IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY STEPHEN AGNEW AND OTHERS

AND IN THE MATTER OF AN APPLICATION BY RAYMOND MCCORD

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

SKELETON ARGUMENT ON BEHALF OF THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION AND THE SECRETARY OF STATE FOR NORTHERN IRELAND

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I. Introduction.

1. The Applicants in these proceedings seek leave to apply for judicial review of the intention of the government to use the Royal Prerogative to invoke Article 50 of the Treaty of the European Union ("TEU") following the result of the referendum held on 23rd June 2016 in which the majority of those who voted, voted in favour of the United Kingdom leaving the EU.

2. Prior to the referendum the Government's policy was unequivocal that the outcome of the referendum would be respected. Parliament enacted the EU Referendum Act 2015 based on this clear understanding. The Prime Minister has confirmed that the Government will give effect to the outcome of the referendum by bringing about the exit of the UK from the EU.

3. Under the EU Treaties, Article 50 TEU sets out the procedure by which a Member State which has decided to withdraw from the EU achieves that result. That decision has been taken in accordance with Article 50(1) and the next stage in the process is for the Member State to notify the European Council in accordance with Article 50(2) of the intention to withdraw. The Government intends to give notification, and to conduct the subsequent negotiations, in exercise of prerogative powers to conclude and withdraw from international agreements, against the backdrop of the referendum.

II. The Proceedings.

4. The Court has directed that these applications proceed by way of a rolled-up hearing on 4th and 5th October 2016. The Court has stayed some of the grounds of challenge in both cases on the basis that they directly overlap with issues that are being litigated in proceedings brought by Miller and others ("the *Miller* claim") due to be heard by the Divisional Court in London on 13th and 17th October 2016. The grounds of challenge that are so stayed relate directly to the question of whether notification pursuant to Article 50 requires prior authorisation by Act of Parliament. The Applicants in the present case raise these issues in the following grounds:

    a. *Agnew and others* Ground 4(2)(a)(i);
    b. *McCord* Grounds 3(b) and (c).

5. The remaining grounds of challenge are not directly raised in the pleadings and Skeleton Arguments in the *Miller* case although there may inevitably be some areas where similar lines of argument are developed in both cases.

6. The Applicants' grounds of challenge can be grouped under the following broad headings.

a. The prerogative power cannot be exercised for the purpose of notification in accordance with Article 50(2) TEU because it has been displaced by the Northern Ireland Act 1998;
b. If an Act of Parliament is required then there is a requirement for a legislative consent motion before legislation is passed authorising notification pursuant to Article 50(2) TEU.
c. There are further constraints imposed by: section 75 of the Northern Ireland Act 1998, the Public Sector Equality Duty in s. 149 of the Equality Act 2010 and general principles of EU law.
d. There are non-statutory limitations on the use of prerogative powers to issue notification including constraints imposed by the effect on the Northern Ireland peace process and the constitutional arrangements between Northern Ireland and the other constituent countries of the United Kingdom.

7. The Respondent's case, in summary is:

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

a. The lawfulness of the prerogative is not impacted upon by the Northern Ireland Act 1998 (or other devolution statutes). The conduct of foreign affairs and international relations are not transferred matters and are outwith the competence of the devolved legislatures.
b. References to EU law in the Northern Ireland Act 1998 and the Belfast Agreement assume, but do not require, ongoing membership of the EU.

On the Legislative Consent Motion

c. The giving of notice under Article 50 does not require an Act of Parliament and, therefore, the need for a legislative consent motion simply does not arise.

d. On the assumption that an Act of Parliament is required to authorise notification pursuant to Article 50(2), such legislation would not involve a devolved matter so no question of a legislative consent motion would arise.
e. The Applicant's argument fails to recognise the constitutional status of the Sewel convention in Northern Ireland as a convention which does not give rise to legal rights and obligations. Whether or not a LCM is required is not, therefore, a justiciable issue.
f. Further, the Sewel convention itself recognises that there will always be circumstances where the Westminster Parliament can legislate upon a devolved matter without the consent of the relevant devolved legislature. These are matters of political judgment and are not readily amenable to the supervision of the Court.

On the Limitations on the Prerogative powers

g. The Royal Prerogative to make and withdraw from treaties is only subject to the limitations that are clearly imposed by statute.
h. The non-statutory factors relied upon by the Applicants do not impose any limitation on the exercise of the powers for the purposes of notification under Article 50(2) which is not justiciable.

Section 75 obligations

i. The decision to invoke the Article 50 process does not engage the section 75 obligations.
j. While the Northern Ireland Office is a designated public authority pursuant to the Northern Ireland Act 1998 (Designation of Public Authorities) Order 2000, the Secretary of State for Northern Ireland is not. He is not, therefore, subject to section 75 obligations in respect of his involvement in executive decisions to invoke Article 50.

k. In any event, even if the section 75 obligations were engaged the Court of Appeal in *Neill* has established that the superintendence of those obligations is to be conducted primarily through the mechanism of Schedule 9 of the Northern Ireland Act 1998 rather than by way of judicial review.

l. It is not accepted that the section 75 obligation has any application to the decision to notify pursuant to Article 50. If the section 75 obligation applies at all to the process of withdrawal from the EU it does not apply to the Article 50(2) process as this is the first stage in a complex negotiated decision-making process that will only yield a defined policy capable of being assessed at a much later stage.

On the Application of EU law principles

m. The general principles of EU law do not apply to the decisions and actions contemplated by Article 50, both because they are exclusively within the province of Member States and because a notification is a purely administrative step on the international plane.

On the Peace Process argument

n. The Article 50 decision will not undermine in any material respect the Northern Ireland peace process, the terms of the Belfast Agreement or the structures established in support of it.

o. The references to the EU in the Belfast Agreement are not normative in nature and find only limited expression in the Northern Ireland Act 1998.

p. The commitments in the Belfast Agreement in respect of ongoing engagement on matters pertinent to the EU can be maintained during and after the Article 50 process.

III. The Effect of the Northern Ireland Act on prerogative power.

8. The Government contend that the constitutional law of the United Kingdom permits notification under Article 50(2) without the need for further legislation. Prerogative powers can be lawfully invoked for this purpose having regard to the terms of the EU Referendum Act 2015, standard constitutional practice regarding the conclusion of and withdrawal from treaties and the very limited restrictions which Parliament has chosen to impose upon the exercise of prerogative powers in this context.

9. The referendum was set up and provided for by Parliament in the 2015 Act. Its legislative purpose and object was to enable the people directly to express their will on a single, binary, question: "*Should the United Kingdom remain a member of the European Union or leave the European Union?*" (see section 1(4) of the 2015 Act). There is nothing to suggest that Parliament intended that the Government should only commence the process of implementing the result of the referendum, by giving the notification prescribed by Article 50(2), if given further primary legislative authority to do so. On the contrary, the premise of the 2015 Act, the clear understanding of all concerned and the basis on which the people voted in response to the referendum question was that the Government would give effect to the outcome of the referendum.[1] The

[1] This was clearly stated on many occasions, for example: "*This is a simple, but vital, piece of legislation. It has one clear purpose: to deliver on our promise to give the British people the final say on our EU membership in an in/out referendum by the end of 2017*." (Second Reading, HC, Hansard, 9 June 2015, col. 1047, the Foreign Secretary); "*As the Prime Minister has made very clear, if the British people vote to leave, then we will leave. Should that happen, the Government would need to enter into the processes provided for under our international obligations, including those under Article 50 of the Treaty on European Union."* (Report stage, HL Hansard, 23 November 2015, col. 475, Minister of State, Foreign and Commonwealth Office, Baroness Anelay of St Johns). On 22 February 2016, the-then Prime Minister told the House of Commons that "*This is a vital decision for the future of our country, and I believe we should also be clear that it is a final decision…This is a straight democratic decision—staying in or leaving—and no Government can ignore that. Having a second renegotiation followed by a second referendum is not on the ballot paper. For a Prime Minister to ignore the express will of the British people to leave the EU would be not just wrong, but undemocratic.*" (HC, Hansard, 22 February 2016, col. 24).

argument made by those seeking to rely on Parliamentary sovereignty as a determinative principle, involves the proposition that it would be constitutionally appropriate for the people to vote to leave, and for the Government and/or Parliament then to decline to give effect to that vote. That is a surprising submission in a modern democratic society.[2]

10. It has been suggested that the referendum was "*advisory*". That is a term which does not appear in the 2015 Act and is apt to mislead. The 2015 Act did not prescribe steps which the Government was required to take in the event of a leave vote. That was not because Parliament or the electorate were proceeding on the basis that the outcome of the referendum would not be given effect to. Any such suggestion would be untenable in fact: the Government had been very clear in this respect. It is unsurprising that the legislation did not prescribe steps to be taken in the event of a leave vote given that: (a) Article 50 itself prescribes the formal steps to be taken once a Member State has decided to withdraw from the EU; (b) it would be a matter for the Government to start the formal process of withdrawal by giving notification under Article 50(2), at a time which the Government believed to be in the best interests of the UK; (c) it had not been decided, and Parliament did not itself seek to decide, what outcome the UK should seek to achieve in negotiating its future relationship with the EU. The characterisation of the referendum as merely "*advisory*" is therefore inappropriate and inaccurate if that term is used to imply lack of Parliamentary permission to give effect to the result or some Parliamentary requirement to return by primary legislation before beginning that process in the event of a vote to leave.

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[2] As the Secretary of State for Exiting the European Union has pointed out: "*I am a great supporter of parliamentary democracy because it is our manifestation of democracy in most circumstances; in this unique circumstance we have 17.5 million direct votes that tell us what to do. I cannot imagine what would happen to the House in the event that it overturned 17.5 million votes. I do not want to bring the House into disrepute by doing that. I want to have the House make decisions that are effective and bite into the process. That is what will happen.*" (HC Hansard, 5 September 2016, col. 61)

11. Having, in implementation of the outcome of the referendum, validly decided that the UK should withdraw from the EU (which is, apparently, common ground between all parties), the Government can only give effect to that decision by notifying the European Council pursuant to Article 50(2). It cannot be prevented from doing so by the absence of primary legislation authorising that necessary step.

12. Where Parliament seeks to impose limitations on the exercise of prerogative power to enter into and withdraw from treaties it must do so clearly. Save as set out below the power of the Crown in this context has been limited only to the extent set out in the Constitutional Reform and Governance Act 2010.[3] Nothing in the Northern Ireland Act 1998 imposes any constraint on the ability of the Government to withdraw from an international treaty.

13. The European Communities Act 1972 ("ECA") did not restrict the power of the government to withdraw from the then EEC. Nor was any provision made to control the use of Article 50 TEU when giving effect to the Treaty of Lisbon in the European Union (Amendment) Act 2008. Both the 2008 Act and the European Union Act 2011 have imposed some constraints on the Government's prerogative powers to act under the EU treaties but, notably, neither constrains the Government's power to decide to withdraw from the EU Treaties or to give notification under Article 50(2).[4]

[3] See section 20.

[4] The EUA 2011 contains a number of procedural requirements which apply in particular circumstances where prerogative powers might otherwise have been exercised to ratify amendments of the EU Treaties or to take steps under them. These requirements, *inter alia*, replaced section 6 of the 2008 Act. For example, under section 2, a treaty which amends the TEU or TFEU to confer a new competence on the EU may not be ratified unless the treaty is approved by an Act of Parliament and a referendum. Under section 8, a Minister of the Crown may not vote in favour of or otherwise support a decision under Article 352 TFEU unless one of sub-sections 8(3) to (5) is complied with in relation to the draft decision. Under section 9, certain notifications – under Article 3 of Protocol No. 21 to the TFEU and TEU on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice – cannot be given without Parliamentary approval. The EUA 2011 does not seek to regulate a decision to withdraw from the EU Treaties or to give notification under Article 50(2).

14. This is not to say that Parliament has no role in the process of withdrawing from the EU. Parliament has many and varied means of holding the Government to account both prior to notification and during the course of any negotiations.

15. In circumstances where there is no express restriction on the Crown's powers to take action under the EU Treaties the Courts will not imply any such restriction. In *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* [1994] QB 552 Lloyd J rejected an argument that a Social Policy Protocol attached to the Maastricht Treaty could not be ratified using prerogative power. He stated:

> "We find ourselves unable to accept this far-reaching argument. When Parliament wishes to fetter the Crown's treaty-making power in relation to Community law, it does so in express terms, such as one finds in section 6 of the Act of 1978. Indeed, as was pointed out, if the Crown's treaty-making power were impliedly excluded by section 2(1) of the Act of 1972, section 6 of the Act of 1978 would not have been necessary. There is in any event insufficient ground to hold that Parliament has by implication curtailed or fettered the Crown's prerogative to alter or add to the EEC Treaty."

16. In our submission, if it is correct that the ECA does not provide any constraint on the use of prerogative powers in relation to the EU Treaties, it is difficult to understand how any such limitation could be derived, or otherwise implied, from the terms of the Northern Ireland Act 1998.

17. The Appellants in the *Agnew* challenge contend (paragraphs 51 *et seq*) that, where the Prerogative and legislation occupy the same territory, the prerogative is displaced by the legislation in question. In support of this proposition they seek to rely upon the decisions in *Laker Airways Ltd v*

Department of Trade [1977] QB 643 and *R v Secretary of State for the Home Department ex p Fire Brigades Union*.

18. In our submission these authorities do not assist the Applicants' case. Mr Laker wished to operate "Skytrain", a budget airline to fly passengers across the Atlantic. In order to achieve this, two things had to happen. First, he needed to obtain a licence from the Civil Aviation Authority (**"the Authority"**) under the Civil Aviation Act 1971 (**"the CAA"**). The CAA contained detailed provisions relating to the basis on which, and the process through which, such licences were to be granted. Section 4 of the CAA conferred powers on the Secretary of State to revoke licences in specified circumstances. Secondly, the UK Government had to "*designate*" Skytrain as an air carrier under an international treaty between the UK and the USA, the Bermuda Agreement, under which those nations' Governments mutually agreed to permit carriers to fly into and out of their countries. Mr Laker was granted a licence by the Authority, and the Government designated Skytrain under the Bermuda Agreement. The Secretary of State subsequently made a change to his aviation policy, which involved deciding that Skytrain should not be able to operate. But instead of seeking to use his powers under the CAA (such as in section 4), or seeking to amend the CAA through legislation, he decided instead to withdraw Skytrain's designation under the Bermuda Agreement, which had the practical effect which he wished to achieve and to issue new guidance to the Authority to the effect that Laker's licence should be revoked.

19. The Court of Appeal held that the new guidance was unlawful, contrary to the CAA, and could not be relied upon by the Authority as a basis for revoking Laker's licence. The Secretary of State argued, nevertheless, that the Government was entitled to withdraw Laker's designation under the

Bermuda Agreement, in exercise of prerogative powers, the exercise of which was not justiciable. As Roskill LJ explained (at 718G):

> *"The sole question is whether the relevant prerogative power has been fettered so as to prevent the Crown seeking by use of the prerogative to withdraw the plaintiffs' designation under the Bermuda Agreement and thus in effect achieve what it is unable lawfully to achieve by securing the revocation by the Authority of the plaintiffs' air transport licence".*

20. Roskill LJ explained that the relevant principles upon which the Courts have to determine whether prerogative power has been fettered by statute were "*plain*" and had been "*exhaustively considered*" by the House of Lords in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, including in the speech of Lord Parmoor (at 721E):

> *"The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words [or] by necessary implication … I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced".*

21. The Court of Appeal examined the particular statutory framework in question (the CAA). Having regard to that framework, they decided that the prerogative was not available to the Secretary of State to stop Skytrain, because the CAA had specified the circumstances in which and process through which it could be stopped, for example using the Secretary of State's powers under s.4 of the CAA (*per* Roskill LJ at 722F-G, *per* Lawton LJ at 728B, and *per* Lord Denning MR at 706H-707B). On a proper construction of the

CAA, Parliament had, in that case, intended to fetter the use of the prerogative (per Roskill LJ at 722H, per Lawton LJ at 728C-D).

22. In the present case, by contrast, it cannot be said that the Northern Ireland Act has "fettered" the Government's ability to use the prerogative to commence the process of giving effect to the will of the people as expressed through the referendum. As explained above, no legislation contains any such fetter either expressly, or by necessary implication. There is no legislation other than the 2015 Act which purports to regulate the process by which the UK may decide to withdraw from the EU and then give effect to that decision. Save in the 2015 Act, those matters have not been "*directly regulated*" so as to come within the principle expressed in *Laker Airways*.

23. The concept of necessary implication is a narrow one. As Lord Hobhouse held in R (Morgan Grenfell) v Special Commissioners of Income Tax [2002] UKHL 21; [2003] 1 AC 563 at §45: "A necessary implication is not the same as a reasonable implication…A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation" (original emphasis).

24. In the context of Parliament being taken to have "occupied the field" otherwise covered by the prerogative, that narrow approach requires a party to show that Parliament has legislated to cover the "whole ground" or has "directly regulated" the subject-matter: Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508, 526 per Lord Dunedin and 576 per Lord Parmoor. In the words of Lord Hope in R (Alvi) v Secretary of State for the Home

Department [2012] UKSC 33; [2012] 1 WLR 2208 at §28: "Where a complete and exhaustive code is to be found in the statute, any powers under the prerogative which would otherwise have applied are excluded entirely" (emphasis added).

25. Where Parliament has not adopted a "monopoly" of the prerogative power in issue, even where it has enacted legislation which did make provision in the same area, the prerogative power remains available to the Crown: R v Secretary of State for the Home Department, ex p Northumbria Police Authority [1989] QB 26.

26. Similarly, the decision in *Ex parte Fire Brigades Union* does not assist the Applicants. The Criminal Justice Act 1988 (**"CJA 1988"**) provided for a Criminal Injuries Compensation Scheme. By s.171 CJA 1988, this was to come into force "on such day as the Secretary of State may appoint". However, the Secretary of State did not bring the statutory scheme into force. Instead, in exercise of prerogative powers, he replaced an existing non-statutory scheme with a new non-statutory tariff scheme.

27. A majority of the House of Lords accepted the argument of the claimant that it was not permissible for the Secretary of State to use prerogative powers to bring in the new non-statutory tariff scheme. Lord Browne-Wilkinson said, at 552D-G:

> *"… it would be most surprising if … prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme even though the old scheme has been abandoned … The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body. The prerogative*

powers of the Crown remain in existence to the extent that Parliament has not expressly or by implication extinguished them. But under the principle in Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508, if Parliament has conferred on the executive statutory powers to do a particular act, that act can only thereafter be done under the statutory power so conferred: any pre-existing prerogative power to do the same act is pro tanto excluded".

28. Lord Browne-Wilkinson held that by "*introducing the tariff scheme he debars himself from exercising the statutory power for the purposes and on the basis which Parliament intended*" (p.554G). Lord Nicholls held that the Secretary of State had "*disabled himself from properly discharging his statutory duty in the way Parliament intended*" (p.578F).

29. The *ratio* of this case, following *De Keyser's Royal Hotel*, is that the Crown may not use prerogative powers to do a particular act where Parliament has prescribed statutory powers for the doing of that act. Again, this has no application in the present case. There is no legislative scheme governing withdrawal from the EU which the Government would be undermining by proceeding under the prerogative. The use of the prerogative to provide notification under Article 50(2) would not frustrate the will of Parliament.

IV. The Need for a Legislative Consent Motion

30. The Applicants contend that an Act of Parliament is required to authorise the commencement of the Article 50 process and that it follows that there is a constitutional obligation to (a) seek and (b) receive the consent of the Northern Ireland Assembly before any such legislation is enacted. It is contended therefore that a legislative consent motion ("LCM") must be passed in advance of the enactment of any statute enabling notification.

31. In our submission it is clear that notification pursuant to Article 50(2) is not a devolved matter, does not involve devolved powers and therefore there could be no requirement to seek consent from the Northern Ireland Assembly before legislation authorising an Article 50 notification could be enacted.

32. There are two key documents that address the question of the need for an LCM. These are:

    a. The Devolution Memorandum of Understanding;
    b. The Devolution Guidance Note No. 8 on post-devolution legislation affecting Northern Ireland.

33. The Devolution Memorandum of Understanding states that:

    "The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature."

34. The convention referred to herein is sometimes described as the Sewel convention. This remains no more than a non-binding political convention in terms of the constitutional law of Northern Ireland. The Convention has been put on a statutory footing in section 2 of the Scotland Act 2016 which provides under the heading "Sewel convention" that section 28 of the Scotland Act 1998 should be amended to include sub-paragraph 8 which states:

    "But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

35. A similar provision is included in the Wales Bill introduced into Parliament in 2016 but, notably, there is no analogous provision in the Northern Ireland Act 1998.[5] Accordingly, in Northern Ireland the Sewel convention has not been placed on a statutory footing and its status as a convention is beyond dispute. Further, it is clear from the text of the Convention – and section 2 of the Scotland Act 2016 - that the operation of the convention admits of exceptions. The use of the word "normally" indicates that Parliament continues to recognise that there will be circumstances where it is appropriate for the Westminster Parliament to legislate with regard to devolved matters in Scotland, Northern Ireland and Wales.

36. Further, it is the use of the term "normally" that gives the clearest indication that the Convention is not justiciable. A judgment as to what is or is not "normal" is a political rather than a legal one. An assessment of political norms is not one which the Court is well placed to make.

37. In any event the Convention must be read against the statutory provision in section 5(6) of the Northern Ireland Act 1998 which provides:

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

This betokens statutory acceptance that Parliament remains sovereign and that the only constraint upon that sovereignty is in the form of a convention containing an exceptionality clause in the plainest of terms.

38. The Memorandum of Understanding reflects this analysis. It states at paragraph 2:

[5] The equivalent provision to section 28 of the Scotland Act 1998 is section 5 of the Northern Ireland Act 1998. No similar amendment has been introduced in this jurisdiction. In the Wales Bill clause 2 includes a proposed amendment to section 107 of the Government of Wales Act 2006 in terms identical to those in section 2 of the Scotland Act 2016.

"This Memorandum is a statement of political intent, and should not be interpreted as a binding agreement. It does not create legal obligations between the parties..."

39. In Northern Ireland the convention only has application in respect of legislative provisions that are expressly dealing with transferred matters. Paragraph 2(iii) of Guidance Note 8 states:

"Whether agreement is needed depends on the purpose of the legislation. Agreement need be obtained only for legislative provisions which are specifically for transferred purposes…."

40. Paragraph 5 of DGN8 states that only bills which contain provisions applying to Northern Ireland and which deal with transferred matters (but not excepted or reserved matters) or which alter the legislative competence of the Northern Ireland Assembly or the executive functions of the Northern Ireland Ministers or department are subject to the convention on seeking the agreement of the devolved Assembly.

41. The text of paragraph 4 of DGN8 identifies a number of conditions that must be met before there is a need for an LCM. There are three specific triggering components:

a. The legislation contains provisions which apply to Northern Ireland and deal with transferred matters (but not excepted or reserved matters);
b. The legislation alters the legislative competence of the Northern Ireland Assembly;
c. The legislation alters the executive functions of Northern Ireland departments or Ministers.

42. It is clear that any legislation drafted to authorise the invocation of Article 50 would deal only with excepted matters. International relations, including

relations with the European Union are an excepted matter. Paragraph 3 of Schedule 2 to the Northern Ireland Act 1998 includes as excepted matters:

> "International relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organisations and extradition, and international relations and co-operation."

43. Paragraph 18 of the Memorandum of Understanding confirms that "As a matter of law, international relations and relations with the European Union remain the responsibility of the United Kingdom government and the UK parliament." Further support for the proposition that the invocation of Article 50 is not a matter for the devolved institutions can be found in section 7 of the Northern Ireland Act which includes the European Communities Act 1972 in the list of "entrenched enactments" that cannot be modified by an Act of the Northern Ireland Assembly or by subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department."

44. Paragraph 4 of DGN8 identifies the type of proposed legislation that will require an LCM. This includes legislation that contains provisions applying to Northern Ireland and which deal with transferred matters (but not reserved or excepted matters), or which alter the legislative competence of the Northern Ireland Assembly or the Executive functions of the Northern Ireland Ministers or departments. The Article 50 notification process will not sound on transferred matters and will not alter the legislative competence of the Northern Ireland Assembly.

45. Similarly, it cannot be argued that any legislation passed to facilitate Article 50 notification would, in itself, alter the legislative competence of the Assembly or the executive functions of Ministers or Departments in Northern Ireland.

V. Constraints on the Use of Prerogative Power

46. The commencement of the Article 50(2) process involves the withdrawal from international treaty obligations. The relief sought the Applicants is designed to secure that the decision made under Article 50(1) that the UK should withdraw from the EU might not be implemented at all, seeks, in substance, to attack that prior decision. These are matters that are exclusively within the province of the Crown and which are not justiciable. In *CCSU v Minister for the Civil Service* [1985] AC 374 Lord Roskill explained:

> "*Prerogative powers such as those relating to the making of treaties …. are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The Courts are not the place wherein to conclude whether a treaty should be concluded…"* [at 418]

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

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

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

49. The Applicants in these proceedings seek to challenge the proposed exercise of the prerogative power in the abstract (see in particular grounds 4(2)(c) of the *Agnew* pleadings). The constraints proposed by the Applicants are a combination of statutory, namely the Northern Ireland Act 1998, and a range of non-statutory considerations.

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

VI. The Section 75 Issue

51. At ground 4(4) of the Agnew Order 53 statement it is argued that the Northern Ireland Office and the Secretary of State for Northern Ireland must, before tendering advice to the Cabinet on whether an Article 50 notice should be issued, comply with the statutory requirements under section 75 of the Northern Ireland Act 1998. The Secretary of State for Northern Ireland has not provided any such advice to the Cabinet. However, if such advice were to be provided in our submission the section 75 obligations would not be engaged.

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

> "**75.** – (1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity-
>
> (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
>
> …
>
> (2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.
>
> (3) In this section "public authority" means-
>
> (a) any department, corporation or body listed in Schedule 2 to the Parliamentary Commissioner Act 1967 (departments, corporations and bodies subject to investigation) and designated for the purposes of this section by order made by the Secretary of State;
>
> (b) any body (other than the Equality Commission) listed in Schedule 2 to the Commissioner for Complaints (Northern Ireland) Order 1996 (bodies subject to investigation);

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

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

53. Schedule 9 of the Northern Ireland Act 1998 contains a detailed enforcement mechanism for addressing complaints that there has been a breach of the section 75 obligation. The Schedule 9 regime is subject to the oversight of the Equality Commission for Northern Ireland and permits matters to be referred ultimately to the Secretary of State for Northern Ireland.

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

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

56. The application of the section 75 regime to the Secretary of State was considered by the High Court in *Re Conor Murphy's Application* [2001] NIQB

34. In that case it was argued that the Secretary of State for Northern Ireland was not a public authority for the purposes of section 75. Kerr J (as he then was) accepted this argument. He stated:

> *"It is not strictly necessary for me to decide this point in order to reach a conclusion on the application of section 75 to the making of the Regulations but I am confident that the respondent's argument must prevail. Only those bodies or agencies specified in section 75 (3) of the Act are to be public authorities for the purpose of the section. The fact that the Secretary of State was performing a function that, in other circumstances, might have been carried out by the Assembly could not bring him within the provision. In this context it is worthy of note that section 76 (7) provides that a public authority shall include a Minister of the Crown. If it had been intended that the Secretary of State should be subject to section 75, that could have readily been made clear, as it has been in section 76."*

57. It is our submission, therefore, that insofar as the target of the section 75 challenge is advice provided by the Secretary of State for Northern Ireland to the Cabinet in respect of the Article 50 process, this is a matter beyond the reach of section 75. Parliament has deliberately excluded the Secretary of State from the reach of section 75. This is evidenced by section 76 (discrimination by public authorities) which, in contrast, extends a duty to Ministers of the Crown.

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

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

> *"The conclusion that the exclusive remedy available to deal with the complained of failure of NIO to comply with its equality scheme does not mean that judicial review will in all instances be unavailable. We have not decided that the existence of the Schedule 9 procedure ousts the jurisdiction of the court in all instances of breach of section 75. Mr Allen suggested that none of the hallmarks of an effective ouster clause was to be found in the section and that Schedule 9 was principally concerned with the investigation of procedural failures of public authorities. Judicial review should therefore be available to deal with substantive breaches of the section. It is not necessary for us to reach a final view on this argument since we are convinced that the alleged default of NIO must be characterised as a procedural failure. We incline to the opinion, however, that there may well be occasions where a judicial review challenge to a public authority's failure to observe section 75 would lie. We do not consider it profitable at this stage to hypothesise situations where such a challenge might arise. This issue is best dealt with, in our view, on a case by case basis."*

60. In our submission, the complaint against the Northern Ireland Office at paragraph 4(4) of the Agnew Order 53 statement is based on an alleged procedural failure to comply with consultation requirements in the Northern Ireland Office equality scheme. This is directly analogous to the complaint – a procedural complaint – considered by the Court of Appeal in *Neill.* The appropriate mechanism for redress in respect of such a complaint can be

found in the enforcement mechanisms of Schedule 9 of the Northern Ireland Act 1998. Such matters are for the Equality Commission in the first instance rather than the Court.

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

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

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

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

properly informs the decision-making process before the ultimate decision is made."

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

> *"It is perfectly sensible for the Government to wait until policy has been adequately formulated for there to be a clear basis upon which its ... equality impact can be assessed. The point at which that is reached is ... very much a question of rationality not of duty."*[6]

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

The Public Sector Equality Duty

66. The Applicants in the Agnew case place reliance upon the public sector equality duty (PSED) in section 149 of the Equality Act 2010. This provision does not apply in Northern Ireland where the issue of statutory equality duties is addressed with the framework of section 75 and Schedule 9 as discussed above. Equal opportunities and discrimination are "transferred matters" under the Northern Ireland Act. Consequently, with some minor exceptions, the Equality Act 2010 is not part of the law of Northern Ireland.[7] It is not at all clear what actions of the proposed Respondents are alleged to have breached the obligations in section 149 and, if those actions took place in

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

[7] The Disabiity Discrimination Act 1995 which has been repealed in England, Scotland and Wales by the 2010 Act remains in force for Northern Ireland.

this jurisdiction, how they can raise a justiciable issue in the High Court in Northern Ireland.

67. Section 149(1) provides:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to
> (a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
> (b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> (c) Foster good relations between persons who share a relevant characteristic and persons who do not share it."

68. If, contrary to the jurisdictional point, section 149 can be found to have some application in this jurisdiction that engages the supervisory jurisdiction of the Court we submit that the argument that the PSED requires the conduct of some form of EQIA in Northern Ireland cannot be sustained. The invocation of Article 50 is an act related to international treaty making. It operates, therefore, on the international plane and the requirement to conduct equality impact assessments on the making of international treaties cannot have been envisaged by Parliament. Further, as submitted above in respect of the section 75 obligations, even if the statutory duty is engaged, which is not accepted, there is no obligation to conduct an equality impact assessment at the commencement of a multi-stage decision-making process.

VII. **Article 50 and adherence to the general principles of EU law**

69. At grounds 4(3)(a) and (b) of the Order 53 statement, the Applicant in the Agnew challenge contends that government intends not to comply with the general principles of EU law in acting pursuant to Article 50 TEU.

70. The decision of the High Court in *Shindler* will be of assistance to the Court on this point. There the Court considered the legality of the franchise rules adopted pursuant to the EU Referendum Act 2015. Those rules excluded from the franchise UK citizens who moved abroad and were last registered to vote in the UK more than 15 years ago ("the 15 year rule"). One of the issues which the Court considered was whether the franchise for the referendum fell within the scope of EU law. The Court held that it did not.

71. In reaching its decision the Court considered the meaning of the words in Article 50(1) TEU, in particular the stipulation that a Member State may decide to withdraw from the Union "in accordance with its own constitutional requirements". The Court noted that this phrase had not been subject to elucidation in the *travaux préparatoires* to the Lisbon Treaty, nor had it been considered previously by the domestic courts or the CJEU. It had, however, been considered by the German Constitutional Court in *Re Ratification of the Treaty of Lisbon* [2010] 3 CMLR 13. The Court cited that judgment, in particular its finding that the issue of whether a Member state had complied with its own constitutional requirements could "*only be verified by the Member State itself, not by the European Union or the other Member States*"(paragraph 7).

72. The Court then stated at paragraph 16:

> "*A decision by a Member State to withdraw from the EU is an exercise of national sovereignty of a special kind for which the TEU has made the express provision that this may be done in accordance with a Member State's own constitutional requirements. That is hardly surprising. It would have been*

surprising if the Member States had agreed that a Member who wishes to withdraw from the EU altogether could only do so if the decision to withdraw did not infringe one or more fundamental EU rules. An obvious reason why a Member State might wish to withdraw is that it found such rules unacceptable and was no longer willing to be bound by them."

73. Accordingly, the Court held that one of the constitutional requirements that Parliament decided had to be satisfied as a condition of withdrawal from the EU was a referendum. The 2015 Act, which gave effect to that decision, was not within the scope of EU law.

74. *Schindler* is authority for the proposition that the decision to withdraw from the EU falls outside the scope of EU law. The logic of that proposition, and indeed the words used in paragraph 16 of the Court of Appeal's judgment, must necessarily extend to the notification under Article 50(2) which follows from a withdrawal decision under Article 50(1). Otherwise, a decision to withdraw from the EU could be compromised by a Member State being constrained in the implementation of the Article 50(1) decision.

75. Accordingly, it would be incorrect to say that a Member State is required to comply with the general principles of EU law when giving notification under Article 50(2).

76. Even if the general principles of EU law were potentially applicable, they could have no meaningful content in the case of notification under Article 50(2), which is a purely administrative act in implementation of the Article 50(1) withdrawal decision. Nor is it apparent how such a decision could sensibly be to the effect that the Government should not implement the outcome of the referendum.

VIII. **The Northern Ireland peace process and the Belfast Agreement**

77. The *McCord* challenge raises issues relating to the Northern Ireland peace process and the Good Friday/Belfast Agreement at grounds 3(d) and (f). The government has stated its clear and ongoing commitment to the Belfast Agreement which is not diminished in any way by the implementation of the decision to leave the European Union.

78. The Court will note that very sparing reference is made to the European Union in the text of the Belfast Agreement. Further none of these references were given statutory expression through incorporation into the Northern Ireland Act 1998 and none of them appear to be of any direct consequence to the issues in the litigation. In general terms, both the Northern Ireland Act 1998 and the Belfast Agreement that preceded it, *assume but do not require* ongoing membership of the European Union. It is accepted that the legislative and executive competence of the Assembly and Ministers is limited by the requirement to act compatibility with EU law. However, the operation of the Act is not dependent upon the application of EU law and the Applicants have not sought to demonstrate how the Act would become inoperable in the event of withdrawal.

79. The Applicants in both *Agnew* and *McCord* adumbrate various passages of the Belfast Agreement and related documents which refer to EU law. However, the Court will not, in our submission, find this to be helpful exercise in determining the legality of notification under Article 50(2).

80. The preamble to the British Irish treaty refers to both parties being "partners in the European Union". That was, of course, a factually accurate empirical observation when the agreement was concluded. It was not intended to be a normative statement and cannot conceivably have any enduring effect in law.

On analysis leaving the European Union has no legal or practical consequence upon this aspect of the Belfast Agreement.

81. There is a reference to the European Union at paragraph 31 of Strand One. Here the section relating to the Assembly refers to "co-ordination and input by Ministers to national policy-making, including on EU issues". However, it is likely that national policy making will continue to include policy making on EU issues even after the United Kingdom leaves the EU.

82. In paragraph 3(iii) of Strand Two, the North/South Ministerial Council is tasked with considering "institutional or cross-sectoral matters (including in relation to the EU)". There is no impediment to the Council considering matters relating to the EU even after the Article 50 process has concluded.

83. Paragraph 17 of Strand Two and paragraph 8 of the Annex, the Council is tasked with considering EU dimensions and programmes and proposals under consideration in the EU framework. There is also provision for arrangements to be made to ensure the views of the Council are represented at relevant EU meetings. There is no impediment to the Council being represented at EU meetings even if the UK no longer remains a member of the EU, and so again, the UK leaving the EU would not amount to a breach of this aspect of the Belfast Agreement.

84. Similarly, in Strand Three paragraph 5, there is provision that suitable issues for early discussion in the British Irish Council could include "approaches to EU issues". This provision imposes no legal or practical constraints on the decision to notify pursuant to Article 50(2) TEU.

85. There is nothing in the text of the Belfast Agreement that would impede the Article 50 process. The Agreement is a quasi-constitutional document containing important commitments to human rights and the setting up and

support for various institutions. Many, although not all, of those commitments have been given statutory expression in the Northern Ireland Act 1998. The Belfast Agreement does not impose any fetter on prerogative power. Since, in our submission, the terms of the Northern Ireland Act 1998 impose no fetter or constraint on the exercise of the prerogative power to invoke Article 50(2) it follows that the terms if the Agreement will have no greater effect. Moreover, on a practical and political level the operation of the Agreement and its outworkings will continue notwithstanding the Article 50 process and the Government has given express commitments to that effect.

IX. Response to the Applicants Arguments

86. *McCord Skeleton.* The Applicant in the *McCord* challenge contends that the decision to invoke Article 50 would be unconstitutional even if it was otherwise lawful. It is contended that the Belfast Agreement is justiciable. [para 19 skeleton]. However, the question of justiciability would arise only if there was some public law issue arising in respect of the Agreement. The Applicant contends that the invoking Article 50 would undermine the Agreement. However, for the reasons outlined above Article 50 notification would have no material impact upon the Agreement which the government has pledged to uphold.

87. The Applicant contends that the sovereignty of the Westminster Parliament is now attenuated in some way. It is suggested that the devolution acts, the establishment of the Supreme Court and the Belfast Agreement [see paras 24-26] have resulted in an erosion of sovereignty. However, this submission pays no regard to the fact that the constitutional balance between affording the devolved institutions scope to legislate on transferred matters while retaining sovereignty over excepted and reserved matters is a constant feature of the devolution Acts. In the Northern Ireland Act 1998 sections 5 and 6 expressly provide for this balance. Section 5, in particular, affords the

Northern Ireland Assembly scope to legislate subject to the express reservation in section 5(6) that the power of Parliament to make laws for Northern Ireland remains intact.

88. The Applicant develops an argument that an Act of Parliament which is "in a strict sense legal" could also be illegitimate because it is incompatible with the constitution. The Applicant cites no United Kingdom authority on the point but relies on a number of decisions of the Canadian Supreme Court [paras 39 *et seq*]. In our submission casual parallels between decisions about the written Canadian constitution in respect of the operation of a federalist system of government are not helpful to the Court.

89. The Applicant also places reliance upon section 1 of the Northern Ireland Act which provides that the status of Northern Ireland – as part of the United Kingdom – will remain unless majority voting in a poll defined in Schedule 1 give their consent to change. The Applicant contends that this provision must be read purposively to include the status of Northern Ireland as a constituent country of the European Union.

90. However, section 1 is plainly directed to the question of whether Northern Ireland should "cease to be part of the United Kingdom and form part of a United Ireland". This is the express language that is used in section 1(2). There is nothing in the text of section 1 that would support that Applicant's argument that the consent of the people of Northern Ireland is specifically required in order to invoke Article 50.

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

"if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between her Majesty's Government in the United Kingdom and the Government of Ireland."

Agnew Skeleton.

92. The Applicants dilate on a number of propositions relating to constitutional law in Northern Ireland. At paragraphs 30-37, a number of provisions in the Belfast Agreement which refer to the EU, at varying levels of generality, are highlighted. However, the fundamental point remains that in paragraph 3 of Schedule 2 to the Northern Ireland Act matters relating to relations with the European Union and the relevant institutions are, and remain, excepted.

93. At paragraph 38 it suggested that the Northern Ireland Act 1998 has constitutional status. This is not a controversial proposition in itself but there is nothing in the Act that impedes Government action in respect of excepted matters. The designation of "constitutional statute" can be traced to the decision of Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151 where it was introduced to restrict the ordinary doctrine of implied repeal. No issue of implied repeal of the Northern Ireland Act 1998 presently arises and the designation of the 1998 Act as a "constitutional statute" (a rule of statutory construction in any event) does not act as an absolute bar to the exercise of prerogative powers.

94. At paragraph 39 attention is drawn to various provisions of the Northern Ireland Act which, it is argued, require EU law to be "recognised and available in law." The Applicant then identifies sections 6, 7, 24 as the provisions which have these effects. However, section 6 simply provides that

an Act of the Assembly will not be law if it is incompatible with "community law". This is a provision which imposes a limit on the scope of the legislative competence of the Assembly; it does not require that EU law be "available" in Northern Ireland.

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

96. Section 24 is found in Part III of the Act which deals with Executive functions. It imposes constraints on the scope of executive power and, again, reflects the constitutional constraint that the devolved Assembly and executive are precluded from legislating on excepted matters and entrenched provisions. None of the provisions relied upon by the Applicants in paragraph 42 of their skeleton *require* that EU law be "available" nor do they preclude the commencement of the Article 50(2) notification process.

97. At paragraph 42 the Applicant contends that amendments to the devolution Acts require the authority of Parliament. At paragraph 55 the Applicant asserts that invoking Article 50 TEU "*involves, in effect, the beginning of a far-reaching process of amending the Northern Ireland Act. 1998.*" This is a wholly speculative contention. Invoking Article 50 does not involve amending the Northern Ireland Act 1998. The commencement of the process of withdrawal from the EU does not itself involve any change to common law or statute. Any alterations are a matter for future negotiation and will be subject to Parliamentary scrutiny and, if necessary, implementation by legislation.

98. At paragraphs 62-68 the Applicants contend that there is an obligation to seek and obtain a legislative consent motion before any legislation is enacted to

facilitate the Article 50 process. The Applicants concede, at paragraph 67, that Parliament could legislate in this area without the consent of the Northern Ireland Assembly. In light of this submission it seems that the Applicants no longer pursue the relief sought at paragraph 3(b) of the Order 53 statement. At paragraph 67 they state:

> "it is not proposed to ask the High Court to declare that an Act of Parliament authorizing withdrawal from the EU in the absence of an LCM from the Northern Ireland Assembly would be unconstitutional and unlawful."

99. However, the Applicants suggest that they will reserve their position on this point for possible determination in the Supreme Court. However, if the High Court is not invited to rule upon the relief sought then the Applicants cannot seek to raise the issue, as they suggest, in the Supreme Court.

100. At paragraphs 68-72 the Applicants contend that the exercise of the Royal Prerogative is justiciable. As we have argued above the exercise of the prerogative power to conclude and withdraw from international treaties is not justiciable. However, in any event, even if the powers were justiciable in this context, the use of prerogative powers to invoke Article 50(2) is not inconsistent with the Northern Ireland's constitutional law. This argument repeats the points raised already in respect of the application of the Northern Ireland Act 1998. There is nothing within the terms of the Northern Ireland Act which impedes the commencement of the Article 50(2) process. The argument, faintly made, at paragraph 74 that the use of the prerogative is so antithetical to the constitutional place of Northern Ireland that it "might" amount to an abuse of power is not sustainable.

101. At paragraph 82 *et seq* the Applicants contend that the Northern Ireland Office is *prima facie* in breach of its equality and good relations duty under section 75 NIA. The Applicants advance no evidence in support of this

proposition. The Applicant bears the onus of proof in a judicial review application *(Re SOS (NI) Ltd)* and cannot simply assert that lack of evidence leads to a conclusion that a statutory duty has been breached. In any event, for the reasons we have outlined above, there is an existing, and more appropriate, mechanism in Schedule 9 for close examination of the extent to which the obligations under section 75, if applicable, have been discharged by a public authority.

X. Conclusion

102. None of the grounds of challenge raised by the Applicants can be sustained. The process of Article 50(2) notification has yet to commence and many of the arguments advanced by the Applicants are either directed to the Article 50(1) decision to withdraw from the EU – which is not, and cannot be, directly challenged - or to the policy position on withdrawal from the EU which remains at a formative stage. We invite the Court to refuse leave on those grounds which have not been stayed and to adjourn any further argument on the stayed grounds until after the judgment of the Divisional Court has issued in *Miller.*

30th September 2016