UKSC 2022/0098

IN THE SUPREME COURT OF THE UNITED KINGDOM

IN THE MATTER OF

A REFERENCE BY THE LORD ADVOCATE

UNDER PARAGRAPH 34 OF SCHEDULE 6 TO THE SCOTLAND ACT 1998

BETWEEN

THE LORD ADVOCATE

Applicant

-and-

HIS MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

Respondent

-and-

THE SCOTTISH NATIONAL PARTY

Intervener

WRITTEN RESPONSE TO THE INTERVENTION ON BEHALF OF

HIS MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

INTRODUCTION

1. The intervention of the Scottish National Party ("the SNP") of 21 September 2022 ("the SNP Case") [INT EF p.3] supports those aspects of the Lord Advocate's Case which would answer the question referred to this Court in the negative. The SNP Case focuses in particular upon a right in international law to self-determination, the purported effect of which it submits means that the Scotland Act 1998 ("the 1998 Act") should be interpreted in a way that puts the draft Scottish Independence Referendum Bill ("the Draft Bill") [EF p.13] within legislative competence. In support, it relies upon what the SNP calls the constitutional tradition of Scotland.

2. The Advocate General for Scotland ("the AGS") invites the Court to reject the submissions advanced in the SNP Case, for the reasons set out below.

GENERAL OBSERVATIONS

3. **First**, the question that the Lord Advocate has referred [EF pp.9-10] is one of interpretation of the 1998 Act. The 1998 Act must be interpreted in the same way as any other statute: see the Advocate General's Case ("AGS Case") at §23 [EF p.93]. To the extent that the SNP Case at §7.10 [INT EF p.18] advances a different approach to interpretation of the 1998 Act, it is wrong to do so, on the clearest, recent and repeated authority of this Court.

4. **Secondly**, none of the arguments advanced by the SNP Case as to the approach to the 1998 Act, even taken at their highest, have any material impact on the question referred because for the reasons set out in the AGS Case there is no relevant ambiguity in the 1998 Act. The meaning of the legislation, and the scope of the legislative competence for which it provides, is clear.

5. In this context, assertions such as the purpose of devolution being to empower the devolved nations (SNP Case, §7.14) [INT EF p.19] are simply question-begging. There is no doubt that the 1998 Act is empowering in the sense that significant powers are devolved to the Scottish Parliament. But that bare statement does not begin to assist in answering the specific question on the reference. The purpose of the 1998 Act was to create a carefully balanced scheme of devolution, including by placing important limits on devolved competence and significant reservations of matters which remain solely for the UK Parliament at Westminster. Those reservations include the Union itself and Parliament.

6. For the same reason, reliance on the positions of political parties at any given point in time can similarly not assist (cf SNP Case, §§6.11 and 8.1(d) [INT EF pp.15 and 22]). The 1998 Act must have the same meaning, regardless of those positions.

7. **Thirdly**, the reliance placed in the SNP Case at §7.6 [INT EF pp.16-17] on the Supreme Court of Canada's decision in *Reference re the Secession of Quebec* [1998] 2 RCS 217 [INT EF p.800] proves too much. There is no dispute that the outcome of the referendum proposed by the Draft Bill does not have legal effect (in the sense of directly affecting the legal status of the Union): see AGS Case at §78 [EF p.112]. But, as the AGS Case also points out at §§78-79, the practical

realities of the referendum outcome (whichever the outcome is[1]) are obvious and not speculative [EF pp.112-113]. This is precisely the point made by the Supreme Court of Canada at §92 [INT EF p.850] and quoted by the SNP Case; indeed the full paragraph refers to a referendum as imposing "*obligations*" on the federal government. It is a matter for political debate whether the language used by the Canadian Court would be applicable in the different context of the United Kingdom, but the forceful reiteration of the practical impact of a referendum outcome on secession underlines the close, indeed direct, degree of connection between the Draft Bill and the identified reserved matters.

8. **Fourthly**, arguments from the *Padfield* principle (SNP Case, §7.17) [INT EF p.20] have no purchase in the determination of the meaning of the 1998 Act in connection with the question referred.

THE RIGHT OF SELF-DETERMINATION

9. The SNP's central submission is that the Scottish people have the right of self-determination, which is a fundamental right, and the 1998 Act must accordingly be interpreted so as to afford the Scottish Parliament the legislative competence to enact the Draft Bill and permit those resident in Scotland to vote (if they wish) for independence in a non-self-executing referendum.

10. This submission fails at a variety of different legal stages, many of which are barely addressed by the SNP Case, even assuming the AGS is wrong that the 1998 Act is not ambiguous.

(1) The scope of the right of self-determination in international law does not extend to the possibility of the secession of Scotland from the United Kingdom or requiring the holding of an advisory referendum on independence, which is the relevant issue.

(2) In any event, the principle that legislation be interpreted consistently with obligations in international law does not relevantly apply because the SNP relies upon unincorporated treaties which are not given effect in domestic law by the 1998 Act.

[1] The SNP are wrong to say that the AGS's arguments focus on a referendum outcome which favours independence. In some respects, a referendum outcome which rejects independence has even more clear and less speculative practical effects in relation to the Union (i.e. that it is likely to remain) than a vote in favour of independence. As the AGS Case states at §71, a referendum on dissolving the Union relates to the Union regardless of its outcome [EF p.110].

(3) The principle of legality does not assist, where the allocation of legislative competence does not override any fundamental right, and there is no relevant recognised fundamental right at common law in any event.

The Scope of the Purported Right

12. There is no dispute that the United Kingdom recognises and respects the right of self-determination. The precise boundaries and content of that right in international law are by no means settled, but it is unnecessary for the Court to attempt to address such issues – even leaving aside that the SNP Case has failed to provide it the materials upon which to do so – in circumstances where, taken at its highest, the SNP Case fails to make good its implicit, and necessary, assertion that the right of self-determination in international law obliges the United Kingdom to make provision[2] for a further advisory referendum on Scottish independence in the terms of the Draft Bill.

13. **First**, despite the reliance elsewhere placed in the SNP Case on the *Secession of Quebec* judgment of the Supreme Court of Canada, the SNP makes no reference to the critical finding in that case that the scope of the right of self-determination, and particularly to secede from within an existing State, did not extend to the people of Quebec. The core of the reasoning is set out at §138 [INT EF p870]:

> "*In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions.*"[3]

14. The SNP makes no attempt to identify a material point of distinction between this reasoning and the position of Scotland.[4]

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[2] Whether through the terms of the 1998 Act to place it within devolved competence or by some other mechanism.

[3] The existing conditions were described in §136 [INT EF pp869-870]: "*Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions.*"

[4] It is similarly striking that the SNP Case cites various international legal materials in connection with the scope of the right relied upon, and makes no attempt to explain how these materials could even arguably apply

15. **Secondly**, it would be surprising if a right of self-determination necessarily included the right to participate in a non-self-executing referendum on independence, held on terms and at such time as desired by a particular subset of the relevant people. The SNP cites no authority for such a proposition. None of the materials that the SNP cites demonstrates that the scope of the right is so wide or so specific.

16. It is common for treaty and other international law rights to be expressed at a very high level of generality and to require fulfilment at national level through more specific domestic law: *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 at §§55-56. The treaty provisions on self-determination relied upon by the SNP are expressed in that way: e.g. Articles 1(2) [INT EF p50] and 55 of the UN Charter provide for respect of "*the principle of...self-determination of peoples*" and Article 1(1) [INT EF p.51] of the International Covenant on Civil and Political Rights provides that "*All peoples have the right of self-determination*". Neither specifies that the competence for a devolved legislature to legislate for an advisory referendum on independence forms any part of such a right. AG Auth. Tab 3

17. Nothing in the 1998 Act – which is the only relevant statutory scheme on this Reference – breaches the right of self-determination provided for in the treaties, regardless of the interpretation given to it on this reference.

18. In the circumstances, the Court need not consider the submissions made by the SNP on whether or not the people of Scotland are a relevant 'people' for the purposes of the right of self-determination in international law. Just as the Supreme Court of Canada expressed no concluded view on the equivalent question in relation to the people of Quebec (*Secession of Quebec*, §125) [INT EF pp.864-865], no view need be expressed on the present reference.

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to Scotland. Two obvious examples suffice. First, the reasoning of Judge Cançado Trindade in the *Kosovo Advisory Opinion* case extends the right of internal self-determination beyond the colonial context to situations of "*tyranny*" (SNP Case, §3.6 [INT EF pp.6-7]), but on no view are the people of Scotland subject to 'tyranny', whether or not a second independence referendum takes place. Secondly, the lengthy quotation from the UK Representative to the General Assembly in 1984 sets out at SNP Case §4.3 [INT EF pp.8 - 9], upon which the SNP apparently relies, a series of rights guaranteed by the Covenants which, if denied, might engage the right of self-determination. None of those rights are denied to the people of Scotland, who live in a free and democratic society. It is also noteworthy that while the SNP Case (§3.2) cites §2 of Resolution 1514 adopted by the UN General Assembly [INT EF p.5], they omit to refer to §6 of that Resolution which states that "*Any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations*." [INT EF p.989]

The Interpretative Exercise

19. The SNP relies on two principles of statutory interpretation: consistency with international obligations and the principle of legality.[5] Even leaving aside the absence of any sufficient ambiguity (as noted above), neither principle can be engaged here: there is no domestic law 'hook' upon which to hang the purported right.

20. As to the **first** of these principles, the SNP is wrong to submit (SNP Case, §6.8) [INT EF p.14] that "*there is a strong presumption in favour of interpreting domestic legislation in a manner which is compatible with international law*".

(1) The SNP materially overstates the interpretative principle. In *Re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42; [2021] 1 WLR 5106; 2022 SC (UKSC) 1 at §34 [EF p.921], this Court confirmed that the law on the effect of an unincorporated treaty on the interpretation of legislation is set out in *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116 at p.143 and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at p.500. These authorities establish that a treaty may be used as an aid to interpretation of legislation that: (a) is ambiguous; and (b) was enacted to give effect to the treaty.[6] Neither of these conditions is met, still less both of them.

AG Auth. Tab 1
AG Auth. Tab 2

(2) The SNP relies in particular upon (SNP Case, §§3.2-3.3) [INT EF p.5-6] three unincorporated treaties: the United Nations Charter, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The 1998 Act was not enacted to give effect to any of these instruments, and it does not do so. The requirements of the treaties are irrelevant to the meaning of the 1998 Act. No other basis in international law of the right of self-determination is relied upon by the SNP, and no other explanation is given in its Case for how such a right takes effect in domestic law.[7]

[5] The SNP also refers to s.101(2) of the 1998 Act (SNP Case, §§7.9 [INT EF p.18] and 8.2 [INT EF p.22]), but makes no submission about how that provision should be used in the interpretation of the Draft Bill or what any narrow reading of the Draft Bill would be.

[6] An unincorporated treaty can also be used as an aid to interpretation of legislation that expressly or by necessary implication requires its use (*JH Rayner* at p.500G) but the SNP rightly does not suggest that there is any such requirement in the 1998 Act.

AG Auth. Tab 2

[7] No attempt is made, for example, even to assert – still less properly evidence – that the right of self-determination is a general principle of customary international law, whether by reference to the general practice of States or otherwise.

(3) Lord Dyson's judgment, on which reliance is placed (SNP Case, §6.8), in *Assange v Swedish Prosecution Authority* [2012] UKSC 22; [2012] 1 AC 471 at §122 [INT EF p.649] is not to any different or wider effect. The legislation there being interpreted (s.2(2) of the Extradition Act 2003) was enacted to give effect to the treaty (Council of Europe Framework Decision 2002/584/JHA) in issue: see §121. Accordingly, in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591 at §77 [INT EF p.584], the majority of the Court cited *Assange* as an example of a presumption "*that Parliament intends legislation enacted to implement this country's European Treaty obligations to be read consistently with those obligations*". The decision in *Assange* does not assist the SNP in the present context.

21. As to the **second** principle, of legality, general or ambiguous words cannot generally override common law fundamental rights, unless the necessary implication is to that effect: see *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; [2021] 1 WLR 2326 at §§66-67. The SNP Case at §6.6 [INT EF p.13] misstates the principle, in particular by omitting the role of necessary implication. However, the principle of legality has no purchase in the present context. AG Auth. Tab 4

(1) The 1998 Act creates a carefully constructed statutory scheme for devolution in Scotland, including demarcation of areas which fall within and outside the legislative competence of the Scottish Parliament. The allocation of competence under the 1998 Act as to which body may legislate for any form of referendum on independence does not override any common law right, regardless of its content or source. It simply addresses which of the bodies within the constitutional structure of the United Kingdom has the power in domestic law to make such provision.

(2) The clear terms of the 1998 Act, whether expressly or by necessary implication from the scheme of the legislation as a whole, preclude any scope for the principle of legality to require a different interpretation of its terms.

(3) In any event, the recognition of fundamental rights involves the reasoned application of established common law principles, and the courts are slow to extend the common law by entering a field regulated by legislation: *Moohan v Lord Advocate* [2014] UKSC 67; 2015 SC (UKSC) 1 at §§33-34 [EF p.690]. The SNP Case identifies no authority for the proposition that the right of self-determination is a recognised fundamental right at common law. Legislation provides for the expression of democracy in Scotland through elections to the UK

and Scottish Parliaments, and has previously provided for a referendum. Any development of the common law would intrude on the legislative field. There is no fundamental common law right upon which the principle of legality could bite.

SCOTTISH CONSTITUTIONAL TRADITION

22. The SNP's submissions about a Scottish constitutional tradition are less developed versions of the submissions made by the pursuer in *Keatings v Advocate General* 2021 SC 329 at §21 [EF p.892]. The First Division's description of those submissions in §64 [EF p.902] as having "*peripheral relevance*" to the question of the Scottish Parliament's legislative competence was generous.

23. **First**, they cast no light on the words or context of the 1998 Act. Rather, the SNP's principal submission (SNP Case, §§6.2-6.7) [INT EF pp.11-14], that the principle of Parliamentary sovereignty is no part of Scots law, conflicts with both the language and context of the 1998 Act.

24. The sovereignty of Parliament is well-established as a fundamental principle of the entirety of the constitution of the United Kingdom, including as it applies to Scotland: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 at §43 [EF p.3407]; *Moohan* at §35 [EF p.691]; *AXA General Insurance Co v Lord Advocate* [2011] UKSC 46; 2012 SC (UKSC) 122 at §§46, 48 and 138 [EF pp.476, 477, 512]; and in particular *Cherry v Advocate General for Scotland* [2019] UKSC 41; 2020 SC (UKSC) 1 at §41 [INT EF p.445], in which a very similar argument was advanced on behalf of Ms Cherry. It is unarguable, as the SNP appear to suggest, that these cases were all somehow *per incuriam* when each involved Scottish parties making submissions about the constitutional content and context of Scots law. The 1998 Act falls to be interpreted in that context.

25. Moreover, the 1998 Act itself embodies and preserves the principle of Parliamentary sovereignty. Section 28(7) of the 1998 Act [EF p.127], and its protection from modification, has been held to have precisely this effect: *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; 2019 SC (UKSC) 13 at §§41 and 53 [EF pp.840, 844]; *UNCRC Bill* at §§21, 28-30, 40, 45 [EF pp.916, 919-920, 924, 925]. The background materials to the 1998 Act confirm the same position: the White Paper, *Scotland's Parliament* (Cm 3658) stated that the UK Parliament "*is and will remain sovereign*": p.x and §4.2 [EF pp.4941 and 4955]. In addition, as set out at §§86-88 of the AGS Case [EF p.115], the reservation of the Parliament of the United

Kingdom in §1(c) of Schedule 5 to the 1998 Act has been held by this Court to encompass the sovereignty of that Parliament over the entirety of the United Kingdom.

26. **Secondly**, even if the SNP were right that Scots law contained some different constitutional tradition whereby Parliament were not sovereign, this has no legal relevance to the question referred. The argument apparently advanced is simply another version of the reliance on the principle of legality, which cannot assist the SNP for the reasons already set out.

SNP MANIFESTO COMMITMENTS

27. The SNP no longer appears to advance the submission it made in its application to intervene that it is "*at least constitutionally improper for any part of the UK Government to seek to prevent a devolved administration from implementing a clear manifesto commitment*" (Application, §30) [INT EF p.1261]. It is right not to do so. What a political party puts in a political manifesto many years after the 1998 Act was enacted can cast no light on the proper meaning of the 1998 Act's words, their purpose or even the context in which they were chosen. As to the submission now advanced at §2.4 [INT EF p.4] of the SNP Case, it is hard to understand the claim that a political party's political manifesto is not a matter of politics but of law. Nothing in the AGS Case (at §45 [EF p.102] or elsewhere) casts any doubt on the importance of such manifesto commitments in the democratic system, but their importance is self-evidently political rather than legal. Use of language such as it being "*democratically unthinkable that the people of Scotland would be denied such a right to express their view*" (SNP Case, §7.8) [INT EF p.17-18] is, with respect, unlikely to assist the Court on the legal question before it. There may be circumstances in which a matter having been a manifesto commitment of the electorally successful party is relevant to the respect owed to the policy choice of the decision-maker, or the legal choice made by Parliament in a proportionality exercise (as to which see *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223 at §209 *per* Lord Reed), but neither such context is of any relevance to the proper interpretation of the 1998 Act on this reference.

JURISDICTION

28. The SNP Case makes, in passing at §2.4 [INT EF p.5], a reference to *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62; 2019 SC 111 at §67 [EF p.3513] in apparent support of the Court having jurisdiction over, and determining, this reference. But as the formulation of Lord Drummond Young there quoted makes clear, the Inner House in

Wightman was concerned with the approach on the particular circumstances of that case to the scope of the supervisory jurisdiction of the Scottish courts. This case does not concern the supervisory jurisdiction of the courts; it concerns the scope of the particular and exceptional statutory jurisdiction conferred on the Supreme Court by §34 of Schedule 6 to the 1998 Act. The comments in *Wightman* take the present issues no further.

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5 October 2022

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