ANNEX 1 to FORM 1
5. Information about the decision being appealed

APPLICATION FOR PERMISSION TO APPEAL

I. Application

[1] Permission is sought to appeal the decision of the Inner House of the Court of Session to refer to the Court of Justice of the European Union (CJEU) for a preliminary ruling the following question (the Question).

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

II. Facts

[2] On 23 June 2016, in the referendum conducted under the European Union Referendum Act 2015, the people of the United Kingdom voted to leave the European Union (EU).

[3] Article 50(2) and (3) of the Treaty on European Union (TEU) provides, *inter alia*:

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

entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

[4] On 16 March 2017 Royal Assent was given to the European Union (Notification of Withdrawal) Act 2017, authorising the Prime Minister to notify under Article 50(2), TEU the United Kingdom's intention to withdraw from the EU.

[5] On 29 March 2017 the Prime Minister gave notice under Article 50(2), TEU of the United Kingdom's intention to withdraw.

[6] On 26 June 2018 Royal Assent was given to the European Union (Withdrawal) Act 2018 which provided that Parliament will be able to consider and vote on the terms of any negotiated withdrawal agreement and framework for the future relationship with the EU. Section 13 of the 2018 Act makes ratification of the withdrawal agreement conditional on the House of Commons having first approved the negotiated withdrawal agreement and framework for the future relationship.

[7] Negotiations between the United Kingdom and the EU are ongoing.

[8] On 19 December 2017 the petitioners lodged this petition. The petitioners argue that in order to inform themselves for the purposes of parliamentary voting, it was necessary for them to have a preliminary ruling from the CJEU as to whether the Article 50 notice might be revoked unilaterally by the United Kingdom.

[9] The primary remedy sought by the petitioners was a reference to the CJEU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU) as to whether the Article 50 notice might be revoked unilaterally by the United Kingdom, and if so on what basis. The petitioners maintained that only the CJEU could authoritatively answer those questions. The petitioner also sought "on return of that reference from the CJEU and in the light of the guidance given by that court" a declarator "specifying whether, when and how the notification … can unilaterally be revoked".

[10] On 1 May 2018 the Additional Parties were permitted to enter the process.

[11] By interlocutor dated 8 June 2018 the Lord Ordinary (after a substantive hearing occupying one day) declined to make a reference to the CJEU and refused the petition. The Lord Ordinary refused the petition on three grounds: (1) the issue was hypothetical; (2) the matter involved an encroachment on Parliamentary sovereignty; and (3) the conditions for a reference had not been met as the facts were not ascertainable and the issue was hypothetical. The Lord Ordinary's Opinion is reported at 2018 SLT 657, [2018] CSOH 61.

[12] By interlocutor dated 21 September 2018 the First Division of the Inner House of the Court of Session on a reclaiming motion by the Appellant (occupying one day) recalled the Lord Ordinary's interlocutor and *inter alia* sustained the petitioner's first, fourth and fifth pleas in law and directed the parties to provide submissions on a draft reference to the CJEU. The Opinions of the First Division are reported at 2018 SLT 959, [2018] CSIH 62.

[13] Following submissions made by the parties, by interlocutor dated 3 October 2018 the Inner House of the Court of Session requested the CJEU to give a preliminary ruling in terms of Article 267 TFEU on the Question.

[14] By order of the President of the Court, on 19 October 2018 the CJEU ordered that the case before it (Case C-621/18) be determined pursuant to the expedited procedure.

[15] Written observations to the CJEU were due to be submitted to the Court by 30 October 2018. An oral hearing is to take place on 27 November 2018.

[16] By interlocutor dated 8 November 2018 the Inner House of the Court of Session refused permission to appeal to this court.

III. Appeal to the Supreme Court

[17] Decisions of the Inner House of the Court of Session constituting a final judgment in any proceedings may be taken to the Supreme Court against a decision of the Inner House with the permission of the Supreme Court, where

the Inner House has refused permission. Court of Session Act 1988, s. 40(1), (2)(a).

[18] A "final judgment" is (per Court of Session Act 1988 s. 40(10)):

> *"any decision which by itself or taken along with prior decisions in the proceedings,* ***disposes of the subject matter of the proceedings upon its merits****, even though judgment may not have been pronounced on every question raised or expenses found due may not have been modified, taxed of discerned for"*

[19] The interlocutor of the Inner House of 3 October 2018 referring the Question to the CJEU is a final judgment, being a decision which by itself or taken along with prior decisions in the proceedings, in particular the interlocutor of 21 September 2018, disposes of the subject matter of the proceedings upon its merits.

[20] The petition is simply a delivery device for the reference made to the CJEU, which is the primary remedy sought by the petitioners because they argue that the correct interpretation of the provisions of Article 50, not being *acte clair*, can only be given by the CJEU. The declarator sought is not merely a *subsequent* remedy; it is truly a *subsidiary* remedy to the reference. If the CJEU were to answer the question posed, any declarator to follow by the Court of Session would merely, and could only give effect to and mirror, the ruling of the CJEU. The declarator sought is truly an ancillary process of giving judicial imprimatur in Scotland to the advice of the CJEU.

[21] Section 40, 1988 Act as presently enacted proceeds upon an earlier version of the section:

> *"(1) Subject to the provisions of any other Act restricting or excluding an appeal to the House of Lords and of sections 27(5) and 32(5) of this Act, it shall be competent to appeal from the Inner House to the House of Lords— (a) without the leave of the Inner House,* ***against a judgment on the whole merits of the cause****, or against an interlocutory judgment where there is a difference of opinion among the judges or where the interlocutory judgment is one sustaining a dilatory defence and dismissing the action; (b) with the leave of the*

Inner House, against an interlocutory judgment other than one falling within paragraph (a) above."

[22] The equivalent provision to the current s. 40(2)(a) is in bold above.

[23] There are two fairly recent decisions of appeal committees of the House of Lords and Supreme Court respectively, dealing with s. 40(1) in its earlier form: *Davidson v Scottish Ministers* 2005 1 SC 1 at §§ 12-14; *Apollo Engineering v James Scott* 2013 SC (UKSC) 286 at §§ 19, 24, 27.

[24] Both of these recent cases refer to and apply the approach adopted in two earlier cases, which set out how the question whether a judgment is final was dealt with under the statutory provision then applicable, the Court of Session Act 1808 s. 15. It was for present purposes in the same terms:

'*Hereafter no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only* ***from judgments or decrees on the whole merits of the cause****, except with the leave of the division of the judges pronouncing such interlocutory judgments or except in cases where there is a difference of opinion among the judges of the said division. …'*

[25] In *Beattie v Glasgow Corporation* 1917 SC (HL) 22 Earl Loreburn at p. 24 stated (italics added):

"Now let us look at the nature of this statutory prohibition. As I read the statute it applies to interlocutory judgments, meaning judgments which are in substance interlocutory, not simply those that are in form interlocutory. *A judgment may be interlocutory in form but final in substance as, for example, when it determines a liability to account, leaving merely the ancillary process of taking the account*. The prohibition also applies where the judgment or decree is not on the whole merits of the cause."

[26] In *Ross v Ross* 1927 SC (HL) 4, Lord Dunedin at p.6 observed:

"… (3) The right of appeal remains where the judgment, though interlocutory in form, is final in substance. (4) The test of finality in substance is to see whether the case would have been equally decided

in substance whether the interlocutor under discussion had been pronounced as it was or had been pronounced to the opposite effect. …"

[27] The orders sought in the present case are comparable to the example of accounting given in *Beattie*: in an accounting, the operative order is the order to account; quantifying the sum to be accounted for is merely ancillary. So here the operative or substantive order may be said to be the making of the order for a preliminary reference, the application of the terms of that reference being merely ancillary. Indeed, the fact that there is nothing more for the Inner House to do than pronounce a declarator in the terms determined by CJEU is all the clearer since there are no facts to which the declarator needs to be adjusted: it is an abstract declarator only.

[28] As for the observations in *Ross*, had the Inner House refused the petitioners' application for a reference, the petition would have been dismissed. That would clearly be a decision that was final in substance. In fact, the Inner House granted the application for a reference to CJEU, satisfying one of the two substantive orders sought in the petition. That was final in substance: the only other order remaining (as noted already) is one for the Inner House to apply the terms of the CJEU ruling by issuing its own declarator. Although it is true to say that the Inner House still has to do something, in reality the position is as Lord Hope put it in § 13 of *Davidson*: "There was nothing left for it to decide."

[29] Following this approach in *Apollo*, this Court held that the decision reached by Inner House (refusing to allow an individual director to represent his company in court) was a decision on the whole merits of the case, even though the Inner House had not actually considered the issues raised in the appeal from the arbitrator's decision which was the subject of the appeal; its decision had been on procedural grounds only: see § 27.

[30] There is no material distinction between the current and previous wording of s, 40. Indeed, in its current form ('final judgment in any proceedings') the section is broader than 'the whole merits of the cause'. For example, using Earl Loreburn's example, determining a liability to account is a final judgment; although an accounting would still have to follow.

[31] Further, as noted in *Apollo* at § 19, the reason for the s. 40 restriction is that, following the Treaty of Union of 1707 the common-law right of appeal was easily open to abuse. The objective of the section is to protect the court by restricting litigants' ability to seek permission to appeal to certain specified cases. That being so, it makes sense to interpret purposively the words of s 40, to ensure that judgments that are in substance final are covered by the provision and those that are apparently final but in reality interlocutory are not.

IV. An arguable point of law of general public importance which ought to be considered by the Supreme Court at this time (s. 40A(3), 1988 Act)

[32] This case raises a single, central issue of considerable constitutional importance ("the Issue"): *in what circumstances, if any, is it proper for a Scottish Court (or indeed any Court in the United Kingdom) to offer a hypothetical or advisory legal opinion providing guidance upon a topic of ongoing controversy and debate before Parliament*?

[33] That single issue can be broken down into two, connected points. The first is the circumstances in which the court should facilitate the giving of an advisory opinion on a hypothetical issue of law. The second is the separation of powers between the judicial and legislative functions.

[34] The points are necessarily connected when an advisory opinion is sought on a point of 'very great constitutional importance' (the Inner House's own description at § [12]). That is because in the context of constitutional issues, for the court to make an advisory declaration risks violating the boundaries between the judicial and legislative functions. That separation of responsibilities constitutes the bedrock of constitutional law.

[35] The full Case the Appellant advances is annexed to this application as ANNEX 3 and reference is made to it.

1. Arguable errors of law of general public importance

1.1. The Inner House's rejection of the proposition that the question posed is academic and hypothetical

1.1.1 Advisory declarations

[36] First, while the Inner House recognized that there are limits to the circumstances in which it is appropriate to make an advisory declaration, it held in effect that this restraint is appropriate only in private law: see §§ [25], [35], [58]. But it is submitted that this is an error.

(1) The need for restraint in dealing with hypothetical issues referred to in the well known case of *Macnaughton v Macnaughton's Trs* 1953 SC 387 has been recognised in the area of public law by a Full Bench of this Inner House (*Law Hospital NHS Trust v Lord Advocate 1996 SC 301*), as well as by the House of Lords *(R (Rusbridger) v Avttorney General* [2004] 1 AC 357. The Inner House court did not engage significantly with those authorities.

(2) The fact that public law makes use of a wider notion of standing than applies in private law (Lord President at § [24]) is true; but it does not affect the present question. The rules governing standing serve a distinct purpose – aimed at ensuring that only those with sufficient interest in the issue may bring proceedings for judicial review. Those rules and that purpose have nothing to do with the desirability of the courts engaging (or the powers of the court to engage) with a hypothetical issue and providing an advisory opinion. Indeed, the rules about standing arise at a later stage in the analysis: assuming the existence of a live, legal issue which the court can properly address, does the potential claimant have a sufficient interest in that issue?

(3) In public law cases it is especially important that the courts should be alive to the constitutional issues that may arise in exercising the jurisdiction to grant an advisory declaration. Restraint of this kind is found in numerous other jurisdictions -e.g. the refusal of the US Supreme Court to grant advisory declarations, precisely because of the doctrine of separation of powers. Comparative material is provided as an Annex to the Case.

1.1.2 No proposal to revoke the Notice

[37] The appellant submits that the Inner House failed to have proper regard to the absence of any live proposal to revoke the Notice; and thus the absence of any domestic necessity to answer the question posed.

[38] For the issue of revocability of the Notice to become live, Parliament must first have directed the Government, against the Government's settled policy and against the popular answer provided by the Referendum, unilaterally to revoke the Notice. Second, either an EU Member State or the EU Parliament must then object to the United Kingdom's attempt unilaterally to revoke. Third, all attempts at finding a consensus for revocation must fail, so that the effect of revoking the Notice becomes a live issue. If that stage were reached, any such live issue and dispute would be at the inter-state or EU institutional level. At that time it would fall to be adjudicated by the CJEU in a direct action.

[39] The Inner House relied upon the terms of the 2018 Act, apparently in order to derive support for the view that parliamentary votes in relation to a withdrawal agreement are to be held (see §§ [27], [37]), and apparently to support its view that the issue about revocability of the Notice should be authoritatively determined by the CJEU. But the terms of the 2018 Act provide no support at all for that view. The key relevant feature of the 2018 Act is that it makes no provision about revocation. It proceeds on the premise that the UK will withdraw (as the short title of the Act reflects) from the EU, whether there is a deal or no deal. Thus:

[40] Section 13 of the 2018 Act deals with two situations. The first is that the Government reaches a deal with the EU. Section 13 outlines a number of conditions which must be fulfilled before the Withdrawal Agreement can be ratified: see s.13(1), (2). In particular, the House of Commons must pass a resolution to approve both the Withdrawal Agreement and the framework for the future relationship in one vote. The House of Lords will consider the Withdrawal Agreement and the future framework but its approval is not required. In short: Parliament will have the choice to accept or reject the deal. If Parliament accepts the deal, the Government will introduce the EU (Withdrawal Agreement) Bill, which will implement the Withdrawal Agreement in domestic legislation. If Parliament chooses to reject the deal, the Government will be unable to ratify the Withdrawal Agreement.

[41] The second situation is that no deal is reached. Section 13 also makes provision for Parliament's role in this situation, which may arise in one of three ways: (i) if the House of Commons does not pass the resolution (mentioned above) to approve the deal; (ii) if the Prime Minister makes a statement before the end of

21 January 2019 saying that no deal can be agreed with the EU; or (iii) if no deal has been reached with the EU by the end of 21 January 2019: see s.13(3) –(12).

[42] The 2018 Act does not address revocation of the Notice: Parliament could have made provision about revocation of the Notice in the 2018 Act, but it did not do so. Nor does the Act provide any mechanism enabling Parliament to require the process of withdrawal to be halted. It follows that the issue of revocability of the Notice simply does not arise under the 2018 Act.

1.1.3 The relevant facts are unknown

[43] The Inner House further erred in failing to attach any significance to the absence of any clear factual basis upon which any advisory declaration would proceed. Here not only are the facts unclear, but the very nature of the act to be evaluated is not identifiable. Lord Drummond Young says as much in § 57 ('*it appears impossible to be certain as to what will happen*'), without recognizing the difficulties this poses. Indeed, in the absence of some form of identifiable reviewable act or omission, public law procedure becomes unworkable: against what and whom is relief sought? who is to defend the proceedings? is an amicus to be appointed? when does time start running? who has standing and why and so forth?

[44] Accordingly, it is submitted that for all these reasons it is inappropriate to make an advisory declaration in a case of this kind. In short:

- there are sound reasons of principle, especially in the sphere of public law, for exercising restraint in making an advisory declaration
- such a procedure is ill-advised in principle, since the issue may never come to pass
- here the factual background is unknown
- here the premise on which the present declaration is sought conflicts with legislation recently enacted after full consideration by Parliament
- the procedure consumes limited judicial resources
- the principle, once permitted, is difficult to control in application (who knows what other parliamentary issues the court may then be asked to advise on)
- there is (scope for) violation of the constitutional separation of powers.

[45] These issues are not peculiar aspects of the supervisory jurisdiction or of Scottish procedure. They go to the issue of where the court *can* issue a declarator in a public law field, and whether it *should* do so. It is in the answering of *that* latter question that it is said the court erred. That is a broader question than the procedural aspects of Scots judicial review.

[46] ***1.2 Breach of parliamentary privilege***

[47] The question here goes to the bedrock of constitutional law – the legitimate scope for courts to pronounce on matters which may have resonance in Parliament and illegitimately transgress into the parliamentary arena. It involves no lesser issues than the limits of parliamentary and judicial powers, and the separation of powers.

[48] Established authority (*Adams, Coulson*) recognises that parliamentary privilege goes beyond the issue of free speech. It involves a wider issue of constitutional restraint (mutual respect).

[49] The summary given by Stanley Burnton J in *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin)at [46] has been much quoted, with approval:

> *"These authorities demonstrate that the law of parliamentary privilege is essentially based on two principles. The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers, which in our constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature. These basic principles lead to the requirement of mutual respect by the courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the courts."*

1.2.1 Encroachment on the legislative sphere

[50] The present application seeks to place the court in a position where its decision may influence debate or voting within parliament. Indeed, the petitioners openly state that the litigation is to enable them to perform their parliamentary duties (which the court recognised: § [58]). And the Inner House found this petition to be competent at the instance of an MP because she has 'an interest in seeing the matter resolved'. That is: she will be able to vote in parliamentary vote(s) which are to be held in terms of section 13 of the European Union (Withdrawal) Act 2018: § [27].

[51] The Inner House's willingness to consider the prospect of revocation as a material issue after the enactment of the 2018 Act involved an illegitimate re-opening of the earlier parliamentary debate. The Inner House ought to, but failed, to respect the legal effect of the 2018 Act.

1.2.2 Inadequate recognition of the extent of parliamentary privilege.

[52] The Inner House recognised some elements of the concept of parliamentary sovereignty – not to criticise or call into question what is said in Parliament; nor to interfere with free speech in Parliament – but it did not have proper regard to the principle of constitutional restraint (mutual respect).

[53] The Inner House erred in concluding that, because it is the function of the court to adjudicate on questions of law, the present application does not infringe the doctrine of parliamentary privilege. When the scope of the doctrine of parliamentary privilege is properly understood, namely as embracing the separation of powers, there is indeed an infringement when the court becomes enmeshed in the political debate that precedes the sort of definitive action that may produce a dispute properly so called.

[54] Furthermore, the court erred in concluding that authoritative legal advice ought to be provided to Parliament in the form of a ruling from the CJEU. Established authority makes it clear that it is for Parliament to decide what material and advice it requires: *Pickin v British Railways Board* [1974] AC 765, 790: '*It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach.*'

[55] Where the policy in question is being formed and must be formed by Parliament, considerations of parliamentary privilege and parliamentary sovereignty act as a complete and jurisdictional bar to any adjudication by the Court. Such matters are simply not justiciable. That is no more than the recognition of: (a) the principle of separation of powers which is part of the twin aspect of parliamentary privilege; and (b) the high constitutional status accorded to that principle, not least by this Court in the recent *HS2* case.

[56] The logic of the Inner House acceding to the invitation to provide the advisory opinion sought needs to be clearly recognised. The key justification advanced is that the opinion will or may inform parliamentary debate. But it is impossible to see why that justification would not apply across a very wide range of situations in which there is ongoing debate in Parliament, including debate about possible future legislation. It would turn any subject being debated in Parliament into a topic for immediate and pre-legislative adjudication.

[57] The elevated political importance of the present issue is not, and cannot be, a relevant or operative criterion for deciding upon exceptionality; or for the court otherwise deciding to engage with hypothetical issues and provide an advisory opinion. How would the court operate any such criterion? How would it do so without being drawn into the political debate?

1.2.3 Summary

[58] An application of the present kind draws the courts squarely into the political controversy surrounding debates in Parliament about possible future legislation. The very purpose of the invitation by the petitioners to the courts is to influence - and it may well influence - current parliamentary debate about political options.

[59] The scope of parliamentary privilege as a fundamental tenet of constitutional law in the United Kingdom, and the resolution of the location of its boundaries ought to find its resolution in the UK Supreme Court. And, if, as the appellant argues, the boundaries have been incorrectly identified by the Inner House court, then that matter requires to be addressed before the constitutional impropriety which it creates occurs.

1.3. The proper route under the Treaty

[60] The appellant further submits that, viewed from the perspective of the EU Treaties, the present application is not the proper route for resolution of a question of interpretation about Article 50 TEU. The TFEU provides the means by which Member States and EU Institutions can raise before the CJEU issues about the rights and obligations of Member States under the Treaties, including disputes under Article 50: see e.g. Article 258, 259 and 263. Advisory opinions may only be provided exceptionally under the Treaties, in the case of proposed international agreements: see Article 218(11) TFEU. But, unlike Article 218(3) TFEU, strikingly this provision was *not* incorporated into Article 50 TEU.

[61] The approach adopted by the petitioners involves a collateral request (routed via national proceedings) for an advisory opinion on a question of EU constitutional law that Member States or EU institutions would not be permitted to raise by way of advisory opinion. Such a request is either designed - or will operate - to circumvent the clear Treaty limits upon such exceptional remedies. The impermissibility in principle of such a collateral route is accentuated by the use to which it is proposed to be put, namely so that the petitioners can use it to influence the domestic politics of a Member State.

[62] In any event, the present application is inadmissible viewed from the perspective of the CJEU. The CJEU has over many years consistently refused to answer questions that are truly hypothetical. Whilst it is deferential to the view of a national court that the questions require answering for a domestic dispute before it, it will test that question for itself and refuse to answer the questions referred if it is clear that there is no domestic dispute to which the questions are relevant, or the domestic proceedings are contrived. Likewise, the CJEU has long refused to provide advisory opinions on questions of EU law. There are compelling reasons in the Treaties for such a stance. The Treaties make provision for the CJEU to provide advisory opinions, but only in strictly limited cases: the opinion must concern the legality of a proposed international agreement; and the opinion must be sought by an EU Member State or institution, rather than a private person. To allow national proceedings to be used as a route to circumvent these limitations would be a misuse of the preliminary reference procedure.

[63] These CJEU rules on admissibility are a form of judicial self-restraint and (where dealing with public law or constitutional matters) a reflection of the principle of the separation of powers, that prevents the judiciary becoming inadvisably involved in political debate. Comparative constitutional law shows that other Supreme Courts (the US, Canada, Ireland, Germany) either forbid or strictly limit the answering of advisory opinions (and police the limits of such advisory opinions to prevent circumvention by other procedures); and apply strict self-limiting rules to prevent "unripe" or hypothetical disputes from being raised before them.

[64] The appellant's full Observations to the CJEU are set out in full as an Annex to the Case.

2. *"…at this time"*

[65] The Inner House has taken the view that there is constitutional significance in the question of EU law which it is sought be answered. But there is also constitutional significance in *whether it should* be answered. That constitutional significance is itself a driver toward the appropriateness of granting permission to appeal at this time. If the appellant's argument is correct, no *effective* remedy would be available if the constitutional impropriety (as the appellant characterises what is intended) of a judicial determination can only be challenged *after* the very event which it is sought to stop.

V. Inner House's grounds of refusal of permission to appeal

[66] The Inner House refused permission to appeal in the following grounds:

> "[6] The points of law in this appeal may well be arguable and the matters raised are of great constitutional significance. However, if permission were granted, and the CJEU were thereby required to await the decision of the UKSC, then even if the UKSC were able to hear the case on the dates provisionally fixed, there would seem to be little prospect of the CJEU being able to answer the question in the reference in advance of the prospective parliamentary vote. It has to be assumed that, whatever the date of the oral hearing, the UKSC would require some time to consider the points raised. Permission would, in short,

render the reference, and indeed the petition, academic. For this reason, permission to appeal must be refused.

[7] As permission is thus refused, if the CJEU answer (or decline to answer) the reference, the first ground of appeal will be resolved in terms of EU law at least. Depending upon the answer, and the circumstances then prevailing, whether the question raised in the petition is academic will be capable of being answered in the petition process. The normal route of appeal will then be open in relation to any matters remaining to be determined by the court. Whether this court's decision amounts to a breach of parliamentary privilege will be capable of being the subject of an application for permission to appeal once this court's procedures have been exhausted. The court does not consider that its decision in any way fetters the options open to Parliament or freedom of speech within its walls. If it transpires that it has done so, that question would be better answered, after due consideration, then rather than now."

[67] While the Inner House recognised the application for permission to appeal met the statutory test in terms of importance, it wrongly assumed that the CJEU would have to await a determination by this court.

[68] Further, the application was refused only because of considerations about timing as to which the Inner House had no specific information: the decision proceeds upon mere speculation about when this Court would hear or determine any appeal.

[69] In addition the Inner House gave no recognition of the fact that, if the appellant's separation of powers argument is a good one, the damage will be done when the preliminary ruling is issued. That damage cannot be undone.

VI. Conclusion

[70] In all the circumstances, the appellant seeks permission to appeal to the Supreme Court.

VII. Chronology

23 June 2016	Referendum vote to leave the EU
16 March 2017	Royal Assent to the European Union (Notification of Withdrawal) Act 2017
29 March 2017	Article 50(2) notice given to EU
26 June 2018	Royal assent to the European Union (Withdrawal) Act 2018
21 December 2017	Petition served
6 February 2018	Permission to proceed refused
20 March 2018	Permission to proceed granted by Inner House on Appeal
1 May 2018	Additional parties enter process
8 June 2018	Lord Ordinary refuses orders sought
21 September 2018	Inner House recalls interlocutor of the Lord Ordinary
3 October 2018	Inner House refers question for preliminary ruling
5 October 2018	CJEU advises date for oral hearing on 27 November 2018
19 October 2018	CJEU orders reference to be determined pursuant to the expedited procedure
8 November 2018	Inner House refuses permission to appeal to Supreme Court