



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 8

P1293/17

OPINION OF LORD DOHERTY

In the Petition of

(First) ANDREW WIGHTMAN MSP; (Second) ROSS GREER MSP;
(Third) ALYN SMITH MEP; (Fourth) DAVID MARTIN MEP;
(Fifth) CATHERINE STIHLER MEP; (Sixth) CHRISTINE JARDINE MP;
(Seventh) JOANNA CHERRY MP

Petitioners

for

Judicial review on the issue of the unilateral revocability of Article 50 of the
Treaty on European Union

Petitioners: O'Neill QC, Sellar; Balfour + Manson LLP
Respondent: Johnston QC, Webster; Office of the Advocate General

6 February 2018

Introduction

[1] In these judicial review proceedings the first and second petitioners are Members of the Scottish Parliament. The third, fourth and fifth petitioners are Members of the European Parliament. The sixth and seventh petitioners are Members of Parliament. The respondent is the Secretary of State for Exiting the European Union.

[2] On 23 June 2016 the EU referendum took place. A majority of those who voted chose to leave the European Union. In recognition of the will of the people of the United Kingdom, Parliament enacted the European Union (Notification of Withdrawal) Act 2017,

s 1. The Act received Royal Assent on 16 March 2017. On 29 March 2017 the Prime Minister, exercising the power conferred on her by s 1 of the Act, gave notification under Article 50(2) of the Treaty on European Union (TEU) of the United Kingdom's intention to withdraw from the European Union. Since that date the Government has been in negotiations with the EU with a view to reaching agreement on terms of withdrawal and agreement as to the relationship between the EU and the UK after withdrawal.

Pre-application correspondence

[3] On 28 November 2017 the petitioners' solicitors wrote a pre-application letter to the Advocate General for Scotland. The letter referred to the Government's Brexit negotiations and stated that:

"The stated and consistent public position of the United Kingdom Government since these negotiations have commenced is that it is not legally possible - as a matter of EU law - for the United Kingdom unilaterally to withdraw its Article 50(2) TEU notification."

The letter also stated that it expected the Government:

"To confirm that the United Kingdom Government accepts that it is legally possible - as a matter of EU law - for the UK unilaterally to withdraw its Article 50(2) TEU notification at least until the expiry of the notification period on 29 March 2019."

By letter dated 7 December 2017 the Solicitor to the Advocate General replied on behalf of the Secretary of State for Exiting the European Union and the Advocate General. The letter disputed that the Government had taken the legal position described in the letter of 28 November 2017. The letter continued:

"For the avoidance of doubt, the public position we do recognise having taken is that the stated and consistent position of the Government has been and is that the United Kingdom's notification under Article 50(2) will not be withdrawn. This is clearly long established and consistent and discloses no basis for legal challenge."

Pleadings

[4] The petitioners aver (paragraph 14 of the petition) that the terms of the letter of 7 December 2017 “are ... misleading both in law and in fact”. They aver that as a matter of law the United Kingdom could unilaterally withdraw the Article 50(2) notification before 29 March 2019; and that as a matter of fact the Government’s claim that it has never taken any position on whether the notification may be withdrawn unilaterally is inconsistent with two statements made in Parliament on 13 November 2017, one by the respondent and the other by another Minister, Lord Callanan. Those statements could be used to look at what was said and done in Parliament as a matter of history (*Prebble v Television New Zealand Ltd* [1995] 1 AC 321, per Lord Brown-Wilkinson at p.337); or for determining what the Government’s policy was (*Toussant v Attorney General of St Vincent and the Grenadines* [2007] 1 WLR 2825, per Lord Mance delivering the judgment of the Privy Council at paragraphs 51 and 55). The petitioners aver that the Government’s position as stated in the letter of 7 December 2017:

“is unlawful and falls to be reduced, along with any underlying United Kingdom policy position to which it gives voice.”

Under reference to the same Parliamentary statements the petitioners maintain that the true position of the Government is that the notification cannot legally be revoked unilaterally by the United Kingdom, and that therefore there is a dispute between the petitioners and the Government as to the correct interpretation of Article 50(2) which only the Court of Justice of the European Union (“the CJEU”) can determine authoritatively. The primary remedy which the petitioners seek is that this court should make a preliminary reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union (“TFEU”), and that the reference be sought by way of the CJEU’s expedited procedure. They aver that *esto*

the Government has expressed no view as to the legality of revocation, its refusal to state a position is unlawful. They maintain that permission to proceed should be granted (Court of Session Act 1988, s 27B).

[5] In the answers to the petition the respondent states that, as indicated in the letter of 7 December 2017, the firm and repeated stated policy of the Government is that the United Kingdom's notification under Article 50(2) will not be withdrawn; and that no genuine dispute exists as to the proper interpretation of Article 50(2). He avers that the petitioners' reliance on the statements made in Parliament on 13 November 2017 is a breach of Parliamentary privilege and is unlawful. Reference is made to *Adams v Guardian Newspapers Ltd* 2003 SC 425, per Lord Reed at paragraph 16; *Coulson v HM Advocate* [2015] HCJAC 49, per the Opinion of the Court delivered by Lord Brodie at para 11; and *Kimathi and others v Foreign and Commonwealth Office* [2017] EWHC 3379 (QB), per Stewart J at para 20. He further avers that, *esto* reference to Hansard is lawful for the purposes relied upon, the statements have to be considered in context and in light of the correction and clarification which Lord Callanan provided in a letter to Baroness Hayter of 14 November 2017 and in a statement to the House of Lords on 20 November 2017. He also avers that, *esto* the petition raises a justiciable issue, the issue must have first arisen when the notification was given on 29 March 2017, and that the proceedings are time-barred (Court of Session Act 1988, s 27A). He avers that permission to proceed should be refused because the application does not have a real prospect of success.

Oral hearing

[6] I ordered an oral hearing for the purpose of deciding whether to grant permission to proceed (Court of Session Act 1988, s 27B and Rule of Court 58.7(1)(b)).

[7] At the hearing Mr O'Neill submitted that the application has a real prospect of success. The Government's declared policy that the notification will not be withdrawn had to be "unpacked". It must mean one of two things *viz* (i) that the Government considers it would be entitled to refuse to comply with any legislation enacted by Parliament which might instruct unilateral withdrawal of the notification; or (ii) that the Government's interpretation of Article 50(2) is that it cannot unilaterally withdraw the notification. The court should infer that the rationale of the policy is explanation (ii). The Parliamentary statements of 13 November 2017 support that conclusion. They are admissible in these proceedings for that purpose. It follows that there is a genuine dispute as to the proper interpretation of Article 50(2) which the court requires to resolve. If, on the other hand, the Government has no declared position on the legality of unilateral withdrawal, and no such position is implicit in its stated policy, the Government's failure to make its position clear on this issue is unlawful and is amenable to judicial review.

[8] In reply Mr Johnston submitted that the application has no real prospect of success. It does not focus a live, justiciable issue which is amenable to the supervisory jurisdiction of the court. The firm policy of the Government is that the notification under Article 50(2) will not be withdrawn. As a result of the referendum the Government is committed to withdrawal from the EU in terms of the Art 50(2) notification whether or not an agreement is reached with the EU. The policy does not challenge the supremacy of Parliament. The Government has no intention of withdrawing the notification, so the question whether or not it would be legal for it to do so unilaterally is entirely hypothetical and academic. The court should not entertain it. Neither would the CJEU be prepared to entertain a reference on that question in the circumstances. The fact of the matter is that there is no genuine dispute. There is no proper basis for making reference to the two Parliamentary statements

(*Coulson v HM Advocate, supra*, per Lord Brodie at paragraph 20). The proposed use is not to look at what was said in Parliament as a matter of historical fact, or in order to ascertain what the Government's policy is. Rather, reference to the passages is in order to suggest that there is a conflict between them and the Government's clearly declared policy. Even if it is permissible to look at them, it is perfectly plain that, when looked at in context and read with the contemporaneous clarification, they do not support the petitioners' contention that the rationale for the Government policy is a belief that the notification may not be withdrawn unilaterally. In any case, any issue as to the proper construction of Article 50(2) first arose when the notification was made. The application was not made within three months of that date. It is accordingly time-barred.

Decision and reasons

[9] I am mindful that demonstrating a real prospect of success is a low hurdle for an applicant to overcome. However, I am satisfied that that hurdle has not been surmounted. Indeed, in my opinion the application's prospect of success falls very far short of being a real prospect.

[10] In my view the Government's stated policy is very clear. It is that the notification under Article 50(2) will not be withdrawn. This is not a case where it is necessary to examine statements in Parliament in order to ascertain or identify Government policy. Nor do I think that in the circumstances it is possible or legitimate to do so without breaching Parliamentary privilege. In any case, looked at in context, in my opinion the statements founded upon do not in fact support the contention that the rationale of the policy is a belief that unilateral withdrawal is not an available legal option.

[11] I do not accept the submission that the policy must mean either (i) that the Government considers it will be entitled to refuse to comply with any legislative instruction which conflicts with it; or (ii) that the Government's interpretation of Article 50(2) is that the UK cannot unilaterally withdraw the notification.

[12] The fact of the matter is that Parliament has not proposed, let alone enacted, legislation directed to the United Kingdom's withdrawal of its Article 50(2) notification. The Government's policy is not in conflict with the legislative will of Parliament. Parliament authorised the Government to give the notification. Neither Parliament nor the Government wishes that the notification be withdrawn.

[13] Nor in my opinion is it implicit in the policy that the Government's interpretation of Article 50(2) is that the notifying member cannot unilaterally withdraw the notification. On the contrary, the policy reflects, and is intended to give effect to, the view of the people of the United Kingdom, as expressed in the EU referendum and as confirmed by Parliament when it enacted the European Union (Notification of Withdrawal) Act 2017.

[14] Given that neither Parliament nor the Government has any wish to withdraw the notification, the central issue which the petitioners ask the court to decide - whether the UK could unilaterally withdraw the Article 50(2) notification - is hypothetical and academic. In those circumstances it is not a matter which this court, or the CJEU, require to adjudicate upon.

[15] In my opinion the suggestion that the Government is acting unlawfully in declining to respond to the petitioners' request that it accept that it is legally possible for the UK unilaterally to withdraw its notification is unfounded. Whether or not the Government has legal advice on that question, and whether or not that advice enables it to reach a firm and

concluded view on it, in my view the Government is under no obligation to opine on a matter which is hypothetical and academic.

[16] For all these reasons I am not satisfied that the application has a real prospect of success. In reaching that view I have not thought it appropriate, in the circumstances of this case, to give any weight to the respondent's time-bar argument. Permission to proceed is refused.