Case No. UKSC 2018/0080

IN THE SUPREME COURT OF THE UNITED KINGDOM

BETWEEN:

HER MAJESTY'S ATTORNEY GENERAL

-and-

HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

Applicants

-and-

THE LORD ADVOCATE

Respondent

-and-

(1) THE COUNSEL GENERAL TO THE WELSH GOVERNMENT

(2) THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Interested Parties

CASE FOR THE COUNSEL GENERAL TO THE WELSH GOVERNMENT

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1. The Counsel General wishes in these written submissions to assist the Court as to the answer to the following five key questions:

Question 1: Is an Act of the UK Parliament needed before a devolved legislature could act in an area which EU law ceases to occupy?

2. The Applicants are inviting the Court to answer "yes" to this question. In particular:

   2.1. The Applicants' analysis relates to any area occupied by EU law. They speak of *"matters currently governed by EU law"*, to include (i) *"areas for which, through the ECA and the treaties to which it gave effect, exclusive competence had already been transferred to the EU"* and (ii) *"areas where competence was shared with the EU and*

where EU law had already occupied the field" **(Applicants' Case §43)**. As to this see §§6-7 below.

2.2. The Applicants say: (1) the devolved legislatures received competence only (a) to act in areas unoccupied by EU law and (b) to implement EU law in areas occupied by EU law; so that (2) there could be no future competence in an area formerly occupied by EU law unless and until the UK Parliament decides to confer it. That is incorrect: see §5 below.

2.3. The Applicants also say that conferring such competence is what the UK Bill – now the European Union (Withdrawal) Act 2018 (the "UK Act") – is doing. As they put it **(Annex C §6)**:[1] "*the UK Bill makes provision to amend the SA, GOWA and the Northern Ireland Act 1998 to give the devolved legislatures legislative competence to modify retained EU law, unless it is a modification of a description specified in regulations made by a Minister of the Crown…"* That is also incorrect: see §8 below.

3. As the Court can see from the terms of the Reference, this argument was originally conceived as being free-standing, based on what the Applicants called the "*constitutional framework underpinning the devolution settlement"* **(Reference §66(1)(a))**. But the argument now rests instead squarely on Schedule 5 Part 1 §7(1) of the Scotland Act 1998 ("SA") **(Reference §66(1)(b))**. It comes to this **(Applicants' Case §112(1))**: *"The whole of the Scottish Bill is not law because it relates to the reserved matter of international relations as defined in §7(1) of Schedule 5, and is therefore outside of competence by virtue of s.29(2)(b) SA"* **(see Applicants' Case §§27-47)**. Key to this argument based on Schedule 5 §7 are two ideas:

3.1. First, the idea of an expansive interpretation of Schedule 5 §7(1). That is incorrect: see §§10-12 below.

3.2. Secondly, the idea that Schedule 5 §7(2) is the source of competence to implement EU law in areas occupied by EU law (§2.2(1)(b) above). That is incorrect: see §9 below.

[1] Underlining in quotations connotes emphasis added.

4. The Court is invited to answer "no" to this first question. The Counsel General agrees with the Lord Advocate **(Lord Advocate's Case §§17-25).**

5. The correct analysis (cf. §2.2 above) is that: the devolved legislatures received competence (a) to act in areas unoccupied by EU law and (b) to act in areas occupied by EU law provided that they did so compatibly with EU law; so that (2) there would be future competence in an area formerly occupied by EU law without the UK Parliament conferring it. The Counsel General emphasises the following points:

   5.1. The source of the legislative competence of the Scottish Parliament to act in areas occupied by EU law is s.28 of the SA. For the National Assembly for Wales ("Welsh Assembly"), it is s.107(1) and s.108A(1) of the Government of Wales Act 2006 ("GOWA"). That legislative competence is applicable within familiar sectors. Examples include: agriculture and fisheries; education; environment; food; highways and transport; social welfare; and so on[2].

   5.2. The express restriction in SA s.29(2)(d) (GOWA s.108A(6)(c)) – that a provision is outside competence if incompatible with EU law – recognises that devolved legislative competence so conferred includes sectors already occupied by EU law and which could come to be occupied by EU law.

   5.3. Parliament did not design the devolution legislation so as (a) to confer general legislative competence which excluded areas occupied by EU law and then (b) to confer a specific additional competence to legislate to implement EU law in areas occupied by EU law. It would have been easy enough to do this by design. It is what Parliament would have done if the Applicants were right.

   5.4. It would have been an odd thing to do, because it would have excluded action which did not implement EU law, but which was alongside EU law and was compatible with it. That is practically very important. After all: (a) EU minimum

[2] The Welsh Assembly's legislative competence in relation to those sectors was originally by way of expressly conferred competences under GOWA s.108 and Schedule 7. Since 1 April 2018, the new competence provisions introduced into GOWA by the Wales Act 2017 have governed. The Assembly's legislative competence is now, like that of the Scottish Parliament, delineated according to a 'reserved powers' model under GOWA s.108A and Schedules 7A and 7B. This Reference is the first opportunity for the Supreme Court to consider the new devolution settlement for Wales.

standards do not prevent domestic enhanced standards; and (b) EU measures frequently permit latitude as to their implementation and augmentation. Within devolved sectors occupied by EU law, acting compatibly with EU law is what the devolved legislatures were empowered to do, and that is what they did.

6. There are different ways in which EU law 'occupies' a field (§2.1 above). It may be different across sectors and subject-matters. EU law regulation may be 'exclusive' or 'shared', expansive or modest. EU law may impose mandatory standards or minimum standards. There may be opt-outs, in the case of an EU law instrument as a whole, or part. There may be reservations and discretions. There may be necessary choices, and permitted choices.

7. Also, the extent to which EU law 'occupies' a field may change over time. The extent to which EU law occupies the field was not something fixed when Parliament enacted the European Communities Act in 1972, nor by the time of enacting the SA in 1998, nor the GOWA in 2006. It can in principle ebb and flow. Accordingly:

   7.1. If EU law occupied a devolved sector field for the first time, or in a new way, after enactment of the devolution legislation, the general competence of the devolved legislature for the sector would endure. However, the restriction requiring EU law-compatible action would bite to constrain the choices that the devolved legislature could make in the field.

   7.2. Conversely, if EU law ceased to occupy a devolved sector field after enactment of the devolution legislation, the general competence of the devolved legislature for the sector would again endure. However, the restriction requiring EU law-compatibility would lose its bite and choices would be less constrained.

   7.3. That includes withdrawal, as was explicitly recognised by Lord Neuberger PSC in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 at §130 **(Lord Advocate's Case §21**).

8. The Applicants say (§2.3 above) the UK Act[3] would operate to "*give the devolved legislatures legislative competence to modify retained EU law, unless it is of a modification of a description specified in regulations made by a Minister of the Crown*" **(Applicants' Case Annex C §6)**. However, that is not correct:

8.1. The Applicants' argument **(Applicants' Case §44 and Annex C §6)** rests on the provision[4] designed to amend SA 1998 to introduce new s.30A(1) (s.109A for the GOWA), now s.12 of the UK Act. New s.30A would provide that: "*An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.*" But this is not an empowering provision. It is itself a restriction (cf. §5.2 above), which presupposes legislative competence otherwise arising. Indeed, s.12 is headed "*Retaining EU restrictions in devolution legislation etc*". Even the Applicants state that this provision "*restricts the competence of the devolved legislatures to modify retained EU law*" (**§44**). Quite so.

8.2. It is also noteworthy that the mode of the restriction in s.12 changed, from general restriction to narrower restriction. The original drafting of what was clause 11 of the UK Bill would have imposed this general restriction: that devolved legislatures could not act to modify retained law unless Ministers of the Crown permitted this by Order in Council. The clause being described in the Applicants' case (and reproduced in s.12) was narrower. It contained no general restriction. Rather Ministers of the Crown were to be empowered to regulate to introduce specified restrictions on what the devolved legislatures and devolved administrations could otherwise do in modifying retained EU law. Accordingly, even in the design of the devolution provisions in the UK Act, there has been an unmistakeable and consistent baseline position. The baseline is that the devolved legislatures would be able to act so as to modify retained EU law, subject to any restrictions as could be imposed under the Act.

[3] The Counsel General agrees with the Lord Advocate that the UK Act is itself consistent with the analysis set out at §5 above (**Lord Advocate's Case, §22)**.
[4] This clause was originally clause 11 of the UK Bill. At the date of the Applicant's case, it was numbered clause 15. It is now reproduced in s.12 of the UK Act.

8.3. The point goes further. The reshaping of s.12 involved, so far as the UK and Welsh Governments were concerned, an Inter-Governmental Agreement signed on 24 April 2018, which led to the Welsh Assembly providing legislative consent to the UK Act. The UK Government had said that consent of the devolved legislatures to this provision in the UK Bill with its restriction (originally widely drawn), was required pursuant to the Sewel Convention, for this reason: because the restriction would "*alter the competence of the devolved institutions*" **(see Lord Advocate's Case, §22)**. This explanation makes sense precisely because of the 'baseline' position of competence, which does not need a UK Act of Parliament now to confer it. The restriction in s.12 is a restriction upon a pre-existing competence.

9. So, there is a 'baseline' competence and no express conferral of competence is needed from the UK Parliament if a devolved legislature is to act in an area formerly occupied by EU law. The Applicants seek to defeat this analysis by arguing (§3 above) that it is the exception in SA Sch 5 §7(2)(a) which is the source of any competence of devolved legislatures to act in a field occupied by EU law (§2.2(1)(b) above). However, this cannot be right.

9.1. As the Lord Advocate explains, SA Sch 5 §7(2)(a) is not the source of a legislative competence, for it is not an empowering provision but rather is making an exception to a restriction **(Lord Advocate's Case §63).** Hence the structure and language ("*does not reserve …*").

9.2. The restriction in SA s.29(2)(d) ("*A provision is outside that competence so far as … it is incompatible with … EU law*") (§5.2 above) shows that the Applicants' interpretation is unsound. That restriction is addressing legislative action in sectors that are devolved but where EU law occupies the field. It operates by prohibiting EU-incompatible action. If Schedule 5 §7(2) were conferring the only power to legislate to observe and implement EU law, then why was s.29(2)(d) needed at all?

9.3. There is also this problem. Schedule 5 §7(2) is not apt to describe legislation which *avoids incompatibility* with EU law occupying a field, but is not legislation

to *achieve observance with or implementation of* EU law. There are many actions that Wales could take which avoid incompatibility with EU law without being 'observance' or 'implementation' of EU law.

9.4. Sch 5 §7 does not have the function now claimed by the Applicants for it.

9.5. This is also very clear from considering the way in which the UK Parliament legislated for Wales in 2006. As the Court knows, devolved powers to pass Assembly Acts were conferred on the Welsh Assembly in 2011, for such areas as agriculture and fisheries; education; environment; food; highways and transport; social welfare; and so on (GOWA Sch 7 Part 1, as enacted). Parliament included restrictions (Sch 7 Part 2). But there was no "*international relations*" restriction (and so no accompanying exception). That has this consequence. If the Applicants were right about the purpose and effect of SA Sch 5 §7, it would mean the Scottish Parliament had a narrow power to implement or observe EU law within an EU law occupied field, by reason of Schedule 5 §7(2) read with the broad Schedule 5 §7(1) prohibition, while the Welsh Assembly enjoyed a broader competence to act in any way which avoided incompatibility with EU law within an EU law occupied field (there being no such equivalent prohibition). It would also mean that a withdrawal from the EU after 2006 (and before 1 April 2018) would have required the UK Parliament to confer legislative competence in a formerly EU law occupied area for Scotland, but not for Wales.

9.6. It was not until 1 April 2018 that, under the new 'reserved powers' model, a new "*international relations*" restriction has applied to limit the legislative competence of the Welsh Assembly (GOWA Sch 7A, §10)[5]. The Applicants' logic would presumably mean that, at that stage, the Welsh Assembly's competence narrowed so far as areas occupied by EU law is concerned. That makes no sense. It is also contrary to the idea of successive phases of Welsh devolution involving broadening powers (cf. *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43 [2014] 1 WLR 2622 at §42).

[5] Schedules 1 and 2 of the Wales Act 2017 introduced the 'international relations' restriction into GOWA. This regime was expressed to apply to an Act of the Welsh Assembly "*if the vote by the Assembly agreeing to the general principles of the Bill for the Act took place on or after*" the 1 April 2018: see Sch 7, Part 1, §§1-2 Wales Act 2017 read with s.2 of the Wales Act 2017 (Commencement No.4) Regulations 2017, S.I. 2017/1179

9.7. What Sch 5 §7(2) does describe is a sub-set of action to observe and implement EU obligations (or international obligations or obligations under the ECHR), whose legal permissibility is secured by §7(2) even where it would be action falling within *"international relations, including relations with … the EU"*. It does not for a moment mean that any act which could involve *"observing and implementing … obligations under EU law"*, or for that matter *"obligations under the Human Rights Convention"*, falls within *"international relations"*.

Question 2: Is the "international relations" reservation in SA Sch 5 §7(1) expansive?

10. The Applicants invite the answer "yes, very". As has been seen (§3 above), the Applicants' argument based on Schedule 5 §7 involves the contention that: (i) *"international relations, including relations with … the European Union (and [its] institutions)"* in SA Schedule 5 §7(1) excludes from legislative competence all areas in which EU law occupies the field; so that (ii) the exception for *"observing and implementing … obligations under EU law"* in §7(2)(a) takes effect, against that blanket exclusion, as the source of the legislature's power to observe and implement EU law. Flaws in this argument have already been exposed (§9 above). But it is also worth returning to the expansionist premise claimed for Schedule 5 §7(1) (§3.1 above).

11. The Applicants put forward various broad interpretations of §7(1), so that the following would fall within the words of the reservation: (1) any legislative action for an area occupied by the EU law; (2) any act "*implementing and observing EU law*" **(§33)**; (3) "*all matters of UK policy in relations with the EU*" (**§29**); (4) "*legislating for the effects of withdrawal*" (**§31**); (4) "*EU matters, including those of legal and constitutional policy*" (**§34**); and (5) "*the power to determine, as a matter of legislative policy, what the substantive content of EU-derived Scots law should be after withdrawal*" (**§35**). That there should be different formulations is itself a sign of the weakness of the argument.

12. None of these broad interpretations should be accepted. The correct answer to this question is "no". The Counsel General wishes to emphasise the following points:

12.1. The position can be tested, in this way. Suppose EU law is modified so that there will no longer be minimum common standards in relation to a particular matter and each member state legislature will decide what provision to make in the subject-matter area. Or suppose there is a new EU instrument from which there is a right of opt-out, which the UK has exercised. Provided that this falls within the subject-matter competence of the devolved administrations, it would be for them to address what provision to make. These are situations of 'withdrawal'. They will have entailed discussions between member states and between the United Kingdom and the EU institutions. Making domestic statutory provision for, or indeed in, the post-withdrawal situation is not "*international relations*".

12.2. As has been explained (§9 above), Sch 5 §7(2)(a) (preserving the observance and implementation of EU obligations) does not demonstrate the wide breadth of §7(1). Rather, it indicates that there can be situations where an act would fall within the international relations reservation, properly interpreted, which act involves observing and implementing an EU, ECHR or international obligation.

12.3. Even if Sch 5 §7(1) extended to any action by a devolved legislature to legislate for an area occupied by EU law, it would still not follow that a devolved legislature is acting without competence when it legislates – by design – for the situation which is to apply when the area is no longer occupied by EU law.

12.4. Further, if the Applicants were right about the expansive reach of Sch 5 §7(1), the devolution provisions in the UK Act would fail. Section 12 of the Act is designed and intended to ensure that the devolved legislatures can modify retained EU law after withdrawal, except in areas specified in regulations by Ministers of the Crown. Schedule 2 is designed and intended to empower Ministers in the devolved administrations to make regulations within "*devolved competence*" to fix withdrawal-related deficiencies in retained EU law (Part 1 §§1-2, 8-11) and to implement any withdrawal agreement (Part 2 §§12-13, 17-19). These Schedule 2 powers were conferred upon Royal Assent (s.25(1)(a)). However, the very concept of devolved competence (both legislative and executive) remains subject

to the Sch 5 §7 international relations reserved matter[6]. So, if the Applicants are right about the expansive interpretation of that reserved matter, these powers would themselves stand to be defeated and practically illusory.

12.5. Take an example. The power in the Act, conferred on Welsh Ministers to make regulations to fix deficiencies in retained EU law, may only be used to fix deficiencies "*arising from the withdrawal of the United Kingdom from the EU*" (UK Act, Sch 2, Part 1, §1(1)). An exercise of this power would fall squarely within an expansive interpretation of Sch 5 §7(1) including "*legislating for the effects of withdrawal*"[7] **(Applicants' Case §31)**, and would thus fall outside "*devolved competence*" and be impermissible. There would be nothing within Sch 5 §7(2) to make it permissible.

12.6. Sch 5 §7(1) should be sensibly and narrowly construed in accordance with the ordinary meaning of international relations – at its core, agreements and commitments made between the UK Government and international institutions. As the Explanatory Notes to the SA 1998 explained at p.194: "*[t]he reservations of international relations does not have the effect of precluding the Scottish Ministers and officials from communicating with other countries… so long as [they] do not purport to speak for the United Kingdom or to reach agreements which commit the UK*". This is a far cry from a devolved legislature such as the Welsh Assembly making choices as to how it will regulate environmental protection within Wales, whether such choices are made in anticipation or indeed whether they are made a year or two after withdrawal has taken place. On the Applicants' expansive logic, such action would fall foul of the prohibition.

[6] The Ministerial powers in Schedule 2 are all subject to the same regime of reserved matters by virtue of the concept of "*devolved competence*" which is defined by reference to the Assembly's legislative competence: UK Act Sch 2, Part 1 §2 and Part 2, §13. The international relations reserved matter in GOWA Sch 7A §10 (and SA Sch 5 §7) is not amended by the UK Act.

[7] Potentially even "*the power to determine, as a matter of legislative policy, what the substantive content of EU-derived Scots law should be after withdrawal*" – the choice as to how to fix an identified 'deficiency' may necessarily involve a policy choice between various options.

Question 3: May devolved legislation by design stay within competence by reference to a temporal contingency?

13. The Applicants invite the answer "no". Their case in essence is: (1) that a devolved legislature cannot secure that it is competent to enact legislation by designing in a future contingency necessary to ensure its compatibility with EU law or the ECHR; (2) that this is because the Supreme Court (and those who give statements as to compatibility) are looking at the legislation when passed; (3) that this logic would not apply in the case of any United Kingdom legislation which, by design, takes effect only on a future contingency which secures compatibility with EU (or ECHR) law.

14. The correct answer is "yes". The Counsel General emphasises the following points:

    14.1. The starting point is that there is nothing wrong in principle with legislation being lawful and competent by design, by reference to future contingency. The UK Act itself involves such a design, and would be defended from any present challenge of EU law-incompatibility on precisely this basis.

    14.2. The Applicants are right that the legislative process involves assessments and statements as to compatibility. However, the same is true for UK Acts of Parliament under the Human Rights Act 1998 when a statement of compatibility is made, and the Applicants do not dispute in that context that no Court would ignore the design of the legislation. There is no good reason why the Court should ignore a key feature of the statutory design. Deciding legal compatibility in this way is artificial; it involves a pretence.

    14.3. The point of principle can be tested in this way. Suppose that a new tax is being introduced, but is intended not to be brought into effect until an existing tax has been withdrawn. Suppose that this is regarded as an imperative, because of the ECHR (A1P1) implications of double-taxation. In principle, could a legislature – with competency powers requiring ECHR-compatibility – enact legislation which makes provision for the new taxation, but do so only by designing-in a discretionary power to time implementation appropriately?

14.4. This is not a theoretical example. When the United Kingdom Parliament passed the Wales Act 2014 it conferred new devolved taxation powers (s. 15(1) and s.18(1)), provided for existing taxation to be disapplied upon Treasury order (s.16 and s.19), and required that there be no double-taxation (s. 15(2) and s.18(2)). The Welsh Assembly passed legislation for the introduction of the new taxes: the Landfill Disposals Tax (Wales) Act 2017 s.2(1) and the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 s.2(1). The inclusion of power as to choice of implementation date (s. 97(2) and s.81(2) respectively) enabled the Welsh Ministers to await Treasury confirmation of the date of its disapplication before making the commencement orders (SI 2018/34 & 35). An ECHR-based competency challenge to the 2017 Acts would have failed: there was no ECHR-incompatibility on the face of the legislation, because of its design. No Court would have ignored that design and pretended that the Welsh Acts were coming into force immediately. The position would have been a fortiori if the Assembly had provided – as it could have done – that the new taxes were only to come into effect after the withdrawal of the old.

14.5. Legislation can contain many conditions, powers and contingencies within its scheme. Provisions are frequently designed so that <u>if</u> something is the position, <u>then</u> something else becomes a consequence. There is no reason at all to ignore a necessary premise, designed-into a piece of legislation, just because it is temporal.

14.6. On the Applicants' case, a devolved legislature could not (but the United Kingdom Parliament could) act EU law-compatibly in a situation where a new EU Directive is going to change the law, from a future date, by passing legislation now which by design will implement the EU Directive only when it is in force and effect. Such future-contingent design legislation would (on the Applicants' logic) fall for being incompatible with the existing EU law, even though (a) by design incompatibility is avoided and (b) as would be recognised if it had been a UK Act.

14.7. No principle of law requires express design features in a statute to be ignored on temporal grounds. The statute must be considered as a whole, with all of its

relevant design features. It is elementary that even an impugned provision must be considered "*in the context of the legislation as a whole*": *DS v HM Advocate* [2007] UKPC D1 (2007) S.C. (P.C.) 1 at §25[8]. That is all the stronger where the statute as a whole is impugned.

Question 4: Is there an applicable constitutional principle of uncertainty which is breached?

15. The Applicants, basing themselves on *AXA* at §118 (the rule of law and certainty) and §§143, 149 (constitutional review for abrogating fundamental rights or the rule of law), invite the Court to answer "yes" to this question. The Counsel General submits the answer is "no". There are two key topics which arise.

16. The first topic concerns constitutional review and the nature of a Reference. The Counsel General agrees with the Lord Advocate. What the Applicants are invoking is constitutional review invoking the supervisory jurisdiction of the Court at common law[9], which is not open to them **(Lord Advocate's Case §§45-48)**. This case invokes the special statutory reference jurisdiction established by SA s.33 (GOWA s.112). The question is legislative competence, answered by reference to the restrictions in SA s.29(2) (GOWA s.108A(2)) The Counsel General emphasises:

16.1. That SA s.29(2) restrictions are the sole question on a Reference was explained by Lord Hope in *Re Local Government Byelaws (Wales) Bill* [2012] UKSC 53 [2013] 1 AC 792 at §80:

> "*… the question whether the Bill is within competence must be determined simply by examining the provisions by which the scheme of devolution has been laid out… The rules to which the court must apply in order to give effect to it are those laid down by the statute …*"

16.2. When the Supreme Court in *AXA* identified possible exceptional grounds of "*constitutional review*" for primary (devolved) legislation, the Court was not 'reading-in' additional limbs into s.29(2). The Court was contemplating the

[8] In the course of a competence review of section 275A of the Criminal Procedure (Scotland) Act 1995.

[9] See the **Applicants' Case** at **§17** which accepts that they are invoking something which would involve "*constitutional review*" in exceptional circumstances by reason of the courts' "*supervisory jurisdiction of the courts at common law*".

possibility of core constitutional standards, applicable in the course of its supervisory jurisdiction of the appropriate Court and external to the primary legislation. There was a deliberate link to the *R (Jackson) v Attorney General* [2006] 1 AC 262, in which this Court had contemplated constitutional standards applicable in the common law review of the clear words of a United Kingdom Act of Parliament[10].

16.3. Such constitutional review does not have as its source and underpinning implication into a statutory scheme. If there is a principle of abrogation of constitutional rights or the rule of law, it is not located within s.29(2). Rather, it arises because of core constitutional values recognised at common law and enforced through the common law remedy of judicial review, whose abrogation the general empowering words of s.28(1) do not permit.

16.4. It is important that the scope of statutory reference mechanisms should be respected and not ignored. It is not the case that the Supreme Court, on a mandatory, fast-track ex ante statutory reference decides any issue which a Court might address. This discipline can also be seen from s.32A which provides that the Advocate General, Lord Advocate or Attorney General may refer to the Supreme Court a sub-category of the legislative competence question, namely "*the question of whether a Bill or any provision of a Bill relates to a protected subject-matter to the Supreme Court for decision*" (equivalent provision is found in GOWA s.111B). S.33 is slightly wider, allowing reference of the question of "*legislative competence*" as a whole, but it carries its own clear boundaries: the statutory questions.

17. The second topic (which would only arise if the Applicants were right on the first topic) concerns the concept of legislative uncertainty:

17.1. The Applicants seek to link Lord Reed's references to *offending against or violating the rule of law* (*AXA* §§149, 153) with His Lordship's discussion of the ECHR concepts of 'in accordance with the law' and 'prescribed by law' (§118). This was

[10] See, in particular, the comments of Lord Hope at §47 and Lord Reed at §§136, 139, 142, 147, 149, 153.

not a link made by Lord Reed himself. The Applicants' logic entails the proposition that the standard of prescription for interferences with Convention rights can be replicated as a common law constitutional value of legislative uncertainty on common law judicial review, invoked by any person with a sufficient interest. No authority supports such a proposition and Lord Reed was not suggesting this.

17.2. The sorts of exceptional circumstances abrogating the rule of law countenanced in *AXA* took their lead from *Jackson* and concerned matters such as the purported abrogation of judicial review itself. Thus, at §102 of *Jackson*, Lord Steyn contemplated legislation "*involving an attempt to abolish judicial review or the ordinary role of the courts*". At §120, Lord Hope contemplated legislation "*so absurd or so unacceptable that the populace at large refuses to recognise it as law*". The Scottish Bill is very far from this type of case.

17.3. It is worth remembering the sort of threshold which would need to be surmounted in a case of uncertainty, even in the most benign case of rules such as byelaws and planning conditions. As the English Court of Appeal explained in *Percy v Hall* [1997] QB 924 at 941C per Simon Brown LJ, Courts exercising a supervisory jurisdiction will ask whether the instrument is:

> "*… so uncertain in its language as to have no ascertainable meaning, or so unclear in its effect as to be incapable of certain application in any case…*"

For the origins of this see *Percy v Hall* at 937C-D, citing *Fawcett Properties Ltd v Buckingham CC* [1961] AC 636 at 677-678 per Lord Denning:

> "*I can well understand that a by-law will be held void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning. But if the uncertainty stems only from the fact that the words of the by-law are ambiguous, it is well settled that it must, if possible, be given such a meaning as to make it reasonable and valid, rather than unreasonable and invalid…*

I am of opinion that a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them…"

17.4. This case concerns primary legislation enacted by a democratically elected legislature, where strong principles of compatible interpretation and application operate, even in cases of ambiguity (though this is not such a case). Even assuming that there were an applicable constitutional principle of exceptional uncertainty in primary legislation, which can properly be invoked on a direct reference to this Court, the Applicants cannot establish any breach.

Question 5: Is a Ministerial-consent requirement impermissibly (i) legislating for the UK Parliament or (ii) amending the UK Parliament's powers?

18. The Applicants invite the Court to answer "yes" on both counts. They challenge s.17 of the Scottish Bill, imposing the requirement upon Ministers of the Crown to obtain the prior consent of the Scottish Ministers before modifying retained EU law in devolved sectors (using powers conferred by or under an Act of Parliament enacted after s.17 comes into force). The Applicants say this lacks competence because (i) it legislates for the UK Parliament (SA Schedule 5 §1(c)) or (ii) it purports to amend SA s.28(7) (GOWA s.107(5)) which provides that the legislative competence of the Scottish Parliament "*does not affect the power of the Parliament of the United Kingdom to make laws for Scotland*". It does no such thing.

19. The correct answer is "no" on both counts. The Counsel General emphasises the following points:

19.1. A devolved legislature has competence to make provision of its own, even if it involves the disapplication or reversal of what the UK Parliament has enacted, and notwithstanding that the United Kingdom has made a deliberate choice. That is not legislating for the UK Parliament, or changing the provision regarding the UK Parliament and its power to legislate.

19.2. For example, in 2013 the UK Parliament enacted the Enterprise and Regulatory Reform Act abolishing the Agricultural Wages Board which had regulated agricultural wages for England and Wales (s.72). It did so, knowing that the Welsh Assembly disagreed with this. The Assembly then passed the Agricultural Sector (Wales) Act 2014 which effectively reversed the effects of the UK Act and re-introduced a scheme for regulating agricultural wages in Wales under the supervision of a new Agricultural Advisory Panel. That was within the competence of the Assembly, as was confirmed by the Supreme Court in *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43 [2014] 1 WLR 2622. Nobody thought the Assembly was legislating for the UK Parliament, or changing the provision regarding the UK Parliament.

19.3. Where the United Kingdom Parliament passes legislation for Wales, there is therefore no reason in principle why the Assembly could not legislate to the effect of adding a requirement (for example, for consultation), albeit omitted on the face of the UK legislation. That is not legislating for the UK Parliament, nor is it changing the provision regarding the UK Parliament.

19.4. The devolution legislation recognises this. It deals with the situation by giving the United Kingdom Parliament the option of entrenching primary legislation by protecting it from modification. It is quite inconsistent with that design to say that legislating to add or detract from what Westminster has enacted (or <u>may wish to enact in the future</u> in the case of s.17) is itself lacking in competence on grounds that it legislates for the UK Parliament or purports to change the provision regarding the UK Parliament.

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