OUTER HOUSE, COURT OF SESSION

[2018] CSOH 61

P1293/17

OPINION OF LORD BOYD OF DUNCANSBY

in the Petition of

ANDREW WIGHTMAN MSP AND OTHERS

Petitioners

TOM BRAKE MP AND CHRIS LESLIE MP,

Additional Parties

for Judicial Review against

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondents

Petitioners: O'Neill QC, Welsh; Balfour + Manson LLP
Additional Parties: M Ross QC; Harper Macleod LLP
Respondents: Johnston QC, Webster; Office of the Advocate General

8 June 2018

Introduction

[1] On 23 June 2016 the people of the United Kingdom voted to leave the European Union. Following the Supreme Court case of *Miller* (*R (Miller and another)* v *Secretary of State for Exiting the European Union* [2018] AC 61) the United Kingdom Parliament enacted the European Union (Notification of Withdrawal) Act 2017 authorising the Prime Minister to notify under article 50(2) of the Treaty on European Union (TEU) the UK's intention to

withdraw from the European Union. On 29 March 2017 the Prime Minister, in a letter addressed to the European Council (EC), gave notice under article 50(2) of the TEU (the "article 50 notification") of the UK's intention to withdraw.

[2] Can that notice be unilaterally revoked by the UK acting in good faith such that the United Kingdom could continue to be a member of the European Union after 29 March 2019 on the same terms and conditions as it presently enjoys? That is the question which the petitioners and the additional parties wish answered.

[3] All but one of the petitioners is an elected representative. One, Ms Cherry, is a Member of Parliament and the others are either Members of the European or Scottish Parliaments. The additional parties are both MPs. They say that the answer to the question is necessary to enable them to fulfil their duties as elected politicians. In particular they wish to see the option of remaining in the EU to be considered along with the terms of any agreement between the EU and the UK. At present they say they are only being given the option of either exiting the EU with an agreement or exiting without an agreement.

Procedural history

[4] The petition was lodged on 19 December 2017. On 6 February 2018 following an oral hearing the Lord Ordinary refused permission for the petition to proceed. The petitioners reclaimed. There was a summar roll hearing on 21 February before the First Division. By interlocutor dated 20 March 2018 the First Division recalled the interlocutor of the Lord Ordinary, extended the time period under section 27A of the Court of Session Act 1988 and, being satisfied that the test in section 27B(2) of the Act had been met, granted permission for the petition to proceed. The court remitted the case back to the Lord Ordinary to proceed as accords.

[5] At a procedural hearing on 1 May 2018 I granted leave for Tom Brake MP and Chris Leslie MP to enter the process as additional parties. I stipulated that their contribution should be by written submission but allowed their counsel, Ms Ross QC, 30 minutes in which to reply to the respondents' submissions. I heard the substantive hearing on 22 May.

The Inner House decision

[6] In granting permission for this petition to proceed the Lord President, giving the opinion of the court ([2018] CSIH 18), was critical of the petition as it was then presented. The court was faced with a morass of factual averments and bombarded with authorities. Nevertheless he considered that if the petition was shorn of its rhetoric and extraneous and irrelevant material and was reduced after adjustment to a manageable size a case of substance, albeit not necessarily one which was likely to succeed, could be discovered (paragraph 30). He noted that the subject matter was one of very great constitutional importance; that being the United Kingdom's relationship with the European Union (paragraph 12). On one view, he said, authoritative guidance on whether it is legally possible to revoke the article 50 notification may have the capacity to influence Members of Parliament in deciding what steps to take in advance of and at the time of a debate and vote on the European Union (Withdrawal) Bill. If Parliament is to be regarded as sovereign the government's position on the legality of revoking the notice may not be decisive. Whether such guidance falls within the proper scope of judicial review raised yet another issue. However, he noted that the scope of judicial review is wide and the law is always developing and, in certain areas can do so quickly and dramatically. The scope of judicial review of government policy may be one such area at least where no issue of questioning what is said in Parliament arises (para 30).

[7] During the adjustment period the petitioners made substantial adjustments significantly reducing the scale of the petition but also changing the basis of the argument. As originally drafted the focus was a review of the government's position that the article 50 notification said to be discerned from, among other things, statements by Ministers in Parliament. After adjustment, although the orders sought are the same, the focus has shifted to seeking an advisory declarator on the basis that it was required by the petitioners in fulfilment of their various parliamentary duties.

Remedies and question for the Court of Justice of the European Union (CJEU)

[8] The petitioners seek the following orders:

a. A preliminary reference to the Court of Justice of the European Union (CJEU) under article 267 of the Treaty on the Functioning of the European Union (TFEU); and for that reference to be sought by way of expedited procedure;

b. On return of that reference from the CJEU, and in the light of the guidance given by that court, for a declarator from this court specifying whether, when and how the notification which was made by letter dated 29 March 2017 from the United Kingdom Prime Minister, the Right Honourable Theresa May MP, to the President of the European Council, Donald Tusk under article 50(2) TEU can unilaterally be revoked by the United Kingdom.

[9] The question which the petitioners wish referred to the CJEU is as follows:

Does article 50 of the Treaty on European Union allow that the article 50(2) TEU notice which has been sent by the United Kingdom Government on behalf of the United Kingdom notifying the Council of the intention of the United Kingdom to withdraw from the EU can, while the United Kingdom remains a Member State, be

revoked unilaterally by the United Kingdom in good faith and in accordance with its own constitutional requirements, such that the United Kingdom remains a Member State of the European Union on its existing terms of membership?

The additional parties seek a question in similar terms.

Relevant provisions of the European Treaties

[10] Article 50 TEU so far as relevant is as follows:

> "1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
>
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
>
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

[11] Article 267 TFEU so far as relevant is as follows:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; where such a question is raised before any court or tribunal of a Member State that court or tribunal may if it considers that a decision on the question is necessary to enable it to give judgment, request the court to give a ruling thereon."

Submissions for petitioners

[12] Mr O'Neill submitted that the petitioners were not asking for a declarator at this stage but to make a reference to the Court of Justice of the European Union. The conditions

for a preliminary reference were met. The question of law which arose was the proper interpretation of EU Treaties. There was no prior decision from the CJEU on the interpretation of article 50(2).

[13] This was a matter of very great constitutional importance; per Lord Carloway, LP (ibid). The government's position is that notification will not be withdrawn and Parliament would therefore have a clear choice; it could vote to accept the deal or move forward by exiting the European Union with no deal. However government policy is subordinate to the sovereign Parliament. The issue of what vote there might be was a matter for Parliament not the government. Government could not restrict the choices which Parliament could make. Individual Parliamentarians may consider that the better option is to reject the deal on offer and vote instead for the United Kingdom to revoke the letter sent on 29 March 2017 and thereby remain a member of the European Union on its current terms. But it was a necessary prerequisite that the article 50 notification could be withdrawn. The only court or body that could give a definitive answer was the CJEU. That is why a reference is sought.

[14] There was accordingly a question before this court which required a reference. Such a reference could usefully be made at this stage; *Trent Taverns Ltd* v *Ian Sykes* [1999] EuLR 492 per Chadwick LJ. This court cannot resolve the question itself. There is a direct relationship between the national court which makes the reference and the CJEU. If the national court considers that a reference is necessary to resolve a dispute before it the decision to make a reference cannot be called into question on appeal to a superior national court; Case C-2010/06 *Carterio Oktató es Szolgáltató bt* [2009] Ch 354. The CJEU considers itself to be in a partnership with the national court to ensure access to justice; see for example Case C-64/16 *Associação Sindical dos Juízes Portugeuses* EU:C :2018 :117. It is only in exceptional circumstances that the CJEU might decline a request for a preliminary ruling.

But this court should not second guess what the CJEU might do with the reference. The case of *Foglio* v *Novello II* [1981] ECR 3045 and following cases relied on by the respondent can be distinguished. In these cases the court held that there was no genuine dispute. That was not the case here. There is a clear dispute related to article 50. The CJEU has a strong presumption as to the admissibility of the reference and will defer to the national court on the issue of whether it is necessary for the resolution of a case before it. In *Gauweiler and Others* EU:C:2015:400 the CJEU dealt with an argument that the main proceedings were contrived and artificial and that the question referred to it was hypothetical. The court observed that it was solely for the national court to determine in the light of the particular circumstances of the case both the need for a preliminary ruling and the relevance of the question it submits to the court (see paragraph 24). A reference was competent in cases before the national courts in which a purely declaratory remedy is sought; Case C-415/93 *Union Royale Belges des Societes de Football Association* v *Bosman* [1995] ECR I-4921. There were numerous examples of cases where the court will assert its constitutional jurisdiction and determine points of law even where there was no dispute. In *R (Rusbridger)* v *Attorney General* [2004] 1 AC 357 Lord Steyn noted that the fact that the Attorney General had declined to indicate a view could not by itself conclude the matter if there were otherwise good reasons to allow the claim to go forward. The case of *Law Hospital NHS Trust* v *Lord Advocate* 1996 SC 301 is an example of a case where there was no dispute or contradictor on the law.

[15] While the government in this case has refused to show its hand on the revocability of article 50, once a reference was made every EU institution and every member state has a right of audience before the CJEU. They will doubtless be willing to express their view and act as a contradictor. Accordingly any declarator which this court makes on return from the

CJEU will be as a result of a process in which parties in dispute are represented. Government action was subject to supervision and instruction by Parliament; *Miller*. Mr O'Neill took me through the amendments made by the House of Lords to the EU (Withdrawal) Bill. These amendments he said, if accepted by the House of Commons, would give Parliament the opportunity to instruct the government to revoke the article 50 notification and for the UK then to remain a member of the EU.

[16] There is no breach of Parliamentary privilege as the respondent asserts. The application does not involve any questioning of what was said in Parliament. In relation to the Westminster Parliament the constitutional principle set out in article 9 of the Bill of Rights Act 1689 has no application because the court is giving a ruling on a point of great constitutional importance and before any Parliamentary vote. It cannot therefore be said to be impeaching or questioning "the freedom of speech and debates or proceedings in Parliament." In *Toussaint* v *Attorney General of Saint Vincent and the Grenadines* [2007] 1 WLR 2825 the judicial committee of the Privy Council allowed the use of a statement made to Parliament by the Prime Minister for the purpose of reviewing executive action (see in particular the speech of Lord Mance at paragraphs 16-17, 23 and 31). In any event the article 9 Bill of Rights case law cannot be assumed to apply to the relationship between the courts and other Parliaments; *A* v *Scottish Ministers* 2001 SC 1; *Whaley* v *Lord Watson* 2000 SC 340.

[17] In relation to the European Parliament the CJEU has long recognised that it is a requirement of the rule of law that the legislature be subject to review by the court; Case 294/82 *Parti Ecologiste Les Verts* v *European Parliament* [1987] 2 CMLR 343 (see paragraphs 23-25); *Case C-163-10 Patriciello* [2012] 1 CMLR 11 (paragraphs 39 and 40). In *European Parliament and Commission* v *Council of the European Union* [2016] QB 1123 it was

made plain that the CJEU will defend, under the principle of full and proper democratic participation and accountability and control, the rights of Members of the European Parliament to be fully informed of the negotiations of international agreements being concluded by the European Union.

[18] Accordingly there was a real dispute as to the interpretation of article 50(2) and whether a notification made under that article might be unilaterally revoked. It was necessary for the resolution of that dispute by this court that there be a reference to the CJEU.

Submissions for the additional parties

[19] The additional parties' argument is contained in a detailed note of argument and for convenience I summarise the main points.

[20] The petition was not hypothetical or abstract. The constitutional position was that the United Kingdom Parliament will make decisive choices about the future relationship between the United Kingdom and the European Union. It is precisely because these decisions rest in the hands of Parliament that a real and live issue arises as to the constraints that EU law may impose on Parliament's sovereign decision making power. The question as to whether or not the article 50 notification can be unilaterally withdrawn is directly relevant to the decisions being faced by MPs in the coming months. A briefing from the House of Commons Library dated 30 January 2017 noted that "Whether or not an Article 50 notice is revocable is relevant to the decision that Parliament will be taking both in authorising the government to give this notice, and in voting on the final Brexit agreement." The briefing went on to describe the question of revocation as central to the decision that Parliament will be taking both in authorising the government to give the notice and in voting at the end of

negotiations. These statements, and the second affidavit of Tom Brake MP, demonstrated that the issue raised in the petition is far from academic.

[21] A government could not constrain the decision making of Parliament. It is Parliament and only Parliament that has the power to decide whether, and if so, on what basis the United Kingdom should withdraw from the European Union; *Miller*, paragraph 122. Accordingly the government's firm policy was irrelevant. Government could not restrict Parliamentary debate into a binary option of exit from the EU either subject to agreement or with no agreement. The respondent had no real answer to the compelling evidence that the revocability of the article 50 notification is, so far as Parliament is concerned, a real live question with practical consequences.

[22] The government's assertion that it had not stated any position on the revocability of article 50 was untrue. The Supreme Court in *Miller* records the respondent's position as being that "Notice under Article 50(2) … cannot be given in qualified or conditional terms and … once given, it cannot be withdrawn" (paragraph 26). In any event it was not a precondition for justiciability that the respondent had adopted a final position on what is plainly a controversial legal issue. It was sufficient that there was a live practical question. Judicial review proceedings often arise in the context where no-one is very certain as to the law and an authoritative ruling is required. The existence of serious controversy is sufficient to render an issue, including a future issue justiciable; *Judicial Review*, Clyde and Edwards (2000) paragraph 13.07.

[23] The respondent relied on the cases of *Adams* v *Guardian Newspapers* 2003 SC 425 and *Coulson* v *HM Advocate* [2015] HCJAC 49 for the proposition that the petition encroached onto Parliamentary privilege. However these authorities and subsequent cases before the Judicial Committee of the Privy Council (JCPC) (*Buchanan* v *Jennings (New Zealand)* [2005]

1 AC 115 and *Toussaint* v *Attorney General of Saint Vincent and the Grenadines*) did not support the broad proposition that the respondent sought to establish; this amounted to saying that the courts are excluded from deciding questions of law which related to legal issues under consideration by Parliament. The petitioners do not call into question anything that was said or done in Parliament. Parliamentary privilege is intended to protect the integrity of the legislature from the executive and the courts; it is not a source of protection of the executive from the power of the courts; *Toussaint*, paragraph 17. Reference to proceedings in Parliament as relevant historical fact was legitimate; *Prebble* v *Television New Zealand Ltd* [1995] 1 AC 321 at page 337.

[24] The additional parties consider that until 29 March 2019 EU law does not preclude a unilateral decision by the United Kingdom to remain a member of the EU. That was supported by the opinion of a group of eminent EU lawyers including Sir David Edwards QC and Sir Francis Jacobs QC (opinion for Bindmans dated 10 February 2017). They opined that there were very strong arguments that a notification given under article 50(2) may be unilaterally revoked. But the matter was not without doubt. The European Parliament, in a resolution dated 5 April 2017, concluded "A revocation of [the article 50] notification needs to be subject to conditions set by all EU-27, so that it cannot be used as a procedural device or abused in an attempt to improve on the current terms of the United Kingdom's membership." On 12 July 2017 the European Commission published a statement that article 50 TEU cannot be unilaterally revoked, stating "It was the decision of the United Kingdom to trigger article 50. But once triggered, it cannot be unilaterally reversed. Article 50 does not provide for the unilateral withdrawal of the notification." Only the CJEU could give an authoritative judgment. The additional parties note of argument sets out substantial arguments in support of their interpretation of article 50. It is not necessary to repeat these for the purposes of this

opinion. However it should be recorded that as MPs the additional parties submit that EU law should be interpreted as affording respect to the constitutional and democratic role of an elected Parliament. This is in accordance with Articles 4 and 5 TEU and reflected shared democratic values. Accordingly EU law should not be interpreted as precluding the possibility of a good faith constitutional legitimate decision by a democratically elected legislature that a Member State remain within the EU. These are matters of the highest importance to the UK and the EU. It is appropriate that the Court of Justice assisted by observations from other Member States and EU institutions give a definitive ruling as a matter of legal clarity.

[25] The CJEU's recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings confirm that the courts and tribunals of the Member States may refer a question to the court on the interpretation or validity of EU law where they consider that a decision of the court on the question is necessary to enable them to give judgment. The recommendations observe that "A reference for a preliminary ruling may, *inter alia*, prove particularly useful when a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU law or where the existing case law does not appear to provide the necessary guidance in a new legal context or set of facts." It was for this court to determine whether there was a dispute giving rise to the need for a preliminary reference, *Gauweiler and Others* paragraph 31 and 32. While a request may not be made for a purely advisory opinion on a general or hypothetical question, where a national court considers that a preliminary ruling is necessary for the effective resolution of a dispute before it concerning EU law the CJEU will in good faith regard itself as bound to respond and will presume the questions to be relevant; *R (American Express Company)* v *HM Treasury*, 7 February 2018 EU:C:2018:66. The dispute may

be a dispute as to the validity or interpretation of rights and obligations that arise only in the future. In a number of cases the CJEU has accepted that a claim for judicial review of the intention and/or obligation of a national authority to implement a directive in future can give rise to an admissible request for a preliminary ruling even though, when the claims were brought the period for implementation of the EU provisions had not yet expired and no implementation measures had been adopted; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* EU:C:2002:741.

[26] In the absence of a ruling by the CJEU in advance of the critical decisions that must be taken by Parliament later this year there will remain uncertainty as to the legal effect, if any, of Parliament deciding that the article 50 notification should be unilaterally revoked. If Parliament sought to withdraw the article 50 notice and there was not to be a legal determination of the issues raised it is likely that there would be, at that stage, a challenge to the legality and consequences of such a withdrawal. In those circumstances it was unlikely that the issue could be resolved before 29 March 2019 leaving it unclear as to whether or not the United Kingdom, as a matter of law, remained a member of the EU. Such uncertainty and potential chaos could only be avoided by asking the CJEU to clarify the legal position now.

Submissions for the respondent

[27] The issue raised in the petition is hypothetical and academic. From the outset the United Kingdom Government has made it clear that its firm policy is that the notification under article 50 will not be withdrawn. The government has committed itself to holding a vote in Parliament on the final deal reached with the European Union as soon as possible after negotiations have concluded. That vote will cover both the withdrawal agreement and the terms of the future relationship between the United Kingdom and the European Union.

Parliament will therefore have a clear choice: it can vote to accept the deal or move forward with no deal. Neither option involves revocation of the notification under article 50. The UK government does not intend to seek to revoke the notification and Parliament has not instructed it to do so and as a matter of fact there is nothing to suggest that it will.

[28] The ordinary function of this court is not to answer hypothetical or academic questions or to provide advisory opinions; *Macnaughton* v *Macnaughton's Trs* 1953 SC 387 at 392. In certain circumstances the courts have been willing to grant advisory declaratory remedies but only where there was demonstrably good reason. In *R (Pretty)* v *Director of Public Prosecutions* [2002] 1 AC 800 the proposed conduct which might give rise to potentially actionable consequences related to private or criminal law. In *Law Hospital NHS Trust* v *Lord Advocate* there was a live practical issue in giving guidance on the legal consequences of terminating existing medical treatment. The present case falls into neither of those categories. The application is concerned with the lawfulness of a course of action which the UK Government has consistently stated that it will not take and which Parliament has not required it to take. This was for an advisory declaration in relation to an issue which there is no indication will ever actually materialise.

[29] The hypothetical nature of the application is also evident when account is taken of the international law context. Article 50 TEU does not create rights enforceable by private individual citizens. It creates rights and obligations enforceable by member states as High Contracting Parties to the Treaty. The issue is accordingly whether as a matter of international law the article 50 notice can be withdrawn. That issue could only arise if the UK as a High Contracting Party purported to withdraw it. The petition is accordingly incompetent.

[30] Even if the petition is not incompetent there required to be exceptional and compelling reasons for granting an advisory declaratory remedy; *R (Stamford Chamber of Trade and Commerce)* [2010] EWCA Civ 992 at paragraph 13; *R (Campaign for Nuclear Disarmament)* v *Prime Minister* [2002] EWHC 2777 (Admin). Exceptional circumstances are required to justify entertaining hypothetical or academic questions even in subsisting litigation; *R* v *Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450.

[31] Mr Johnston submitted that it was wrong to maintain that the respondent's argument involved asserting that government policy takes precedence over Parliament. But the petitioners' proposition that in order for those of them who are elected representatives to perform their roles they need to know with certainty the legal position with regard to revocability of the article 50 notification is entirely misconceived. As regards the UK Parliament, Parliamentary proceedings are as an aspect of Parliamentary privilege matters which are not justiciable; *Adams* v *Guardian Newspapers* and *Coulson* v *HM Advocate*. These cases vouched the following propositions. First, Parliamentary privilege is an issue that goes to the jurisdiction of the court. Second, article 9 of the Bill of Rights refers to impeaching or questioning freedom of speech and debates or proceedings in Parliament. But this is just one manifestation of a wider principle. Third, the wider principle reflects what has been described as a "mutuality of respect between two constitutional sovereignties; or in other words the separation of powers"; *Adams*, paragraph 15; *Coulson*, paragraph 13. It recognises that the constitutional roles and respective jurisdictions of the court and of Parliament are different. Fourth, it is not for one to interfere with or otherwise trench upon the proceedings of the other. The authorities demonstrate that the law of Parliamentary privilege is 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 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 court. The additional parties' reliance on *Toussaint* is misplaced. That was an exceptional case concerning executive action which had a direct effect on the claimant's right to property. The JCPC held (at paragraphs 34 to 35) that the claimant's right of access to the court to vindicate his constitutional right to property would be effectively undermined if he could not rely on evidence from Parliamentary proceedings. Mr Johnston submitted that Parliamentary privilege includes among other things the non-justiciability of questions as to the extent and nature of information needed by members to perform their duties and the need for a judicial ruling on an issue of law. The petitioners stated that the purpose of the present litigation is to enable them to obtain legal advice for the purpose of performing their Parliamentary duties. It could not be clearer that the very purpose of the application infringed Parliamentary privilege. That also emerged from the second affidavit of Mr Brake MP. This was a particularly flagrant violation of Parliamentary privilege. The court is being invited to become involved in a current debate in Parliament. The petitioners were seeking to place the court in a position where its decision may influence debate or voting within Parliament. Even in respect of enacted legislation where the question arises of discerning the intention of Parliament the courts are properly cautious about the extent to which it is permissible to have regard to what was said in Parliament (*Peper* v *Hart*). It was a matter for Parliament to take a view on the legal advice it required in order to conduct its business. It was not a matter for individual members to seek to enlist the

assistance of the court for the purpose of conducting Parliamentary business. These constitutional principles also applied to the Scottish and European Parliaments.

[32] Mr Johnston submitted that the supervisory jurisdiction of this court extended to determining the legality of administrative actions, decisions or policy making. In appropriate cases the courts have been willing to rule on the legality of proposed conduct or policies to be adopted in the future. This was not the position here. The petition is concerned with the lawfulness of a course of action which the UK Government has consistently stated that it will not take. The petitioners now contended that the true question is whether as a matter of EU law an instruction by Parliament to the UK Government to withdraw the article 50(2) notification would be lawful but Parliament has given no such instruction and there is nothing to suggest that it will do so. Accordingly it is hypothetical and irrelevant.

[33] The CJEU does not admit requests for purely hypothetical or advisory rulings, there had to be a genuine dispute and a ruling must be necessary for the effective resolution of that dispute. It is the national court which has the responsibility to determine the need for a request for a preliminary reference. It was not the duty of the court to deliver advisory opinions on general or hypothetical questions but to assist in the administration of justice to Member States; *Foglia* v *Novello II*. There must be a dispute actually pending before the national court which requires a preliminary ruling in order to be able to give judgment. The national court must have regard to the proper function of the CJEU when requesting a ruling; *Pohotovost* v *Vasuta* [2014] 1 All ER Comm at paragraph 29. In *Union Royale Belges des Societes de Football Association* v *Bosman* the court was willing to give a ruling in relation to a purely declaratory action but Belgian law permitted an action to be brought for declaratory purposes to prevent infringement of a right which was seriously threatened. The CJEU held that it was not for it to call the assessment of the national court into question. In *Gauweiler* the court said

that it may refuse to give a ruling on a question referred by a national court where it was quite obvious that the problem is hypothetical or "where the court does not have before it the factual or legal material necessary to give a useful answer to the question submitted to it" (para 25). In *British American Tobacco* the issue was whether a directive had an adequate legal basis in the EC Treaty. The UK court referred that question to the CJEU although the UK had not yet adopted regulations to transpose the directive and the implementation date for the directive had not yet arrived. The CJEU was cautious about whether in those circumstances it was appropriate to give a ruling but concluded that it should. The conclusion rested on the fact that the UK was under an obligation to transpose the directive later by the implementation date. There was therefore nothing hypothetical about the question of the validity of the underlying directive.

[34] Accordingly the respondent contended that there was no genuine dispute; there was no relevant domestic law issue which required the matter to be referred to the CJEU; the factual basis had not been established so the CJEU would not be in a position to give a useful answer to the question submitted but would be ruling in the abstract; the present application did not meet the test for the court to make an advisory declaration; there was no determination by the CJEU necessary for the effective resolution of any dispute and there are no grounds for either CJEU or this court to entertain the question proposed by the petitioners.

[35] Mr Johnston referred to the argument that the government had adopted contradictory positions. This submission relied on statements made by Ministers in Parliament. The use of such statements is inadmissible; *Adams* v *Guardian Newspapers*; *Coulson* v *HM Advocate*. The case was not, as the petitioners contended, one in which they sought to rely on the use of Hansard to prove what was said in Parliament merely as a matter of historical fact. They sought to draw inferences from the Parliamentary statements about government policy. Even

if the use of Parliamentary proceedings was lawful the whole context of the statements would need to be considered. In context they did not vouch the proposition which the petitioners sought to draw. The government's clearly stated and repeated position is simply that the article 50 notification will not be withdrawn. So far as the submission that the government in *Miller* adopted the position that article 50 notification was irrevocable that was incorrect. The divisional court transcript records the Attorney General as stating that "As a matter of firm policy once given a notification will not in fact be withdrawn". So far as the legal position was concerned he invited the court to proceed on the basis that it was irrevocable. It was not an important question in *Miller*. At paragraph 26 of the Supreme Court judgment it is recorded that it was common ground in the proceedings that the notice once given cannot be withdrawn and that it was the Secretary of State's case that even if that common ground was mistaken it would make no difference to the outcome of the proceedings.

[36] Accordingly the petition should be dismissed.

Discussion

[37] This is a petition for judicial review. While I do not question the court's competence to issue what is in effect an advisory declarator in appropriate (and exceptional) circumstances I question whether it is competent to do so in this process. In *West* v *Secretary of State for Scotland* 1992 SC 385 Lord Hope of Craighead LP said that the sole purpose of the supervisory jurisdiction of the Court of Session is to ensure that a person or body empowered to take a decision does not exceed or abuse that power (p 413). No issue of abuse or excess of power arises in this case. Indeed it is not suggested that any party is intending to abuse its power. In *Law Hospital,* which the petitioners point to as an example of the Court of Session issuing an advisory declarator, the court was not exercising its

supervisory jurisdiction but its jurisdiction as *parens patriae* to authorise the withdrawal of treatment. In these circumstances I have reservations as to whether the supervisory jurisdiction of this court is engaged at all. However I have not been addressed on this point.

[38] It is not suggested that any of the petitioners lack standing to bring proceedings but their interests are not uniform. Only one of the petitioners, Ms Cherry is a Member of Parliament. Since part of the argument is that Parliament has the power to instruct the government to revoke the article 50 notification she, along with the additional parties have the strongest interest in seeking clarity on whether such a revocation could be made unilaterally.

[39] Three of the petitioners are MEPs. Their interest is said to come *inter alia* from the role of the European Parliament under article 50(2) in giving consent to the agreement reached by the Council, acting on behalf of the EU, with the United Kingdom. While I acknowledge their general interest, particularly on behalf of their constituents, I am not clear how any vote in the European Parliament could bring about the option of the UK remaining a member of the EU. Similarly it is not clear how a legislative consent motion in the Scottish Parliament could have a direct effect on the UK exercising an option to remain in the EU.

[40] Accordingly while I do not discount the interests of the other petitioners I will concentrate on the role of Members of Parliament in overseeing the process of withdrawal from the EU. For ease of reference, unless the context determines otherwise any reference to the petitioners includes the additional parties.

[41] There is no doubt of the MP's earnest belief that an answer to the question they pose is necessary for the proper discharge of their functions as parliamentarians. They want to have as an option at the end of the negotiations the possibility of Parliament voting to stay in the EU. One of the affidavits lodged by the petitioners is from a Welsh MP Hywel Williams

who represents Arfon. He refers to the support that his constituency has received from the EU through cohesion funding and agricultural subsidies and the wide appreciation that EU membership has brought his constituents. He outlines what he sees as the uncertainties that face his constituents and those from other EU states working in his constituency many of them in the NHS or as academics.

[42] The petitioners view the present options before them of exiting the EU with an agreement or exiting without one – the so called "cliff edge" – as representing a choice which either makes things bad or even worse for their constituents and for the country. They want to see the option of remaining in the EU on present terms as one which Parliament ought to be able to explore.

[43] Under article 257 TFEU I have to be satisfied that there is a dispute and that a reference to the CJEU is necessary for the resolution of that dispute. For the avoidance of doubt I accept that if there is a dispute then a reference ought to follow. The question is whether there is a dispute.

[44] There are in my opinion three issues for me to resolve. First is the question academic or hypothetical? Secondly is there a breach of Parliamentary Privilege? Thirdly, is it likely that the CJEU would accept a reference from this court?

Is the question academic or hypothetical?

[45] There is at present no live proposal that the article 50 notification should be revoked. Article 50, as Mr Johnston points out, confers no rights on private citizens. It is for the government alone as representing the High Contracting Party to invoke the provisions of article 50.

[46] At present the government propose that there will be a "meaningful" vote in Parliament on the terms of withdrawal. Parliament could vote either to accept the deal and exit the EU or reject the deal in which case the UK would in terms of article 50(3) leave the EU on 29 March 2019 without a deal. The petitioners criticise the stance taken by the respondent as suggesting an attempt to constrain Parliament in the options that might be pursued. It is of course true that the government cannot constrain Parliament in the choices that it makes. The present amendments passed by the House of Lords shows that one chamber, at least, wish to see the option of remaining in the EU as a live issue. It will be a matter for the House of Commons as to whether these are accepted. The government no doubt believes that it has a mandate to pursue the present course of leaving the EU and, at present, enjoys the confidence of the House of Commons.

[47] Standing the result of the referendum and the firm and consistent position which it has adopted it seems highly unlikely that this government will revoke the notification. Circumstances can change and political opinion may shift in favour of remaining in the EU and, in consequence, in favour of revoking the article 50 notification. However I have not been presented with any evidence that there is a real and substantial prospect of a UK government taking such a step. Whether such an action, were it to take place, would require a change of government, a General Election or a fresh referendum, or all three is a matter of speculation and not addressed by the petitioners. Nor have I been presented with any argument that Members of Parliament are in some way impeded from pursuing the objective of remaining in the EU or indeed of giving MPs the opportunity to vote in favour of that option by tabling of appropriate amendments to the legislation regulating withdrawal.

[48] In *Macnaughton* v *Macnaughton Trustees* Lord Justice Clerk Thomson said (p392):

> "Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau. Just what is a live practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case. I doubt whether any good purpose is to be served by trying to extract any general rule from the decided cases."

[49] What the petitioners are seeking is advice that, were a certain set of circumstances to come about, there is an alternative option that could be pursued given the political will to do so. In short the option of revocation of the article 50 notice is contingent on other factors rendering it a live possibility. At present it cannot be said that it is a live practical question.

[50] As parties have acknowledged there are occasions when the courts have given advice through a declarator, even where the controversy may be contingent or in the future; Clyde and Edwards *Judicial Review,* paragraph 13.07. These are however limited. In *Law Hospital* the live practical issue was on the legal consequences of terminating treatment with the result that the patient's life would inevitably end. In *Law Hospital* and *Pretty* the courts were being asked to give advisory declarators on issues of life and death where there was an immediate proposal of action which engaged issues of criminal and civil liability.

[51] In conclusion I consider that the issue is hypothetical. The issue of revocation is contingent on a set of circumstances and a change in political will. The answer to the question is not required to enable the petitioners to properly fulfil their roles in their respective Parliaments.

Parliamentary privilege

[52] There are two aspects to this issue. The first relates to the use of statements made in Parliament by Ministers. As I indicated above when the petition was first presented it

proceeded on a review of the government's "position" which was said to be that the article 50 notification could not as a matter of law be revoked. That was said to be derived in part from statements in Parliament by the responsible Ministers. Following adjustment it is not necessary for the court to find that the government have adopted a position that the article 50 notification cannot be revoked. Mr O'Neill submitted that what the petitioners required was the certainty that would come from the CJEU ruling. He accepted that even if the government were to accept that the article 50 notification was revocable that would not give the certainty that the petitioners seek. Nevertheless although little was made of this in oral submissions the petition still relies on these statements as the basis for a submission that the government is misdirecting itself in law. The additional parties rely on Hansard to demonstrate the need to have the option of revocation and the necessity for clarity on the legal question. Mr Brake's second affidavit relies heavily on a number of statements in both Houses of Parliament to support the proposition that the issue of revocability is not of merely academic interest. Both Ms Ross and Mr O'Neill argue that the references to these statements do not call into question or impeach proceedings in Parliament. They submit that these references are merely historical references and do not therefore involve any breach of article 9 of the Bill of Rights.

[53] There are of course well known exceptions to the prohibition on the use of Parliamentary material in the court. In *Pepper* v *Hart* 1993 AC 593 the House of Lords was prepared to admit references to Hansard for the limited purpose of interpreting legislation which was said to be ambiguous or obscure or lead to absurdity. The law has developed since then. In *Prebble* v *Television New Zealand Limited* the JCPC made it clear that the principle against the use of Parliamentary material did not exclude all references in court

proceedings to what has taken place in Parliament. There was no objection to the use of Hansard to prove what was said and done in Parliament as a matter of history (page 337). In *Toussaint* v *Attorney General of St Vincent and the Grenadines* the plaintiff was allowed to rely on a statement made by the Prime Minister in Parliament in order to vindicate his rights.

[54] Article 9 of the Bill of Rights is however only one part of a wider principle of the separation of powers. It is not merely a means of protecting free speech in Parliament but goes to the question of the jurisdiction of the courts. The law was summarised by Lord Reed sitting in the Outer House in the *Adams* v *Guardian Newspapers Ltd* at paragraphs 14 and 15:

> "14 The concept of Parliamentary privilege was explained by Lord Browne-Wilkinson in *Prebble* v *Television New Zealand*. His Lordship referred (at p332) to art 9 of the Bill of Rights, which provides:
>
> > ' Freedom of Speech —That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament'.
>
> His Lordship continued:
>
> > 'In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz—that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges … As Blackstone said in his *Commentaries on the Laws of England* , 17th ed. (1830) Vol.1, p.163:
>
> "the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere'" '.
>
> 15 As Lord Browne-Wilkinson indicated in that passage, the privilege in question is not merely a means of protecting free speech in Parliament (such as might be achieved, for example, by conferring an absolute privilege under the law of defamation such as attaches to the reporting of court proceedings). It is a ***432** constitutional constraint based on what Sedley J (as he then was) aptly described as

> 'a mutuality of respect between two constitutional sovereignties': *R v Parliamentary Commissioner for Standards, ex p Al Fayed* at p 670. It reflects a conception of the separation of powers between the legislature and the judiciary. Putting the matter another way, Parliamentary privilege is not (unlike absolute privilege) a defence arising under the law of defamation: it is, rather, an issue going to the jurisdiction of the court. Lord Browne-Wilkinson returned to this point at p 335:
>
> 'The wider principle encapsulated in Blackstone's words quoted above prevents the courts from adjudicating on issues arising in or concerning the House, viz, whether or not a member has misled the House or acted from improper motives. The decision of an individual member cannot override that collective privilege of the House to be the sole judge of such matters'."

[55] The relationship between the courts and the sovereign Parliament was explored in the speeches in the House of Lords in *R (Jackson and others)* v *Attorney General* [2006] 1 AC 262 which considered the validity of the Parliament Act 1949. Lord Steyn considered the possible limits of Parliamentary sovereignty and suggested that there may be exceptional circumstances in which the courts would require to step in and protect fundamental rights even at the expense of encroaching on traditional notions of Parliamentary sovereignty. He gave as an example an attempt to abolish judicial review or the ordinary role of the courts.

[56] The principle behind this judicial restraint is rooted in democratic traditions and values. In *Axa General Insurance and others* v *HM Advocate and others* [2012] 1 AC 868 Lord Hope of Craighead JSC considered the justiciability of Acts of the Scottish Parliament. At paragraph 49 he observed:

> "The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate. While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are ignored or despised by the majority, the elected members of a legislature of this kind are best placed to judge what is in the country's best interests as a whole. A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances."

These observations are clearly pertinent to proceedings in the Westminster Parliament.

[57] It is not for me to explore the outer limits of the court's jurisdiction to entertain questions arising out of proceedings in Parliament. However it is clear that the question posed by the petitioners and the additional parties does not involve a proposed infringement of fundamental rights or freedoms. Nor is there a challenge to the rule of law of the kind contemplated by Lord Steyn in *Jackson*.

[58] It is of course true that the court is not being asked to rule on the validity of an Act of either the UK Parliament or Scottish Parliament. It is however being asked to settle a legal question raised by a number of MPs in the course of the legislative process. The petitioners seek judicial support for the option of the UK remaining in the European Union to be considered by Parliament. In my opinion that is a clear and dangerous encroachment on the sovereignty of Parliament. It is for Parliament itself to determine what options it considers in the process of withdrawing from the European Union. It is for Parliament to determine what advice, if any, it requires in the course of the legislative process.

[59] In the course of his submissions Mr O'Neill said that the great thing about the EU was that "law trumped politics". If his comment refers to the need to respect the rule of law then of course he is absolutely correct. But the rule of law should not be transposed to rule by the courts. Politics requires space in which to flourish and the courts should only become involved when the elements of constitutional order require it (eg *Miller*) or to protect and uphold fundamental rights and freedoms. The court is not there to be used by one side or another to advance one side of a political debate. Both Mr O'Neill and Ms Ross reminded me of the Lord President's words in the Division that the question raised "related to a matter of very great constitutional importance; that being the United Kingdom's relationship with

the European Union" (para 12). So it does, but the resolution of this issue is a political question to be debated and decided in Parliament and the country.

[60] I also reject the submission that resolution of the question of revocability of article 50 is necessary for the MPs to perform their Parliamentary duty. I do not accept Ms Ross's submission that EU law acts as a constraint on Parliament's sovereign decision making power to determine that it wishes to revoke the article 50 notification. No authority for that proposition was put before me. As I have already indicated there is no rule of Parliamentary procedure preventing MPs from putting the option of revocation before the House of Commons as the House of Lords have apparently done in the amendments to the European Union (Withdrawal) Bill. The petitioners are confident in their interpretation that article 50 allows a member state to unilaterally revoke a notification made under article 50 before they cease to be a member of the EU. They have access to legal advice of the highest order. Of course it is always good to have certainty but in life that is not often available. For the reasons set out below I doubt that it would be available in this case.

[61] Turning to the use of Parliamentary statements by Ministers I accept that there has been a more relaxed attitude to the use of such material in courts. In general I can accept from the material before me that there are Members of Parliament, including those involved in this process, who have been raising the issue of revocation in Parliament. However in this case I reject the submission that reference to Parliamentary material does not seek to impeach what was said or done in Parliament. The most obvious example of questioning of Parliamentary proceedings is the reference to the statement relied on by the petitioners of what was said by Lord Callinan in answer to a question in the House of Lords on 13 November 2017 to the effect that "it has been stated by legal opinion on this side of the water and in the EU that article 50 is not revocable". On 14 November the Minister wrote to

Baroness Hayter to clarify his comments. He indicated that he had been referring to the position put forward by the government in *Miller*. He stated that, "The Supreme Court proceeded on this basis and decided that it was not necessary for it to consider the legal position on this specific point further". On 20 November he made a statement to the House of Lords in which he took the opportunity to give further clarification of the government's position reiterating that the Supreme Court did not rule on the legal position regarding the revocability of the article 50 notification. What is the court to make of this? The court is being asked to discern a meaning in the Minister's words in order to aid and assist the petitioners' case.

[62] I also reject Ms Ross's submission that reference to the material is being made as a matter of historical fact. Logically she is correct that these statements were made in the past. But on no view could it be said that they related to matters which were now settled history. They relate to the most contentious constitutional and political debate of our time and to legislation which is currently before Parliament.

[63] In conclusion I find that the subject matter involves an encroachment on Parliamentary sovereignty and is outwith the jurisdiction of the court. I further find that use of Parliamentary material of the nature referred to by the petitioners and additional parties involve a clear breach of Parliamentary privilege.

Will the CJEU entertain a reference from this court?

[64] To some extent this is speculative. I accept Mr O'Neill's analysis of the law. I accept that the court would only know for sure if a reference would be accepted by the CJEU if it was made. However I do not consider that this court can simply make a reference and hope that it might be accepted. Mr O'Neill emphasised in his submissions the partnership that

exists between the domestic courts and the CJEU. However a partnership involves both sides taking responsibility for its decisions. Accordingly I need to consider whether the circumstances are met for a reference to the CJEU.

[65] The proposition that the petitioners advance is that article 50 allows for the member state which triggers the article 50 procedure to revoke its notification of withdrawal unilaterally before it ceases to be a member. It would then continue as a member of the EU on the same terms and conditions as it did before, as if the member state had never given notice of withdrawal. It is implicit in that proposition that the EU institutions have no role in this process other than receiving the revocation notice.

[66] It is perhaps because of the simplicity of that proposition that neither the petitioners nor the additional parties raised the issue of the powers of the European institutions or other member states in such a situation. As I read article 50 any revocation of the notice of withdrawal would require to be addressed to the European Council – the European institution which received the notice of intention to withdraw. The EC would then have to decide how to respond on behalf of the EU. Accordingly it seems to me that the question posed by the petitioners is as much about the powers of the EU institutions, in particular the European Council, as it is about the rights of the UK under article 50.

[67] It may be that the EC would conclude, as the petitioners submit, that it has no discretion in the matter and that the only action it can take is to stand down M Barnier and the negotiating team. However it might not be quite so simple. It is not for me to speculate as to how such a revocation might be received but one could envisage situations in which the EC may wish to question whether it should be accepted or whether it should place conditions on acceptance. The European Parliament has suggested that conditions may have to be imposed to ensure that the UK did not obtain a benefit from triggering the Article

50 procedure. Member states might also question whether a revocation of the article 50 notification represented the settled will of the British people. If the issue came before the CJEU it will have to consider not just the rights of a withdrawing member state under article 50 but also the rights of the European institutions and remaining member states.

[68] When faced with that question Mr O'Neill and Ms Ross both pointed to the fact that member states and the European institutions have a right of audience before the CJEU. They would therefore be able to participate and give their views on the question before the court. Mr O'Neill submitted that his wording was sufficient to enable the court to take a nuanced approach if required.

[69] I can see good reasons why those parties would be reluctant to engage in the procedure before the CJEU. In the first place from their perspective it is entirely hypothetical. The UK has not signalled an intention to revoke the notification and nor does it show any signs of doing so. Secondly the EU is in the course of negotiating the UK's withdrawal. Accordingly the EU institutions and member states may find it not only an unwelcome distraction but difficult or awkward to consider the circumstances in which the UK reversed that process.

[70] The more fundamental objection is however that the relevant facts would not at that stage be known. The context in which the revocation had been given, and the EC called upon to exercise its powers, could not be ascertained. The CJEU would not know whether the EC had accepted or rejected the revocation or whether it had sought to impose conditions on its acceptance. In effect the CJEU would be deciding a hypothetical question without the background of fact essential to a proper determination.

[71] The presumption is for the CJEU to accept references from the national court on the basis that it is primarily for the national court to determine whether it is necessary for the

determination of a dispute before it. There are however a number of authorities which suggest that the CJEU will not engage in academic or hypothetical questions. These have been canvassed in submissions. The most authoritative statement of the principles which the CJEU will adopt when faced with a reference is to be found in *Gauweiler and others* at paragraphs 24 and 25:

> "24. …[A]s regards the argument that the dispute in the main proceedings is contrived and artificial and that the questions referred are hypothetical, it should be observed that, as is apparent from paragraph 15 of this judgment, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling.
>
> 25. Accordingly, questions concerning EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law is sought bears no relation, to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it."

[72] So far as the domestic courts are concerned the most authoritative guidance comes from Sir Thomas Bingham MR in *R* v *International Stock Exchange Limited of the United Kingdom and Republic of Ireland ex pa Else* (1992) Ltd, quoted in *Trent Taverns* by Chadwick LJ:

> "Guidance as to the principles upon which that discretion should be exercised were given by Sir Thomas Bingham MR, in his judgment in this court in *R v International Stock Exchange of the United Kingdom and the Republic of Ireland ex p. Else (1982) Ltd*:
>
> > 'I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself."

[73] Applying these principles I am satisfied that the question that is being asked is hypothetical. The facts upon which the CJEU would be asked to give an answer could not at this stage be ascertained, simply because they have not occurred.

[74] I commenced this section with an acknowledgement that to some extent it is speculative as to whether a reference would be accepted by the CJEU. However, for all the reasons that I have set out, I am not persuaded that the conditions for a reference have been met. Accordingly I am satisfied that I should decline to make a reference.

Decision

[75] I shall refuse the petition. In doing so I shall sustain the respondent's first, second, fifth, sixth and eighth pleas in law and repel the petitioners' pleas. I shall reserve all question of expenses.