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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATIONS BY RAYMOND McCORD, JR 83 AND JAMIE WARING FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

v

THE PRIME MINISTER AND OTHERS

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INDEX

McCloskey LJ

Introduction

[1] By these applications for leave to apply for judicial review Raymond McCord, Jamie Waring and JR83 (collectively "*the Applicants*") invite this court to intervene at this stage of the evolving, fluctuating and uncompleted Brexit saga. The three cases have been conjoined. They have received a high degree of expedition and have been processed in accordance with the so-called "rolled up" mechanism at a hearing conducted on the successive dates of 06, 09 and 10 September 2019.

[2] The standing of the Applicants to bring these proceedings is not in dispute. The third of the Applicants has been allocated the cipher "*JR83*", the court having been satisfied that there were appropriate grounds for the grant of anonymity. As the challenges raise "devolution issues" under the scheme of the Northern Ireland Act 1998 the appropriate notice was given to the Attorney General for Northern Ireland, whose contribution consisted of a written submission and, with the permission of the court, time limited oral argument.

[3] I draw attention to one particular feature of the case management of these proceedings. This court, having been alerted to the substance of the legal challenges in the Scottish case of Cherry and the English case of Miller, ruled that the discrete challenge (forming part of Mr McCord's case only) relating to the recent controversial Order in Council ("*the prorogation measure*") made on 28 August 2019 whereby Parliament is to be prorogued from a day no earlier than 09 September 2019 and no later than 12 September 2019 (and has now been prorogued), with effect from 10 September 2019 until 14 October 2019, would not be considered. This court so ruled given that the legality of the prorogation measure evidently forms the centrepiece of the legal challenges in the Scottish and English proceedings, these three cases raise several other distinctly Northern Irish issues and, finally, by reason of the acute need for expedition and finality some curtailment of the breadth of these challenges was essential on pragmatic grounds.

[4] As will become apparent while there is, unsurprisingly, some degree of overlap one can identify certain issues of a distinctive character in each of the three cases. Notwithstanding the brief lifetime of these proceedings all parties energetically brought before the court further evidence as and when it materialised. This was a reflection of the parallel extra - proceedings fluctuations and developments in the "Brexit" saga, unfolding in the world of politics and international relations. In passing, as one would expect the justiciability of what the Applicants are seeking to challenge is an issue of some importance. In tandem with rapid developments externally the Applicants also amended their formal pleadings with some frequency. The High Court in this jurisdiction continues to operate a general (not inflexible) rule of practice whereby amendments of an applicant's

pleading can be made without permission prior to the court's determination of whether to grant leave to apply for judicial review. In the compressed circumstances of these proceedings the court was disinclined to invest any time or resources in debates about the propriety of amendments and reception of further evidence. Taking into account also the public law character of these proceedings, in the event all of the evidence presented was admitted, while the challenges have proceeded on the basis of the ultimate incarnation of each Applicant's amended pleading.

The Three Challenges

[5] Mr McCord in his challenge, identifies four proposed respondents: the Prime Minister, the Secretary of State for Northern Ireland, the Secretary of State for Exiting the European Union (the "Brexit Secretary") and Her Majesty's Government. There is a convenient distillation of the contours of Mr McCord's challenge in the following passage in the skeleton argument of Mr Ronan Lavery QC (with Mr Conan Fegan of counsel):

> "(1) He contends that the prorogation of Parliament proposed by the Prime Minister and made by way of Order in Council on 28th of August 2019 is unlawful and unconstitutional. The Order in Council is an abuse of the discretionary power available to the Prime Minister to prorogue parliament. The true motivation is to prevent Parliament having sufficient time to table and/or enact any legislation which would prevent the Prime Minister's policy of withdrawal from the European Union by 31 October 2019 in any circumstances including without a withdrawal agreement.[1]
>
> (2) The Applicant contends that it is unlawful for the Prime Minister to effect or attempt to effect a withdrawal from the European Union outside of the express terms, provisions and safeguards set out in the European Union (Withdrawal) Act 2018 ('EUWA'). For the Prime Minister to do so either by way of act or omission is contrary to the express will of Parliament as set out in that legislation in particular with reference to sections 10 and 13.
>
> (3) The Applicant contends that any act or omission purporting to effect a withdrawal from the European Union must be in accordance and consistent with the terms of The Good Friday

[1] Hereinafter the phrase 'without a withdrawal agreement' is used interchangeably with 'no deal'.

Agreement which, by virtue of the EUWA and its incorporation of The Good Friday Agreement into domestic law is binding upon the Executive in so far as the Executive purports or attempts to effect a withdrawal from the European Union. Those provisions of the Withdrawal Agreement must be read and given effect to in a way that is consistent with the letter, spirit, purpose, aims and objectives of The Good Friday Agreement. Through the EUWA Parliament has recognised that leaving the European Union without a deal and in such a way that would leave no option but to impede movement and trade between both parts of the island and the erection of border infrastructure and other regulatory inhibitions to free movement and trade would be contrary to The Good Friday Agreement. The Act does not authorise withdrawal from the European Union to occur without a deal being reached with the other 27 European Union Member States. Any act or omission on the part of the Prime Minister to effect withdrawal without a deal is ultra vires and unconstitutional.

(4) The Applicant further contends that any decision by the Executive to effect a withdrawal from the European Union without a deal with the other 27 Member States ('EU 27') is on the face of it irrational, fails to take into account material considerations and is oppressive to the citizens of Northern Ireland.

(5) The Applicant contends that the Courts are best placed to adjudicate upon tension arising between the Executive and Parliament and upon the lawful and/or constitutional exercise of discretionary powers whether by virtue of Royal prerogative or on foot of powers expressed or implied in legislation. The Applicant contends that the subject matter of the exercise of discretion is of such constitutional importance, involving the deprivation of rights of citizens that it is justiciable and indeed is a textbook example of the role of the Courts in safeguarding the role of Parliament and indeed its sovereignty but also to safeguard the constitutional and lawful rights of its citizens.

(6) The Applicant's position is that until a position can be reached whereby withdrawal from the European Union can be effected without jeopardising or breaching the terms of The Good Friday Agreement which have binding constitutional status in so far as they relate to Britain's exit from the European Union, the current position must be preserved, namely the United Kingdom's continued membership of the European Union. The Court is obliged to provide whatever remedy is appropriate in the fluid and fast-moving circumstances to preserve the Applicant's constitutional rights."

("EUWA" denotes the European Union (Withdrawal) Act 2018 - the "Withdrawal Act").

[6] One finds greater focus and definition in the Order 53 pleading in the following way, under the heading of "The Impugned Decision/Omission":

(a) The Applicants' challenge:

> "*…. concerns the constitutional and lawfulness of the United Kingdom's withdrawal and exit from the European Union without a withdrawal agreement made between the United Kingdom and the European Union pursuant to Article 50* (TEU)"

(b) "*The proposed Respondent's decision to no longer endorse paragraph 49 of the Joint Report from the Negotiators of the European Union and the United Kingdom of 20 December 2017 …., a central element of the withdrawal agreement which the EU has repeatedly said it will not reopen,* ***has created a very high risk that the UK will leave the EU without a withdrawal agreement.*** *The said decision was promulgated by the Prime Minister in Parliament on 25 July 2019 and repeated in a letter to the President of the European Council, Donald Tusk, dated 19 August 2019.*"

[My emphasis.]

[7] In the final reconfiguration of this Applicant's pleading there are references to the European Union (Withdrawal) (No 2) Act 2019 (the "Withdrawal No 2 Act"), which became law on 09 September 2019. Various forms of relief – declaratory, mandatory and quashing – are sought on foot of the basic contention that the withdrawal of the UK from the EU must be in accordance with the Withdrawal No 2

Act. Overall, the main target of this Applicant's challenge is an asserted government "decision" or "policy" to depart the EU on 31 October 2019 in the absence of a withdrawal agreement. In counsels' submissions there was a heavy emphasis on the declaratory relief pursued by this Applicant.

[8] I consider it no over-simplification to suggest that the central thrust of Mr McCord's case is that the United Kingdom Government would be acting unlawfully should it withdraw from the EU without a withdrawal agreement. This I consider clear from the Order 53 pleading as a whole, in conjunction with counsels' written and oral submissions. This analysis is confirmed by the terms of the declaratory and mandatory remedies finally pursued in this Applicant's pleading. The two mandatory orders sought are couched in the language of "*…. in the event that a withdrawal agreement is not in place between the United Kingdom and the European Union by 24 October 2019 ….*". The two declaratory orders sought implicitly adopt the same linguistic formula. The final remedy pursued by Mr McCord is an order of certiorari quashing the European Union (Withdrawal) Act 2018 (Commencement Number 4) Regulations 2019 (the "Commencement No 4 Regulations"). This is the measure of subordinate legislation the effect whereof is that the repeal of the European Communities Act 1972 will occur on "exit day" (see sections 1 and 25 of the Withdrawal Act). It is not easy to identify within the pleaded grounds anything specific to this discrete form of relief.

[9] JR 83, the second of the three Applicants, identifies as proposed respondents the Brexit Secretary of State and the Prime Minister. This Applicant's pleading identifies the "*impugned decision/omission*" in the following terms:

> "*The adoption of a combination of policies that will **inevitably** result in the creation or facilitation of a 'hard border' between Northern Ireland and the Republic of Ireland following the UK's departure from the European Union, namely:*
>
> *(i) Refusing to contemplate a withdrawal agreement in which the UK remains within the EU Customs Union and Northern Ireland maintains regulatory alignment with the single market.*
>
> *(ii) Refusing to contemplate an agreement which includes the provisions in the Protocol on Ireland and Northern Ireland (hereinafter the 'back stop') which ensures the permanent prevention of the creation or facilitation of a hard border.*
>
> *(iii) Refusing to rule out the prospect that the UK will leave the EU in the absence of an agreement that would prevent the creation of a hard border in Ireland.*

(iv) *The decision to resile from the UK Government's commitment in paragraph 49 of the Joint Report …(* as per Mr McCord's challenge *supra*).

(v) *The decision of the Brexit Secretary to make the Commencement No 4 Regulations.*"

[10] The remedies pursued by JR83 are mainly declaratory. This Applicant invites the court to declare that each of the "decisions" rehearsed above is unlawful. This Applicant further seeks a discrete declaration that the impugned decisions are incompatible with Articles 2, 3 and 8 ECHR either individually or in conjunction with Article 14 ECHR (contrary to section 6 of the Human Rights Act 1998). In common with Mr McCord, JR83 also seeks an order of certiorari quashing the Commencement No 4 Regulations. Finally, this Applicant seeks an order of mandamus requiring the Respondents to comply with Section 10 of the Withdrawal Act and Section 1(3) and (4) of the Withdrawal No 2 Act.

[11] The grounds of this Applicant's challenge are these:

(i) The impugned decisions are unlawful as they infringe and frustrate the requirements of, section 10(1)(a) of the Withdrawal Act as the Brexit Secretary of State has failed to act in a manner compatible with the North/South co-operation provisions of the Northern Ireland Act 1998 ("NIA 1998") and impedes the ability of Northern Ireland Ministers and Departments to comply with their duty under section 24 of NIA 1998. It is pleaded that in both respects the impugned decisions "*would inevitably have this effect*". It is contended further that the impugned decisions "*frustrate*" section 10(1)(a) of the Withdrawal Act and are "*incompatible with*" the obligation enshrined in section 75 of NIA 1998.

(ii) The Brexit Secretary has "*… failed to have due regard to the joint report …..*" (*supra*), in the context of an asserted policy of the UK Government "*… explicitly to reject commitments made by the UK Government which were intended to ensure against the imposition of a hard border… "*.

(iii) The impugned decisions frustrate the operation of section 10(2)(a) and (b) of the Withdrawal Act.

(iv) The Commencement No 4 Regulations are *ultra vires* the Withdrawal Act being incompatible with section 10(1)(a) and (b).

(v) The impugned decisions are irrational.

(vi) The impugned decisions infringe Articles 2, 3 and 8 ECHR, either singly or in conjunction with Article 14 ECHR, contrary to section 6 of the Human Rights Act. The Article 14 complaint entails the contention

that the impugned decisions "*… will disproportionately have a detrimental effect on Irish citizens living in Northern Ireland and, in particular, Irish citizens living in border regions in Northern Ireland*".

(vii) The Brexit Secretary and the Prime Minister are obliged by Section 10 of the Withdrawal Act and Section 1(3) and (4) of the Withdrawal No 2 Act to request an extension of the Article 50 TEU notice period if a withdrawal agreement (which must have Parliamentary approval) has not been secured by the relevant date.

[12] The skeleton argument of Mr Barry MacDonald QC (with Mr Malachy Magowan of counsel) contains the following convenient digest:

> "*The Applicant is challenging a number of decisions of the Respondent which relate to the terms on which the UK will leave the EU. The practical effect of* ***these policy decisions*** *runs counter to the statutory obligations imposed by Parliament under both the (*Withdrawal Act) *and the Human Rights Act ….*
>
> *The proposed Respondent is the Secretary of State for Brexit who is named as the appropriate representative of the Government on this issue. The Applicant will argue that the combination of policies the Government has adopted are unlawful and in breach of their statutory duties.*"

A latter passage in counsels' skeleton argument confirms that the target of this Applicant's challenge is the asserted adoption by the UK Government of "*a combination of policy decisions*" which, it is said, are "*in conflict with* [the] *aim and with the statutory duties that are inherently linked to* [the] *aim*" of Governmental commitment to the "*peace process*" in Northern Ireland. The asserted "*policy decisions*" are framed in the following terms:

(i) The UK "*…. will leave the EU on 31 October 2019 with or without a deal*", with the ensuing contention that this "*… will* ***inevitably*** *result in a hard border being imposed*" [my emphasis].

(i) The rejection of paragraph 49 of the Joint Report (*supra*), with the ensuing contention that the available evidence does not operate to "*… give the Applicant confidence that the proposed Respondent has a proposal which, if implemented, could avoid the* ***inevitable*** *creation of a hard border*" (my emphasis).

(ii) The Commencement No 4 Regulations which, it is contended, are "*a practical illustration of the unlawfulness of*" the "*combination of policy decisions*" asserted by this Applicant.

[13] Mr Waring, the third of the Applicants, brings his case against two proposed respondents, namely the Prime Minister and the Brexit Secretary "*… as individually, and collectively, representing Her Majesty's Government in relation to its approach to the proposed exit from the European Union of the United Kingdom*". The decisions impugned by Mr Waring are threefold:

(i) The asserted decision of the UK Government "*not to seek an extension of the date of exit under Article 50(3) TEU under any circumstances*".

(ii) The asserted decision of the UK Government "*to propose measures to the EU 27 which do not protect the Belfast Agreement … in all its parts*".

(iii) The Commencement No 4 Regulations.

[14] The foregoing formulation of the three "*decisions*" challenged by this Applicant is followed by a convenient précis of his case:

> "*… the Applicant seeks to challenge these decisions by reason of their incompatibility with the Northern Ireland Act 1998 and/or because they demonstrate that HMG has not had, or does not intend to have, due regard to the Joint Report … and/or as contrary to common law principle.*"

In the next ensuing paragraph of the pleading one finds the terminology "*the impugned decisions/policies*", followed by:

> "*The Applicant believes that statements made by or on behalf of HMG make it clear that its intention is that the UK will leave the EU on 31 October 2019 irrespective of whether there is a withdrawal agreement between the EU 27 and the UK which safeguards the Belfast/Good Friday Agreement in all its parts and notwithstanding HMG's legal obligations (under, primarily, the* [Withdrawal Act] *but also at common law).*"

This is followed by a discrete pleading which is common to all three Applicants' cases:

> "*The impugned decisions/policies have been adopted notwithstanding that the clear weight of evidence is that …. a 'no deal' Brexit would have deleterious effects upon, inter alia, cross-border co-operation on the island of Ireland.*"

The pleaded underpinning of this contention is "*Parliamentary reports and HMG's own assessments*".

[15] Mr Waring invites the court to make three declarations, namely that:

(i) HMG's "decision" not to seek an extension of the exit date under Article 50 (TEU) under any circumstances is unlawful.

(ii) HMG's "decision" to propose measures to the EU 27 which do not protect the Belfast Agreement is unlawful.

(iii) The Commencement No:4 Regulations are unlawful.

[16] In the skeleton argument on behalf of this Applicant his case is helpfully condensed in these terms:

> "*The focus of the Applicant's case is solely on the lawfulness of HMG's decision actively to pursue a 'no deal' exit that is inconsistent with the Belfast/Good Friday Agreement as one means of giving effect to the outcome of the referendum on EU Membership held on 23 June 2016. This illegality has several specific dimensions: the illegality of HMG's decision to propose measures to the EU 27 that are incompatible with the Northern Ireland Act 1998 and/or do not have due regard to the Joint Report …. which committed HMG to uphold the Belfast/Good Friday Agreement 'in all its parts'.*"

This is followed by:

> "*The Applicant makes two principal submissions:*
>
> *(i) That HMG's power to participate in negotiations with the EU is constrained by sections 10 and 20 of the* [Withdrawal Act]*, which have the effect of binding the UK Government to seek a withdrawal agreement which is compatible with the Northern Ireland Act 1998 and which safeguards the Belfast/Good Friday Agreement 'in all its parts'; and*
>
> *(ii) That where an extension of time under Article 50 TEU is required to ensure that HMG acts compatibly with the Northern Ireland Act 1998 and safeguards the Belfast/Good Friday Agreement 'in all its parts', HMG is required to request such an extension from the EU 27.*"

The Treaty on European Union

[17] Article 50 of this international treaty (the "TEU") provides:

"*(1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirement.*

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

(3) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph (2), unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

(4) For the purposes of paragraphs (2) and (3), the Member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it ….

(5) If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

Article 49 makes provision for any European State applying to become a member of the EU. This contemplates a formal agreement between the Applicant State and the Member States.

[18] Article 218(3) TFEU, to which reference is made in Article 50(2), provides in part:

"***Article 218***

(ex Article 300 TEC)

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries

or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

(i) association agreements;

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

(iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

> *11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."*

[19] In passing, nothing of note turns on Article 207 TFEU, which makes further provision for the process of negotiating and concluding agreements with third countries and international organisations. *Inter alia* the Commission is charged with conducting the negotiations, while the Council acts by a qualified majority.

The decision in Wightman

[20] In *Wightman and Others v Secretary of State for Exiting the European Union* [2019] 1 CMLR 29, a reference from the Scottish Court of Session (Inner House) for a preliminary ruling under Article 267 TFEU, the Court of Justice of the European Union ("CJEU"), in plenary constitution, made the following ruling:

> "*Article 50 TEU must be interpreted as meaning that, where a Member State has notified the European Council, in accordance with that article, of its intention to withdraw from the EU, that article allows that Member State – for as long as a withdrawal agreement concluded between that Member State and the EU has not entered into force or, if no such agreement has been concluded, for as long as the two year period laid down in Article 50(3) TEU, possibly extended in accordance with that paragraph, has not expired – to revoke that notification unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements. The purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end.*"
>
> (Paragraph R1, page 1025.)

[21] The following passages in the judgment of the CJEU have a certain resonance in relation to the peculiarly Northern Irish issues raised in the case of Mr Waring in particular:

> "*[61] As regards the context of Article 50 TEU reference must be made to the 13th recital in the preamble to the TEU,*

the first recital in the preamble to the TFEU and Article 1 TEU, which indicate that those treaties have as their purpose the creation of an ever closer union among the peoples of Europe, and to the second recital in the preamble to the TFEU, from which it follows that the European Union aims to eliminate the barriers which divide Europe.

[62] It is also appropriate … to underline the importance of the values of liberty and democracy, referred to in the second and fourth recitals of the preamble to the TEU, which are among the common values referred to in Article 2 of that Treaty and in the preamble to the Charter of Fundamental Rights of the European Union, and which thus form part of the very foundations of the European Union legal order (see, to that effect, judgment of 3 September 2008, Kadi and Al Barakaat International Foundation v Council and Commission, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 303 and 304) … at [303] and [304].

[63] As is apparent from …. Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union and to which Article 50 TEU, on the right of withdrawal, is the counterpart, the European Union is composed of States which have freely and voluntarily committed themselves to those values, and EU law is thus based on the fundamental premise that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, … at [35].

[64] It must also be noted that … since citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, to that effect, judgments of 20 September 2001, Grzelczyk, C-184/99, EU:C:2001:458, paragraph 31; of 19 October 2004, Zhu and Chen, C-200/02, EU:C:2004:639, paragraph 25; and of 2 March 2010, Rottmann, C-135/08, EU:C:2010:104, paragraph 43), any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, inter alia, their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States."

The Decision in Miller

[22] In *R (Miller and Another) v Secretary of State for Exiting the European Union* [2018] AC 61 the Supreme Court of the United Kingdom ("UKSC"), by a majority, held *inter alia* that the Prerogative powers conventionally exercised in the realm of making and unmaking international treaties were not applicable to the EU Treaties, with the result that Parliamentary approval, by legislation, was required to give effect to the UK Government's proposal that this Member State should withdraw from the EU. This dramatic alteration in the constitutional arrangements of the EU could not be effected by Ministerial resort to the Prerogative. I shall examine certain aspects of the reasoning underpinning this conclusion and other aspects of *Miller infra*.

European Union (Notification of Withdrawal) Act 2017

[23] By section 1 of this measure of primary legislation (the "*Notification Act*"):

> "*(1) The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.*"

This Act was made on 16 March 2017. The step authorised by section 1(1) was taken by the former Prime Minister in a letter dated 28 March 2017 to the President of the European Council.

The European Union (Withdrawal) Act 2018

[24] This measure of primary legislation (the "Withdrawal Act") is described in its long title as:

> "*An Act to repel the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU.*"

Section 20 contains the following noteworthy definitions:

(i) "*Devolved authority*" means *inter alia* a Northern Ireland Department.

(ii) "*Exit day*" means 29 March 2019 at 11.00pm (later amended to 31 October 2019: see [28] (i) *infra*).

(iii) "*Northern Ireland devolved authority*" means the First Minister and Deputy First Minister in Northern Ireland acting jointly, a Northern Ireland minister or a Northern Ireland department.

(iv) "*Withdrawal agreement*" means an agreement (whether or not ratified) between the United Kingdom and the EU under Article 50(2) of the

Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU.

[25] Section 9 of the Withdrawal Act makes provision for implementing the withdrawal agreement, providing in part, per subsection (1):

> "*A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the EU.*"

Pausing, this makes abundantly clear that any proposed withdrawal agreement shall not take effect in the absence of Parliamentary approval through primary legislation. Section 13 makes further and detailed provision for this.

[26] Sections 10 – 12 are grouped together in a discrete compartment of the statute bearing the title "*Devolution*". The subject matter of section 10 is "*Continuation of North-South Co-operation and the prevention of new border arrangements*". Section 10 provides:

> "*(1) In exercising any of the powers under this Act, a Minister of the Crown or devolved authority must –*
>
> *(a) act in a way that is compatible with the terms of the Northern Ireland Act 1998, and*
>
> *(b) have due regard to the joint report from the negotiators of the EU and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 of the Treaty on European Union.*
>
> *(2) Nothing in section 8, 9 or 23(1) or (6) of this Act authorises regulations which –*
>
> *(a) diminish any form of North-South cooperation provided for by the Belfast Agreement (as defined by section 98 of the Northern Ireland Act 1998), or*
>
> *(b) create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which feature physical infrastructure, including border posts, or checks and controls, that did not exist before exit day and are not in accordance with an agreement between the United Kingdom and the EU.*"

Section 11 gives effect to Schedule 2, which contains powers to make regulations involving devolved authorities corresponding to those conferred by sections 8 and 9.

[27] Section 13 of the Withdrawal Act is a provision which, singly and in an elaborate way, establishes the regime for "*Parliamentary approval of the outcome of negotiations with the EU*". It suffices to draw attention to subsections (1) – (5) at this juncture:

> "*(1) The withdrawal agreement may be ratified only if –*
>
> *(a) a Minister of the Crown has laid before each House of Parliament –*
>
> *(i) a statement that political agreement has been reached,*
>
> *(ii) a copy of the negotiated withdrawal agreement, and*
>
> *(iii) a copy of the framework for the future relationship,*
>
> *(b) the negotiated withdrawal agreement and the framework for the future relationship have been approved by a resolution of the House of Commons on a motion moved by a Minister of the Crown,*
>
> *(c) a motion for the House of Lords to take note of the negotiated withdrawal agreement and the framework for the future relationship has been tabled in the House of Lords by a Minister of the Crown and –*
>
> *(i) the House of Lords has debated the motion, or*
>
> *(ii) the House of Lords has not concluded a debate on the motion before the end of the period of five Lords sitting days beginning with the first Lords sitting day after the day on which the House of Commons passes the resolution mentioned in paragraph (b), and*
>
> *(d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.*
>
> *(2) So far as practicable, a Minister of the Crown must make arrangements for the motion mentioned in*

subsection (1)(b) to be debated and voted on by the House of Commons before the European Parliament decides whether it consents to the withdrawal agreement being concluded on behalf of the EU in accordance with Article 50(2) of the Treaty on European Union.

(3) Subsection (4) applies if the House of Commons decides not to pass the resolution mentioned in subsection (1)(b).

(4) A Minister of the Crown must, within the period of 21 days beginning with the day on which the House of Commons decides not to pass the resolution, make a statement setting out how Her Majesty's Government proposes to proceed in relation to negotiations for the United Kingdom's withdrawal from the EU under Article 50(2) of the Treaty on European Union.

(5) A statement under subsection (4) must be made in writing and be published in such manner as the Minister making it considers appropriate."

Legislative Activity In 2019

[28] Three successive measures of legislation, both primary and subordinate, were made prior to September this year:

(i) The European Union (Withdrawal) Act 2018 (Exit Day)(Amendment) Regulations 2019, made on 28 March 2019, which amended the definition of "*Exit Day*" in section 20 of the Withdrawal Act.

(ii) The European Union (Withdrawal) Act 2019, made on 08 April 2019, which made further provision for extending the period specified in Article 50(3) TEU.

(iii) The European Union (Withdrawal) Act 2018 (Commencement No 4) Regulations 2019 (described earlier in this judgment as "*the Commencement No 4 Regulations*") made on 16 August 2019, which brought section 1 of the Withdrawal Act into force on 17 August 2019. Section 1 is one of the provisions of the Withdrawal Act which had not previously been commenced by section 25 thereof.

The European Union (Withdrawal) (No 2) Act 2019

[29] The Bill culminating in this measure of primary legislation (described as the "Withdrawal No 2 Act") progressed through both Houses of Parliament in tandem with the advance of these proceedings and, on 09 September 2019, it became law. Its long title is "An Act to make further provision in connection with the period for negotiations for withdrawing from the European Union". It effects no alteration of

either the Parliamentary oversight and approval requirements or the special Northern Ireland provisions in the Withdrawal Act. It reiterates, in section 1, that if the Government formally declares that a withdrawal agreement has been concluded with the EU it must be approved by resolution of the House of Commons. Where no such agreement has been concluded, section 1(2) makes clear that the House of Commons could resolve to approve the Government's proposal to depart from the EU without a withdrawal agreement. In the event of neither of these House of Commons resolutions being made by 19 October 2019, the Prime Minister must formally request of the European Council an extension to 31 January 2020 of the period scheduled to end on 31 October 2019. Section 1(5) authorises the Prime Minister to withdraw or modify such request in the event of either of the specified House of Commons resolutions being made by 30 October 2019.

[30] Should an extension of the Article 50 (3) period materialise, section 2 clearly contemplates that there will be continuing negotiations between the UK Government and the EU 27, imposing a specific requirement that the relevant Minister –

> *"… must, by 30 November 2019, publish a report explaining what progress has been made in negotiations on the United Kingdom's relationship with the European Union."*

This will be followed by a motion which, in principle, could give rise to any of several outcomes in the House of Commons: approval, rejection or amendment. The second or third of these outcomes would stimulate a further obligation to publish a further updating report by 10 January 2020, per section 2(4). Further reports could follow, per section 2(5). The gist of section 3 is that the Prime Minister will be obliged to formally accept on behalf of the UK such extension, if any, beyond 31 October 2019 as the European Council may grant.

The Northern Ireland Act 1998

[31] The provisions of the Northern Ireland Act 1998 ("NIA 1998") invoked in the Applicants' challenges are threefold. First, Section 24:

> *"(1)A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act –*
>
> *(a)is incompatible with any of the Convention rights;*
>
> *(b)is incompatible with EU law;*
>
> *(c)discriminates against a person or class of person on the ground of religious belief or political opinion;*

(d)in the case of an act, aids or incites another person to discriminate against a person or class of person on that ground; or

(e)in the case of legislation, modifies an enactment in breach of section 7.

(2)Subsection (1)(c) and (d) does not apply in relation to any act which is unlawful by virtue of the Fair Employment and Treatment (Northern Ireland) Order 1998, or would be unlawful but for some exception made by virtue of Part VIII of that Order.

(3)A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation so far as the legislation modifies retained EU law and the modification is of a description specified in regulations made by a Minister of the Crown.

(4)But subsection (3) does not apply –

(a)so far as the modification would be within the legislative competence of the Assembly if it were included in an Act of the Assembly, or

(b)to the making of regulations under Schedule 2 or 4 to the European Union (Withdrawal) Act 2018.

(5)A Minister of the Crown must not lay for approval before each House of the Parliament a draft of a statutory instrument containing regulations under subsection (3) unless –

(a)the Assembly has made a consent decision in relation to the laying of the draft, or

(b)the 40 day period has ended without the Assembly having made such a decision.

(6)For the purposes of subsection (5) a consent decision is –

(a)a decision to agree a motion consenting to the laying of the draft,

(b)a decision not to agree a motion consenting to the laying of the draft, or

(c)a decision to agree a motion refusing to consent to the laying of the draft;

and a consent decision is made when the Assembly first makes a decision falling within any of paragraphs (a) to (c) (whether or not it subsequently makes another such decision).

(7)A Minister of the Crown who is proposing to lay a draft as mentioned in subsection (5) must –

(a)provide a copy of the draft to the relevant Northern Ireland department, and

(b)inform the Presiding Officer that a copy has been so provided.

(8)See also section 96A (duty to make explanatory statement about regulations under subsection (3) including a duty to explain any decision to lay a draft without the consent of the Assembly).

(9)No regulations may be made under subsection (3) after the end of the period of two years beginning with exit day.

(10)Subsection (9) does not affect the continuation in force of regulations made under subsection (3) at or before the end of the period mentioned in subsection (9).

(11)Any regulations under subsection (3) which are in force at the end of the period of five years beginning with the time at which they came into force are revoked in their application to the making, confirming or approving of subordinate legislation after the end of that period.

(12)Subsections (5) to (10) do not apply in relation to regulations which only relate to a revocation of a specification.

(13)Regulations under subsection (3) may include such supplementary, incidental, consequential, transitional, transitory or saving provision as the Minister of the Crown making them considers appropriate.

(14)The restriction in subsection (3) is in addition to any restriction in section 7 of the European Union (Withdrawal) Act 2018 or elsewhere on the power of a Minister or Northern Ireland department to make, confirm or approve any subordinate legislation so far as the legislation modifies retained EU law.

(15)In this section –

"the relevant Northern Ireland department" means such Northern Ireland department as the Minister of the Crown concerned considers appropriate;

"the 40 day period" means the period of 40 days beginning with the day on which a copy of the draft instrument is provided to the relevant Northern Ireland department,

and, in calculating that period, no account is to be taken of any time during which the Assembly is dissolved or during which it is in recess for more than four days."

Second, Section 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;

(b)between men and women generally;

(c)between persons with a disability and persons without; and

(d)between persons with dependants and persons without.

(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 authority (other than the Equality Commission, the board of governors of a grant-aided school, the Comptroller and Auditor General, a general health care provider or an independent provider of health and social care) listed in

Schedule 3 to the Public Services Ombudsman Act (Northern Ireland) 2016 (listed authorities);

(cc)... the Chief Constable of the Police Service of Northern Ireland and the Police Ombudsman for Northern Ireland;

(cd)the Director of Public Prosecutions for Northern Ireland;

(ce). . . . . .

(cf). . . . . .

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

(3A)An order under subsection (3)(a) or (d) may provide that the designated department, corporation, body or other person –

(a)is not subject to, or is only subject to, specified obligations under subsection (1) or (2), or

(b)is not subject to, or is only subject to, specified obligations under subsection (1) or (2) –

(i)when exercising a specified function, or

(ii)when exercising a specified function in specified circumstances or for specified purposes.

(3B)In subsection (3A) "specified" means specified in the order.
(4)Schedule 9 (which makes provision for the enforcement of the duties under this section) shall have effect.

(4A)The references in subsections (1) and (2) and Schedule 9 to the functions of the Director of Public Prosecutions for Northern Ireland do not include any of his functions relating to the prosecution of offences or any of the functions conferred on him by, or in relation to, Part 5 or 8 of the Proceeds of Crime Act 2002 (c. 29) (civil recovery of the proceeds etc. of unlawful conduct, civil recovery investigations and disclosure orders in relation to confiscation investigations) .

(5)In this section –

"disability" has the same meaning as in the Disability Discrimination Act 1995; and

> *"racial group" has the same meaning as in the Race Relations (Northern Ireland) Order 1997."*

[32] The Applicants' challenges also invoke the provisions in Part (V) of NIA 1998. This discrete compartment of the Act makes detailed provision for three of the bodies established by the Belfast Agreement, in particular the North-South Ministerial Council ("NSMC"), made on 10 April 1998. These provisions are illuminated by parts of the Belfast Agreement, in particular "Strand 2". Some brief extracts from the latter will suffice. First, per paragraph 1:

> "*Under a new British/Irish agreement dealing with the totality of relationships, and related legislation at Westminster and in the Orieachtas, a North South Ministerial Council to be established to bring together those with executive responsibilities in Northern Ireland and the Irish Government, to develop consultation, co-operation within the Island of Ireland – including through implementation on an all-island and cross-border basis – on matters of mutual interest within the competence of the Administrations, north and south.*"

By paragraphs 2 – 4, while the "*cross-border*" and "*all-island*" themes are prominent throughout Strand 2, the EU dimension also features, as appears from paragraph 17:

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

[33] The Annex to Strand 2 contemplated the possible creation of "*implementation bodies*" in a broad range of fields – agriculture, tourism and health amongst others. The implementation bodies which have been established are …… The Belfast Agreement incorporates *inter alia*, a free standing agreement between the governments of the UK and Ireland. This agreement contains the following recital of note:

> "*The British and Irish Governments …….*
>
> *wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union ……..*"

Article 2 of the Agreement provides that in the context of solemn commitment to support and implement the "multi-party agreement":

> *"In particular there shall be established in accordance with the provisions of the Multi-party Agreement immediately on the entry into force of this Agreement, the following institutions:*
>
> *(i) A North/South Ministerial Council;*
>
> *(ii) The implementation bodies …."*

[34] I return to Part V of NIA 1998. Sections 52A, 52B and 52C prescribe in some detail how the NSMC is to operate. There are extensive procedural arrangements and requirements, coupled with a series of associated Ministerial responsibilities. The linkage between these provisions and the Belfast Agreement is made clear by section 52C(5):

> *"In sections 52A and 52B and this section 'participate' shall be construed –*
>
> *(a) In relation to the North-South Ministerial Council, in accordance with paragraphs 5 and 6 of Strand 2 of the Belfast Agreement …."*

By Section 55 the Secretary of State for Northern Ireland is given wide powers to make provision for the implementation bodies through subordinate legislation.

[35] The text of Sections 52A, 52B and 52C is the following:

> *"(1) The First Minister and the deputy First Minister acting jointly shall, as far in advance of each meeting of the North-South Ministerial Council or the British-Irish Council as is reasonably practicable, give to the Executive Committee and to the Assembly the following information in relation to the meeting –*
>
> *(a) the date;*
>
> *(b) the agenda; and*
>
> *(c) (once determined under this section) the names of the Ministers or junior Ministers who are to attend the meeting.*
>
> *(2) Each Minister or junior Minister who has responsibility (whether or not with another Minister or junior Minister) in relation to any matter included in the agenda for a meeting of either Council ("appropriate Minister") shall be entitled –*

(a) to attend the meeting; and

(b) to participate (see section 52C) in the meeting so far as it relates to that matter.

(3) An appropriate Minister may nominate another Minister or junior Minister –

(a) to attend the meeting in place of the appropriate Minister; and

(b) to participate in the meeting so far as it relates to matters for which the appropriate Minister has responsibility,

but a person may not be nominated under this subsection without his consent.

(4) Each appropriate Minister shall notify the First Minister and the deputy First Minister, as soon as reasonably practicable and in any event no later than 10 days before the date of the meeting, that –

(a) he intends to attend the meeting;

(b) he does not intend to attend the meeting but has nominated another person under subsection (3) to attend in his place; or

(c) he does not intend to attend the meeting and he does not intend, or has not been able, to make such a nomination,

and a notification under paragraph (b) shall include the name of the person nominated.

(5) If the appropriate Minister gives a notification under subsection (4)(c) (or if the First Minister and the deputy First Minister receive no notification from him under subsection (4)), the First Minister and the deputy First Minister acting jointly shall nominate a Minister or junior Minister –

(a) to attend the meeting in place of the appropriate Minister; and

(b) to participate in the meeting so far as it relates to matters for which the appropriate Minister has responsibility.

(6) In relation to a matter for which the First Minister and the deputy First Minister are the appropriate Ministers –

(a) the notification to be made by each of them under subsection (4) shall be made to the other; and

(b) if either of them ("A") gives a notification under subsection (4)(c) (or if the other ("B") receives no notification from A under subsection (4)), B (acting alone) shall make the nomination under subsection (5) in relation to A.

(7) The First Minister and the deputy First Minister acting jointly shall make such nominations (or further nominations) of Ministers and junior Ministers (including where appropriate alternative nominations) as they consider necessary to ensure such cross-community participation in either Council as is required by the Belfast Agreement.

(8) Subsection (9) applies in relation to any matter included in the agenda for a meeting of either Council if –

(a) the First Minister and the deputy First Minister are not the appropriate Ministers in relation to the matter; but

(b) the matter is one that ought, by virtue of section 20(3) or (4), to be considered by the Executive Committee.

(9) The First Minister and the deputy First Minister acting jointly shall also be entitled –

(a) to attend the meeting; and

(b) to participate in the meeting so far as it relates to that matter.

(10) In this section "day" does not include a Saturday, a Sunday, Christmas Day, Good Friday and any day which is a bank holiday in Northern Ireland."

Section 52A: duty to attend Council meetings etc

(1) It shall be a Ministerial responsibility of –

(a) each appropriate Minister; or

(b) if a Minister or junior Minister is nominated under section 52A(3) or (5) to attend a meeting of the North-

South Ministerial Council or the British-Irish Council in place of an appropriate Minister, that Minister or junior Minister, to participate in the meeting so far as it relates to matters for which the appropriate Minister has responsibility.

(2) It shall be a Ministerial responsibility of a Minister or junior Minister nominated to attend a meeting of either Council under section 52A(7) to participate in the meeting so far as specified in the nomination.

(3) Each appropriate Minister shall give to –

(a) a person nominated under section 52A(3) or (5) to attend a meeting of either Council in his place; or

(b) a person nominated under section 52A(7) to participate in a meeting of either Council so far as specified in the nomination,

such information as may be necessary to enable the person's full participation in the meeting.

(4) But if the appropriate Minister does not give sufficient information under subsection (3) to enable the person's full participation in the meeting –

(a) the First Minister and the deputy First Minister acting jointly may request the necessary information; and

(b) if they do so, the appropriate Minister must give that information to the person nominated.

(5) A person nominated under section 52A(3) or (5) may enter into agreements or arrangements in respect of matters for which the appropriate Minister is (or the appropriate Ministers are) responsible.

(6) Without prejudice to the operation of section 24, a Minister or junior Minister attending a meeting of either Council by virtue of any provision of section 52A or this section shall act in accordance with any decisions of the Assembly or the Executive Committee (by virtue of section 20) which are relevant to his participation in the Council concerned.

(7) In this section "appropriate Minister", in relation to a meeting of the North-South Ministerial Council or the British-Irish Council, has the same meaning as in section 52A.

52CSections 52A and 52B: supplementary

(1) If any question arises under section 52A or 52B as to which Minister or junior Minister has responsibility for any matter, the First Minister and the deputy First Minister acting jointly shall determine that question.

(2) A Minister or junior Minister who participates in a meeting of either the North-South Ministerial Council or the British-Irish Council by virtue of any provision of section 52A or 52B shall, as soon as reasonably practicable after the meeting, make a report –

(a) to the Executive Committee; and

(b) to the Assembly.

(3) A report under subsection (2)(b) shall be made orally unless standing orders authorise it to be made in writing.

(4) The Northern Ireland contributions towards the expenses of the Councils shall be defrayed as expenses of the Office of the First Minister and deputy First Minister.

(5) In sections 52A and 52B and this section "participate" shall be construed –

(a) in relation to the North-South Ministerial Council, in accordance with paragraphs 5 and 6 of Strand Two of the Belfast Agreement;

(b) in relation to the British-Irish Council, in accordance with the first paragraph 5 of Strand Three of that Agreement."

The Joint Report

[36] This measure, upon which all Applicants placed considerable reliance, is described as "*Joint Report from the Negotiators of the European Union and the United Kingdom Government on progress during Phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*". The report is dated 08 December 2017 and identified as TF 50 (2017) 19. It was designed to be considered at a meeting of the European Council on 14/15 December 2017.

[37] Brief reference at this juncture to the "*guidelines provided by the European Council*", mentioned in Article 50(2) TEU is appropriate. Four separate sets of Guidelines were adopted by the European Council following receipt of the formal notification noted in [23] above. The first of these was adopted on 29 April 2017, at which stage the Article 50(3) period was scheduled to end on 29 March 2019. This instrument contains a short section entitled "Core Principles". The first of these is the preservation of the integrity of the Single Market. This is followed by the indivisibility of the four freedoms of the Single Market. The third is the preservation of the autonomy of the EU in decision making, together with the role of the CJEU. The "Core Principles" continue:

> "*Negotiations under Article 50 TEU will be conducted in transparency and as a single passage.* ***In accordance with the principle that nothing is agreed until everything is agreed, individual items cannot be settled separately****. The Union will approach the negotiations with unified positions, and will engage with the United Kingdom exclusively through the channels set out in these guidelines and in the negotiating directives. So as not to undercut the position of the Union there will be no separate negotiations between individual Member States and the United Kingdom on matters pertaining to the withdrawal of the United Kingdom from the Union.*"
>
> [my emphasis]

In the text that follows one finds *inter alia* the following policy statements:

> "*The main purpose of the negotiations will be to ensure the United Kingdom's orderly withdrawal so as to reduce uncertainty and, to the extent possible, minimise disruption caused by this abrupt change.*"

The passages which follow make clear the adoption of a structured and phased model for the purpose of the negotiations. The dominant role of the European Council also emerges with some force. This, of course, is a reflection not only of the provisions of Article 50 but also the machinery of the EU generally.

[38] The first of the Council's Article 50(2) Guidelines measures both informs the context of the Joint Report and illuminates its content. The introductory statement contains the following:

> "*Under the caveat that nothing is agreed until everything is agreed, the joint commitments set out in this joint report shall be reflected in the Withdrawal Agreement in full detail. This does not prejudge any adaptations that might be appropriate in case transitional arrangements were to be agreed in the second*

> *phase of the negotiations and it is without prejudice to discussions on the framework of the future relationship."*

From the report one deduces that the negotiations were being conducted according to a structured, orderly and phased agreed model. Furthermore, it would appear that the first phase was not at this stage completed.

[39] It is recorded in the report that the parties had reached "*agreement in principle*" on three topics, namely:

> "*(a) Protecting the rights of Union citizens in the UK and UK citizens in the Union;*
>
> *(b) The framework for addressing the unique circumstances in Northern Ireland; and*
>
> *(c) The financial settlement."*

The text continues:

> "*Progress was also made in achieving agreement on aspects of other separation issues. "*

In the next ensuing paragraph the phrase "*agreement in principle*" is repeated. So too the caveat that "*nothing is agreed until everything is agreed*". The final paragraph [No 96] of the report contains a statement of note:

> "*This report is put forward with a view to the meeting of the European Council (Article 50) of 14 and 15 December 2017.* ***It is also agreed by the UK on the condition of an overall agreement under Article 50 on the UK's withdrawal, taking into account the framework of the future relationship, including an agreement as early as possible in 2018 on transitional arrangements.***"
>
> [My emphasis.]

[40] The report addresses each of the "agreed in principle" topics sequentially. The discrete chapter entitled "Ireland and Northern Ireland" consists of 15 paragraphs. There is no substitute for considering this chapter in its entirety:

> *"42. Both Parties affirm that the achievements, benefits and commitments of the peace process will remain of paramount importance to peace, stability and reconciliation. They agree that the Good Friday or Belfast Agreement reached on 10 April 1998 by the United Kingdom Government, the Irish Government and the other participants in the multi-party*

negotiations (the '1998 Agreement') must be protected in all its parts, and that this extends to the practical application of the 1998 Agreement on the island of Ireland and to the totality of the relationships set out in the Agreement.

43. The United Kingdom's withdrawal from the European Union presents a significant and unique challenge in relation to the island of Ireland. The United Kingdom recalls its commitment to protecting the operation of the 1998 Agreement, including its subsequent implementation agreements and arrangements, and to the effective operation of each of the institutions and bodies established under them. The United Kingdom also recalls its commitment to the avoidance of a hard border, including any physical infrastructure or related checks and controls.

44. Both Parties recognise the need to respect the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent. The commitments set out in this joint report are and must remain fully consistent with these provisions. The United Kingdom continues to respect and support fully Northern Ireland's position as an integral part of the United Kingdom, consistent with the principle of consent.

45. The United Kingdom respects Ireland's ongoing membership of the European Union and all of the corresponding rights and obligations that entails, in particular Ireland's place in the Internal Market and the Customs Union. The United Kingdom also recalls its commitment to preserving the integrity of its internal market and Northern Ireland's place within it, as the United Kingdom leaves the European Union's Internal Market and Customs Union.

46. The commitments and principles outlined in this joint report will not pre-determine the outcome of wider discussions on the future relationship between the European Union and the United Kingdom and are, as necessary, specific to the unique circumstances on the island of Ireland. They are made and must be upheld in all circumstances, irrespective of the nature of any future agreement between the European Union and United Kingdom.

47. Cooperation between Ireland and Northern Ireland is a central part of the 1998 Agreement and is essential for achieving reconciliation and the normalisation of relationships on the island of Ireland. In this regard, both Parties recall the roles, functions and safeguards of the Northern Ireland

Executive, the Northern Ireland Assembly, and the North-South Ministerial Council (including its cross-community provisions) as set out in the 1998 Agreement. The two Parties have carried out a mapping exercise, which shows that North-South cooperation relies to a significant extent on a common European Union legal and policy framework. Therefore, the United Kingdom's departure from the European Union gives rise to substantial challenges to the maintenance and development of North-South cooperation.

48. The United Kingdom remains committed to protecting and supporting continued North-South and East-West cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks of cooperation, including the continued operation of the North-South implementation bodies.

49. The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.

50. In the absence of agreed solutions, as set out in the previous paragraph, the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market.

51. Both Parties will establish mechanisms to ensure the implementation and oversight of any specific arrangement to safeguard the integrity of the EU Internal Market and the Customs Union.

52. Both Parties acknowledge that the 1998 Agreement recognises the birth right of all the people of Northern Ireland to choose to be Irish or British or both and be accepted as such. The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.

53. The 1998 Agreement also includes important provisions on Rights, Safeguards and Equality of Opportunity for which EU law and practice has provided a supporting framework in Northern Ireland and across the island of Ireland. The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law. The United Kingdom commits to facilitating the related work of the institutions and bodies, established by the 1998 Agreement, in upholding human rights and equality standards.

54. Both Parties recognise that the United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (Common Travel Area), while fully respecting the rights of natural persons conferred by Union law. The United Kingdom confirms and accepts that the Common Travel Area and associated rights and privileges can continue to operate without affecting Ireland's obligations under Union law, in particular with respect to free movement for EU citizens.

55. Both Parties will honour their commitments to the PEACE and INTERREG funding programmes under the current multi-annual financial framework. Possibilities for future support will be examined favourably.

56. Given the specific nature of issues related to Ireland and Northern Ireland, and on the basis of the principles and commitments set out above, both Parties agree that in the next phase work will continue in a distinct strand of the negotiations on the detailed arrangements required to give them effect. Such work will also address issues arising from Ireland's unique geographic situation, including the transit of goods (to and from Ireland via the United Kingdom), in line

> *with the approach established by the European Council Guidelines of 29 April 2017."*

[41] It is convenient to recall at this juncture, in the briefest terms, the case made by the Applicants with regard to the Joint Report. They contend that the UK Government has acted and/or is acting without due regard to the report, in contravention of section 10(1)(b) of the Withdrawal Act and in a manner that is not compatible with NIA 1998, in contravention of section 10(1)(a) of the former. They further contend that the alleged offending conduct is frustrating the operation of certain provisions of primary legislation, namely the aforementioned section 10 and the NIA 1998 provisions rehearsed above. The scheme of the Withdrawal Act, it is argued, is that there must be a withdrawal agreement.

[42] For completeness, none of the Applicants relies on any of the provisions of the second, third and fourth of the Council Guidelines issued under Article 50(2) TEU (and these are not in the assembled evidence).

House of Lords Hansard

[43] The evidence includes an excerpt from Hansard relating to proceedings in the House of Lords on 02 May 2018 (some weeks before the Withdrawal Act was made). From this it emerges that section 10 has its origins in an amendment which was moved in that chamber on this occasion. Lord Patten, moving the proposed amendment, first expressed his understanding of the Government's supposed policy commitment to a "*frictionless*" North/South border on the Island of Ireland. He then explained the rationale of the proposed new clause in these terms:

> "*Why is there such a problem that we address in this new clause? There is a problem because, as the excellent Northern Ireland position paper makes clear, the current substantive position in Northern Ireland and the Republic – that is, the existence of a frictionless border – is not to be changed by Brexit. The Prime Minister, perhaps as well as or more than anyone, understands the problem. Two days before the referendum, she said, in effect, that you can be in a customs union and not have a border but outside a customs union you have to have a border. That situation is made much more complicated when you look at the provisions and rules of the World Trade Organisation.*"

The central theme of Lord Patten's address to the chamber was the supposed Government policy of a "*frictionless*" North/South border on the Island of Ireland.

Evidential Underpinning

[44] In the submissions of counsel for the Applicants the attention of the court was drawn to the following elements of the evidential matrix (in addition to the Joint Report noted above):

(i) In the statement of the recently elected leader of the Conservative Party, and Prime Minister, to the House of Commons on 25 July 2019 the Prime Minister *inter alia* pledged to –

> "*… fulfil the repeated promises of Parliament to the people by coming out of the European Union, and doing so on 31 October. I and all Ministers are committed to leaving on this date, whatever the circumstances ….*
>
> *The withdrawal agreement negotiated by my predecessor has been three times rejected by this House. Its terms are unacceptable to this Parliament and to this country.*"

Continuing, the Prime Minister adverted to the so-called "*Backstop*":

> "*No country that values its independence, and indeed its self-respect, could agree to a treaty that signs away our economic independence and self-government, as this backstop does. A time limit is not enough. If an agreement is to be reached, it must be clearly understood that the way to the deal goes by way of the abolition of the Backstop.*"

(ii) In order to understand the "Backstop" it is necessary to have resort to the "Protocol on Ireland/Northern Ireland" contained in the draft Article 50 Withdrawal Agreement rejected three times by the House of Commons. The relevant provision is Article 6, which bears the title "Single Customs Territory, Freedom of Goods":

> "*1. Until the future relationship becomes applicable, a single customs territory between the Union and the United Kingdom shall be established ('the single customs territory') accordingly, Northern Ireland is in the same customs territory as Great Britain. The single customs territory shall comprise:*
>
> *(a) The customs territory of the Union defined in Article 4 of Regulation (EU) No: 952/2013; and*
>
> *(b) The customs territory of the United Kingdom.*

> *The rules set out in Annex 2 to this Protocol shall apply in respect of all trade in goods between the territories referred to in the second sub-paragraph as well as, where so provided, between the single customs territory and third countries."*

(iii) There is a letter dated 19 August 2019 from the Prime Minister to His Excellency, Mr Donald Tusk, which begins with:

> "*I very much hope that we will be leaving with a deal. You have my personal commitment that this government will work with energy and determination to achieve an agreement. That is our highest priority.*"

The remainder of the letter relates to Northern Ireland and the Island of Ireland. It makes the case that the so-called 'backstop' "*… cannot form part of an agreed Withdrawal Agreement*". It seeks to justify this on the basis of the UK Government's commitments to peace in Northern Ireland and its obligations under the Belfast Agreement which, it is emphasised, will continue irrespective of whether there is a withdrawal agreement. The Government's commitment to the Common Travel Area is also highlighted. Three arguments are developed: first, the proposed "back stop" is "*anti-democratic and inconsistent with the sovereignty of the UK …*"; second, it is "*… inconsistent with the UK's desired final destination for a sustainable long-term relationship with the EU*"; and third "*… it has become increasingly clear that the back stop risks weakening the delicate balance embodied in the Belfast (Good Friday) Agreement*". This latter argument continues:

> "*While I appreciate the laudable intentions with which the back stop was designed, by removing control of such large areas of the commercial and economic life of Northern Ireland to an external body over which the people of Northern Ireland have no democratic control, this balance risks being undermined. The Belfast (Good Friday) Agreement neither depends upon nor requires a particular customs or regulatory regime. The broader commitments in the Agreement, including to parity of esteem, partnership, democracy and to peaceful means of resolving differences, can best be met if we explore solutions other than the back stop*".

(iv) In the following passage in the Government white paper "The Process for Withdrawing from the European Union", published in February 2016, it was stated:

> "***Northern Ireland*** *would be confronted with difficult issues about the relationship with Ireland. Outside the EU's Custom's Union, it would be necessary to impose customs checks on the movement of goods across the border. Questions would also need to be answered about the Common Travel Area which covers the movement of people. This could have an impact on cross-border co-operation and trade. The withdrawal of structural funds, which have helped address economic challenges, would also have an impact.*"

(v) On 13 December 2016, in the forum of the House of Commons Northern Ireland Affairs Committee, the Chief Constable of the Police Service of Northern Ireland ("PSNI") expressed the view that in the event of static check points being erected in the vicinity of the North/South border, these could become targets for so-called "dissident republicans". The Chief Constable also adverted to the prospect of constructing "*additional security infrastructure*". In the same forum, a PSNI Assistant Chief Constable expressed confidence that "*… technical controls at borders, which can be very effective and robust*" could be developed. He illustrated this by reference to the "*Broadly seamless transition*" of people from Gibraltar into the territory of Spain. The Chief Constable expressed his satisfaction that the UK negotiators were mindful of the Island of Ireland "*security considerations*". In further replies the Chief Constable reiterated that his personal concern related to the possible increased "*threat and risk*" flowing from "*a lot of hard infrastructure around the border*".

(vi) In November 2018 the Government published CM 9742, "*EU Exit, Long Term Economic Analysis*". This contains *inter alia* a section relating to a "no deal" scenario, containing the following passage:

> "*This is not representative of possible government policy, as it would not meet UK objectives including avoiding a hard border between Northern Ireland and Ireland.*"
>
> (The word "*possible*" is of note.)

(vii) On 21 June 2019 the European Commission transmitted a further report – TF 50 (2019) 63 – to the "EU 27". Its subject matter is "Negotiations on Ireland/Northern Ireland, mapping of North – South co-operation". The report is "*… based on a series of detailed discussions between the UK and the EU, supported by Ireland*". The report reiterates that North/South co-operation is a "*central part*" of the Belfast Agreement, highlighting the six formal areas of co-operation and the six related "implementation bodies". It contains the following passage:

> *"…. It was consistently recognised that virtually all areas of North – South co-operation are predicated on the avoidance of a hard border, including related customs or regulatory checks and control. Similarly, it was acknowledged that the free movement of people underpins many areas of North – South co-operation as well as access to services on both sides of the border. The continuation of the Common Travel Area between Ireland and the UK is therefore vital in this regard."*

(viii) There is a Sunday Times Report of 18 August 2019 relating to "*The Leaked Operation Yellow Hammer document*". The latter contains the following section devoted to Northern Ireland:

> *"On Day 1 of No Deal, Her Majesty's Government will activate the 'no new checks with limited exceptions' model announced on March 13, establishing a legislative framework and essential operations and system on the ground, to avoid an immediate risk of a return to a hard border on the UK side. The model is likely to prove unsustainable because of economic, legal and biosecurity risks. With the UK becoming a 'third [non-EU] country', the automatic application of EU tariffs and regulatory requirements for goods entering Ireland will severely disrupt trade. The expectation is that some businesses will stop trading or relocate to avoid either paying tariffs that will make them uncompetitive or trading illegally; others will continue to trade but will experience higher costs that may be passed onto consumers. The agri-food sector will be hardest hit, given its reliance on complicated cross-border supply chains and the high tariff and non-tariff barriers to trade. Disruption to key sectors and job losses are likely to result in protests and direct action with road blockages. Price and other differentials are likely to lead to the growth of the illegitimate economy. This will be particularly severe in border communities where criminal and dissident groups already operate with greater freedom."*

This section ends with the following:

> *"However, there will probably be marked price rises for electricity consumers (business and domestic), with associated wider economic and political effects. Some*

participants could exit the market, exacerbating economic and political effects."

(ix) There is a newspaper report documenting the Prime Minister's statement in a speech made on 24 July 2019 that he would "deliver" Brexit by 31 October 2019, with or without a deal, "*no ifs, no buts*".

(x) According to a report in The Guardian on 03 September 2019, EU diplomats are claiming that the UK Government has not proposed any concrete alternative to the "backstop", while the EU negotiators maintain an open mind on this issue. Political splits in the Government are noted. A former Chancellor has claimed that the UK Government has no negotiating team at present. The riposte from the UK Government (via a spokesman) is a claim that there are "*conversations with the EU all the time*", bolstered by certain public remarks of the French and German leaders and President Tusk.

(xi) One of the Prime Minister's most recent public statements on this issue was that he would rather "*be dead in a ditch*" than request the EU 27 for an extension beyond 31 October 2019.

(xii) Other media evidence of very recent vintage confirms the UK Government's recently adopted policy of espousing a swift general election.

(xiii) There are other recent media reports claiming that such negotiations with the EU 27 as <u>are</u> continuing are little more than a "sham". The same reports document the government's robust rejection of these claims.

(xiv) Finally, the evidence presented to the court, being nothing if not current, includes still further media reports, extracted from various websites, spanning the period 03-08 September 2019. The particular feature of these materials is that they relate to an eclectic mix of statements of government ministers and information emanating from unspecified and unidentified "sources" relating to possible future governmental conduct concerning *inter alia* the No 2 Withdrawal Act. These are the materials upon which the most recent reconfiguration of the Applicants' pleadings are founded.

[45] While much of the voluminous documentary evidence assembled was not opened to the court in counsels' submissions (given unavoidable time constraints), I have perused this to be the best of my ability in the limited time available. I have considered in particular the House of Commons "Briefing Paper" number 7960, dated 13 August 2019, which is largely a chronology of events during the past seven years approximately. I have also considered the Government's "Northern Ireland

and Ireland Position Paper". Other aspects of the assembled evidence partake of the nature and characteristics of what I have tabulated above. The increasingly familiar twofold phenomena of (a) the assembly of large quantities of printed material emanating from multiple internet sources and (b) the non-appearance of most of this in the written and oral arguments of counsel are not conducive to the furtherance of the overriding objective or the facilitation of judicial adjudication, particularly in high speed and legally complex proceedings.

[46] The affidavits sworn by applicants (which take the form of witness statements in the jurisdiction of England and Wales) are always potentially a source of important evidence in judicial review proceedings. I have considered all of the affidavits sworn in these three conjoined cases. The affidavits of Mr McCord are confined to exhibiting large quantities of documentary materials (the most important noted above) and contain his expression of subjective opinion relating to the Prime Minister's public statement about the purpose of the prorogation measure. The other affidavits in Mr McCord's case have been sworn by his solicitor. The first of these contains averments directed to Mr McCord's standing to bring these proceedings and purport to depose to other subjective beliefs and opinions of his client. The second does nothing beyond exhibiting various documents, mainly sourced from the internet. There is a third solicitor's affidavit to like effect exhibiting almost 800 pages of documentary materials. Only two of these featured in counsels' submissions, namely the joint report of 08 December 2017 and the Prime Minister's letter of 19 August 2019.

[47] As regards the Applicant JR 83, there are five solicitor's affidavits containing quotations from various sources and exhibiting some 900 pages of documents. There is also one affidavit sworn by this Applicant which, in summary, contains averments (a) requesting the protection of anonymity, (b) establishing her standing to bring these proceedings, (c) deposing to certain aspects of the Brexit history and (d) expressing certain subjective opinions and beliefs.

[48] In the third case, that of Mr Waring, there is a single affidavit, sworn by the Applicant. His averments conveniently expose the thrust of all three legal challenges:

> "*I understand from a range of public pronouncements that have been made by members of the UK Government that it is fully committed to leaving the European Union on 31 October 2019 come what may; and that it will not seek any extension to that date. I also understand from those pronouncements that the UK Government countenances leaving even without any withdrawal agreement with the European Union and, indeed, that it is actively preparing for such a 'no deal' Brexit. For reasons summarised below and to be expanded upon in legal submissions on my behalf, I believe that the UK Government is acting unlawfully in doing so, not least because of commitments it has previously given about the need to protect*

> *the Belfast Agreement … I firmly believe that a 'no deal' Brexit would have very serious implications for that Agreement and its implementation."*

Some of the exhibits to Mr Waring's affidavit duplicate those of the other Applicants. Others, in common with the other Applicants, consist of sundry website media materials and government press releases. Mr Waring's evidence has also brought to the attention of the court certain commentaries and kindred materials relating to post – withdrawal possibilities which were not opened to the court.

Some Governing Principles

[49] These are judicial review proceedings brought in the High Court. It is axiomatic that the jurisdiction of this court is one of supervisory superintendence. This is to be contrasted with a court which exercises an appellate jurisdiction. Furthermore, this court has none of the powers or functions of a public enquiry and its proceedings lack the trappings of a forum of that kind. This court, fundamentally, holds public authorities accountable to the rule of law by conducting an audit of legality in accordance with well established principles and standards.

[50] Second, the Applicants bear a burden of proof. This was highlighted recently in *JG v Upper Tribunal, Immigration and Asylum Chamber* [2019] NICA 27 at [34]:

> "*While judicial review proceedings differ sharply from their private law counterpart, there is nonetheless a burden of proof in play. The applicant must establish his/her case to the civil standard of the balance of probabilities: see for example R v Inland Revenue Commissioners, ex parte Rossminster [1980] AC 592 at 1026H per Lord Scarrman.*"

Given that certain aspects of the Applicants' challenges rest on the assertion that the proposed respondents have failed to have due regard to, in particular, the Joint Report reference in this context to *Re SOS Application* [2003] NIJB 252 is apposite. There, disposing of the suggestion that a planning authority had failed to have regard to specified matters, Carswell LCJ stated at [19]:

> "*It is for an applicant for leave to show in some fashion that the deciding body did not have regard to such changes in material considerations before issuing its decision. It cannot be said that the burden is imposed on the decider of proving that he did so. There must be some evidence or a sufficient inference that he failed to do so before a case has been made out for leave to apply for judicial review.*"

[51] I have devoted some attention to the subject of evidence in earlier paragraphs as alertness to the materials on which the Applicants seek to make good their respective cases is essential. The burden of proof rests on them and the standard of

proof is that of the balance of probabilities, as explained particularly in *Re H and Others* [1996] AC 563 and *Re CD* [2008] UKHL 33 at [22] – [28], per Lord Carswell. In this context it is also appropriate to highlight that the evidence in this case has been provided through the conventional procedural medium of sworn affidavits. There has been no examination in chief or cross examination of any deponent. Furthermore, there are no affidavits at all on behalf of the proposed Respondents.

[52] The next consideration which I would highlight concerns the function of this supervisory court in a context bereft of both factual and legal finality. This was expressed by Lloyd Jones LJ in *R (Yalland) v Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin):

> *"[23] As a general rule, the courts are concerned in judicial review with adjudicating on issues of law that have already arisen for decision and where the facts are established. The courts will not generally consider cases which are brought prematurely because, at the time the claim is made, the relevant legal or factual events to which the claim relates have not yet occurred.*
>
> *[24] The courts may have jurisdiction to grant what is sometimes referred to as advisory declarations. That is declarations on points of law of general importance where there are important reasons in the public interest for doing so. Even here, the courts proceed with caution.*
>
> *[25] It will rarely be appropriate to consider such issues when they may depend in part on factual matters or future events since until those factual matters are established or the events occur, the courts will not be in a position to know with sufficient certainty what issues do arise in a particular case. Similarly, when matters may depend upon or be affected by future legislation, it would generally not be appropriate to make rulings on questions of law until the precise terms of any legislation are known.*
>
> *[26] In the present case, both sets of claims as originally framed sought rulings in relation to an alleged decision which, on analysis, has not yet finally been reached. This has now been accepted by counsel for the Applicants at the hearing this morning.*
>
> *[27] Furthermore, any legal ruling may well be influenced by future decisions by the United Kingdom Government, the terms of future legislation enacted by the United Kingdom Parliament and possibly the outcome of negotiation at the*

> *international level between the United Kingdom and the European Union and the States party to the EEA Agreement."*

Coincidentally, these statements were made in the context of dismissing a judicial review challenge in a kindred context, being that of the possible effects of withdrawal on the EEA Agreement.

[53] The submissions on behalf of the proposed Respondents also drew attention to a recent pronouncement of this court, in *Re Kelly's Application* [2018] NIQB 8, at [9]:

> "*In my judgement the fundamental flaw in this challenge is that it is brought in a legal and factual vacuum. It has no legal framework since it is not concerned with an actual decision of the Secretary of State, a proposed decision of the Secretary of State, an explicit refusal by the Secretary of State to exercise any of the powers, duties, functions or discretions conferred by [the 1998 Act], a failure by the Secretary of State to do so or, finally, a failure to consider whether to do so. Consequential upon this analysis, the Applicant's challenge has no factual framework either. It is entirely devoid of context. Absent a concrete context, I consider that there is nothing to which the relevant common law principles fall to be applied. These principles are entirely dormant at the moment. They have no role in the setting of the Applicant's unavoidably vague and speculative case that a factual and legal context might conceivably arise in some unspecified circumstances on some unpredicted future date. In the event of such a context materialising, the application of the relevant principles will fall to be considered against a concrete framework, legal and factual and a series of legal effects and consequences will ensue. These will include the possibility of recourse to the court for supervisory relief.*"

[54] Fundamentally, it is the constitutional function of this court to conduct an audit of legality in holding public authorities accountable to the rule of law. This exercise is almost invariably carried out in a context of agreed and/or undisputed and/or indisputable facts. Furthermore, the court is ordinarily invited to review a decision, act or other measure of a public authority having legal effects and consequences. Thus, the court normally operates in legal and factual contexts which are concrete and finished.

Article 50 TEU Analysed

[55] I consider Article 50 TEU to be the main cornerstone of the legal framework for the adjudication of these challenges. It is neither trite nor pedantic to recall at the outset that Article 50 is a measure of supreme EU law. This status of supremacy

applies fully to the Applicants' conjoined challenges and the resolution thereof by the court. Article 50 is also a measure of domestic, or municipal, UK law by virtue of Section 2(1) of the European Communities Act 1972.

[56] Those aspects of Article 50 which were the subject of full argument in the present cases featured at most tangentially in *Miller*, as [25] – [26] and [153] – [154] of that decision confirm. Article 50 received rather fuller consideration in the decision of the CJEU in *Wightman*: see [20] *ante*.

[57] Certain aspects of Article 50 did not fall to be construed in either *Miller* or *Wightman*. Bearing in mind that the exercise is one of construing a measure of EU law, I consider that those aspects of Article 50 not addressed in either *Miller* or *Wightman* yield the following construction:

(i) First, there is no concept, meaning or definition of "*negotiate*" supporting the view that the clause beginning "… the Union shall negotiate …" denotes a duty and exercise unilateral in nature. It takes two to tango. The concept of negotiation must surely be, depending on its context, something bilateral or multilateral in nature. This discrete element of Article 50(2) would be emptied of meaning and rendered nugatory if it is not to be construed thus.

(ii) There is no legal context known to this court which dictates that negotiations must culminate in a legally binding agreement between the negotiating parties. There is nothing in the text of Article 50 which displaces this proposition. Nor is there any identifiable basis or rationale for implying any different or contrary construction.

(iii) Article 50(2) clearly establishes an imperative, namely a negotiated and concluded withdrawal agreement, without purporting to mandate that this occur.

(iv) Article 50(3) expressly contemplates the possibility that the negotiations required by Article 50(2) will not culminate in a withdrawal agreement.

(v) The plain aim of the two year period specified in Article 50(3) is the promotion of stability and certainty in the EU.

(vi) The provision made in Article 50(3) for consensual extension of the basic two year period is plainly designed to further the overarching imperative of a negotiated and concluded withdrawal agreement.

The Section 10 Challenge

[58] The suggested breach of section 10(1)(a) and (b) of the Withdrawal Act emerged in oral argument as the most prominent feature of the Applicants' conjoined challenges. Their cases are not directed against any "*devolved authority*".

Rather their target in this context is "*a Minister of the Crown*" and it was confirmed at the hearing that their specific focus is the Prime Minister. Thus, the first question for the court becomes: has the Prime Minister "*exercised any of the powers under this Act*"?

[59] The most visible "*powers under this Act*" are those which authorise Ministers of the Crown to make subordinate legislation by the mechanism of regulations: see for example section 8(1), section 9(1), section 11 in conjunction with Schedule 2 and Schedule 7. No other "*powers under this Act*" were identified in counsels' submissions. Mr Scoffield QC, who led most of the argument on this issue, agreed that the Prime Minister has not been exercising any express power conferred by the Withdrawal Act. Rather both he and Mr Lavery QC contended that an implied power is in play. They formulated this as the power of the Prime Minister to conduct negotiations with the EU 27 concerning a possible Article 50(2) withdrawal agreement.

[60] The starting point in any analysis of what has shaped and driven the Withdrawal Act is Article 50 TEU. In the overall matrix the word "*negotiate*" has its origins in Article 50(2) and the related measures considered above. This provides that following receipt of the requisite notification from the Member State concerned the Union "*… shall negotiate and conclude an agreement with that State ….*".

[61] To all of the foregoing one adds the fact, clearly established by the evidence, that the UK Government was negotiating with EU council representatives long before the Withdrawal Act entered the fray: see in particular (but not exclusively) the Joint Report of December 2017. Furthermore, none of the parties makes the case that either the fact or the content of these negotiations, which clearly continued thereafter, was one of the imperatives giving rise to the Withdrawal Act. Thus, the first possible analysis is that Article 50(2) provided the UK Government with clear authority to engage in withdrawal negotiations with the EU 27. It prescribes both the duty and the corresponding power to negotiate (see [50] above). If correct, it follows that there was no need for the Withdrawal Act to confer a power to this effect. Furthermore, this Act was made in the midst of a protracted and uncompleted process of negotiations.

[62] The alternative analysis is that in its interaction with the EU 27 since the statutory notification of 29 March 2017 the UK government has been exercising prerogative powers. In *Miller* the judgment of the majority contains the following, at [54]-[55]:

> *"The most significant area in which ministers exercise the Royal Prerogative is the conduct of the United Kingdom's foreign affairs. This includes diplomatic relations, the deployment of armed forces abroad, and, particularly in point for present purposes, the making of treaties. There is little case law on the power to terminate or withdraw from treaties, but, as a matter of both logic and practical necessity, it must be part of the Treaty-making prerogative. As Lord Templeman put it in*

> *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, 476, "The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. …*
>
> *Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts – see Civil Service Unions case cited above, at pp 397–398. Lord Coleridge CJ said that the Queen acts "throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority" – Rustomjee v The Queen (1876) 2 QBD 69, 74. This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state. As Lord Kingsdown expressed it in Secretary of State in Council of India v Kamachee Boye Sahaba (1859) 13 Moo PC 22, 75, treaties are "governed by other laws than those which municipal courts administer". The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law."*

These passages give expression to what may be described as an entrenched principle of United Kingdom constitutional law. While *Miller* examined the limits of this principle, it did not modify it in any way. On balance, given the importance and longevity of this surviving Prerogative power and its uncompromising reaffirmation by the Supreme Court in *Miller*, I favour the second of the two analyses postulated, subject to examining the third alternative urged on behalf of the Applicants.

[63] The Applicants contest each of the foregoing alternative analyses. They invite the court to hold that Section 10(1) of the Withdrawal Act has, in the particular context of Article 50 TEU negotiations and related activities, extinguished the prerogative power otherwise operative in the conduct of foreign affairs and the making or unmaking of international treaties. The principle which they invoke in support of this contention is not controversial. It is that any prerogative power may be modified or extinguished by primary legislation (see [88] *infra*]. It is at this point of the analysis that the Applicants' contention begins to wobble.

[64] First, at the time when the Withdrawal Act was made, the UK Government had been engaged in negotiations with the EU 27 for well over a year. There was no concern in any quarter – judicial, political or otherwise – regarding the government's

legal competence to engage in this exercise. Second, the background to the Withdrawal Act included the decision in *Miller* which had resoundly restated the contours of the relevant prerogative power. Third, as a matter of evidence, no rationale for modifying or extinguishing this prerogative power was identified. Fourth, if Section 10(1) does have the effect of supplanting and extinguishing the prerogative power in question it does so in fulfilment of no ascertainable purpose. Finally, if the legislature had truly intended to extinguish this prerogative power, in the narrow and specific context of Article 50 (2) TEU negotiations, enshrining it instead in Section 10(1) it could have said so in simple language and, having regard to the legislative context and the broader legal context, one would have expected it to do so.

[65] The Applicants' contention, in substance, is that the legislature omitted to express the aforementioned intention but that such intention can be gleaned by implication from the terms of Section 10(1) (in particular), Section 13 and Section 20 of the Withdrawal Act considered together. I shall explain presently my reasons for considering that, as a matter of statutory construction, Sections 10 and 13 do not apply to the current, uncompleted process of negotiations involving the UK Government and the EU 27. If the construction of these provisions which I espouse is incorrect, I consider that this does not advance the Applicants' contention for the reasons given. I would add that I am unable to ascertain any basis upon which the definition of "withdrawal agreement" in Section 20(1) gives any traction to the Applicants' arguments.

[66] My second reason for rejecting the Applicants' Section 10 contention is that one of the substantive provisions of the Withdrawal Act on which they rely, section 13, is clearly designed to be operative in the future and is concerned with Parliamentary, rather than executive, powers. Section 13 is one of a suite of Withdrawal Act provisions driven by one of the imperatives of the Withdrawal Act namely an orderly and structured departure by the UK from the EU.

[67] The prospective nature and effect of section 13 as a whole emerges unmistakeably from the language used. Section 13 (1)-(3) are expressly directed to the scenario where a draft withdrawal agreement is presented to Parliament for approval: "*Parliamentary approval of the outcome of negotiations with the EU.*" The further scenarios specified in the remaining provisions are the product of a carefully devised construct, all of them plainly future in nature. I consider all of these provisions to be remote from the Applicants' contention, which is firmly directed to the present (the continuing negotiations) and the immediate past (the March 2019 and August 2019 measures of subordinate legislation noted in [28] *ante*). The third of the Withdrawal Act provisions which Mr Scoffield QC prayed in aid is section 20 and two of the definitions therein enshrined. "*Exit day*", as defined, ranks as one of the most important phrases in the Act. "*Withdrawal Agreement*" means precisely that, namely a concluded agreement with all the certainty and finality thereby entailed. Each speaks to exclusively future events, the second whereof as a matter of law may

not materialise. These definitions, in my view, confound rather than fortify the Applicants' Section 10 contention.

[68] The analysis of section 10 of the Withdrawal Act may be developed further. The effect of Article 50 TEU is that as a matter of supreme EU law the UK has not yet withdrawn from the EU. Rather the UK finds itself still embroiled in a process governed by Article 50 which will culminate in one of the following possible outcomes:

(a) a draft Article 50 agreement which the UK and EU 27 are prepared to execute and which secures the approval of Parliament under Section 13 of the Withdrawal Act; or

(b) a draft Article 50 agreement which Parliament rejects; or

(c) neither of (a) or (b) and no consensual UK/EU extension under Article 50(3) TEU; or

(d) neither of (a) or (b) and a consensual UK/EU extension under Article 50(3).

The effect of Section 13(1) and (2) of the Withdrawal Act is that where the executive is proposing to execute a withdrawal agreement with the EU 27 it can proceed only if the proposed agreement has been approved by a resolution of the House of Commons.

[69] Section 13(3)-(6) establishes a discrete regime which gives Parliament a specific role in the event of deciding not to pass an approval resolution. Significantly, in this scenario Parliament's role is confined to being formally informed by a Minister of the Crown of how the Executive proposes to proceed with further Article 50(2) negotiations and resolving pursuant to a motion that it has "*considered the matter*" Parliament is given no more extensive role. To the same effect are the discrete regimes established in relation to two further possible future scenarios by Section 13(7)-(9) and Section 13(10)-(12). I consider it clear from all of these provisions that it is the legal and constitutional responsibility of the executive to conduct all Article 50(2) negotiations.

[70] Overall, the scheme of Section 13 has two main elements. First, it empowers Parliament to approve or reject a draft Article 50 withdrawal agreement presented to it by the executive. Second, it confers on Parliament a role of demonstrably less intrusive and potent dimensions in the event of any or all of three specifically formulated future scenarios, all of them having in common no Article 50(2) TEU agreement approved by Parliament, materialising. I consider that, correctly analysed and construed, Section 13 as a whole and considered in its full statutory context makes abundantly clear that Parliament is to have no role in the Article 50(2) negotiations. Rather such negotiations lie within the exclusive preserve of the executive.

[71] Parliamentary scrutiny of the executive, now sharpened and fortified by the No:2 Withdrawal Act, will, therefore, begin on a given future date. Until then the executive is to continue its interaction with the EU 27 under Article 50(2) TEU without any Parliamentary oversight, direction or approval. It is elementary, but of no little importance, that the model chosen to fulfil one of the imperatives underpinning the Withdrawal Act namely the assertion of a crucial Parliamentary role in the withdrawal process was devised by Parliament itself. It is highly unlikely that Parliament would, simultaneously, create a pre-withdrawal Ministerial powers régime with any potential, however slim, to dilute or undermine the vital Parliamentary role. This is another, freestanding, riposte to the Applicants' Section 10 contention.

[72] Parliament, of course, is to be distinguished in this context from the third arm of the United Kingdom's constitutional machinery, namely the judiciary. The supervisory jurisdiction of the High Court can, in principle, be invoked in a wide spectrum of situations. Turning to the present context, fundamentally this is not a case of some arguable completed public law misdemeanour on the part of the executive. Rather, properly analysed and exposed, the Applicants' complaint relates to the manner in which the UK Government is conducting itself at this stage in its interaction with the EU 27 under the umbrella of Article 50 TEU. This has prompted them to have recourse to this court of supervisory superintendence. The Applicants, in effect, invite this court to supervise the negotiations by reviewing all of the evidence assembled and providing an appropriate remedy or remedies. Viewed through the lens of statutory construction, I find it impossible to divine a legislative intention underpinning Section 10, considered in conjunction with all the other provisions of the statute, that recourse could be had to this court at this stage for this purpose. Alternatively phrased, the judicial intervention of the kind pursued at this stage seems to me inconsistent with the scheme of the Withdrawal Act as a whole.

[73] Further support for the foregoing assessments is found in a closer examination of the twin elements of Section 10(1) of the Withdrawal Act. Section 10(1)(a) simply emphasises the overarching authority of NIA 1998: such regulations as may permissibly be made under the Withdrawal Act must not conflict with this measure of primary legislation of constitutional stature. Pausing briefly, it might be observed that Section 10(1)(a) is an "*abundance of caution*" provision as it simply restates a fundamental principle. It is axiomatic that subordinate legislation cannot permissibly diminish, dilute or frustrate primary legislation.

[74] Section 10(1)(b) is, however, quite different. It clearly has in mind those parts of the Joint Report considered in [36]-[41] above. If, in a future scenario, there is a duly executed UK/EU Withdrawal Agreement previously approved by Parliament as required by Section 13 which incorporates the relevant parts of the Joint Report Section 10(1)(b) will probably be redundant. It will have no evident purpose. A second possible scenario is that of a concluded and approved Withdrawal Agreement which does not incorporate and give effect to the relevant parts of the

Joint Report. In that scenario Section 10(1)(b) would apply only to the extent that having due regard to the Joint Report would be compatible with the concluded Withdrawal Agreement. This analysis tends to suggest that what is contemplated by Section 10(1)(b) is a no-agreement scenario. In such scenario it would be permissible to confer on the Joint Report the status specified in Section 10(1)(b) namely something to which "*due regard*" (as this phrase has been interpreted and explained in the decided cases) must be given in situations where any of the regulation making powers of the Withdrawal Act can permissibly be exercised.

[75] The exercise conducted in [68]-[74] above reinforces the view that the crucial opening clause in Section 10(1) has no application to the present negotiating conduct and related activities of the Prime Minister or, for that matter, any other Minister of the Crown.

[76] If, contrary to all of the foregoing, the correct analysis is that the exercise of negotiating an Article 50(2) TEU Withdrawal Agreement with the EU 27 entails exercising one of "*the powers under this Act*", I consider that the Applicants' Section 10 challenge must fail in any event. This involves examining the nature, quality and cogency of much of the assembled evidence in the context of what I had said about judicial review generally in [40]-[45] above. All of the Applicants, without reservation, rely on the Prime Minister's letter, statement to Parliament and other internet media materials digested in [44] above. These are supplemented by the Applicants' affidavits. As already observed the affidavits are characterised by assertion and the expression of subjective belief and opinion.

[77] Turning to the other supporting evidence, the first observation must be that the factual matrix laid before the court is evolving, fluctuating and uncompleted. Second, those aspects of the evidence which consist of unsubstantiated claims and assertions suffer from obvious frailties. Third, those aspects of the evidence which relate to information said to have been "leaked" by unidentified persons, also unsubstantiated and untested, are similarly frail. Fourth, those aspects of the evidence which superficially support the Applicants' claims and assertions are disputed, some acutely so. This is illustrated by the most recent internet media materials provided on behalf of the Applicants which document (on the one hand) allegations of sham negotiations and robust government denials (on the other).

[78] Properly analysed, it is a fact that, on one side of the divide, certain sources, many unidentified, are making allegations about the authenticity and bona fides of the UK Government's Article 50(2) negotiations conduct and it is a fact that these are denied by the government. I consider these to be the only identifiable facts. I do not consider it appropriate for this court, in the litigation context explained in [77] above and considered further in [79] – [81] *infra*, to engage in an exercise of adjudicating on the competing claims and assertions. The evidential underpinning of the Applicants' cases is a mixture of unsubstantiated assertion, subjective opinion, rumour, innuendo and speculation. It is non – compliant with the governing legal principles outlined in [49] – [54] above. It falls manifestly short of the evidential

quality and pedigree required for the intervention of this court of supervisory superintendence.

[79] Furthermore, I consider that the court must take heed of certain notorious facts and truisms. The intervention urged on this court occurs at a highly advanced stage of a protracted phase of intense, sometimes frenzied, political activity at both the national and international levels stemming from the referendum result of June 2016. Controversy, conflict and division have been some of the hallmarks of this phase. Uncertainty, suspicion, speculation and acrimony continue to abound. This is reflected in much of the evidence on which the Applicants urge the court to act.

[80] The context to which the aforementioned evidence belongs is that of negotiations between the UK government and the EU 27 in the midst of a domestic political maelstrom. The court takes judicial notice of the fact that the interaction – or negotiations – between the UK government and the EU 27 may partake of some or all of the features common to negotiations in all manner of contexts namely bluff and counter-bluff, posturing, sabre rattling, all manner of threats, assertion and counter-assertion, claim and counter-claim, leaks, rumour, counter - rumour and so forth. This does not purport to be a definitive list. The point is that this court must consider and weigh much of the evidence placed before it realistically and cautiously.

[81] The Applicants' Section 10 contention also founders on the freestanding ground that it infringes the principle expounded in *Yalland*: see [52] *ante*. I do not overlook that this is a general, and not inflexible, principle. However, having regard to the court's analysis of the supporting evidence in the foregoing paragraphs I consider this principle to be of compelling force in the circumstances of these proceedings. The unmistakeable hallmark of the evidential matrix placed before the court is that it discloses a process which is evolving, fluctuating, unpredictable and uncompleted. Linked to this is the truism that it is not possible to identify any definitive or concrete decision or measure falling within the embrace of either Section 10(1)(a) or Section 10(1)(b) of the Withdrawal Act. I consider that the *Yalland* principle applies with particular force in these circumstances. This is freestanding of the foregoing reasons for rejecting the Applicants' section 10 case.

[82] It is appropriate to preface any further analysis of Section 10(1)(a) with a recognition of the nature and status of NIA 1998. In *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 Lord Bingham of Cornhill considered this issue at [11]:

> "The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the 1998 Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be

> interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody."

The submissions of the Attorney General reminded the court that purposive, rather than generous, construction has found greater emphasis in subsequent decisions of the Supreme Court, *Re Recovery of medical costs for Asbestos Diseases Bill (Wales)* [2015] UKSC 3 at [18] and *Re Local Government Bylaws (Wales) Bill 2012* [2012] UKSC 53 at [80]. Most recently one finds an emphasis on "*the ordinary meaning of the words used*": *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2019] 2 WLR 1 at [12]. I add the observation, of obvious importance, that neither NIA 1998 nor the international treaty scheduled to the Belfast Agreement (or, for that matter, the Agreement itself) has the effect in law of requiring the continued membership of the EU on the part of the UK. The Supreme Court was alert to this in *Miller*: see [129]. Furthermore, none of the sources mentioned subjects the EU 27 to conclude an Article 50 Withdrawal Agreement in any particular terms.

[83] Closer analysis of the disjunctive provisions of Section 10(1) of the Withdrawal Act serves to confound the Applicants' case still further. Those provisions of NIA 1998 invoked for the purpose of the Section 10(1)(a) contention are Section 24, Section 75 and Part V. (These provisions are reproduced in [31]-[35] *ante*.) Subject and without prejudice to any of the other reasons already elaborated for rejecting the Applicants' Section 10 contention, I would offer the following further analysis and conclusions:

> (i) In the case of JR83 the act said to have breached Section 10(1)(a) is the No:4 Commencement Regulations. In substance, the contention appears to be that the future coming into force of Section 1 of the Withdrawal Act will give rise to an incompatibility with Section 24 of NIA 1998. This contention, firstly, fails to engage with those provisions of the Withdrawal Act – specifically Section 12(5) and (6) and Schedule 1, Part I, paragraph 3 – which will amend NIA 1998 by *inter alia* omitting Section 24(1)(b). Secondly, and substantively, the Applicant fails to identify <u>how</u> the Commencement Regulation and its ensuing consequence will, in some unspecified future scenario, give rise to an equally unspecified incompatibility with Section 24. Furthermore, it would seem incongruous if an act authorised by the Withdrawal Act – the Commencement Regulations – could give rise to a breach of another provision of the same statute. Finally, having regard to the terms of Section 1 of the Withdrawal

Act, this contention would also appear to entail the plainly untenable contention that Section 10(1)(a) somehow precludes the commencement of Section 1 of the same statute, the provision lying at the apex of everything which follows.

(ii) On the premise that the construction of the opening clause of Section 10(1) which I have espoused is incorrect, I consider the second limb of this challenge, which focuses on Sections 52A-C and 53 of NIA 1998 to be equally unmeritorious. I have, as urged by counsel, considered these provisions in the context of the relevant parts of the Belfast Agreement. They constitute the detailed outworkings of the latter. Overall, they are designed to ensure that the NSMC operates in accordance with procedures and structures which will invest this entity with appropriate gravitas and enhance its prospects of commanding the respect and support of the population. These provisions, while commendably detailed, are essentially procedural in nature. I agree with the Attorney General that they are directed to the arrangements for the operation of this body. Once again, neither the Belfast Agreement nor this suite of provisions was predicated on the basis that UK membership of the EU would continue forever. Neither of them can be construed as requiring a customs Union or continued regulatory alignment. More fundamentally, there is no sufficient evidential foundation for the incompatibility asserted. There is no suggestion that the incompatibility has already materialised and, once again, this discrete challenge invites the court to speculate about possible future events. One may add, finally, that the eventuation of any of the mooted post-withdrawal complications on the island of Ireland would be expected, if anything, to subject the NSMC to an enhanced duty of scrupulous compliance with the arrangements enshrined in these statutory provisions.

(iii) In the foregoing assessment I concur with the observations of Maguire J in *Re McCord* [2017] 2 CMLR 7 at [106]:

> *"… it is a different matter to portray the position as being one in which it is accurate to say that a cornerstone of the new institutions, without which the various edifices would crumble, is continued membership of the EU. The devolved institutions and the various North/South and East/West bodies do not as their raison d'etre critically focus on EU law. Their concerns and functions are much wider than this."*

Furthermore, as submitted by the Attorney General it is impossible to distil from either Section 10 of the 2018 Act or any of the relevant provisions of NIA 1998 a legal obligation requiring the United Kingdom to conclude any, or any particular, agreement under Article 50(2) TEU or to ensure no "hard border" between the two separate jurisdictions on this island or that the agenda of NSMC meetings have some specific policy content. Finally, all such issues of importance and interest arising out of the post-withdrawal arrangements which will include the corpus of "retained EU law" and other matters, including the continued EU membership of the Republic of Ireland and the implications of this for sovereign relations on the island and the welfare and interests of its two populations will, without any identifiable impediment, be discussed and debated by the NSMC acting within its remit and powers.

(iv) I consider that aspect of the Section 10(a) challenge based on Section 75 of NIA 1998 to be equally unmeritorious. Section 75(1) requires public authorities carrying out their functions relating to Northern Ireland to have due regard to the need to promote equality of opportunity between specified persons and groups. Section 75(2) requires that they have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. "*Public authority*" is defined by Section 75(3). This aspect of the Applicants' cases was formulated at a general level. It lacked particularisation and

specificity. This is illustrated in the following passage in counsel's skeleton argument in JR83:

> *"… the impugned decision of UK government will inevitably lead to the creation of a hard border. This will inevitably have consequences for the exercise of functions under Section 75. It would be inconsistent with the requirements of Section 10 for the proposed respondents to fail to have due regard to the needs identified in Section 75. There is no evidence that they have done so. Their decisions are consequently incompatible with the object and purpose of [NIA] 1998 and thereby frustrate Section 10(1)(a) of the Withdrawal Act."*

(v) For the reasons explained above, I consider the evidential foundation for the asserted *inevitability* to be manifestly inadequate. Secondly, there is no articulation of the "consequence" asserted. Thirdly, some un-particularised "affects the consequence" plainly does not equate with an act that is *incompatible* with Section 75. Fourthly, the judicial adjudication of the conduct of any public authority to which Section 75 applies is both premature and misconceived in the absence of a concrete matrix. Fifthly, Section 75 has its own inbuilt enforcement machinery, per Section 75(4) and Schedule 9. Finally, the frailty of this discrete ground is confirmed by the remoteness of the two Respondent Ministers from the Section 75 regime itself, neither having the status of a public authority to which Section 75 applies. They are, in this sense, no different from the Secretary of State for Northern Ireland: see *Miller* at [133]."

[84] As regards Section 10(1)(b), the suggested *exercise of any of the powers under the Withdrawal Act* is confined to the proposed Respondents (in essence the UK Government's) conduct of the Article 50 withdrawal negotiations (and related activities) with the EU 27. If the reasons which I have given above for rejecting the Applicants' Section 10 contention are incorrect, the question to be addressed is whether the Prime Minister or Brexit Minister has conducted such negotiations without having due regard to the Joint Report. As already noted, I consider that *having due regard* denotes an obligation more exacting than *having regard* or *taking into*

account, two of the most familiar statutory formulations. This is not contentious. The duty requires careful and conscientious consideration on the part of the authority concerned, while bearing in mind that no particular outcome of the exercise in question is mandated. While the relevant English decisions are concerned with different statutory contexts I consider that no different approach to Section 10(1)(a) is appropriate see, amongst others, *Hotak v Southwark LBC* [2016] AC 811 and the summary provided by Lord Neuberger at [72]-[75].

[85] This discrete aspect of the Applicants' challenges engages the burden and standard of proof principles rehearsed in [50] above. I consider that the *assertion* (properly so-called, I believe) that either the Prime Minister or Brexit Minister has failed to have due regard to the Joint Report is not made good. It lacks the necessary evidential foundation. Furthermore, it is contradicted by the "*Protocol on Ireland/Northern Ireland*" contained in the draft withdrawal agreement negotiated on behalf of the previous Prime Minister and rejected by Parliament. I accept Mr McGleenan's submission that there is a clearly identifiable nexus between the Protocol and the Joint Report. The evidence does not disclose any further or subsequent version of the Protocol. What the evidence does demonstrate clearly is that the Prime Minister and others have adopted a current stance (quintessentially political and bargaining in nature) which does not espouse the relevant island of Ireland provisions of the Joint Report or their near relatives in the Protocol. The evidential frailties and inadequacies assessed above apply fully to this discrete ground. The evidence, far from lending any support to the assertion (an important characterisation in this context) that there has been a failure to *"have due regard to"* the Joint Report, positively contradicts it.

[86] The conclusion arising out of the foregoing analysis is that if and insofar as any of the offending forms of conduct challenged by the Applicants, namely the making of the two 2019 measures of subordinate legislation and/or the UK Government's conduct of the Article 50(2) negotiations by the Prime Minister and the Brexit Minister (being the two Ministers of the Crown under challenge), is embraced by the opening clause in Section 10(1) of the Withdrawal Act I consider that the evidence falls demonstrably short of establishing Ministerial conduct incompatible with NIA 1998 [section 10(1)(a)] or which has failed to have due regard to the Joint Report [section 10(1)(b)]. The nature and quality of the evidence put forward in support of the contrary conclusion falls markedly short of the notional mark.

The Section 10 Challenge: Summary of Conclusions

(i) The impugned decisions and policies, as formulated and characterised by the Applicants, do not entail the exercise of any of the powers under the Withdrawal Act by any Minister of the Crown.

(ii) The conduct of negotiations and related activities on behalf of the UK Government under Article 50(2) TEU entails the exercise of Prerogative powers or, alternatively, is authorised by Article 50(2) itself.

(iii) No breach of section 10(1) is established in any event.

*(iv) This challenge is further defeated by the **Yalland** principle.*

Misuse of Prerogative Powers

[87] The Applicants formulate an alternative to their Section 10 ground of challenge. It is predicated on the premise that the proposed respondents have been exercising, and continue to exercise, prerogative powers. They assert (in my shorthand) a misuse of these powers.

[88] This alternative challenge is based on well-established doctrine. The legal principles pertaining to this alternative ground of challenge are conveniently digested in [47]-[51] of *Miller*. From these passages one distils the following principles:

(i) The starting point is parliamentary sovereignty.

(ii) Any prerogative power is susceptible to modification or abrogation by primary legislation.

(iii) Consequent upon (iii), the Royal Prerogative is operative in spheres which have not been occupied, or regulated, by primary legislation.

(iv) Most of the former prerogative powers have been curtailed or abrogated by legislation.

(v) It is legally impermissible to purport to exercise prerogative powers in a manner which frustrates primary legislation "*for example by emptying it of its contents or preventing its effectual operation*": see [51]. This flows from (i) – (iii) above.

[89] The self-evidently elevated hurdle which this alternative ground entails is apparent from the submission of Mr McDonald QC on behalf of the Applicant JR83 that the "*policy decisions*" under challenge will lead inevitably to the blunting of Section 10. This argument was adopted on behalf of the other Applicants with the exception of Mr Scoffield's tentative suggestion that the threshold might be that of probability rather than inevitability. Whatever the correct threshold, I consider that this alternative challenge founders on the grounds and for the reasons given.

[90] The foregoing conclusion is unchanged if the correct analysis is that the legal authority empowering the UK Government to conduct negotiations under the Article 50 umbrella is Article 50 itself. The principle set forth at [88](iv) would still apply fully. While Article 50 is a measure of supreme EU law, it does not purport to modify or extinguish the prerogative power in play.

[91] I reject Mr Scoffield's discrete argument that the UK Government's power to negotiate an Article 50(2) agreement requires authority in domestic primary

legislation. The reliance placed on [81] and [92] of *Miller* in support of this argument is, in my view, misconceived. The decision in *Miller*, considered as a whole, does not speak to the conduct of any negotiations anterior to the notification required by Article 50(1) TEU, much less the Article 50(2) negotiations ensuing therefrom. For the reasons already given, the Withdrawal Act does not purport to regulate or prescribe the conduct by the UK Government of these negotiations. *Miller* decided that there is no scope for the exercise of prerogative powers in final decisions pertaining to the withdrawal of the UK from the EU. I consider that *Miller* does not regulate or circumscribe the anterior negotiating conduct of the UK Government.

[92] If the immediately foregoing analysis and conclusion are incorrect, this alternative challenge fails in any event for the reasons elaborated in [58]-[86] above.

The "Operation Yellowhammer" ground

[93] Buried deep in the latest iteration of Mr McCord's Order 53 pleading is a ground relating to a document known as "Operation Yellowhammer". This is a government document of sensitive and secret classification which has found its way into the evidence as a result of a leak to, and publication by, the press.

[94] The nature, thrust and purpose of this document can be gleaned from a combination of its contents and an affidavit sworn on behalf of the proposed Respondents by a senior Cabinet Office official. In summary, "Operation Yellowhammer" is a cross-departmental programme which entails preparations for short - term disruptive impacts likely to arise from the UK departing the EU without a Withdrawal Agreement. Its methodology is to identify what are assessed to be possible worst case scenarios, followed by appropriate evaluation and the formulation of steps designed to mitigate possible consequential risks. Unsurprisingly, this is not a static document. Rather it is revisited and revised in response to changing circumstances. It is a UK wide document. The official in question avers *inter alia*:

> "*Since its purpose is to help the UK prepare for exiting the European Union, it follows that the Yellowhammer programme has been taken into account by the government in its planning.*"

[95] Exhibited to the official's affidavit is the transcript of a statement made by the Chancellor of the Duchy of Lancaster to the House of Commons on 03 September 2019. This contains the following salient passages:

> "*Of course, this Government is determined to secure our departure with a good deal – one that paves the way for a bright future outside the single market and the customs union. And the response the Prime Minister has received from European leaders shows that they are ready to move. .. but of*

> *course we must be prepared for every eventuality … we must be ready to leave without a deal on October 31st … leaving without a deal does not mean talks with European partners end altogether. In those circumstances, after we depart without a deal in place, we will all want to discuss how we can reach new arrangements on trade and other issues.*"

The statement then presents the government "line" on "no deal" short term consequences:

> "*…. Provided the right preparations are undertaken by government, business and individuals, risks can be mitigated, significant challenges met and we can be ready.*"

In a later passage the Chancellor states that two new Cabinet committees have been established "*…. to discuss negotiating strategy and make operational decisions about exit respectively*". The statement also makes explicit reference to Operation Yellowhammer, explaining its rationale.

[96] The discrete ground of challenge pursued on behalf of Mr McCord (as understood by the court) is that the proposed Respondents – in effect Her Majesty's Government – have, in making decisions relating to the departure of the United Kingdom from the EU, failed to take this document into account. I refer to the analysis and determination of the comparable ground of challenge asserting a failure to have due regard to the Joint Report, in [66] – [81] above. This applies fully to this free standing ground of challenge, with the addition that the evidence presented on behalf of the proposed Respondents positively contradicts the Applicant's case. This ground fails accordingly.

The ECHR grounds

[97] As noted in [11] above, the Applicant JR83 makes the case that the impugned decisions (as formulated: see [9]) infringe the duty imposed upon the Prime Minister and the Brexit secretary not to act incompatibly with any of the protected Convention rights. This Applicant invokes Articles 2, 3 and 8 ECHR, either singly or in conjunction with Article 14. I have already drawn attention to the evidential underpinning of this Applicant's case: see [36] – [45] generally and [47] specifically.

[98] Article 2 ECHR protects the right to life and encompasses a positive obligation to protect life in specified circumstances. See *Osman – v – United Kingdom* [1998] 29 EHRR 245 at [115] – [116]. The threshold test is that of a real and immediate risk to the life of the person concerned. This requires the demonstration of an objectively verified, present and continuing risk: *Re Officer L* [2007] UKHL 36 at [20], per Lord Carswell. Where this threshold is overcome the duty thereby triggered was explained by Lord Carswell in the following terms:

> "*The applicant has to show that the authorities failed to do all that was reasonably to be expected of them to avoid the risk to life. The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available. In this way the state is not expected to undertake an unduly burdensome obligation: it is not required to satisfy an absolute standard requiring the risk to be averted, regardless of all other considerations.*"

[99] The evidential foundation of this aspect of JR83's case is, in summary, a combination of her subjective beliefs and assertions and the evidence documenting statements made by certain senior police officers. I have examined the latter species of evidence in particular and I refer to the summary at [44](v) above. In short, police officers have engaged in debate and discussion about possible future "on the ground" scenarios. These belong to the currently unpredictable post-withdrawal world on the island of Ireland. This is the critical prism through which any expressed views, predictions and concerns are to be evaluated. These are predicated on the possibility of static border check points and/or additional security infrastructure. This evidence includes a confident statement by an Assistant Chief Constable based on evidence (the Gibraltar/Spain land boundary arrangements) that a "*very effective and robust*" technological solution is available.

[100] Having considered all the evidence on which the Applicant relies, I find that it falls markedly short of satisfying the threshold test. Her case is replete with possibilities and uncertainties. In common with the remainder of the population, she simply does not know what the post-withdrawal future holds for the land border on the island of Ireland. Properly analysed, what she postulates is a vague, speculative risk to her life in currently unknown and unpredictable future scenarios. In *Re Officer L* Lord Carswell made clear that the legal threshold is an elevated one, not easily overcome. What is required of the court is an evaluative assessment of the evidence presented. I conclude that the Article 2 ECHR ground must fail as the evidence falls well short of satisfying the exacting threshold test.

[101] Finally, it seems to me elementary that the *Osman* duty, where this arises, requires identification of the appropriate public authority. As in *Osman* itself, this will normally be the police force. Having regard to the identities of the proposed Respondents, the Applicant's case is not only that the threshold test is overcome but also that the Brexit secretary and the Prime Minister are in breach of their section duty because they have failed and/or are failing to take reasonable steps to protect the Applicant's life. It is striking that this aspect of the Applicant's case omits any focus on the identities of the two proposed Respondents. Furthermore there is a notable failure to specify and elaborate on the *reasonable steps* which these two public authorities have allegedly failed to take. These further reflections serve to underline the intrinsic weakness of the Applicant's Article 2 ECHR case.

[102] The foregoing conclusion also disposes of the Article 3 ECHR ground, given that the threshold test is the same.

[103] This Applicant's Article 8 ECHR ground does not have to satisfy the same threshold test. Notwithstanding I consider that it suffers from the same evidential frailties. Properly analysed, it resolves to a complaint of the "what if?" variety. It is predicated on the vague possibility of a future interference with the Applicant's right to private and family life. The possibility being of a vague and speculative nature it is unsurprising that, evidentially, the asserted possible future interference with this Applicant's enjoyment of this Convention right lacks specificity and definition. No interference having been established, no question of justification arises.

[104] The Applicant's Article 14 ECHR case must fail, firstly, on the basis of the evidential frailties identified. I consider that, for the same reason, the "ambit" test is not satisfied. Third, the Applicant's alignment with persons who "*hold Irish citizenship*" (per counsels' skeleton argument) is at best obscure. What about non – Irish citizenship, including non – Irish and non – Btritish EU (and other) citizens, residing in border regions? Fourth, there is no attempt in the skeleton argument to identify a comparator. Mr MacDonald's suggestion in oral argument, in response to the court, that the relevant comparators are the entire population of Scotland, England and Wales was made *ad hoc* and lacks the kind of carefully focused and sophisticated analysis, with appropriate supporting evidence, to be expected in every case of asserted differential treatment. (See *Re Lennon's Application* [2019] NIQB 68 at [34] and the questions posed at the beginning of each section of the judgment). I conclude therefore that the invocation of Article 14 does not avail the Applicant.

The Irrationality ground

[105] Insofar as any of the Applicants seriously espoused the contention that the impugned decisions/policies (as formulated by them) of the Prime Minister and/or the Brexit Secretary or any other identified proposed respondent are vitiated by irrationality, I consider that this ground invites swift disposal.

[106] Argument on the public law doctrine of irrationality was (understandably) somewhat sparse. In consequence, there was no examination of decisions such as *Pham v SSHD* [2015] UKSC 19. Mr McGleenan founded mainly on Lord Hope's statement in *R v Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839, a case concerning a decision of the Home Secretary to extradite a person for the purpose of trial on charges of corruption, at 853 – 854:

> "*It cannot be stressed too strongly that the decision in this matter rests with the Secretary of State and not at all with the court. The function of the court in the exercise of its supervisory jurisdiction is that of review ….* [the Secretary of

> State's decision] *depends, in the end, upon the exercise of judgment of a kind which lies beyond the expertise of the court …..*
>
> *I would regard this as a case where great caution would have to be exercised, despite the need for anxious scrutiny, before holding that decision to be one which, in the relevant sense, was unreasonable.*"

In the same passages Lord Hope emphasised that the impugned decision was one entailing "*... a substantial policy content where ... the court must exercise great caution in holding a decision to be irrational*" (at 854).

[107] The targets of the Applicants' challenges have the unmistakable stamp, hue and hallmark of government policy at both national and international levels, evolving and fluctuating, together with political manoeuvring, the delicate conduct of international relations, rapid evolution, intrinsic unpredictability and all of the other characteristics noted particularly at [80] above. It is within a context marked by these characteristics (amongst others) that the court is invited to condemn the Government's conduct as irrational. For the reasons explained by Lord Hope in *Launder* I consider that this quest is doomed to failure.

Justiciability

[108] In the specific context of judicial review proceedings, where an issue of justiciability arises, the question for the High Court is whether the exercise of its function of supervisory superintendence of the acts and omissions of public authorities should properly extend to adjudicate on the subject matter of the challenge in question. Properly analysed, this issue is rooted in the constitutional doctrine of the separation of powers. The judiciary, in the absence of clear and compelling statutory prescription, is the arbiter of this issue. I draw attention to the factor of statutory prescription mainly for the purpose of highlighting that the doctrine of justiciability in judicial review is essentially judge made. This is appropriate for the elementary reason that the judiciary is the ultimate guardian of the rule of law and the interface between the citizen and the State.

[109] There will be cases where the non - justiciability of the subject matter of a given judicial review claim is so clear and compelling that the issue should rank first and foremost in the court's consideration of the challenge in question. There will be other cases where the court's evaluation of the issue of justiciability will be shaped and informed, to some extent at least, by its examination of the grounds of challenge. Every case has its particulate sensitivity – factually, legally and contextually. The present case is an illustration of the desirability, in appropriate contexts, of considering and determining the substantive grounds of challenge before turning to the issue of justiciability. This approach, where appropriate, serves to inform and illuminate the court's evaluation and determination of the justiciability question.

[110] This approach will also, in appropriate cases, be preferable to its blunt, summary and guillotine-like alternative. It requires of the court a more rounded and fully informed approach to the question of justiciability.

[111] To the foregoing I add the passing observation that whereas the issue of justiciability was at the forefront of the skeleton argument of the proposed Respondents, it was the last of the issues addressed by Mr McGleenan in oral argument. I commend the wisdom of this approach in the particular context of these fact and legally sensitive proceedings.

[112] Restrained citation of authority suffices in the identification of the governing legal principles. The brief survey which follows will demonstrate how this doctrine has progressed during the past three decades approximately. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, Lord Roskill stated at 293 a/c:

> "*But I do not think that* [the right of the executive to do a lawful act affecting the rights of the citizen] *can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are not such as to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular matter or Parliament dissolved on one date rather than another.*"

Lord Roskill's statement, manifestly so, extended well beyond the narrow contours of the *CCSU* litigation, namely national security.

[113] Lord Roskill's statement reflects what had been said a decade previously by Lord Keith in *Gibson v Lord Advocate* [1975] SC 136 at 144:

> "*The making of decisions upon what must essentially be a political matter is no part of the function of the court and it is highly undesirable that it should be. The function of the court is to adjudicate upon the particular rights and obligations of individual persons, natural or corporate, in relation to other persons or, in certain instances, in the State.*"

In *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, Lord Phillips MR described decisions affecting foreign policy as one of the "*forbidden areas*", at 333 d/e.

[114] In *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* one finds the following uncompromising statement in the judgment of Lord Carnwath at [26]:

> "*The conduct of foreign policy through the United Nations and in particular the Security Council is clearly not amenable to review in the domestic courts so far as it concerns relations between sovereign states.*"

This seems to me a clear endorsement of what Taylor LJ stated in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1975] 1 QB 811 at 820 c/d where, in the context of discussing whether judicial review of the exercise of prerogative power is available, His Lordship stated:

> "*At the top of the scale of executive functions under the prerogative are matters of high policy …. making treaties …*
>
> *Clearly those matters, and no doubt a number of others, are not justiciable.*"

[115] The court's dismissal of a judicial review challenge involving the so-called "confidence and supply agreement" between the Conservative Party and the Democratic Unionist Party of Northern Ireland in *McClean v First Secretary of State and her Majesty's Attorney General* [2017] EWHC 3174 (Admin) contains the following passage of note at [21]:

> "*The confidence and supply agreement is a political agreement made in a context where some form of political agreement was inevitable and indeed required if a stable government was to be formed. All political parties seek to promote particular interests and particular interested points of view. That is the nature of the political process and the disciplines to which they are subject are the usual political ones of needing to be able to command majorities in the House of Lords on important votes and of seeking re-election at the appropriate time. The law does not superimpose additional standards which would make the political process unworkable.*"

[116] Multiplication of citations from the decided cases considered in the foregoing paragraphs and others is unnecessary. I consider the characterisation of the subject matter of these proceedings as inherently and unmistakeably political to be beyond plausible dispute. Virtually all of the assembled evidence belongs to the world of politics, both national and supra-national. Within the world of politics the well-recognised phenomena of claim and counterclaim, assertion and counter-assertion,

allegation and denial, blow and counter-blow, alteration and modification of government policy, public statements, unpublished deliberations, posturing, strategy and tactics are familiar to all. They are the very essence of what is both countenanced and permitted in a democratic society. They abound in the evidence in this case. The briefest of reflections on this incomplete and rudimentary formulation serves to reinforce the twofold juridical truisms that the judicial function must respect certain boundaries and, in instances where there is no "boundary" prohibition, a concrete and completed act of government having legal effects and consequences is an essential pre-requisite to the invocation of the supervisory jurisdiction of the High Court.

[117] I need not repeat the various features of the Applicants' conjoined challenges highlighted in the body of this judgment. Considered in their totality they point inexorably to the conclusion that these cases trespass upon the prohibited domain of the non-justiciable. They qualify to be dismissed on this ground alone which is free standing of those rehearsed above.

Omnibus Conclusion

[118] I draw together the various strands of the court's decision in the following way:

(a) Leave to apply for judicial review is granted in respect of the section 10 Withdrawal Act issue only.

(b) Leave to apply for judicial review is refused on all other grounds.

(c) Within the ambit of (a), the application for judicial review is refused.

Costs

[119] Having considered the parties' submissions, the orthodox costs order is hereby made: the Applicants shall pay the costs of the Respondents, to be taxed in default of agreement and, to reflect that all three are assisted persons, not to be enforced without the leave of the court. The Applicants' costs shall be taxed as assisted litigants.