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*(subject to editorial corrections)**	

IN HER MAJESTY'S COURT OF APPEAL NORTHERN IRELAND

ON APPEAL FROM THE QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY RAYMOND McCORD, JR83 and JAMIE WARING FOR JUDICIAL REVIEW

RAYMOND McCORD, JR83 and JAMIE WARING

Applicants/Appellants;

and

(1) THE PRIME MINISTER (2) THE SECRETARY OF STATE FOR NORTHERN IRELAND (3) THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION and (4) HER MAJESTY'S GOVERNMENT

Proposed Respondents/Respondents.

Before: Morgan LCJ, Stephens LJ and Treacy LJ

MORGAN LCJ (delivering the judgment of the court)

Introduction

[1] This is a judgment to which all the members of the court have contributed.

[2] Raymond McCord, Jamie Waring and JR 83 ("the appellants") appeal against the decision of McCloskey LJ ("the judge") to dismiss those parts of their applications for judicial review of various decisions of, in essence the Prime Minister, the Rt Hon Boris Johnson MP and of the Secretary of State for Exiting the EU, the Rt Hon Stephen Barclay which parts relied on section 10 of the European Union (Withdrawal) Act 2018 ("the Withdrawal Act") and refusing their applications for leave to apply for judicial review of those decisions on all other grounds. In essence the decisions which are challenged are those which have led the UK Government to conduct negotiations with the EU 27 proposing measures which it is suggested do

not protect the Belfast Agreement and/or which are not compatible with the Northern Ireland Act 1998 ("NIA"). The Appellants contend that the prerogative power of the Executive to conduct negotiations has been curtailed or abrogated either expressly or by necessary implication by the European Union (Withdrawal) Act 2018 so that those negotiations are justiciable and subject to the supervisory jurisdiction of the courts.

[3] Mr Ronan Lavery QC and Mr Fegan appeared on behalf of Raymond McCord, Mr Scoffield QC, Mr Christopher McCrudden and Mr Gordon Anthony appeared on behalf of Jamie Waring, Mr Barry Macdonald QC, SC and Mr Malachy McGowan appeared on behalf of JR83 and Mr McGleenan QC and Mr Philip McAteer appeared on behalf of the Prime Minister, the Secretary of State for Northern Ireland, the Secretary of State for Exiting the European Union and Her Majesty's Government. We are grateful to all counsel for their helpful oral and written submissions. We also wish to acknowledge the helpful written submissions lodged by the Attorney General with whom Mr Compton appeared.

The relevant provisions of EU and domestic law together with Parliamentary material recorded in Hansard

[4] In this part of the judgment we will summarise relevant provisions of EU and domestic law together with references to Parliamentary material contained in Hansard.

The Belfast/Good Friday Agreement and the Northern Ireland Act 1998

[5] The preamble to the NIA describes it as "An Act to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3883." Part V of the 1998 Act which is entitled "NSMC, BIC, BIIC etc." makes provision in respect of a number of bodies provided for in the Belfast/Good Friday Agreement including the North-South Ministerial Council, the British-Irish Council and Implementation bodies.

[6] In *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61, 161, §128 it was stated that the NIA:

> … "is the product of the Belfast Agreement and the British-Irish Agreement, and is a very important step in the programme designed to achieve reconciliation of the communities of Northern Ireland … [and] … has established institutions and arrangements which are intended to address the unique political history of the province and the island of Ireland"

In *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 [2002] NI 390, 398, §11, Lord Bingham stated that the NIA:

> "… does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution … 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"

In the same case Lord Hoffmann stated at paragraph 25 that the NIA

> "Is a "constitution for Northern Ireland, framed to create a continuing form of government against the history of the territory and the principles agreed in Belfast."

The European Union Referendum Act 2015

[7] Section 1 of the European Union Referendum Act 2015 provided for a referendum on the question whether the UK should leave or remain a member of the EU.

[8] On 23 June 2016, it was decided by a majority of those who voted in the referendum that the UK should leave the EU.

The Treaty on European Union

[9] Article 50 of the Treaty on European Union ("the TEU") provides the mechanism for a Member State "to withdraw from the Union …." Article 50(2) provides that if a Member State decides to withdraw it "shall notify the European Council of its intention" (which we term "the notification"). Thereafter "… the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, …." Article 50(3) provides that 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 …, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

[10] The notification can be revoked (see the judgment dated 10 December 2018 of the CJEU in *Wightman and Others v Secretary of State for Exiting the European Union* [2019] 1 CMLR 29). At paragraph 51 the CJEU stated that there were three stages of the withdrawal process. First, notification to the European Council of the intention to withdraw, secondly, negotiation and conclusion of an agreement setting out the arrangements for withdrawal, taking into account the future relationship between the state concerned and the European Union and, thirdly, the actual withdrawal from the Union on the date of entry into force of that agreement or, failing that, two years after the notification given to the European Council, unless the latter, in agreement with the member state concerned, unanimously decides to extend that period.

[11] Once a Member State has notified the European Council of its intention to withdraw under Article 50(2) that Article specifies that guidelines are to be provided by the European Council in the light of which the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal.

R (Miller and Another) v Secretary of State for Exiting the European Union

[12] The question before the Supreme Court in *R (Miller and Another) v Secretary of State for Exiting the European Union* [2018] AC 61 concerned the steps which were required as a matter of UK domestic law before the process of leaving the European Union could be initiated. Lord Neuberger defined the particular issue as "whether a formal notice of withdrawal can lawfully be given by ministers without prior legislation passed in both Houses of Parliament and assented to by HM The Queen." Before the Supreme Court it was "common ground that notice under article 50(2)" could not be given in qualified or conditional terms and that, once given, it could not be withdrawn. The Secretary of State's case was that, even if this common ground was mistaken, it would make no difference to the outcome of those proceedings. On that basis the majority judgment proceeded on the basis "that once the United Kingdom gives Notice, it will inevitably cease at a later date to be a member of the European Union and a party to the EU Treaties."

[13] In its judgment delivered on 24 January 2017 the Supreme Court, by a majority, held amongst other matters that the prerogative powers exercised in making and withdrawing from 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 the UK should withdraw from the EU.

European Union (Notification of Withdrawal) Act 2017

[14] In response to the decision in *Miller* and on 16 March 2017 the European Union (Notification of Withdrawal) Act 2017 ("Notification of Withdrawal Act") was made which by section 1(1) permitted the Prime Minister to give the notification.

[15] In view of the common ground in *Miller* that notice under article 50(2) could not be given in qualified or conditional terms and that, once given, it could not be withdrawn Parliament must have been aware in enacting this legislation that notification led to an obligation on the EU to conduct negotiations but that, in the absence of agreement, Article 50(3) applied and exit would follow. In effect Parliament contemplated and permitted leaving the EU without an agreement with all the consequences that entailed if negotiations failed. Furthermore there was nothing in the Act which required the Executive to negotiate. It was clear when the Act was made that withdrawal would happen post-notification whether or not the UK negotiated and even if no withdrawal agreement was entered into.

[16] By letter dated 28 March 2017 the former Prime Minister, The Rt Hon Theresa May MP gave notification under Article 50 TEU to the President of the European Council. The European Council accepted the notification. In accordance with Article 50(3) TEU, the UK's withdrawal would take effect two years after the date of the

notification, unless any extension of time was agreed between the UK and the Council.

Guidelines under Article 50(2) TEU

[17] Four separate sets of Guidelines were adopted by the European Council following receipt of the notification. The first of these was adopted on 29 April 2017 and contains a section entitled "Core Principles." The first such principle 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" also state that "(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*" (emphasis added). It can be seen that one of the core principles is that nothing is agreed in the negotiations until everything is agreed.

The Joint Report dated 8 December 2017

[18] Negotiations took place between the UK Government and the EU which resulted in the joint report dated 8 December 2017 entitled "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." It was designed to be considered at a meeting of the European Council on 14/15 December 2017. One of the core principles set out in the guidelines under Article 50(2) is that that "nothing is agreed until everything is agreed." The introductory statement to the joint report reflects this core principle. Paragraph 2 of the Joint Report records that both parties had reached agreement in principle across three areas under consideration in the first phase of negotiations 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 report addressed each of the topics "agreed in principle" one of which is contained in the chapter entitled "Ireland and Northern Ireland."

[19] Because of its importance we set out below the entirety of the section on "Ireland and Northern Ireland" contained within the Joint Report:

> "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."

The Mapping Exercise

[20] The mapping exercise referred to in para 47 of the Joint Report was carried out between the Northern Ireland Civil Service and the EU Commission to identify areas of North-South cooperation that are directly underpinned by EU legal and policy frameworks with a view to maintaining North-South cooperation following the UK's withdrawal and which would therefore require an agreement to enable them to continue unaffected.

[21] The European Commission produced its own version of the mapping exercise entitled "Negotiations in Ireland/Northern Ireland, mapping of North-South cooperation". In the "Report and key findings of the exercise" it is recorded that "North-South cooperation is a central part of the Good Friday Agreement". Page 5 expressly acknowledges that:

> "This exercise also demonstrated clearly that many areas of North-South cooperation have either expressly relied upon or have been significantly enabled by the overarching EU legal and policy framework and the implicit assumption that both Ireland and the UK would remain EU Member States. North-South regulatory alignment supports the effective operation of all of the implementation bodies."

The European Union (Withdrawal) Act 2018

[22] The Withdrawal Act was made on 26 June 2018.

[23] The long title of the Withdrawal Act states that it is "An Act to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU."

[24] Section 1 provides that "the European Communities Act 1972 is repealed on exit day."

[25] Sections 2 to 9 make provision for the retention of existing EU law.

[26] Section 20 contains a number of definitions which include:

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

(ii) "*Exit day*" means 29 March 2019 at 11.00 pm (later amended to either 12 April 2019 or 22 May 2019 then subsequently amended to 31 October 2019, by respectively the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019 made on 28 March 2019 and then by the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations 2019 made on 11 April 2019.

(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."

[27] As originally enacted section 20(4) provided that a Minister of the Crown "*may*" by regulations amend the definition of "exit day" in subsection (1) to ensure that the day and time specified in the definition are the day and time that the Treaties are to cease to apply to the United Kingdom. The European Union (Withdrawal) (No. 2) Act 2019 amended section 20(4) by substituting "must" for "may".

[28] Section 8 provides that a Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU. Section 8(8) provides that no regulations may be made under this section after the end of the period of two years beginning with exit day.

[29] Section 9 provides that 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." Section 9(4) provides that "no regulations may be made under this section after exit day."

[30] That part of the Withdrawal Act containing sections 10 – 12 is entitled "Devolution." The heading of section 10 is "Continuation of North-South Co-operation and the prevention of new border arrangements." We will set out section 10 in full in that part of this judgment headed Consideration.

[31] Relying on *Pepper v Hart* [1992] 3 WLR 1032 and as an aid to the construction of section 10 the appellants relied on various Parliamentary materials. When Clause 10 (now section 10 of the 2018 Act) was being introduced by Lord Patten in the House of Lords he stated:

> "If at the end of the debate the Minister, with his customary civility, says 'What's the problem? We're going to do all this any way. Why bother to put this new clause into the Bill?", my response will be that while I totally expect him to honour his word and do what the Government have said, I think the Prime Minister and others, such as the Minister, need some support at this moment when a number of their colleagues and Conservative Party Members in the other place, who are very keen on the over-the-cliff, on-to-the-rocks Brexit, are making it rather difficult for the Prime Minister to square circles than should be the case"

Lord Patten referring to the Joint Report continued by stating:

> "… The amendment would bring into legal effect the commitments the UK Government have already made to the European Union and to everyone.
>
> In Brussels a means of doing so in legally operable terms in the withdrawal agreement that's currently

> being negotiated, it's essential we do likewise in passing this amendment to the bill.
>
> Any Customs partnership must be tight and seamless enough to avoid such checks while ensuring that the border is not a back door into the EU single market. Any technological facilitation must not entail physical or infrastructure, random checks or compliance checks at any point. The amendment will provide much needed clarity and legal certainty with no fudges, creeping barriers or sly erosion of the finally honed balance. It will ensure that cross border movement, north south co-operation and day to day mundane integration will continue to happen unimpeded. It does not tie the Government's hands on the precise solution except to insist upon what everyone says they want anyway, namely a border that's as free, open and invisible as it is today. In my view this can only mean reproducing in some form the customs, trade, rules of origins, standards and regulatory arrangements that we now have across it.
>
> It is our responsibility to ensure that Brexit does not mean the emergence, at any level, of any new conflict about the border because that would be both economically catastrophic and politically lethal, that's why this amendment is so vital". [The amendment is passed and it becomes section 10.]

[32] Lord Carswell, although he opposed the amendment, appears to have appreciated the significance of the amendment and was of the same view as to its purpose.

[33] In the House of Commons Mr Liddington, speaking on behalf of the government, addressed the amendment as follows:

> "In many ways the amendment is, as a number of noble lords noted, a statement of Government policy and was prompted very eloquently in the Lords by …. Lord Patten. It seeks to ensure that that we will not act incompatibly with the Northern Ireland Act and will have due regard for the Joint Report. It seeks to protect north-south cooperation between Northern Ireland and Ireland and to prevent, among other things, physical infrastructure on the border with Ireland"

[34] There was then an intervention from Mr Dodds who said:

> "I welcome the decision to tidy up the jurisdiction and sovereignty issues raised in the House of Lords in the Patten amendment. Will the Minister confirm that the powers in the amendment are restricted purely to the purposes of the Bill?"

Mr Liddington replied:

> "I can confirm the Right Hon. Gentleman's interpretation of the Government amendment in lieu is exactly as he has described."

[35] In the Trade Bill there is a discussion with Lord Hain suggesting that there should be a similar provision to section 10 of the EU Withdrawal Act. Lord Bates, speaking for the government, said (addressing an intervention by Lord Bruce):

> "I am sure he would recognise that the whole thrust of the Government's and the Prime Minister's negotiations, and what the withdrawal agreement is about, is seeking to secure the type of border arrangements that … Lord Mackay…Lord Hain … Lord Alderdice … Lord Eames and others seek to work towards. Peace on the island of Ireland between Northern Ireland and the Republic of Ireland, and the Good Friday Agreement – the partnership between the United Kingdom and the Republic of Ireland in this context – surely must be **the red line above all red lines** that we need to preserve.
>
> That is why there is the amendment in the EU Withdrawal Act making that explicit which …Lord Kerr, was instrumental in securing. That has been a key part of what Her Majesty's Government have done when engaging in negotiations on these matters."

[36] The power to make regulations under the Withdrawal Act is not confined to a Minister of the Crown as section 11 which gives effect to Schedule 2 confers powers to make regulations involving devolved authorities. Those powers correspond to the powers conferred by sections 8 and 9.

[37] Section 13 of the Withdrawal Act is headed "Parliamentary approval of the outcome of negotiations with the EU" and it establishes the regime for approval of either a negotiated withdrawal agreement or of "no deal" if that occurred prior to 21 January 2019.

[38] Section 25(1)-(3) provides for commencement of different parts of the Act so that for instance sections 8 to 11 (including Schedule 2), come into force on the day on which the Act is passed. Section 1 which provides that "the European Communities Act 1972 is repealed on exit day" was not brought into force by subsections (1) to (3). However section 25(4) then provides that "the provisions of this Act, so far as they are not brought into force by subsections (1) to (3), come into force on such day as a Minister of the Crown may by regulations appoint; and different days may be appointed for different purposes." Section 1 was subsequently brought into force on 17 August 2019 by The European Union (Withdrawal) Act 2018 (Commencement No 4) Regulations 2019 made on 16 August 2019.

The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019

[39] The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019, made on 28 March 2019, amended the definition of "*Exit Day*" in section 20 of the Withdrawal Act. An extension to the two year period in Article 50 TEU was agreed between the United Kingdom and the European Council on 22 March 2019. Exit day was either to be 11.00 p.m. on 22 May 2019 if the House of Commons approved the withdrawal agreement by 11.00 p.m. on 29 March 2019 or 11.00 p.m. on 12 April 2019.

The European Union (Withdrawal) Act 2019

[40] The European Union (Withdrawal) Act 2019, made on 8 April 2019, imposed a duty on a Minister of the Crown to move a motion in the House of Commons that this House agrees for the purposes of section 1 of the European Union (Withdrawal) Act 2019 to the Prime Minister seeking an extension of the period specified in Article 50(3) of the Treaty on European Union.

The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations 2019

[41] The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations 2019 made on 11 April 2019 amended the definition of "exit day" to 31 October 2019.

The European Union (Withdrawal) Act 2018 (Commencement No 4) Regulations 2019

[42] The European Union (Withdrawal) Act 2018 (Commencement No 4) Regulations 2019 made on 16 August 2019, brought section 1 of the Withdrawal Act into force on 17 August 2019.

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

[43] As the judge stated the Bill which culminated in this primary legislation (the "Withdrawal No 2 Act") progressed through both Houses of Parliament in tandem with the proceedings before him becoming law on 9 September 2019. Its long title is "An Act to make further provision in connection with the period for negotiations for withdrawing from the European Union."

[44] Section 1 imposes a duty on the Prime Minister if one or other of two conditions are not met no later than 19 October 2019. In short form those conditions are either there is a withdrawal agreement and it has been approved by resolution of the House of Commons or there is no deal and a resolution approving no deal has been approved by the House of Commons. If neither of those conditions are met then in summary the Prime Minister must seek to obtain from the European Council an extension of the period under Article 50(3) of the TEU by sending to the President of the European Council a letter in the form set out in the Schedule to the Act requesting an extension of the period to 11.00pm on 31 January 2020.

[45] Section 3 creates duties in connection with an Article 50 extension so that for instance if the European Council decides to agree an extension of the period in Article 50(3) of the Treaty on European Union ending at 11.00 pm on 31 October 2019 to the period ending at 11.00pm on 31 January 2020, the Prime Minister must, immediately after such a decision is made, notify the President of the European Council that the United Kingdom agrees to the proposed extension.

[46] Section 2 is headed report on progress of negotiations on the United Kingdom's relationship with the European Union and for instance obliges the Secretary of State in the event that an extension of the period under Article 50(3) of the TEU is agreed with the European Council, the Secretary of State to publish a report by 30 November 2019 explaining what progress has been made in negotiations on the United Kingdom's relationship with the European Union and must make arrangements for amongst other matters a motion to the effect that the House of Commons has approved the report, to be moved in the House of Commons by a Minister of the Crown.

[47] As the judge observed 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.

The trial judge's conclusions

[48] In his comprehensive and detailed judgment the Judge between paragraphs [5] and [16] set out the nature of the different judicial review challenges by reference

to the skeleton arguments and the O. 53 statements: then between paragraphs [17] and [43] he set out the relevant provisions of EU and domestic law together with a reference to a debate in the House of Lords on 2 May 2018. Between paragraphs [44] and [48] the Judge set out elements of the evidence. Having done so the Judge recorded a number of governing principles as being:

(a) The judicial review jurisdiction is one of "supervisory superintendence" so that the "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."

(b) The Applicants bear a burden of proof so that they must establish their case to the civil standard of the balance of probabilities. Relying on *Re SOS Application* [2003] NIJB 252 at [19], *Re H and Others* [1996] AC 563 and *Re CD* [2008] UKHL 33 at [22] – [28] the Judge stated that *assertion* is not sufficient to discharge that burden.

(c) Relying on *R (Yalland) v Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin) and *Re Kelly's Application* [2018] NIQB 8, at [9] the Judge set out the legal principles in relation to prematurity. He noted that in *Yalland* it was stated that 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." Rather as expressed in *Yalland* 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."

[49] The Judge considered that Article 50 TEU was "the main cornerstone of the legal framework for the adjudication of these challenges" stating that "Article 50 is a measure of supreme EU law" which was "also a measure of domestic, or municipal, UK law by virtue of section 2(1) of the European Communities Act 1972." He considered that "those aspects of Article 50 which were the subject of full argument in the present cases featured at most tangentially in *Miller*" at paragraphs [25] – [26] and [153] – [154] of that decision." It appears that the Judge was not referred to paragraphs [79] and [104] of *Miller*.

[50] A summary of the Judge's findings in relation to the challenges under section 10 of the Withdrawal Act are:

(a) The challenges are not directed against any "*devolved authority*" but rather the specific target was the Prime Minister.

(b) The Judge considered that the first question for the court became has the Prime Minister exercised any of the powers under section 10 of the Withdrawal Act?

(c) The Judge considered that the most visible "powers under this Act" were those which authorised Ministers of the Crown to make subordinate legislation by the mechanism of regulations. The examples given by the Judge were section 8(1), section 9(1), section 11 in conjunction with Schedule 2 and Schedule 7.

(d) The Judge recorded that no other "powers under this Act" were identified in counsels' submissions but rather Mr Scoffield and Mr Lavery contended that an implied power was in play namely the power of the Prime Minister to conduct negotiations with the EU 27 concerning a possible Article 50(2) withdrawal agreement.

(e) The Judge held that "the first possible analysis" was that Article 50(2) TEU provided the UK Government with clear authority to engage in withdrawal negotiations with the EU 27 as consistent with his earlier ruling that Article 50 was a part of domestic law. We proceed on the basis that this analysis was both as a matter of EU law and of domestic law. The Judge considered on this analysis that in accordance with the bilateral meaning to be attributed to negotiations there was an obligation on the UK to negotiate so that Article 50 prescribed both the duty and the corresponding power to negotiate so that there was no need for the Withdrawal Act to confer an implied power to negotiate.

(f) The Judge stated that support for the analysis that there was no need for the Withdrawal Act to confer a power to negotiate was the fact that the UK Government was negotiating with EU Council representatives long before that Act was made on 26 June 2018. In that respect the Judge referred to the Joint Report of December 2017 which was the result of those earlier negotiations.

(g) The Judge then considered an alternative analysis which was that in conducting the negotiations the Executive was exercising a prerogative power. The Judge relying on *Miller* at [54] to [55] favoured this analysis subject "to examining the third alternative urged on behalf of the Applicants."

(h) The third alternative was identified by the Judge as being 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" (emphasis added).

(i) The Judge rejected the third alternative as:

(i) There were negotiations prior to the Withdrawal Act;

(ii) The background to the Withdrawal Act included the decision in *Miller* which had restated the prerogative power;
(iii) No rationale had been identified for modifying or extinguishing the prerogative power;
(iv) There was no ascertainable purpose for supplanting or extinguishing the prerogative power;
(v) Finally if the legislature had intended to extinguish the prerogative power in the context of Article 50(2) TEU negotiations, enshrining it instead in section 10(1), it could have said so.

(j) The Judge having rejected any express intention to extinguish the prerogative power then considered whether any implied intention to curtail or abrogate the prerogative power to negotiate could be gleaned from sections 10, 13 and 20 of the Withdrawal Act considered together.

(k) The Judge considered that section 13 was not concerned with Executive powers but rather was prospective being concerned with Parliamentary powers when a withdrawal agreement was presented to Parliament for approval. On this basis the Judge considered that section 13 was "remote" from the present negotiations. The Judge stated that "Section 13 … 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."

(l) The Judge considered that the definitions of "Exit day" and "Withdrawal Agreement" in section 20 both spoke to future events confounding rather than supporting any implied intention to extinguish the prerogative power.

(m) The Judge analysed section 10(1)(a) stating that it emphasised that regulations as may permissibly be made under the Withdrawal Act must not conflict with the NIA.

(n) The Judge analysed section 10(1)(b) stating 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."

(o) The Judge concluded that in conducting negotiations with the EU the Executive was not exercising "any of the powers under" the Withdrawal Act.

(p) If he was wrong in that finding the Judge turned to a consideration as to what the position would be if in negotiating the Executive was exercising a power

under the Withdrawal Act. The Judge held that even if this was the exercise of a power under the Withdrawal Act the appellants had not presented sufficiently cogent evidence to discharge the burden of proof that there had been a breach of section 10 and furthermore he held that the challenges failed as premature under the *Yalland* principle.

(q) The judge summarised his findings in relation to section 10 of the Withdrawal Act as follows:

(i) The impugned decisions and policies did 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 as premature by the *Yalland* principle.

[51] The Judge considered and dismissed the alternative challenge that the Executive was misusing the prerogative powers in that the use of those powers would inevitably or probably lead to the blunting of section 10. He found no evidence to support this contention.

[52] The Judge considered the document known as "Operation Yellowhammer" which the Judge described as identifying and assessing worst case scenarios of departing the EU without a withdrawal agreement. The judge identified the ground of challenge as being 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." The Judge referred to the evidence presented on behalf of the proposed Respondents to the effect that the document had been taken into account and he dismissed this ground of challenge.

[53] The Judge considered and dismissed JR83's case that the impugned decisions infringe the duty imposed upon the Prime Minister and the Brexit secretary not to act incompatibly with Articles 2, 3 and 8 ECHR, either singly or in conjunction with Article 14 ECHR.

[54] In relation to Article 2 the Judge found that the evidence was replete with possibilities and uncertainties so that JR83 had not demonstrated an objectively verified, present and continuing risk to life in accordance with the judgment in *Re Officer L* [2007] UKHL 36 at [20]. The Judge therefore dismissed this ground of challenge as "the evidence falls well short of satisfying the exacting threshold test." The Judge also stated that an intrinsic weakness of this ground of challenge was that ordinarily it was the police force, rather than the Prime Minister or Brexit Secretary which was appropriate public authority subject to the positive obligation to protect

life under the principles enunciated in *Osman – v – United Kingdom* [1998] 29 EHRR 245 at [115] – [116].

[55] The Judge dismissed the Article 3 ground given that the threshold test was the same.

[56] In relation to Article 8 the Judge considered that it was predicated on the vague possibility of a future interference with the Applicant's right to private and family life which lacked specificity and definition. The Judge held that no interference with private or family life had been established.

[57] In relation to Article 14 the Judge dismissed the challenge on a number of grounds including on the basis of "evidential frailties."

[58] The Judge dealt at the conclusion of his judgment with the issue as to whether the Executive's negotiations with the EU were the exercise of a prerogative power and if so whether they were non justiciable. The Judge explained his reasons for dealing with this issue last rather than first by stating that "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." The Judge referred to *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, at 293 a/c, *Gibson v Lord Advocate* [1975] SC 136 at 144, *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* at [26] and *McClean v First Secretary of State and her Majesty's Attorney General* [2017] EWHC 3174 (Admin) at [21]. Relying on those authorities the Judge held that the issues in this case were non justiciable.

[59] In conclusion the judge granted leave to apply for judicial review in respect of the section 10 Withdrawal Act issue only but dismissed that application. The Judge refused leave to apply for judicial review on all other grounds.

McCord submissions

[60] Mr Lavery submitted that the respondents had plainly taken the decision not to extend the date of exit day in any circumstances. He also submitted that it was clear that the respondents had abandoned 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. Any exercise of power under the Withdrawal Act was accordingly unlawful. That included the power already used to commence section 1 of the said Act to facilitate a no deal withdrawal.

[61] It was submitted that the Withdrawal Act replaces the prerogative power in relation to negotiations. This appellant contended that Article 50 TEU was part of domestic law by virtue of having been incorporated by section 1 of the European Communities Act 1972. That section is, however, merely an interpretive section identifying the treaties to which the Act refers.

[62] In any event the exercise of powers under the Withdrawal Act are inextricably linked to the negotiations. By way of example the power to change exit day can only reasonably be a reflection of a negotiated agreement with the EU 27 to extend the period for negotiations under Article 50(3) TEU.

[63] The learned trial judge was incorrect to state that the court would not concern itself with legal/factual events that have not yet occurred. The decision to leave the EU without a deal was an unmistakable decision taken by the respondents. The fact that it was a matter likely to occur only in the future did not prevent an analysis of legality.

[64] The judge was wrong to consider that virtually all the evidence belonged to the world of politics. The material submitted was from official government publications and statements designed to substantiate the effects of no deal on Northern Ireland. In any event the courts are not to be excluded from scrutiny simply because the subject matter involves politics.

JR83 submissions

[65] The main thrust of the case on behalf this applicant made by Mr Macdonald is that the decisions that it is said the Government has already made in the exercise of its executive powers to arrange the withdrawal of the UK from the EU are unlawful because by those decisions the Executive is frustrating the will of parliament. In relation to that central issue counsel addressed four questions:

(i) What is the law about executive powers?

(ii) What is the will of parliament in respect of withdrawal from the EU?

(iii) What is the evidence that the Executive has frustrated that will by the decisions it has made?

(iv) Where did the trial judge go wrong?

[66] As to the first question it was submitted, relying on para 48 of *Miller*, that the prerogative powers of the Executive may be abrogated or curtailed by Parliament either by express words or by necessary implication. This means that Executive powers can be curtailed even though there are no express words to that effect as long as it must necessarily be implied that this is the will of Parliament as expressed in statute. Furthermore it also means that the Executive cannot frustrate the will of parliament by exercising its powers in such a way as to prevent the effectual operation of statutory provisions.

[67] As to the second question, what is the will of Parliament, it was submitted that this is a matter of law, not evidence. It was submitted that the Brexit field has been occupied by Parliament in the EU Withdrawal Notification Act 2017 originally, secondly in the EU Withdrawal Act 2018 and thirdly, the EU Withdrawal No.2 Act 2019 (the latter preventing an early exit without a withdrawal agreement). Mr Macdonald submitted that this is apparent from sections 9 and 13 of the 2018 Act in particular. Counsel acknowledged that whilst section 13(7) *et seq* recognised the possibility that no agreement may in fact be reached such a possibility did not represent the will of Parliament. Obviously, as he pointed out, events can occur that are beyond the will of Parliament. The will of Parliament as expressed and/or implied in the 2018 Act is that an agreement should be sought on terms that are spelled out by Parliament in section 10 of the 2018 Act.

[68] By virtue of section 10 the exercise of powers under the 2018 Act is expressly required to be "compatible" with the Northern Ireland Act 1998. Further, the exercise of powers under the Act is expressly required to be exercised with due regard to the Joint report and also to avoid a hard border. The necessary implication, it is argued, is that the agreement to be approved and given effect by the use of powers under the Act must be of the same character so that the Executive can only lawfully exercise its powers to seek such an agreement.

[69] In relation to section 10(1)(a) Mr Macdonald submitted that the most striking feature of that subsection is that there is a requirement to be compatible with the terms of the entire 1998 Act rather than any specific terms. This he says indicates that it is about the whole scheme of the 1998 Act which as the Title to that Act makes clear is designed to give effect to the Good Friday Agreement.

[70] As to section 10(1)(b) Mr Macdonald acknowledged that there was no dispute about the essential meaning of "due regard" but that it has to take its colour and its meaning from the Act in which it appears and that the immediate context in which it appears is the next subsection section 10(2). He submitted that in broad terms the entire Act is about two things – dealing with deficiencies arising from the withdrawal (section 8) and providing for the approval and implementation of the agreement that is expected will be negotiated. Section 9 deals with implementing a withdrawal agreement in a way that has to be done just before it comes into effect. Section 9 requires a withdrawal agreement and you cannot have regulations under section 9 unless there is a withdrawal agreement. Section 9 is all about implementing the agreement. Nothing in the enabling provisions referred to in section 10(2) (ie sections 8, 9, 23(1) and (6)) can authorise regulations which diminish any form of North South co-operation provided for by the agreement as defined in the NIA or 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 UK and the EU. The purpose of section 10 is to create an obligation that an agreement will be negotiated which is consistent with the will of Parliament as expressed therein so that whatever agreement is negotiated will not diminish North South co-operation and will not facilitate in any way a hard border. Further, but of secondary importance, is the fact that when it comes to implementation of the agreement and the consequential provisions that are required in those circumstances ministers etc can only exercise their administrative power in order to maintain what should have already been expressed in the agreement.

[71] In respect of the preceding submission when questioned by the Court why, if that was the case, the statute did not say so as it has done in section 17 Mr Macdonald submitted that there was no need for it to have done so. This was because it was he submitted such a necessary implication from the terms of section 10 that the will of Parliament could not have been mistaken. Counsel said:

> "There is no way anyone reading this legislation fairly and properly could avoid the conclusion that what Parliament intends here is that this agreement

> when it comes to be implemented, will not be, the one thing it will not do is diminish North South co-operation, diminish or impair the Good Friday Agreement or the Northern Ireland Act or specifically create a hard border or facilitate a hard border. There is no way this can be read other than by reflecting the will of Parliament that the agreement itself, which is obviously going to be the precursor to implementation of the agreement, will be of the same character, will also likewise protect the Good Friday Agreement, the Northern Ireland Act and North South co-operation……It is … as clear as a pikestaff from the section itself, it does not need to be said in terms and of course, the agreement will not do any of these things, that would just be superfluous."

[72] Section 10(2) deals with regulations made under 8, 9, 23(1) and 23(6) and therefore deals with all areas – the deficiencies in retained EU law, implementation prior to exit day and with the consequential regulations that may be required. Accordingly, Mr MacDonald submits, in all respects in which ministers are going to be exercising any of their powers concerning any of the regulations about any aspect of the EU withdrawal, the one thing the Minister cannot do is create a hard border or diminish North South co-operation. Counsel acknowledged that under section 9(1) there must be a prior enactment by statute approving the final terms of the withdrawal agreement and that because Parliament is sovereign it could make provision which would offend 10(2). However the Minister's power is constrained unless and until Parliament by statute changes it. Until Parliament changes the law as set out in the 2018 Act the Executive cannot exercise what remains of its Executive prerogative powers in a way that cuts across section 10.

[73] In support of his contention as to what is the intention of parliament counsel referred to the portions of Hansard referred to at paragraphs [31]-[34] above. He submitted that the will of Parliament is that the withdrawal of the EU should not be achieved at the expense of the GFA or the North South co-operation or facilitating a border. The Executive has frustrated the will of parliament by the decisions it has already made. Counsel relies on its refusal to seek an agreement in accordance with the Joint Report and its readiness to exit with no deal.

[74] Counsel submitted that the Executive was seeking to pre-empt the exercise of powers under the Act in accordance with section 10 by creating an agreement or no agreement so as to make it impossible for those powers to be exercised in that way. He argues that it will be impossible for ministers or devolved authorities to exercise its powers in such a way as to prevent a hard border if the agreement itself or the absence of an agreement guarantees a hard border. He submitted that they are completely at odds.

[75] As to the third question, the evidence he says comes from the government itself and that it is evidence which is not he says actually in dispute. Reliance was

placed on a number of documents including the Joint Report, the Mapping exercise, the Operation Yellowhammer report, the Prime Minister's statement on taking office, his letter to Donald Tusk and to the failure by the respondent to engage with the pre-action protocol correspondence.

[76] It was submitted that what the Executive has been doing since early this year is a violation of the curtailment of its prerogative powers necessarily implied by section 10. It is contrary to the will of Parliament and therefore unlawful because they have no power to use prerogative powers in a way that is inconsistent with the will of Parliament where the field is already occupied.

[77] Mr Macdonald then addressed submissions in relation to where he said the trial judge went wrong, which it is unnecessary to rehearse, and to a number of discrete points of challenge which did not form part of the central thrust of the challenge. These discrete issues are briefly addressed later.

Waring submissions

[78] Mr Scoffield adopted Mr Macdonald's submissions. He agreed that it was necessary to take a broad, purposive approach to the Withdrawal Act recognising its constitutional character. The intention of section 10 was to secure the continuation of the Belfast Agreement in all its parts in the event of a UK withdrawal from the EU. That was clear from the statute itself but if there was any ambiguity the statements in Parliament of Lord Patten and Mr Liddington made clear the parliamentary intention. Section 10 operated as a constraint upon the exercise by the Executive of its negotiating powers as a result of which the negotiators were required to deliver an outcome which did not interfere with the intended operation of the Belfast Agreement.

[79] Without prejudice to that case Mr Scoffield also submitted that the same outcome resulted from a narrower analysis of the relevant statutory provisions. Section 1 of the Withdrawal Act repeals the European Communities Act 1972 on exit day. There is little dispute that this is an iconic provision which ends the power of the EU to make laws which have effect in the UK.

[80] It is common case that section 25(4) of the Withdrawal Act is a commencement power which is caught by the opening words of section 10(1) of the said Act. It was submitted on behalf of this appellant that the Withdrawal Act 2018 (Commencement No 4) Regulations 2019 made on 16 August 2019 which commenced section 1 of the Withdrawal Act the following day was a step on the way to the UK leaving the EU without an agreement in light of the public statements of the Prime Minister. Such a step would have the inevitable effect of introducing a hard border on the island of Ireland. That outcome would frustrate the will of Parliament as expressed in the Withdrawal Act but in any event was incompatible with the Northern Ireland Act 1998 ("NIA").

[81] The purpose of the NIA as expressed in the preamble to the Act was the implementation of the agreement reached at multi-party talks in April 1998 known as the Belfast/Good Friday Agreement ("the Agreement"). Part V of the NIA deals with North-South relations on the island of Ireland to be addressed by a North-

South Ministerial Council ("the Council") and East-West relations between Ireland and the United Kingdom to be addressed by the British-Irish Council. Sections 52A, 52B, and 52C in Part V provided for the duty of Ministers to "participate" in meetings of each Council, the procedures in relation to the agreement of the agenda and a duty to report to the Executive Committee and Assembly.

[82] Section 52C(5) provides that "participate" shall be construed in relation to the North-South Ministerial Council in accordance with paragraphs 5 and 6 of Strand Two of the Belfast Agreement.

[83] Section 53 deals with implementation bodies which are defined as bodies for implementing, on the basis mentioned in paragraph 11 of Strand Two of the Belfast Agreement, policies agreed in the North-South Ministerial Council. Section 53(2) provides that an Act of the Assembly could make provision for giving effect to an agreement or arrangement including provision for transferring to any body designated by or constituted under the agreement or arrangement any functions which would otherwise be exercisable by any Minister or Northern Ireland department or for transferring to a Minister or Northern Ireland department any functions which would otherwise be exercisable by any authority outside Northern Ireland.

[84] Although section 6 of the NIA limited the competence of the Assembly to matters internal to Northern Ireland an exception was made to enable that competence to extend to functions that would otherwise be exercisable by any authority outside Northern Ireland where they resulted from any arrangement or agreement arising from the Council. Clearly if the ability to make such arrangements or agreements was diminished that would affect the extent to which that competence could be exercised.

[85] Section 55 of the NIA provides that the Secretary of State may make an order about any body which he considers to be an implementation body conferring on that body the legal capacities of a body corporate and making provision for the payment of grants to such a body. The definition of implementation body is as contained in section 53(2).

[86] The multi-party agreement reached on 10 April 1998 was also supported by an agreement reached between the government of the United Kingdom of Great Britain and Northern Ireland and the government of Ireland in which the Preamble records the parties wishing to develop still further the unique relationship between the peoples and the close cooperation between their countries as friendly neighbours and as partners in the European Union. Article 2 of that agreement affirmed the commitment of both governments to support and where appropriate implement the provisions of the Agreement. In particular in accordance with that agreement the Council and the implementation bodies referred to in Strand Two of the Agreement were established immediately.

[87] Paragraph 1 of Strand Two stated that the object of the Council was to develop consultation, cooperation and action within the island of Ireland, including through implementation on an all-Ireland and cross-border basis, on matters of

mutual interest within the competence of the Administrations, North and South. Paragraph 3 provided that meetings of the Council included meetings in an appropriate format to consider institutional cross-sectoral matters (including in relation to the EU) and to resolve disagreement.

[88] Paragraph 5 of Strand Two provided that the Council was to take decisions by agreement on policies and action at an all-Ireland and cross-border level to be implemented by the bodies established under Strand Two. Paragraph 11 stated that implementation bodies were to have a clear operational remit. They were to implement on an all-Ireland and cross-border basis policies agreed in the Council. Paragraph 17 provided that the Council was 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 were to be made to ensure that the views of the Council were taken into account and represented appropriately at relevant EU meetings. The Annex provided for areas for cooperation and implementation including many areas affected by EU law and specifically included relevant EU programmes and their successors.

[89] In the event of a UK withdrawal from the EU without a deal the work of the implementation bodies would at the very least be severely disrupted. The scheme of the NIA envisaged that the Assembly in Northern Ireland would legislate for implementation bodies throughout the island of Ireland. If the UK withdraws from the EU without an agreement any such implementation body would be subject to EU law in Ireland but not in Northern Ireland. In particular the implementation body would be subject to the jurisdiction of the European Court of Justice in Ireland and issues may well arise in areas of agriculture, transport, environment, fisheries and social security/social welfare relating to cross-border workers. The requirement in paragraph 11 of Strand Two is for the Council to implement on an all-Ireland and cross-border basis policies agreed in the Council. It is difficult to see how that could be achieved if the two parts of the island were subject to different regulatory regimes. Even more complex issues arise in respect of the funding of EU programmes. Those submissions were the subject of a written rebuttal by the Attorney General contending that the work of the North-South bodies would continue although not necessarily in the same form.

[90] Mr Scoffield submitted, therefore, that the work of the Council envisaged in Part V of the NIA would effectively come to a halt. Although the Council could continue to meet it could not deliver on the objectives of the NIA or Strand Two of the Belfast Agreement to implement agreed policies on a cross-border and all-Ireland basis. In other words a UK withdrawal without an agreement with the EU would frustrate the intention of Parliament in the NIA but such an outcome was prohibited both by section 10 of the Withdrawal Act and also because it would undermine the intention of Parliament in the Withdrawal Act that negotiations with the EU could only be achieved successfully if there was an agreement. Any other outcome would require an amendment of the Withdrawal Act and section 10 in particular.

Respondent's submissions

[91] Mr McGleenan supported the broad approach of the judge. He submitted that section 10 of the Withdrawal Act had to be seen in the context of the suite of Brexit legislation in the context of Article 50 of the TEU. The 2017 Act was the trigger for the process of withdrawal. It did not touch on negotiations but necessarily proceeded on the basis that it may not be possible to reach a withdrawal agreement. Similarly the Withdrawal Act also contemplated the possibility that no withdrawal agreement would be reached. It all depended on the outcome of the negotiations.

[92] The Regulations in the Withdrawal Act are designed to bring order to the statute book. They are not designed to abrogate or constrain the exercise of prerogative power by the conduct of negotiations. The outcome of the negotiations remains unknown and it will be for Parliament to decide how to proceed once the outcome is known.

[93] There is no need to resort to *Pepper v Hart*. In any event the statement by Lord Patten was not that of the Bill's proposer. The response of Mr Liddington to the question posed by Mr Dodds plainly confined the reach of section 10 to the exercise of powers under the Withdrawal Act. The comments in the course of the passage of the Trade Bill were made long after the passage of the Withdrawal Act and clearly fall outside the rule in *Pepper v Hart*.

[94] Mr McGleenan also discussed the precise effect of the various obligations in section 10 but it is unnecessary for us to set those out. His overall submission was that the matter was non justiciable.

[95] Insofar as it was necessary to deal with the issue of "due regard" the proper analysis was set out by the Supreme Court in *Hotak v Southwark London Borough Council* [2015] UKSC 30 at [74]-[75].

Consideration

[96] The submissions advanced by the appellants demonstrate that a UK withdrawal from the EU without an agreement would give rise to the very considerable risk of a deterioration in the security situation in Northern Ireland, an adverse impact on the Northern Ireland economy and a severe limitation on the work of the implementation bodies operating with the support of the North-South Ministerial Council. It is not our task, however, to evaluate the merits of a UK withdrawal from the EU without an agreement. The case that we have to deal with is whether the Withdrawal Act imposes a constraint on those negotiating with the EU 27 to proceed on the basis that the UK can only leave the EU if an agreement is reached so that the operation of Strand Two of the Agreement continues undisturbed and the existing arrangements for the all-island economy continue unimpeded by any hard border.

[97] It is common case that the starting point in this exercise is to examine the exercise of the Royal Prerogative ("the prerogative"). There is again no dispute that the general rule in relation to the use of the prerogative is captured at paragraphs [47]-[48] of *Miller*.

> "47. The Royal Prerogative encompasses the residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation. In *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate [1965] AC 75* , 101, Lord Reid explained that the Royal Prerogative is a source of power which is "only available for a case not covered by statute". Professor HWR Wade summarised the position in his introduction to the first edition of what is now *Wade & Forsyth, Administrative Law* (1961), p 13:
>
> > 'the residual prerogative is now confined to such matters as summoning and dissolving Parliament, declaring war and peace, regulating the armed forces in some respects, governing certain colonial territories, making treaties (though as such they cannot affect the rights of subjects), and conferring honours. The one drastic internal power of an administrative kind is the power to intern enemy aliens in time of war.'
>
> 48. Thus, consistently with Parliamentary sovereignty, a prerogative power however well-established may be curtailed or abrogated by statute. Indeed, as Professor Wade explained, most of the powers which made up the Royal Prerogative have been curtailed or abrogated in this way. The statutory curtailment or abrogation may be by express words or, as has been more common, by necessary implication. It is inherent in its residual nature that a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute."

The general rule in relation to the court's power to review the exercise of the prerogative in respect of the making or unmaking of treaties is set out at [55]-[56] of *Miller.*

> "55. 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.
>
> 56. It is only on the basis of these two propositions that the exercise of the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter UK domestic law."

Negotiations on the international plane of themselves cannot alter domestic law. The only issue on the scope of the power is the effect of section 10 of the Withdrawal Act.

[98] This appeal is not directly concerned with the making or unmaking of treaties. It is, however, concerned with negotiations which are likely to lead to the making or unmaking of treaties. Those negotiations commenced after the service on 29 March 2017 of notice under Article 50(2) of the Treaty on European Union of the intention of the United Kingdom to withdraw from the EU. The Withdrawal Act was made on 26 June 2018 long after negotiations had begun. There was no real dispute that the negotiations prior to that date were conducted in exercise of the prerogative power. Applying the principles set out above the issue is whether the making of the Withdrawal Act excluded the prerogative power in respect of the negotiations as submitted by Mr Scoffield or alternatively circumscribed it as contended for by Mr Macdonald and Mr Scoffield in the alternative.

[99] It is against that background that the statutory scheme of the Withdrawal Act needs to be examined. The Preamble to the Act describes it as an Act to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU. As previously discussed the first part of that objective is secured in section 1 which repeals the 1972 Act on exit day.

[100] Exit day as originally drafted was defined in section 20(1) as 29 March 2019 at 11 PM. Section 20(4) provided that the Minister may by Regulations amend the

definition of "exit day" to correspond with the day and time that the EU treaties are to cease to apply to the United Kingdom. That power has been exercised twice; first, on 28 March 2019 to prevent the United Kingdom leaving the EU the following day without an agreement and secondly, on 11 April 2019 to substitute a later date of 31 October 2019 which provided further time for negotiation. In light of the repeal of the 1972 Act sections 2-7 of the Withdrawal Act provide for the retention of existing EU law after exit day and deal with its interpretation, status and certain exceptions.

[101] The process of negotiation is referred to in two sections. The first is section 13 which establishes a mechanism for Parliamentary engagement with the outcome of the withdrawal negotiations. The section provided a scheme for ratification of any negotiated withdrawal agreement which required the approval of that agreement by a resolution of the House of Commons and an Act of Parliament passed containing provision for the agreement. Provision was also made where the Prime Minister made a statement before the end of 21 January 2019 that no agreement in principle could be reached for the government to set out how it proposed to proceed and enable the House of Commons to debate the matter. In any event if there was no agreement in principle in negotiations by the end of 21 January 2019 on the arrangements for withdrawal and the framework for the future relationship between the UK and the EU the government was required to make a statement setting out how it intended to proceed and provision made for both Houses to debate that. All of those obligations have been fulfilled.

[102] There are two features of this section which it is important to note. First, the section neither expressly nor impliedly abrogated nor constrained the exercise of the prerogative power to conduct negotiations with the EU. The section was concerned with ensuring that Parliament had an opportunity to consider the outcome of any negotiations. That was to ensure the ability of Parliament to control the outcome of those negotiations. Parliamentary accountability was, of course, secured by the questioning of Ministers and the scrutiny of secondary legislation. The steps required under the section were taken in accordance with it. Parliament has now passed further primary legislation, the Withdrawal No 2 Act, which again is focused on outcomes and accountability and prescribes the consequences that should follow depending upon those outcomes.

[103] That is in marked contrast to section 17 which is the other section dealing with negotiations. By virtue of that section a Minister of the Crown must seek to negotiate on behalf of the United Kingdom an agreement with the EU under which, after the United Kingdom's withdrawal from the EU, provision is made for certain unaccompanied children in accordance with the agreement. That section plainly imposes a legal duty upon a Minister exercising prerogative power which acts as a constraint on the approach to the negotiation and imposes a best endeavours obligation towards a particular result.

[104] The second feature of section 13 is that it plainly contemplates in subsections (7) and (10) the possibility that no agreement in principle might be achieved in negotiations dealing with the arrangements for the United Kingdom's withdrawal

from the EU. Indeed section 13 imposed no duty to actively pursue negotiations after the commencement of the Act.

[105] The next relevant section of the Withdrawal Act is section 10 which provides as follows:

> "**10 Continuation of North-South co-operation and the prevention of new border arrangements**
>
> (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."

[106] This section sits within that portion of the Withdrawal Act headed "Devolution" but the heading of the section is "Continuation of North-South co-operation and the prevention of new border arrangements". The appellant placed considerable weight on the heading as indicating an intention to impose upon Ministers an obligation to secure the objectives stated in the heading in all circumstances. If correct that would, of course, act as a constraint on the conduct of any negotiations with the EU and arguably would prevent the United Kingdom leaving the EU if the objectives stated in the heading had not been secured. It was accepted, of course, that Parliament was free if it chose to amend the section.

[107] As acknowledged in Section 16.7 of Bennion on Statutory Interpretation (Seventh Edition) the correct approach to the use of headings and interpretation was summarised by the House of Lords in *R v Montila* [2004] UKHL 50 at [34]:

> "34. The question then is whether headings and sidenotes, although unamendable, can be considered in construing a provision in an Act of Parliament. Account must, of course, be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in Parliament. But it is another matter to be required by a rule of law to disregard them altogether. One cannot ignore the fact that the headings and sidenotes are included on the face of the Bill throughout its passage through the legislature. They are there for guidance. They provide the context for an examination of those parts of the Bill that are open for debate. Subject, of course, to the fact that they are unamendable, they ought to be open to consideration as part of the enactment when it reaches the statute book. "

[108] It was broadly accepted that the statute was of a constitutional character and that its interpretation should be approached purposively. That approach might also have been secured by relying on the observation of Lord Steyn in *Attorney General's Reference (No 5 of 2002)* [2004] UKHL 40 at [31]:

> "No explanation for resorting to purposive interpretation of a statute is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black letter lawyer, but in a meaningful and purposive way giving effect to the basic objectives of the legislation."

The submission made on behalf of the appellants was that the learned trial judge had adopted a black letter approach.

[109] The purposive approach was helpfully set out by Lord Bingham in R (on the application of *Quintavalle) v Secretary of State for Health* at [8]:

> "8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will,

> because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

[110] The introductory words of section 10(1) are "In exercising any of the powers under this Act." It is common case that there are powers given to Ministers under the Act notably in section 8 dealing with retained EU Law, section 9 dealing with the implementation of the Withdrawal Agreement, section 20 dealing with the amendment of the Definition of "Exit Day", section 23 dealing with consequential and transitional provisions and section 25 dealing with commencement powers.

[111] There is, however, no power under the Act to negotiate. Apart from the obligation contained in section 17 of the Act there is no constraint on the prerogative power to conduct those negotiations. The distinction between section 10(1) and (2) is that the obligations under section 10(2) only arise in respect of those powers expressly identified whereas in section 10(1) they arise in relation to each of the powers under the Act. We are satisfied, therefore, that the language of the section suggests that the intention of Parliament was to constrain the exercise of powers under the Act but not to exercise any constraint on the prerogative power to negotiate.

[112] Although we are satisfied from the above review that there is no express power in section 10 of the Withdrawal Act to constrain the conduct of withdrawal negotiations under the prerogative we must also look at whether such a constraint arises by necessary implication having regard to the other provisions of the Act. Sections 8, 9 and 23 (1) and (6) apply to both section 10(1) and (2). It is to those sections that we turn first.

[113] Section 8 follows on from the provisions dealing with retained EU law. It is headed "Dealing with deficiencies arising from withdrawal" and provides that a Minister may by regulations make such provision as is considered appropriate to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency in retained EU law arising from the withdrawal of the UK from the EU. By virtue of section 8(7) such regulations may not amend or repeal the Northern Ireland Act 1998 subject to one irrelevant proviso and the time period within which regulations may be made is limited so that it expires after the period of

two years beginning with exit day. Consequently it appears that these powers could be used during any transition period if such were agreed.

[114] There is nothing expressly in the regulations which indicates that they have an effect upon the conduct of negotiations. Section 10(2) ensures that these regulations cannot be used to diminish any form of North-South cooperation or interfere with border arrangements after exit day unless those are agreed between the UK and the EU. Compatibility with section 10(1)(a) is secured by the provisions relating to the repeal or amendment of the NIA and any regulations are also constrained by the obligation to satisfy section 10(1)(b). These provisions have been commenced by section 25(1)(a) of the Withdrawal Act so that they can be used during the negotiating period but there is nothing to indicate any implication that they can be used to constrain or abrogate the exercise of the prerogative power to negotiate.

[115] Section 9 is headed "Implementing the withdrawal agreement". It provides that a Minister may by regulations make such provision as the Minister considers appropriate for the purpose of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day. The proviso, however, is that the condition precedent to the exercise of the power is the prior enactment of a statute by Parliament approving the final terms of the withdrawal of the United Kingdom from the EU. It follows that this power can only be exercised after the negotiations have concluded. It cannot, therefore, act to constrain the conduct of the negotiations leading up to that agreement.

[116] Clearly the power could be used in the window between the statutory approval by Parliament of a withdrawal agreement and exit day. During that period the protections for North-South cooperation and prohibition on the creation or facilitation of border arrangements after exit day in section 10(2) would remain in place whatever the terms of any withdrawal agreement. If, of course, the withdrawal agreement approved border arrangements those could be implemented in accordance with the section.

[117] The exercise of power under section 9 would also have to respect the obligations in section 10(1). The prohibition on amendment or repeal of the NIA in the section itself should largely secure compliance with its terms. The due regard duty in section 10(1)(b) would have to be considered in the context of whatever withdrawal agreement had been reached. That could only be considered if and when such an agreement is reached. The proviso to section 9 requires the approval of a withdrawal agreement so the power does not come into play in the event of withdrawal without such an agreement, which is the situation the appellants seem to contemplate. The entitlement to exercise any power under this section ceases on exit day.

[118] These provisions plainly provide some protection for the existing arrangements under the Agreement to function up to exit day but the position thereafter is uncertain and depends on the outcome of the negotiations. We do not consider that it is possible to derive from these statutory arrangements a necessary implication that the negotiators must strive to secure an outcome which protects

those arrangements after exit day or that an agreement that did not protect those arrangements after exit day was prohibited.

[119] Section 23 is concerned with consequential and transitional provisions. Neither appellant suggested that this section could under any circumstances be interpreted so as to operate as a constraint on the conduct of negotiations. That is also our view.

[120] Turning then to section 10(1) there were two further provisions relating to the exercise of powers to which our attention was drawn by the appellants. The first was section 20(4) dealing with the definition of exit day. As previously indicated that power has already been used in order to redefine exit day as 11 PM on 31 October 2019. It had an effect on negotiations in that it extended the period within which those negotiations might be conducted but we see no basis upon which it could be argued that it constrained the negotiators in the manner in which those negotiations were taken forward.

[121] The final power to which our attention was drawn was that exercised under section 25(4) to make the commencement regulation which brought into force section 1 of the Withdrawal Act providing for the repeal of the European Communities Act 1972 on exit day. It was submitted that this was a step towards implementation of the withdrawal of the UK from the EU without any agreement. We agree that there are some who may aspire to that outcome but we do not see how the commencement of this section can act as a constraint on the exercise of the prerogative power to conduct negotiations with the EU. The underlying complaint here is about the outcome of those negotiations. We agree with the learned trial judge that it would be premature for us to embark on an analysis of the outcome of negotiations based on political rhetoric when that will be a matter to be dealt in accordance with the Withdrawal No 2 Act 2019.

[122] The other interpretive tool relied upon by the appellants in support of the argument that section 10 was intended to have an effect on the conduct of negotiations was the rule in *Pepper v Hart* [1993] AC 593. The rule has been the subject of some criticism but at its height provides that the court may have regard to reports of the debates in Parliament on a Bill for the purpose of ascertaining the meaning of a provision of the resulting Act where the provision is ambiguous or obscure, a statement as to the meaning of the provision is made by or on behalf of a minister or other promoter of the Bill and the statement is clear.

[123] Section 10 was introduced as a result of an amendment introduced in the House of Lords by Lord Patten on 2 May 2018. The text is set out above at [105]. We agree that in moving the amendment Lord Patten was contending for an outcome that would continue to secure a frictionless border in Ireland. Lord Carswell in the same debate was concerned that this would effectively impose a continuation of the status quo. This Government Bill returned to the House of Commons for further debate on the amendment on 12 June 2018. Mr Liddington for the government stated that the amendment in many ways was a statement of government policy and was prompted very eloquently by Lord Patten. He was asked, however, by Mr Dodds to

confirm that the powers in the amendment were restricted purely to the purposes of the Bill. Mr Liddington confirmed that he was correct.

[124] We are not satisfied that the provisions of the Withdrawal Act are ambiguous as to whether or not the Act was intended to constrain the prerogative power of negotiation but in any event we are quite satisfied that there was no clear statement from the Minister who was the promoter of the Bill supporting the meaning for which the appellants contend. The response to Mr Dodds by Mr Liddington pointed firmly away from any suggestion that the section would constrain the negotiations.

[125] We can deal briefly with four further points. A claim is made under Articles 2, 3 and 8 of the European Convention on Human Rights ("ECHR"). We do not accept that the conduct of negotiations, which is what this case is properly concerned with, gives rise to any such issues although we recognise the risks to safety and security in this jurisdiction associated with any withdrawal from the EU by the UK without an agreement. Those risks, if they occur, will have to be addressed by the relevant state agencies.

[126] A claim is made that there has been a breach of section 75 of the NIA. It is common case that none of the respondents in this case is a public authority for the purposes of the Act. Although there are other issues as to remedy that is sufficient to deal with the point. The amendment of section 24 of the NIA by the Withdrawal Act does not affect in any way the conduct of negotiations under the prerogative. Finally, the learned trial judge paid some attention to the provisions of Article 50 of the Treaty on the functioning of the EU. As explained at [104] of Miller Article 50 operates only on the international plane and is not a part of domestic law.

Conclusion

[127] We have reached the following principal conclusions:

(i) The executive is exercising prerogative powers in its negotiations with the EU 27 in respect of the UK's withdrawal from the European Treaties. Ministers are, of course, subject to questioning in Parliament about the negotiations and secondary legislation facilitating withdrawal is subject to scrutiny. Parliament will have the opportunity to vote on the outcome of the negotiations.

(ii) Section 10 of the European Union (Withdrawal) Act 2018 does not expressly or by necessary implication abrogate or constrain that exercise of that prerogative power.

(iii) It is not the purpose of section 10 of the European Union (Withdrawal) Act 2018 to constrain the exercise of the prerogative power in the said negotiations so there is no frustration of the will of Parliament.

(iv) Subject to our remarks about section 17 above, the exercise of the prerogative power in the negotiations with the EU 27 is within the scope of the prerogative and is not justiciable.

(v) It is not appropriate for this court to examine the possible outcome of the negotiation on the basis of political rhetoric and in any event Parliament has made provision for any such outcome in the Withdrawal Act and the Withdrawal (No 2) Act 2019.

[128] The judge gave leave to apply for judicial review in relation to the section 10 Withdrawal Act point and then dismissed that application. We dismiss that part of the appeal.

[129] The judge declined to give leave to apply for judicial review in relation to all the other grounds of challenge. We consider that he was correct to do that and we dismiss the appeals in relation to all those other grounds of challenge.