *McCord* case remitted to the Court of Appeal for final disposal.

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II. The First Instance Judgment.

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7. In the High Court Mr Justice Maguire rejected the Applicants' arguments on all five issues raised by the Applicants in *McCord and Agnew.*

8. *Issue One.* The Court rejected the Applicants' contention that the provisions of the Northern Ireland Act 1998 displaced the Crown's treaty prerogative (at paragraphs 104-108). Mr Justice Maguire accepted that the various provisions of the Northern Ireland Act 1998 relied upon by the Applicants were not concerned with the limitation of prerogative powers but with the operation of the devolved institutions in circumstances where the existing law involved membership of the EU. He expressly rejected the contention that EU law was a

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"cornerstone" essential to the survival of the devolved scheme. At paragraph 107 the Court held:

> "it is an overstatement 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 the issue over and beyond its true contextual position."

9. The Court found that the fact of notification under Article 50(2) would not change the rights of individuals nor would the operation of institutions become transformed. The legislative competence of the Assembly and Executive would remain unaltered, cross border bodies would continue to function and the work of implementation bodies would proceed. Accordingly, the Court held that the 1998 Act had not displaced the foreign relations prerogative power.[5]

10. *Issue Two.* The Court considered the scope of the convention relied upon in support of the argument advanced that an LCM would be required in the event that an Act of Parliament was found to be a pre-requisite to Article 50(2) notification. The Court had before it a submission from the Lord Advocate in respect of the scope of the Sewel Convention, which has recently been given a statutory basis pursuant to an amendment made by section 2 of the Scotland Act 2016. The Lord Advocate contended for a wide scope of the convention which would require an LCM in relation to legislation which dealt with a change to the legislative competence of the Assembly or which altered the functions of a Minister or any Department. The narrower constructions of the convention, advanced by the Respondent and the

[5] At [107] & [108]

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Attorney General for Northern Ireland and by the Applicants in *Agnew*[6], confined its operation to circumstances where Parliament was legislating for Northern Ireland "with regard to devolved matters".

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11. At first instance Mr Justice Maguire adopted the narrow construction of the convention and approached the issue on the basis that an LCM would only be required where the proposed Westminster legislation was "with regards to devolved matters".

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12. The Court's conclusions on this issue were, firstly, that legislation for the purpose of notification would be legislation relating to an excepted matter concerning relations with the European Union and its institutions. He also noted that such legislation would not be with

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regard to devolved matters even if the wider construction contended for by the Lord Advocate were adopted. For that reason he held that the convention had no application to the notification pursuant to Article 50(2).

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13. In any event, the learned judge expressed the view that the LCM convention was likely to be non-justiciable in legal proceedings. Four reasons were identified:

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a. The status of the convention as a *political* convention;
b. The limited remit of the convention in particular the express use of the qualifying word "normally";
c. The essentially political nature of the decision to issue notification

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pursuant to Article 50(2) TEU;

[6] Maguire J expressly relied upon the Applicant's formulation of the scope of the Convention and cited it at paragraph 112 of the judgment.

d. The clear terms of section 5(6) of the Northern Ireland Act 1998 pursuant to which Parliament retains overarching sovereignty in relation to Northern Ireland.

14. *Issue Three.* The Court considered that the weight of argument on this point was heavily co-extensive with the argument advanced in relation to Issue One. Insofar as there were residual matters arising under this issue the Court expressed very considerable reservations about whether such matters – which are classically within the realm of political judgment – could properly be considered justiciable by way of judicial review. Mr Justice Maguire concluded that the matter under consideration was one of high policy and accordingly fell into the category of matters that were unsuitable for judicial review.

15. *Issue Four.* The Court rejected the Applicants' section 75 argument on the fundamental basis that Article 50(2) notification did not involve a function being discharged by the Secretary of State or the Northern Ireland Office.[7] The Court also accepted the Respondents' alternative argument that it was, in any event, premature to consider matters such as assessments of equality impact because this impugned decision marked the beginning rather than the conclusion of the Article 50 process. Finally, the Court was inclined to adopt, without finally deciding the matter, the approach of the Court of Appeal in *Re Neill* [2005] NICA 8 to the effect that the procedure in Schedule 9 was a more appropriate vehicle for the consideration of complaints relating to section 75 than judicial review.

[7] Paragraph 144.

16. *Issue Five.* The Court considered the point raised in Issue Five to be unarguable. The Court accepted the argument that there was no express or implied limitation in the Northern Ireland Act 1998 which required the consent of the people of Northern Ireland to *any* change to the constitutional arrangements for Northern Ireland. The Court recognised that such a requirement would have the result of requiring a second referendum in Northern Ireland only in relation to the decision to withdraw from the European Union. Further, Mr Justice Maguire held the applicant's argument on this issue could not be reconciled with the clear terms of section 5(6) of the 1998 Act which reserved to Parliament the ability to legislate for Northern Ireland.[8]

III. Northern Ireland Devolution Issues

17. As we have noted above, as a result of two separate references by the Attorney General for Northern Ireland and the Northern Ireland Court of Appeal, all issues (apart from issue 3) considered by Maguire J at first instance now fall to be considered as devolution issues before the Supreme Court. The government is a Respondent to the Notice in *Agnew,* a respondent to the appeal before the Court of Appeal in *McCord* and a respondent to the reference by that Court on Issue 5.

18. *The Agnew Notice*. The Attorney General for Northern Ireland required the High Court to refer four matters to the Supreme Court for consideration as devolution issues.[9] The reference was framed by the

[8] See paragraphs 153-157 of the judgment. This argument was advanced only by the Applicant in the *McCord* application.

[9] Devolution issues are defined in paragraph 1 of Schedule 10 to the Northern Ireland Act 1998. Neither the Applicants nor Respondent had identified any issues as devolution issues at the outset of the proceedings. The AGNI intervened on the basis that devolution issues were in play and the Court duly issued "devolution notices" pursuant to Order 120 of the Rules of the

Attorney General and, although not entirely congruent with the issues identified by Maguire J, does broadly capture Issues One to Four as outlined in the judgment of the High Court. The questions for the Supreme Court are:

a. Does any provision of the Northern Ireland Act 1998, read together with the Belfast Agreement and the British-Irish Agreement, have the effect that an Act of Parliament is required before notice can validly be given to the European Council under Article 50(2) TEU?

b. If the answer to question 1 is yes, is the consent of the Northern Ireland Assembly required before the relevant Act of Parliament is passed?

c. If the answer to the question is "no", does any provision of the Northern Ireland Act 1998, read together with the Belfast Agreement and the British-Irish Agreement, operate as a restriction on the exercise of the prerogative to give notice to the European Council under Article 50(2) TEU?

d. Does section 75 of the Northern Ireland Act 1998 prevent the prerogative power being exercised to give notice to the European Council under Article 50(2) TEU in the absence of compliance by the Northern Ireland Office with its obligations under that section?

Court of Judicature (Northern Ireland) 1980. Each of the devolution issues specified in the current references are said to fall within Schedule 10 paragraph 1 in that they involve "any question arising under the Act about excepted or reserved matters."

19. The reference by the Court of Appeal in *McCord* relates only to Issue Five and requires consideration of the scope and effect of section 1 of the Northern Ireland Act 1998.

20. The Respondents case, in summary is:

On the displacement of the prerogative power by the Northern Ireland Act 1998

a. The lawful exercise of the prerogative for the purpose of serving notice under Article 50(2) TEU is not displaced by any provision of the Northern Ireland Act 1998 (or other devolution statutes). The conduct of foreign affairs and international relations are excepted matters and are outwith the competence of the devolved institutions.[10]

b. The establishment and functioning of the devolved institutions under the Northern Ireland Act 1998 and the Belfast Agreement assume, but are not conditional upon, ongoing membership of the EU.

On the Limitations on the Prerogative powers

c. The "foreign relations" prerogative power to make and withdraw from treaties is only subject to such limitations that are clearly imposed by statute.

d. The Northern Ireland Act 1998 and subordinate legislation made pursuant to it cannot impose any such limitation because the conduct of international relations is expressly an excepted matter (Schedule 2, Paragraph 3);

[10] Subject to the exceptions in paragraph 3(aa) and (b) of Schedule 10 in relation to North-South co-operation.

e. The non-statutory factors relied upon by the Applicants do not impose any limitation upon the exercise of prerogative powers for the purposes of notification under Article 50(2) which is not justiciable.

On the Legislative Consent Motion

f. The question of whether a Legislative Consent Motion is required is addressed in the Government's printed case on the devolution issues and we refer to that argument without replicating it in this case.

Section 75 obligations

g. The decision to invoke the Article 50 process does not engage the section 75 obligations.

h. While the Northern Ireland Office is a designated public authority pursuant to the Northern Ireland Act 1998 (Designation of Public Authorities) Order 2000, the Secretary of State for Northern Ireland is not. He is not, therefore, subject to section 75 obligations in respect of his involvement in the exercise of prerogative power to serve notice under Article 50(2).

i. In any event, even if section 75 obligations were engaged, the Northern Ireland Court of Appeal in *Re Neill* [2006] NI 278 has established that enforcement of those obligations is to be conducted primarily in the political arena, through the mechanism of Schedule 9 of the Northern Ireland Act 1998, rather than by way of judicial review.

j. It is not accepted that the section 75 obligation has any application to the decision to notify pursuant to Article 50. If the section 75 obligation applies at all to the process of withdrawal from the EU it does not apply to the Article 50(2) process as this is the first

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stage in a complex negotiated decision-making process that will only yield a defined policy capable of being assessed at a much later stage.

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IV. Limitation on prerogative power.

21. Although the question of whether the ECA displaced the Crown's treaty prerogative was a stayed issue in the Northern Ireland proceedings, the arguments about the effect of the Northern Ireland Act on the foreign relations and treaty prerogative involved consideration of the same legal principles as were considered by the Divisional Court in *Miller.* In particular, the scope of the *De Keyser* principle was considered by both the Northern Ireland High Court and the Divisional Court.

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22. The Respondents contended before the High Court that the appropriate test for determining whether the prerogative power had been displaced was to ask whether:

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> *"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."*

23. The learned judge did not adopt this textual formulation but did accept this is the correct approach. The court's reservation arose from the fact that it was considered that a single bright line rule may not be appropriate for all cases. At paragraph 83 Maguire J stated:

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> *"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*

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relevant, as an obvious way of setting aside or limiting prerogative power would be for the statute 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."

24. The learned judge also identified three factors that would be relevant when determining whether the prerogative had been displaced by means of necessary implication.[11] First, the statute must occupy the specific ground hitherto occupied by the prerogative. Second, the intervention by statute must be direct in its effect on the subject matter and "*not the result of a side wind*". Third, the juxtaposition of the parallel sources of authority must be such that the exercise of the prerogative must be incompatible or inconsistent with the relevant statutory provision.

25. The application of this approach to the *De Keyser* principle to the various provisions of the Northern Ireland Act 1998 relied upon by the Applicants led the Court to the robust conclusion that there was nothing in the Act that impacted upon the exercise of the treaty prerogative to providing notice under Article 50(2). This was an orthodox analysis of the relevant jurisprudence and we commend it to the Court. We refer also to the presentation of this issue in the Government's principal printed case in *Millar* and adopt those submissions without repeating them.

26. The Divisional Court in *Miller* was provided with the judgment in *McCord* while it was deliberating upon the arguments presented in that

[11] At [84]

case. The Divisional Court considered it appropriate to comment on the reasoning of the learned judge at paragraph 104. The Divisional Court appear to have assumed that a full analysis of the constraints on prerogative power was not canvassed before Mr Justice Maguire and that there was some material difference in the stance taken on behalf of the government. In fact, it was accepted on behalf of the Respondents in argument that EU law would be severed from national law.[12] In our submission, there was no deficiency in the argument advanced by the Applicants in *Agnew* or *McCord* and all issues material to the analysis of the *De Keyser* principle were properly exposed to the learned judge. Mr Justice Maguire adopted an analysis of the *De Keyser* principle which was in accordance with orthodoxy and which can properly be followed by the Supreme Court.

V. The Devolution Issues

27. The printed case presented on behalf of the Applicants in the *Agnew* case ranges well beyond the scope of the devolution references to address issues that are the subject of extensive submissions in the *Miller* appeal before the Court. We adopt the arguments in the Appellant's main printed case in *Miller* in response to those points and will not seek to prolong this printed case by a recitation of arguments that have adequately been covered in the government's principal case. We seek to confine our submissions to the questions posed in the devolution notices.

28. ***Question One – Does any provision of the Northern Ireland Act (read with the Belfast Agreement and British-Irish Agreement) have the***

[12] This is acknowledged at paragraph 115 of the printed case in Agnew.

effect that an Act of Parliament is required before Article 50(2) TEU notice can be given?

29. ***Question Three – If the answer to question 1 is "no" does any provision of the Northern Ireland Act 1998 read together with the Belfast Agreement and the British-Irish Agreement, operate as a restriction on the exercise of the prerogative to give notice to the European Council under Article 50(2) TEU?***

30. There is a considerable overlap between the issues raised in questions one and three of the reference issued by the High Court and they are addressed here together. The overarching submission in relation to these two questions is that, consonant with the ambulatory nature of EU law in our dualist system, the Northern Ireland Act 1998 assumes the application of EU law within the devolved institutions, but does not require its application as a condition of their existence or functioning. Similarly, the texts of the Belfast Agreement and British-Irish Agreement make passing reference to EU laws but do not require adherence to such laws in perpetuity, nor do they require continued membership of the EU as a condition of the functioning of the devolved settlement. A fair reading of the texts of these agreements which, sporadically, make reference to EU norms, highlights the hyperbolic nature of the *Agnew* applicants submission that EU law is a "pillar" of the Northern Ireland constitutional arrangements. All of the key aspects of the constitutional architecture established by the terms of the Northern Ireland Act 1998 can function just as effectively after Article 50(2) notification as they could do before. Further, while the Northern Ireland Act 1998 gives effect to the many of the terms of the Belfast Agreement, neither that Agreement nor the British-Irish Agreements have been incorporated into domestic law. These agreements do not

operate at the statutory level. There is no authority for the proposition that political and international agreements of this type can, without more, displace the exercise of prerogative power.

31. The relationship between the provisions of the Northern Ireland Act 1998 and EU law reflects the ambulatory nature of EU law. The 1998 Act is a further conduit by which EU norms are given effect in the devolved system. This is reflected in section 98(1) which defines "EU law" as:

> "all rights, powers, liabilities, obligations and restrictions created by or arising by or under the EU treaties…"

32. *The Belfast Agreement.* This agreement (sometimes known as the Good Friday agreement) contained three strands. The *Agnew* applicants argue that the use of the foreign relations prerogative to issue an Article 50(2) notification will be inconsistent with the terms of this agreement.

33. Strand One made provision for the establishment of democratic institutions in Northern Ireland. Strand Two made provision for the ongoing relationship between the Irish authorities and the devolved authorities in Northern Ireland, including the establishment of a North-South Ministerial Council. Strand Three made provision for the ongoing bilateral relationship between the United Kingdom and the Irish Governments, and the establishment of a British Irish Council and British-Irish Intergovernmental Conference. There was no specific element of the Belfast Agreement that sought to make provisions for relations with the EU or EU institutions. It is submitted that the text of the Belfast Agreement demonstrates that the parties to that agreement, assumed but did not require, ongoing membership of the European

Union. This is no more than a reflection of the fact that when the agreement was made EU law was a firm feature of the legal landscape on both sides of the border.

34. *Strand One.* There is nothing in Strand One of the Belfast Agreement that requires ongoing membership of the EU. The first reference to the EU in Strand One appears in 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."*

35. The intent behind this provision is to ensure that the devolved Ministers have a mechanism whereby they can coordinate input on a range of national policy issues. One of those subject areas was identified in paragraph 31 as "EU issues". There is nothing in the text of paragraph 31 that *requires* ongoing membership of the EU. If, at the conclusion of the EU process, there are no further EU issues upon which to coordinate policy then this part of paragraph 31 could become vestigial. The more likely scenario is that once the United Kingdom leaves the EU there will still be a need to coordinate policy with the Republic of Ireland on EU issues. In either event the text of paragraph 31 does not impact upon the exercise of Article 50(2) notification.

36. *Strand Two.* This Strand of the Belfast Agreement creates the North/South Ministerial Council ("NSMC") and related implementation bodies. Paragraph 3(iii) provides that the NSMC will meet in "an appropriate format to consider institutional or cross-sectoral matters (including in relation to the EU)" As with paragraph 31 of Strand One, this clause of the Agreement does no more than suggest

a particular format for meeting and can operate if there are no institutional or cross-sectoral matters arising in relation to the EU.

37. Paragraph 17 of Strand Two provides:

> *"The Council to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings."*

38. The *Agnew* applicants place great reliance on this passage in their printed case. They quote passages from Strand Two partially and out of sequence and then contend that Strand Two "*requires*" continued membership of the EU on the part of the United Kingdom.[13] It is contended that there is an obligation in Strand Two that the NSMC and the related implementation bodies "will implement EU policies and programmes North and South of the border on an all-island and cross-border basis." The source of this obligation is said to be paragraph 17 of Strand Two. However, paragraph 17 states only that the Council will consider implementation. It does not commit the Council to implementation.

39. It is, as Maguire J noted, a significant overstatement to say that the terms of this paragraph of the agreement *require* the United Kingdom to remain a part of the EU. The paragraph does no more than describe one of the tasks of the Council which is to *consider* the implementation of EU policies and proposals. If the United Kingdom were no longer a part of the EU the NSMC could still consider the effect of those policies on the Republic of Ireland and North-South co-operation and, if

[13] Paragraph 42 Agnew printed case.

appropriate, could make representations to relevant EU meetings. There is nothing in this paragraph of Strand Two that requires ongoing membership of the EU. This, the high water mark of the Applicant's case, demonstrates the overall frailty of the argument based on the Belfast Agreement.

40. At paragraph 51 of the *Agnew* printed case reliance is placed on various references within Strand Two to EU bodies, EU meetings and EU programmes. These references also assume, but do not require, that there will be ongoing membership of the EU. The North South Ministerial Council will continue to function even if the United Kingdom is no longer a member of the EU. In any event the notification through Article 50(2) will have no specific impact on bodies such as the Special European Programmes Body ("SEUPB"). Such bodies are contingent on funding streams from the EU which are not guaranteed in any event. If such bodies were no longer funded it cannot be said that the terms of the Belfast Agreement were breached.[14] Similarly, if after the United Kingdom has left the EU, separate funding streams for such bodies could be utilised that would allow them to continue in operation.

41. *Strand Three.* This Strand of the Belfast Agreement established, among other things, the British Irish Council. Paragraph 5 makes reference to the exchange of information and the need to discuss and consult in order to reach agreement on cooperation on matters of mutual interest. Such matters include "EU issues". It is likely that EU issues will remain a topic of mutual interest for the British Irish council even if the United

[14] The funding for these bodies is not guaranteed and might not be available even if the United Kingdom remains in the European Union.

Kingdom leaves the EU, but paragraph 5 does not require ongoing membership of the European Union on the part of the United Kingdom or the Republic of Ireland. Moreover, this passage has no practical or legal impact on the decision to notify pursuant to Article 50(2).

42. Read contextually there is nothing in the terms of the Belfast Agreement that would require ongoing membership of the EU. The Agreement reflects the ambulatory model of EU law. If there are EU norms in play, the various devolved and North-South bodies may consult upon and discuss them. The absence of such applicable norms in the United Kingdom will not render the work of such bodies nugatory as there is likely to be a continuing need to engage with the Republic of Ireland about interface issues involving EU policies.

43. **The British-Irish Agreement.** The *Agnew* applicants place reliance on this international agreement at paragraphs 52-56 of their printed case. The preamble to the document expressed an aspiration that the British and Irish governments would wish to develop their relationship as "friendly neighbours" and "partners in the European Union". It is clear that this passage of the agreement is descriptive rather than normative. The international British Irish Agreement would continue to have effect if one of the parties exited the EU just as it would have effect if presently friendly relations became strained. The existence of this Agreement has no displacing effect on the prerogative power to notify pursuant to Article 50(2).

44. **The Northern Ireland Act 1998.** It has been asserted that the Northern Ireland Act is a "constitutional statute" and impliedly enjoys some enhanced status as a consequence. The authority that is usually cited in support of this proposition is the speech of Lord Bingham in *Re*

Robinson [2002] UKHL 32. However, he did not actually describe the 1998 Act as a "*constutitonal statute*". Lord Bingham described the Act as "*in effect a constitution" and stated that it "should consistently with the language used, be interpreted generously and purposively, bearing in mind the value which the constitutional provisions are intended to embody*."

45. This is not a controversial proposition in itself but there is nothing in the Act that impedes Government action in respect of excepted matters which fall outside its remit. The designation of "constitutional statute" can be traced to the decision of Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151 where it was introduced to restrict the ordinary doctrine of implied repeal. The designation of the 1998 Act as a "constitutional statute" (a rule of statutory construction in any event) does not act as an absolute bar to the exercise of prerogative powers.

46. In *R(Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3 the Court listed, at paragraph 207 of the judgment, what it considered to be the constitutional statutes that applied:

> "The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701, and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list."

47. It is noted that none of the devolution statutes – the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006 – were included in the Court's list.

48. In any event, designation as a "constitutional statute" does not necessarily import any particular interpretative requirements. In

Agricultural Sector (Wales) Bill Reference by the Attorney General for England and Wales [2014] UKSC 43 the Court declined at paragraph 6(ii) to accept that any different approach to interpretation was required:

> *"The description of the GWA 2006 as an act of great constitutional significance cannot be taken, by itself, to be a guide to its interpretation. The statute must be interpreted in the same way as any other statute."*

49. A similar approach was taken by the Court in *Imperial Tobacco v Lord Advocate* [2012] UKSC 121. Lord Hope stated at paragraph 16 that the Scotland Act 1998 must be interpreted like any other statute.

50. There is, in any event, a clear distinction to be drawn between a statute such as the ECA 1972 and the devolution statutes insofar as the latter include an express reference to the continued sovereignty of Parliament. The Northern Ireland Act 1998 provides at section 5(6) that:

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

51. Similar provisions can be found in section 107(5) of the Government of Wales Act 2006 and in section 28(7) of the Scotland Act 1998.

The Agnew Arguments

52. The *Agnew* printed case presents three arguments in respect of the Northern Ireland Act at paragraph 80. First, it is argued that Article 50(2) notification would deprive Northern Ireland citizens of rights granted by the Northern Ireland Act 1998.

53. The second argument advanced by the *Agnew* applicants is that Article 50(2) TEU notification would alter the distribution of powers between

the Northern Ireland Assembly and the UK Parliament by "*eliminating the constitutive role that EU law currently plays in the definition of competences under the NIA*."[15]

54. Thirdly, it is argued that notification would frustrate the purpose and intention of the Act as it would run contrary to the continued application of EU law in Northern Ireland and would impact upon the operation of cross-border bodies. [16]

Conferral of Rights

55. The argument that the Northern Ireland Act confers rights upon citizens raises an issue of principle that has been dealt with at some length in the government's printed case in *Miller*. Insofar as the rights relied upon are rights pursuant to EU law the government relies upon the ambulatory effect of the ECA in our dualist system. The ECA and the NIA do not, of themselves, confer individual rights upon citizens but provide a conduit through which rights can be given effect in domestic law. We refer to the submissions that are made in the government's principal printed case in *Miller* on this topic.

Legislative Competence

56. At paragraphs 90 *et seq* the *Agnew* applicants seek to rely on sections 6 and 24 of the Northern Ireland Act 1998. Section 6 provides for the legislative competence of the Assembly. Section 6(2) states:

> "*A provision is outside legislative competence if …*
> *(d) it is incompatible with EU law."*

[15] Para 80(b) *Agnew* printed case.
[16] *Ibid*. Para 80(c).

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57. The effect of this provision is to provide a constraint upon the autonomous action of the Assembly which is common with that upon every other UK devolved assembly. However, notification under Article 50(2) will have no immediate effect on the competence of the
B Northern Ireland Assembly. While EU norms remain effective in domestic law the constraint in section 6(2)(d) will continue to be operative. At the conclusion (but not the commencement) of the Article 50 process this restriction may become otiose. The same is true of
C section 24 of the Act which makes virtually identical provision in respect of Northern Ireland Ministers and departments. The Article 50(2) notification will have no impact on these provisions. The issuing of the notification will not, in itself, have any effect on the competence of the Assembly. At some future time, these provisions may be
D repealed or amended. Alternatively, when the United Kingdom is no longer a member of the EU, these provisions will simply beat the air. These provisions do not impact upon the foreign relations prerogative.

E 58. Similarly, section 7 "entrenches" the European Communities Act 1972. As with section 6, this provision reflects the fact that the Northern Ireland Assembly is not empowered to modify certain statutes, including the ECA 1972. Section 7 imposes a limitation on the power of the Assembly. It does not require that any of the entrenched provisions
F remain available in perpetuity.

59. Section 24 is found in Part III of the Act which deals with Executive functions. It imposes constraints on the scope of executive power and,
G again, reflects the same limitation on executive powers which applies to every other devolved administration , while the United Kingdom remains a member of the EU. It also reflects the constitutional

constraint that the devolved Assembly and Ministers are precluded from legislating on excepted matters and entrenched provisions. None of the provisions relied upon by the Applicants in their printed case *require* that EU law be"available" nor do they preclude the commencement of the Article 50(2) process. It follows that these provisions impose no limit on the exercise of the treaty prerogative in respect of Article 50(2).

60. There are no provisions in the Northern Ireland Act 1998 that expressly refer to the Article 50 process. The prohibition on the exercise of powers in relation to foreign affairs negates any possibility of a constraint arising by way of necessary implication.

61. The *Agnew* applicants develop an elaborate argument based on the existence of bodies for the implementation of EU programmes.[17] There is nothing within the legislation which establishes these bodies that expressly impedes the exercise of the foreign affairs and treaty prerogative – it would be remarkable if there was. Once again the applicants' argument is based on the concept of restriction by necessary implication.

62. The relevant statutory instrument that makes provision for the implementation bodies is the North/South Co-Operation (Implementation Bodies) Order 1999 ("the 1999 Order") and was made under S.55 Northern Ireland Act 1998. Part V of the 1999 Order creates the SEUPB. The operation of the body is contingent upon funding from, but cannot require membership of, the European Union. Part 4 of

[17] See paragraphs 73-77 and 115-117 of the *Agnew* printed case.

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Schedule 1 of the Order makes provision for the exercise of the functions of the SEUPB. The operation of the SEUPB is clearly conditional. Paragraph 1 of Part 4 of the Order states that the SEUPB will function "Until the conclusion of the *current Community initiatives.*"

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63. The conditional nature of the SEUPB functions is further underscored by paragraph 2.3 which refers to post-1999 funding programmes "..*likely* to be INTERREG III, LEADER III and EQUAL and *possibly* a successor to PEACE."

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64. The 1999 Order proceeds on the assumption that there is an ongoing need for such a body and that it may have work to do in the event that future EU Programmes are approved. It also clearly anticipates the possibility that there will come a point when there are no future

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programmes. When the United Kingdom withdraws from the EU it is possible that the workload of the SEUPB will alter. Even if only the Republic of Ireland received funding for such programmes there may still be issues for the SEUPB to address.

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65. The *Agnew* applicants rely heavily on the SEUPB point. However, the existence of this body cannot displace the treaty and foreign relations prerogative. The 1999 Order is made pursuant to section 55 of the Northern Ireland Act 1998. As is discussed above the Northern Ireland

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Act does not confer powers upon the devolved institutions to engage in matters relating to foreign relations. Paragraph 3 of Schedule 2 to the Act provides that the following are excepted matters:

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> "*International relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions)*"

66. In direct contrast, paragraph 3 of Schedule 2 makes separate provision for "*observing and implementing …. obligations under community law*." The 1999 Order provides a scheme for implementing existing obligations under community law. It cannot be directed to ongoing matters of foreign relations because these are excepted matters under the devolution scheme. However, consistent with the ambulatory nature of EU law, where there are such obligations the devolved administration can make appropriate arrangements for their implementation.

67. It cannot be correct that the enactment of the 1999 Order displaces the foreign affairs and treaty prerogative. If no provisions of the Northern Ireland Act can be said to limit the prerogative because of the effect section 6(2)(b) then plainly subordinate legislation made under that Act cannot lead to such displacement.

68. The Northern Ireland Act 1998 does not speak to the process of withdrawing from the EU. Indeed, it is a feature of the devolution settlements that the devolved bodies were deliberately provided with no role in respect of foreign affairs or the making of treaties. There is, therefore, no parallel or overlap between the prerogative power which will be exercised in Article 50(2) notification and the 1998 Act. If withdrawal takes place and aspects of the Northern Ireland Act 1998 require to be amended then this will be done not by the exercise of prerogative power but by Parliamentary process. The fact that there may be such a process in the future does not displace the scope for exercise of the prerogative power in the present.

69. At paragraph 118 of the printed case the *Agnew* applicants describe Mr Justice Maguire's treatment of the Northern Ireland Act issues as "*superficial*". This description is not accepted and does not do justice to the reasoning or industry of the learned judge. He identified all the central concepts in reaching his conclusions. His overall conclusion that there is nothing in the Northern Ireland Act 1998 or the subordinate instruments made under it that expressly or impliedly displaces the treaty prerogative power is doctrinally sound. In our submission, it is to be preferred to the reasoning of the Divisional Court in *Miller* expressed at paragraphs [103] & [104] of its judgment, which respectfully reflect a misapprehension of the course of the proceedings and arguments presented in the *Agnew* and *McCord* cases.

70. The answer to the first and third devolution questions raised in the *Agnew* reference should be "No".

71. Before turning to address the second devolution issue raised in the High Court reference we note that the *Agnew* applicants have also presented argument to the Supreme Court in respect of an issue that does not form part of the devolution reference from the High Court. The third issue addressed by Mr Justice Maguire was whether there were constraints upon the exercise of the treaty prerogative from the general constitutional law of the United Kingdom. In particular, it was contended that there was a requirement to take into account the particular position of Northern Ireland and any possible alternatives to full exit from the European Union for the entirety of the United Kingdom. These arguments are developed at paragraphs 146-151 of the *Agnew* printed case. Strictly this issue is not before the Court. It does not form part of the devolution reference and the ruling of Mr

Justice Maguire on this issue is not the subject of any appeal by the *Agnew* applicants.

72. We submit that the argument advanced by the *Agnew* applicants is without merit. Mr Justice Maguire recognised that, in large measure, this argument was simply a recasting of the general argument advanced in respect of the Northern Ireland Act 1998. He held at paragraphs 128-129:

> *"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."*

73. The relief sought by the Applicants is designed to secure that the decision made under Article 50(1) that the United Kingdom should withdraw from the EU might not be implemented at all, seeks, in substance, to attack that prior decision. These are matters that are exclusively within the province of the Crown and which are not justiciable. In *CCSU v Minister for the Civil Service* [1985] AC 374 Lord Roskill explained:

> *"Prerogative powers such as those relating to the making of treaties …. 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*

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not the place wherein to conclude whether a treaty should be concluded…" [at 418]

74. There are cases in which a specific impact upon a specific individual may require the Court to examine more closely an area which would ordinarily be non-justiciable, but those situations cannot be "abstract": *Shergill v Khaira* [2014] UKSC 33; [2015] AC 359 at §43. Yet this challenge could hardly be more abstract. There is presently no way of knowing precisely which, if any, rights or obligations will be removed, varied or added to by the process of withdrawing from the EU. The notification has not yet been given. The eventual outcome of the Article 50 process will be dependent upon the negotiations in which the Government will engage. As a result, this case is one which falls squarely within the "forbidden area" explained in Shergill at §42 and exemplified by CCSU.

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75. The original decision to join the European Economic Community was undertaken by way of the exercise of prerogative power. The issue was addressed by Lord Denning in *Blackburn v Attorney General* [1971] 1 WLR 1037:

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"*The treaty-making power of this country rests not in the courts, but in the Crown: that is, Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treaty, even a treaty of such paramount importance as this proposed one, they act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in the Courts.*"

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76. The Applicants in these proceedings seek to challenge the proposed exercise of the prerogative power in the abstract (see in particular grounds 4(2)(c) of the *Agnew* pleadings). The response to the argument

in respect of the non-statutory constraints is that these matters are primarily political considerations that are not justiciable in the courts for the reasons outlined above. These arguments are directed in the main to the decision to withdraw from the EU under Article 50(1), rather than to the act of giving effect to that decision by notification under Article 50(2).

77. ***Question Two: If the answer to question one is "yes", is the consent of the Northern Ireland Assembly required before the relevant Act of Parliament is passed?***

78. This issue only arises for consideration in the event that the Court rejects the government's primary argument in *Miller* and the argument above in respect of the Northern Ireland Act 1998. The point is, at present, moot. This issue has been addressed in full in the Government's devolution printed case and we adopt those submissions without repeating them. In accordance with that argument it is submitted that the answer to the second question in the *Agnew* devolution notice should therefore be "No".

79. ***Question Four: Does Section 75 of the Northern Ireland Act 1998 prevent the prerogative power being exercised to give notice to the European Council under Article 50(2) TEU in the absence of compliance by the Northern Ireland Office with its obligations under that section?***

80. This devolution issue maps to Issue Four of the *Agnew* judgment issued by Mr Justice Maguire. At ground 4(4) of the Agnew Order 53 statement it is argued that the Northern Ireland Office and the Secretary of State for Northern Ireland must, before tendering advice to the Cabinet on whether an Article 50 notice should be issued, comply

with the statutory requirements under section 75 of the Northern Ireland Act 1998. The argument advanced at first instance clarified that the Secretary of State for Northern Ireland has not provided any such advice to the Cabinet. However, even if such advice were to be provided, it is submitted that the section 75 obligations would not be engaged because matters relating to foreign affairs and international relations are not "*functions relating to Northern Ireland*".

81. Section 75 imposes a duty (sometimes described as a target duty) to have due regard to equality considerations. The section provides:

> "***75.*** *– (1) A public authority shall* ***in carrying out its functions relating to Northern Ireland*** *have due regard to the need to promote equality of opportunity-*
>
> *(a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;*
>
> …
>
> *(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.*
>
> *(3) In this section "public authority" means-*
>
> *(a) any department, corporation or body listed in Schedule 2 to the Parliamentary Commissioner Act 1967 (departments, corporations and bodies subject to*

investigation) and designated for the purposes of this section by order made by the Secretary of State;

(b) any body (other than the Equality Commission) listed in Schedule 2 to the Commissioner for Complaints (Northern Ireland) Order 1996 (bodies subject to investigation);

(c) any department or other authority listed in Schedule 2 to the Ombudsman (Northern Ireland) Order 1996 (departments and other authorities subject to investigation

(d) any other person designated for the purposes of this section by order made by the Secretary of State."

82. Schedule 9 to the Northern Ireland Act 1998 contains a detailed enforcement mechanism for addressing complaints that there has been a breach of the section 75 obligation. The Schedule 9 regime is subject to the oversight of the Equality Commission for Northern Ireland and permits matters to be referred ultimately to the Secretary of State for Northern Ireland. It is therefore directed towards action in the political rather than judicial arena.

83. It is accepted that the Northern Ireland Office is a public authority for the purposes of section 75 of the Northern Ireland Act 1998. However, the Northern Ireland Office does not provide advice to the Cabinet and the Applicant does not identify which, if any, of the functions discharged by that Office would engage the requirements of section 75.

84. The Secretary of State for Northern Ireland is not designated as a public authority under the Northern Ireland Act. Indeed, it would be incongruous if the Secretary of State were to be amenable to the section 75 regime given his specific role at the apex of the enforcement mechanism for section 75 complaints in paragraph 11 of Schedule 9 of the Northern Ireland Act 1998. It follows, in our submission, that the Secretary of State is not required to adhere to the section 75 obligations in relation to his discussions in Cabinet.

85. The application of the section 75 regime to the Secretary of State was considered by the High Court in *Re Conor Murphy's Application* [2001] NIQB 34. In that case it was argued that the Secretary of State for Northern Ireland was not a public authority for the purposes of section 75. Kerr J (as he then was) accepted this argument. He stated:

> *"It is not strictly necessary for me to decide this point in order to reach a conclusion on the application of section 75 to the making of the Regulations but I am confident that the respondent's argument must prevail. Only those bodies or agencies specified in section 75 (3) of the Act are to be public authorities 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 section 76 (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 section 76."*

86. It is our submission, therefore, that insofar as the true target of the section 75 challenge is advice provided by the Secretary of State for Northern Ireland to the Cabinet in respect of the Article 50 process, this is a matter beyond the reach of section 75. Parliament has deliberately

excluded the Secretary of State from the reach of section 75. This is evidenced by section 76 (discrimination by public authorities) which, in contrast, extends a duty to Ministers of the Crown.

87. In the alternative, insofar as the challenge is directed at the actions of the Northern Ireland Office then is submitted that any complaint about compliance with the section 75 process ought to be addressed through the political mechanisms established by Parliament in Schedule 9 of the Northern Ireland Act 1998.

88. This issue was addressed in *Re Neill* [2006] NICA 5 where the Northern Ireland Court of Appeal accepted the argument that the scope for a judicial review challenge based on section 75 was limited by virtue of the mechanisms for redress contained in Schedule 9 of the Act. The Lord Chief Justice accepted the argument advanced on behalf of the Secretary of State for Northern Ireland that there could only be very limited circumstances in which judicial review would be an appropriate means of addressing an alleged failure to adhere to the section 75 duty. At paragraph 30 the Court held:

> *"The conclusion that the exclusive remedy available to deal with the complained of failure of NIO to comply with its equality scheme does not mean that judicial review will in all instances be unavailable. We have not decided that the existence of the Schedule 9 procedure ousts the jurisdiction of the court in all instances of breach of section 75. Mr Allen suggested that none of the hallmarks of an effective ouster clause was to be found in the section and that Schedule 9 was principally concerned with the investigation of procedural failures of public authorities. Judicial review should therefore be available to deal with substantive breaches of the section.*

It is not necessary for us to reach a final view on this argument since we are convinced that the alleged default of NIO must be characterised as a procedural failure. We incline to the opinion, however, that there may well be occasions where a judicial review challenge to a public authority's failure to observe section 75 would lie. We do not consider it profitable at this stage to hypothesise situations where such a challenge might arise. This issue is best dealt with, in our view, on a case by case basis."

89. In our submission, the complaint against the Northern Ireland Office at paragraph 4(4) of the Agnew Order 53 statement is based upon an alleged procedural failure to comply with consultation requirements in the Northern Ireland Office equality scheme. This is directly analogous to the complaint – a procedural complaint – considered by the Court of Appeal in *Neill.* The appropriate mechanism for redress in respect of such a complaint can be found in the enforcement mechanisms of Schedule 9 of the Northern Ireland Act 1998. Such matters are for the Equality Commission in the first instance rather than the Court.

90. It is not accepted that the section 75 obligation has any application to the decision to notify pursuant to Article 50. The decision to notify is not, on proper analysis, a policy decision that would in any event be amenable to equality appraisal and assessment because it is only the first stage in a process that will, ultimately and following extensive negotiations with the European Union and other Member States, lead to a final policy position. The impacts of triggering Article 50 cannot sensibly be assessed at this stage because they remain to be defined.

91. In *R(Nash) v Barnet London Borough Council* [2013] EWHC 1067 (Admin) Underhill LJ (para 80) noted that the public sector equality duty obligations pursuant to section 149 of the Equality Act 2010 in respect of local authority outsourcing decisions could only require detailed consideration "when the details of the outsourcing arrangements were being worked out."

92. Similarly, in *R(Bailey) v London Borough of Brent* [2011] EWCA Civ 1586 Davis LJ stated at paragraph 104:

> *"There cannot necessarily be easy identification of particular formative stages in every decision making process: and it is certainly unreal to require a "comprehensive scrutiny" (whatever that may mean) at every moment throughout the process. Precisely what consideration is due can and will vary from time to time during the process: even if there needs to be consideration during the process and even if an ultimate assessment may need to be made as to whether, overall, "due regard" had been given. Here too it is what happens in substance that counts … It is necessary that consideration of the duty required to be regarded – most obviously here, section 149 of the 2010 Act – properly informs the decision-making process before the ultimate decision is made."*

93. Ouseley J similarly observed that equality impact assessment could legitimately take place during the later stages of a multi-stage decision-making process in *R(Fawcett Society) v Chancellor of the Exchequer* [2010] EWHC 3522 (Admin) at para 15:

> *"It is perfectly sensible for the Government to wait until policy has been adequately formulated for there to be a clear basis upon which its ...*

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> *equality impact can be assessed. The point at which that is reached is ... very much a question of rationality not of duty."*[18]

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94. The assessment of the equality impacts, if any, of the decision to invoke Article 50(2), is as a matter that cannot be conducted in any practicable sense at this stage in the process. The variables that may have a bearing on the ultimate shape of policy are not readily identifiable at this stage.

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95. These arguments were accepted by Mr Justice Maguire. At paragraph 144 he found that:

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> *"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 of 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……section 75 has no purchase on this issue and is not engaged."*

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96. At paragraph 145 the learned judge found that, in any event, arguments about the need for equality impact assessments were premature given the embryonic nature of the Article 50 process. At paragraph 146 he further indicated his acceptance that the appropriate vehicle for a challenge based on section 75 was the bespoke regime contained in Schedule 9 of the Northern Ireland Act 1998.

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[18] See to similar effect *R(JG & MB) v Lancashire County Council* [2011] EWHC 2295 (Admin) per Kenneth Parker J (at 50-52), *R(D&S) v Manchester City Council* [2012] EWHC 17 (Admin) (at ss59-61)

97. The *Agnew* applicants deal with this issue at paragraphs 152-163 of their printed case. They now accept that the Secretary of State for Northern Ireland is not subject to the section 75 obligations.[19] Notably, they do not engage with the judge's central finding that Article 50(2) notification does not involve a function relating to Northern Ireland at all. Again, it is instructive to recall the nature of excepted matters under the Schedule 2 of the Northern Ireland Act 1998. The conduct of foreign relations is an excepted matter. It is not a matter within the purview of the Secretary of State for Northern Ireland or any devolved Department or Minister. A coherent reading of the entirety of the Northern Ireland Act 1998 indicates that the obligations under section 75 cannot apply to functions that are expressly excluded by that same Act.

98. The printed case also fails properly to engage with the point that the assessment of matters of equality of opportunity can only be meaningful when there is an extant policy or process that can be assessed. At this juncture Article 50(2) notification does not lend itself to impact assessment. The argument at paragraph 160 exposes the fact that reliance on section 75 is actually a proxy for an argument about the merits of exiting the EU. The *Agnew* applicants state:

> *"in representing Northern Ireland's interests at Westminster, the NIO must take a position on whether Brexit is good or bad for Northern Ireland."*

[19] The Secretary of State for Exiting the European Union is not subject to section 75 and does not exercise functions in relation to Northern Ireland.

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99. It is not clear why the Applicants say the NIO must take such a position. However even if this is a correct analysis of the obligations on the NIO, the machinery for assessing equality impacts pursuant to section 75 and Schedule 9 was never intended to be used to assess the merits of government policy on foreign relations. The Applicant's argument seeks to apply section 75 in an entirely artificial manner to a matter that is not "a function in relation to Northern Ireland". This was the central finding of Mr Justice Maguire and it is entirely consistent with the scheme of the 1998 Act.

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100. The answer to the fourth question arising from the *Agnew* devolution Notice is "No".

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101. ***The McCord Reference: Does the giving of notice pursuant to Article 50(2) TEU impede the operation of section 1 of the Northern Ireland Act 1998?***

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102. As we have noted above the issues in the *McCord* appeal before the Court of Appeal have been stayed save for this point which has been referred by the Court as a devolution issue.

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103. The Appellant contends that the sovereignty of the Westminster Parliament is now attenuated in some way by *inter alia* the devolution Acts, the establishment of the Supreme Court and the Belfast Agreement. However, this submission pays no regard to the fact that the constitutional balance between affording the devolved institutions scope to legislate on transferred matters while retaining sovereignty over excepted and reserved matters is a constant feature of the devolution Acts. In the Northern Ireland Act 1998 sections 5 and 6

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expressly provide for this balance. Section 5, in particular, affords the Northern Ireland Assembly scope to legislate subject to the express reservation in section 5(6) that the power of Parliament to make laws for Northern Ireland remains intact. This provides a complete answer to the Appellant's case on sovereignty.

104. The Applicant develops an argument that an Act of Parliament which is "in a strict sense legal" could also be illegitimate because it is incompatible with the constitution. The Applicant cites no United Kingdom authority on the point but relies on a number of decisions of the Canadian Supreme Court in paragraphs 71-77 of the printed case. In our submission casual parallels drawn from decisions about the written Canadian constitution in respect of the operation of a federalist system of government do not illuminate the devolution issue before the Court which is confined to an analysis of the operation of section 1 of the Northern Ireland Act 1998.

105. The Appellant relies upon a particular (non-textual) interpretation of section 1 of the 1998 Act which provides that the status of Northern Ireland – as part of the United Kingdom – will remain unless majority voting in a poll defined in Schedule 1 give their consent to change. The Appellant contends that this provision must be read purposively to include the status of Northern Ireland as a constituent country of the European Union.

106. However, section 1 is plainly directed to the question of whether Northern Ireland should "*cease to be part of the United Kingdom and form part of a United Ireland*". This is the express language that is used in

section 1(2). There is nothing in the text of section 1 that would support that Applicant's argument that the consent of the people of Northern Ireland is specifically required in order to issue notification pursuant to Article 50(2).

107. The Appellant also contends that the replacement of the section 1(2) of the Ireland Act 1949 with section 1 of the Northern Ireland Act places sovereignty in "*the people of Northern Ireland*". However, this argument ignores the current provision in section 1(2) of the Northern Ireland Act which states:

> *"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." [emphasis added]*

There cannot be two sovereign sources. The Applicant's interpretation of section 1 cannot be reconciled with the terms of section 5(6) which expressly refers to the retention of sovereignty by Parliament. Furthermore, it would be anomalous that in 1998 Parliament intended to transfer a greater degree of sovereignty to the people of Northern Ireland than to the people of Scotland or Wales, without including express language to that effect in the Northern Ireland Act 1998.

108. The reliance in the *McCord* printed case on the terms of the Belfast Agreement is misplaced. The Belfast Agreement *includes* an agreement between the Government of the United Kingdom and the Government of Ireland. That agreement has two operative Articles. Article 2 makes

provision for the creation of institutions. Article 4 makes provision requiring that certain forms of legislation be put in place. The obligations in Articles 2 and 4 have long been discharged and are not relevant to the issues raised by the Appellant. The remainder of the Belfast Agreement – the sections primarily relied upon by the Appellant – is not a Treaty and the arguments that it should be interpreted in accordance with principles of customary international law or the Vienna Convention on the Law of Treaties is misconceived.

109. The text of the Belfast Agreement does not require the consent of the people of Northern Ireland to any change in the relationship with the EU. In fact, the paragraph relied upon by the Appellant at paragraph 24 of the printed case is expressly directed only to the possibility of a change in status to a united Ireland:

> *"1. The participants ....(ii) recognise that it is for the people of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South,* ***to bring about a united Ireland,*** *if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland."*

110. There is nothing in the Belfast Agreement that requires the consent of the people of Northern Ireland prior to the commencement of the Article 50(2) process.

111. At first instance Maguire J considered this point to be unarguable and refused to grant leave to apply for judicial review. At paragraph 152 of the judgment he stated:

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> *"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 <u>any</u> 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…..[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 under 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."*

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112. The question raised in the *McCord* reference from the Northern Ireland Court of Appeal should be answered "No".

VI Conclusion

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113. The questions arising on the references should all be answered in the negative. The references from the High Court and that from the Court of Appeal should be remitted back to those originating courts to allow for final disposal of the proceedings.

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Tony McGleenan QC

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Paul McLaughlin BL

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30th November 2016

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