UKSC 2022/0098

IN THE SUPREME COURT OF THE UNITED KINGDOM

IN THE MATTER OF

A REFERENCE BY THE LORD ADVOCATE

UNDER PARAGRAPH 34 OF SCHEDULE 6 TO THE SCOTLAND ACT 1998

BETWEEN

THE LORD ADVOCATE

Appellant

-and-

HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

Respondent

WRITTEN CASE ON BEHALF OF HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

INTRODUCTION

1. This Case is filed by HM Advocate General for Scotland ("**the AGS**") in opposition to the reference made by the Lord Advocate dated 27 June 2022 ("**the Reference**") under §34 of Schedule 6 to the Scotland Act 1998 ("**the 1998 Act**"). The Reference was accompanied by a draft 'Scottish Independence Referendum Bill' ("**the Draft Bill**"). It is labelled as being "*pre-introduction*" and is incomplete: e.g. clause 4(2). Clause 1 of the Draft Bill provides that: "*The purpose of this Act is to make provision for ascertaining the view of the people of Scotland on whether Scotland should be an independent country*". Clauses 2(1)-(2) provide:

> "*(1) A referendum is to be held in Scotland on a question about the independence of Scotland.*
>
> *(2) The question is: "Should Scotland be an independent country?".*"

2. The specific question posed in the Reference at §21 is:

> "*Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be 'Should Scotland be an independent country?' relate to reserved matters? In particular, does it relate to: (i) the Union of the Kingdoms of Scotland and England (para.1(b) of Schedule 5); and/or (ii) the Parliament of the United Kingdom (para.1(c) of Schedule 5?*" ("**the Question**")

3. By the Order of Lord Reed of 15 July 2022, the Court will consider the issue of its jurisdiction to hear the Reference rolled up with the substance of the Reference itself.

4. The AGS submits, **first**, that the Reference, and the Question posed by it, does not fall within the jurisdiction of this Court afforded by §34 of Schedule 6; and that in any event, the Court should decline to determine the Reference as a matter of its inherent discretion. The provision made in Schedule 6 for the referral of devolution issues directly to this Court was not intended to circumvent the specific statutory procedure in s.33 of the 1998 Act; and it is not appropriate to address questions of the sort referred in the abstract, in accordance with well-established principles of the public law of both Scotland and England and Wales.

5. If the Court decides that it does have jurisdiction, the AGS submits, **secondly**, that the answer to the Question referred is: 'Yes'. A referendum on Scottish independence plainly (at least) relates to the reserved matters of the Union of the Kingdoms of Scotland and England and of the Parliament of the United Kingdom. That conclusion is unaffected by whether the referendum is, in its outcome, advisory or legally binding.

I. THE JURISDICTION OF THE COURT TO CONSIDER THE LEGISLATIVE COMPETENCE OF THE SCOTTISH PARLIAMENT

The Legislative Context

6. The 1998 Act creates a specific mechanism by which Bills of the Scottish Parliament which are considered by either the Scottish or UK Law Officers to give rise to issues of legislative competence can be brought before the Supreme Court.

7. The Court's jurisdiction arises under s.33(1), which provides that the Advocate General, the Lord Advocate or the Attorney General may "*refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court for decision*".

8. The tests for whether or not a provision of a Bill is within or without legislative competence are set out in s.29(2) of the 1998 Act.[1] If a provision of an Act of the Scottish Parliament ("**ASP**") is outside the legislative competence of the Scottish Parliament it is "*not law*": s.29(1). It is a nullity: *Continuity Bill*, §26.

9. As noted by the Court in *Re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42; [2021] 1 WLR 5106; 2022 SC (UKSC) 1 ("*UNCRC Bill*"), §§12-18, the s.33 reference forms part of a suite of "*pre-enactment safeguards*" to prevent the Scottish Parliament acting outside its legislative competence.

10. These safeguards also include s.31 of the 1998 Act, which provides that:

> "*(1) A person in charge of a Bill shall, on or before introduction of the Bill in the Parliament, state that in his view the provisions of the Bill would be within the legislative competence of the Parliament.*
>
> *(2) The Presiding Officer shall, on or before the introduction of a Bill in the Parliament, decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and state his decision.*"

[1] Common law controls on the *vires* of the Scottish Parliament do not arise on a s.33 reference: *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; [2019] AC 1022; 2019 SC (UKSC) 13 ("*Continuity Bill*"), §26

11. A Bill does not become an ASP until it receives Royal Assent: s.28(2). If a s.33 reference is made, the Bill cannot be submitted for Royal Assent until the reference has been decided or otherwise disposed of by the Court: s.32(2)(b).

12. Such a reference may be made only after the Bill has been passed by the Scottish Parliament, and within a four-week period after being passed before it is given Royal Assent: s.33(2).

13. In *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153, Lord Hope recognised that the application of the competence restriction in s.29(2)(b) and consideration of the purpose and effect of the Bill can be informed by relevant background documentation, such as Committee reports: at §16. The Court has regularly had close regard to the terms of the documents which accompany any Bill introduced into the Scottish Parliament, such as the Explanatory Notes to the Bill and the Policy Memorandum: e.g. *Continuity Bill*, §57; *UNCRC Bill*, §§24, 60, 63 and 68. Yet a draft Bill may have none of these accompanying background documents; certainly the Draft Bill in issue here has none. The Court on this Reference does not have this sort of relevant material that the s.33 procedure would provide.

14. Accordingly, under the s.33 procedure:

    (1) The referred Bill will have been introduced with the requisite accompanying s.31 statements of view as to legislative competence (both from the person introducing the Bill and from the Presiding Officer).

    (2) At the point at which a reference may be made to the Court, the Bill will have completed its legislative process. Following the Parliamentary processes, it will be in its final form. The only remaining step is the formality of Royal Assent, which will bring some or all of the Bill into force as an Act of the Scottish Parliament.

    (3) At that point, the Court, in considering the reference, will also have the benefit of the sorts of documents accompanying a Bill that <u>has</u> been introduced to the Scottish Parliament referred to in §13 above.

15. The s.33 procedure constitutes a legislative exception to the usual principle that the courts do not consider legal questions prematurely before they arise in a particular factual context and do not give advisory opinions on abstract legal questions. The exception is no doubt made to reflect the desirability of an authoritative consideration of a fundamental issue of *vires* (as an issue of competence is under the 1998 Act). But that consideration occurs at a stage when the Court can be certain of the final terms of the provision and will be able to see and consider the full context in which it was introduced and passed.

16. The Lord Advocate relies on Schedule 6 which is given effect by s.98 and deals with "*devolution issues*". The term "*devolution issue*" is defined in §1 as follows:

> "*In this Schedule "devolution issue" means—*
> *(a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,*
> *(b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,*
> *(c) a question whether the purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, within devolved competence,*
> *(d) a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights,*
> *(e) a question whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights,*
> *(f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters.*"

17. §1 does not, on its face, include questions which arise about Bills, or proposed Bills. It encompasses questions which arise about ASPs (i.e. which for whatever reason were not referred under s.33 at the time), and those concerning the exercise or proposed exercise of functions of the Scottish Government.

18. The Lord Advocate relies on the second part of §1(f) alone, that the Question is one "*arising by virtue of this Act about reserved matters*" (see Case, §§7-10).[2] The

[2] By s.126(11) of the 1998 Act, "*by virtue of*" includes "*by*" and "*under*". This does not appear to make any difference to the ordinary meaning of the words, at least as applicable to the present context.

purported basis of the present Reference is §34 of Schedule 6,[3] which appears within the part of Schedule 6 headed "*Direct references to the Supreme Court*". It provides:

> "*The Lord Advocate, the Attorney General, the Advocate General or the Advocate General for Northern Ireland may refer to the Supreme Court any devolution issue which is not the subject of proceedings.*"[4]

19. The Explanatory Notes to the 1998 Act[5] address §§1(f) and 34 in the following terms:

> "*sub-paragraph (f), any other question about whether a function is exercisable within devolved competence or in or as regards Scotland, and any other question arising by virtue of the Scotland Act about reserved matters. The questions swept up into this sub-paragraph can arise in various circumstances. For example, there could be a question whether Her Majesty is making an Order in Council within devolved competence (see note on section 118) or whether a function is exercisable "in or as regards Scotland" so that it may transfer by an order under section 63 or whether a public body is a Scottish public authority whose functions are exercisable only "in or as regards Scotland" (see definition in section 126(1)) or whether the functions of a body relate to a reserved matter (see section 126(3)).*"
>
> "*Paragraph 34 provides that all the principal Law Officers may refer to the Judicial Committee any devolution issue which is not the subject of proceedings. This power enables the Law Officers to refer any vires question to the Judicial Committee if it is not already the subject of a judicial dispute.*" (original underlining)

[3] The Northern Ireland Act 1998 contains a similar, but differently framed, provision to that in issue here in §34 of Schedule 10 (save that the Attorney General for Northern Ireland takes the place of the Lord Advocate); there the definition of devolution issue in §1(d) instead provides only for "*any question arising under this Act about excepted or reserved matters*" (excepted matters arising only under the scheme of devolution to Northern Ireland). The terms of Schedule 9 to the Government of Wales Act 2006 are differently formulated. The equivalent reference power is in §30(1), which provides that "*The Attorney General or the Counsel General may refer to the Supreme Court any devolution issue which is not the subject of proceedings.*" However, the definition of devolution issue does not include any equivalent to §1(f) of Schedule 6 to the 1998 Act. Accordingly, although the present jurisdictional issue might similarly arise in relation Northern Ireland, it does not appear that it could arise in relation to Wales.

[4] The Advocate General for Northern Ireland is not a Law Officer who may refer a Bill under s.33 of the 1998 Act, but as the Advocate General for Northern Ireland is the Attorney General for England and Wales (see s.27(1) of the Justice (Northern Ireland) Act 2002) this distinction is unlikely to be practically significant. The reference in §34 when enacted to the Attorney General for Northern Ireland was to the same effect, as the office-holder was at that time the Attorney-General for England and Wales: see s.22(1) of the Justice (Northern Ireland) Act 2002.

[5] An established aid to interpretation in accordance with *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956, HL.

20. The discussion in the Explanatory Notes of §1(f) does not address the terms of a Bill intended to be considered by the Scottish Parliament. Nor is such use consistent with the terms of the relevant part of the Explanatory Notes to s.98, which provide:

> "*This section forms part of the set of provisions which deal with the power of the Judicial Committee of the Privy Council and the other courts in Scotland, England and Wales and Northern Ireland to deal with disputes about the vires (or legal competence) of Acts of the Scottish Parliament; secondary legislation made under its auspices; and actions of members of the Scottish Executive.*"

21. To like effect is the Explanatory Note to s.33, which refers to the use of Schedule 6 where issues of legislative competence arise after the grant of Royal Assent. See too: *UNCRC Bill*, §18.

22. The Notes on Clauses, produced alongside the Scotland Bill when it was considered by Parliament,[6] address §34 of Schedule 6 in the following terms:

> "*Paragraph 34 provides that all the principal Law Officers may refer to the Judicial Committee any devolution issue which is not the subject of proceedings. This power enables the Law Officers to refer any vires question to the Judicial Committee even though it is not the subject of a judicial dispute and it has not arisen in proceedings on a Bill.*" (emphasis added)

The Submissions of Principle

23. As the Court has repeatedly emphasised – most recently in *UNCRC Bill*, §7 – the "*Scotland Act must be interpreted in the same way as any other statute.*" In *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2022] 2 WLR 343, Lord Hodge reiterated at §29 the basic proposition that:

> "*Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context….Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.*"

[6] Considered a valuable aid to construction of the 1998 Act by Lord Hope in *Imperial Tobacco Ltd* at §33.

24. The scope of the apparently broad wording of §34 of Schedule 6, read with §1(f), must be read in the context of the 1998 Act as a whole, and with the specific and careful provision made by Parliament in the context of references of Bills under s.33. It would be surprising if Parliament had set up such a carefully calibrated scheme in s.33 and the surrounding provisions, and yet simultaneously intended that the scheme be rendered unnecessary by the discretion afforded to the same Law Officers to refer a Bill outside it. This was the point made by the Lord President in *Keatings v Advocate General for Scotland* [2021] CSIH 25; 2021 SC 329 at §60 in holding that s.33 "*is the only method of scrutinising a measure for legislative competency prior to Royal Assent*".

25. That the Inner House was correct, and that the Lord Advocate's approach is unlikely to have been Parliament's considered intent, is further supported by the following points:

    (1) There is an absence of any reference in §1 of Schedule 6 to a Bill in any form or at any stage prior to becoming an ASP. Had Parliament intended §1 to cover Bills, or draft Bills, or proposed Bills, one would have expected the multiple categories set out to say so.

    (2) Linked to this – as it reflects the terms of §1(a) of Schedule 6 – is the correct observation made in *Keatings* at §60 that only a provision of an ASP can be outside of competence: see the terms of s.29(1), and the consequent use of "*would be*" in relation to a referred Bill in s.33(1). This underscores the careful exception made by s.33 to the basic principle that a Bill is of no legal effect and the courts do not give advisory declarations on such matters.

    (3) The terms of the relevant Explanatory Notes, and Notes on Clauses, set out above, do not support the Lord Advocate's analysis. The Notes on Clauses in relation to §34 clearly indicate a lack of intention on the part of Parliament to include questions about Bills outside of the s.33 process.

    (4) Parliament obviously did not intend that a Bill could be referred under §§1(f) and 34 after it has been introduced into the Scottish Parliament, yet the Lord Advocate's analysis lacks an explanation why that is not possible on her interpretation of Schedule 6.

(5) As the Lord President put it in *Keatings*, the s.33 reference procedure risks being rendered "*redundant*" if a draft Bill could be the subject of judicial consideration, and co-existing systems for raising the same or similar points, under the same Act, would be a "*recipe for chaos*": at §61. *Keatings* was not directly concerned with the Schedule 6 procedure,[7] but the reasoning of principle is just as applicable.

(6) The Lord Advocate's argument is limited, by the closing words of §1(f), to issues "*about reserved matters*". Yet as her Case itself recognises, at §10, the legislative competence of the Scottish Parliament to enact the Draft Bill is not limited to issues by reference to reserved matters under s.29(2)(b). At the least, a serious issue would arise as to whether or not the Draft Bill is in breach of the restriction in Schedule 4 prohibiting the modification of s.28(7) of the 1998 Act, contrary to s.29(2)(c). Yet the Court cannot consider this question. Were the Reference to be answered in the negative, and the Draft Bill were subsequently passed in materially the same terms, a s.33 reference might have to be made at that stage to address the issues not raised under Schedule 6. It is hard to identify any positive purpose Parliament might have intended by this bifurcation, and the Lord Advocate does not attempt to do so.

(7) The same point arises even in relation to the s.29(2)(b) restriction, if the terms of the Bill passed by the Scottish Parliament differ from the Draft Bill which was the subject of the Reference. The Lord Advocate recognises this possibility in her Case at §31, but does not address the obvious implications for whether her use of §34 of Schedule 6 is in accordance with the intention of Parliament at all, including why Parliament would have imposed such a potential burden on the finite resources of this Court.

(8) The Lord Advocate's approach gives rise to surprising consequences. In particular, given the power in §34 of Schedule 6 is afforded to the Law Officers of the UK Government too, the effect would be that on any occasion in which the AGS (for example) understands the Scottish Government to be

[7] The Lord Advocate very properly records at §29 of her Case that her position (strictly that of her predecessor) in argument in *Keatings* was that Schedule 6 could not have been used there, in the context of an action seeking an advisory declaration that the Scottish Parliament had competence to legislate for a further independence referendum. The Lord Advocate is fully entitled to adopt a different stance in these proceedings. The AGS simply respectfully suggests that the Lord Advocate's first answer on this issue was the correct one.

formulating a legislative proposal which he considers to be outside legislative competence, a pre-emptive reference can be made of the issue, rather than waiting for the appropriate moment under s.33, if it arises. It would be surprising if Parliament had intended not only the Lord Advocate to be able to circumvent s.33, but the UK Law Officers too.

26. Furthermore, nor can the Lord Advocate in fact satisfy the definition of a devolution issue established in §1(f) of Schedule 6 on its own terms. As Lord Kerr held in *Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court (No.2)* [2019] UKSC 1; [2020] NI 793, while the role of the Supreme Court under §34 of Schedule 6 (and the equivalent of the Northern Ireland Act 1998) "*is to provide authoritative legal guidance on the questions of law which arise on the reference*", it is "*central to the exercise of this function that the reference be made on a devolution issue*": at §2. The Court in that case did not resolve the arguments made as to whether or not a devolution issue was engaged, declining to hear it as a matter of discretion.

27. The Lord Advocate's Case asserts that the Question is one "*arising by virtue of this Act*": at §§11-15. The requirement of s.31(1) of the 1998 Act, that the person in charge of the Bill state that in his view the Bill is within competence, is set out. This is repeated in rule 9.3(1A) of the Standing Orders of the Scottish Parliament. The Lord Advocate also refers to the terms of the Scottish Ministerial Code, at §3.4, which provides that: "*A Bill must also be accompanied by a statement, which will have been cleared with the Law Officers, that the Bill is within the legislative competence of the Scottish Parliament.*" It is said that, therefore, the definition in §1(f) of Schedule 6 is met.

28. The practical problem, which is frankly set out by the Lord Advocate in the Reference and in her Case, is that while she considers there to be "*a genuine issue of law*" as to the competence of the Scottish Parliament to pass the Draft Bill, she does not feel able to 'clear' a statement of a Scottish Government Minister that the Bill is within competence. The Lord Advocate does not explain to what legal standard she must be satisfied in order to 'clear' a s.31(1) statement.[8]

[8] In C. McCorkindale & J. Hiebert, 'Vetting Bills in the Scottish Parliament for Legislative Competence' (2017) 21 Edin LR 319, it is suggested based upon research with relevant officials that the Lord Advocate applies a balance of probabilities standard.

29. In this context, the assertion that the issue arises by virtue of the 1998 Act is a *non sequitur*.

(1) The statement required by s.31(1) is an important safeguard that the Scottish Parliament acts within its competence. But it is a statement required of the person introducing the Bill, not the Lord Advocate.

(2) No part of the Lord Advocate's role, as it now apparently stands, in connection with the statement required by s.31(1) is prescribed by the 1998 Act. Neither the existence nor the terms of the Scottish Ministerial Code is prescribed by the 1998 Act. (The Court noted the terms of the Scottish Ministerial Code in *UNCRC Bill* at §12, but it did not directly describe the Code as a safeguard imposed by the 1998 Act (and did not mention it at §73) and the present issue did not arise in that case.)

30. In *Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court* [2020] UKSC 2, Lord Kerr considered a situation in which it was said that the substantive provisions of welfare reform provisions, set by the Secretary of State and subject to a commencement order made by the Secretary of State, breached Convention rights. It was argued that there was nonetheless a devolution issue (which does not extend to acts of the Secretary of State for Northern Ireland) because the commencement of the provisions was drafted by reference to the issue by the Northern Ireland Department for Communities of lists of relevant postcodes to which the reforms would apply. Lord Kerr held that although the production of such lists could technically be said to be an act of a devolved institution (at §11), the "*relative isolation of the 'act' (in this case the compilation and provision of the postcode lists) from the actual introduction of Universal Credit in the areas covered by them throws into stark relief the inappropriateness of regarding the preparation of the lists as an act sufficient to give rise to a devolution issue*": at §14. The reference was refused.

31. Here too, the way in which the Lord Advocate justifies how the issue "*arises by virtue of*" the 1998 Act is simply too remote to justify it being appropriate to see this as falling within the scope of §1(f) of Schedule 6, especially when taken with the wider architecture of the 1998 Act and the role of s.33 within it. The Question referred does not – or does not sufficiently closely – arise by virtue of the 1998 Act

itself. The true basis for the Reference is the creation of a self-imposed hurdle to s.31(1), derived from (a) the Scottish Ministerial Code, and (b) the Lord Advocate's interpretation of the proper approach of the Law Officers under that Code. These are decisions of policy rather than of law and they are not mandated, or even indicated, by the terms of the 1998 Act.

32. The Lord Advocate objects to any jurisdictional hurdle on the basis that the issue might not otherwise be brought before the courts: Case, §17. The AGS does indeed submit that Schedule 6 does not permit a reference to the Supreme Court of a question concerning a draft or a proposed Bill. However, that does not create any form of unacceptable lacuna.

33. Taken at its highest, the effect is that a Bill cannot be introduced into the Scottish Parliament by a Minister of the Scottish Government which the Lord Advocate considers to be outside legislative competence. It is hard to see why this should be a matter of legal concern. Parliament is unlikely to have intended the time of the Scottish Parliament, or the resources of the Supreme Court on a Schedule 6 reference, to taken up with matters which the Scottish Government's own Law Officer considers to be outside competence. The Court has recently deprecated an approach of the Scottish Parliament of legislating without sufficient regard to competence restrictions, in the expectation that the resources of the court system will address those issues subsequently, in *UNCRC Bill* at §§74, 77. The corollary of the importance of statements of compatibility not being a mere "*formality*" (at §74) is that provisions which are accepted to be outside competence ought not to be introduced in the first place.

34. It is no answer to rely on the observation that §34 of Schedule 6 exists to obtain authoritative legal guidance; that simply begs the question as to the circumstances in which such guidance may be sought.

35. The reliance on *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262 does not assist. That was a context in which an Act of Parliament had been passed and enacted, and it purported to constitute the law of the land. Although difficult jurisdictional issues arose in connection with the operation of Parliament, the question of whether the Hunting Act 2004 was legally valid, and thereby the proper interpretation of the Parliament Acts 1911-1949, were questions of law arising in a

specific factual and legal context which only the courts could answer. That is not at all this case.

36. For these reasons, the Reference does not fall within the proper scope of §34 of Schedule 6 and does not give rise to a "*devolution issue*" as defined in §1(f) of that Schedule. The Court has no jurisdiction over it.

The Court's Discretion

37. This Court has previously made clear that it retains an inherent discretion to decline to accept a reference of a devolution issue.

    (1) In *Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court (No.2)* [2019] UKSC 1; [2020] NI 793, Lord Kerr adjourned the reference in circumstances where the Attorney General had not exercised his power to refer the issues in the context of live proceedings (at §25) and where other proceedings were afoot which would allow most of the issues to be raised (at §28). Lord Kerr commented that "*In general, it is desirable that legal questions be determined against the background of a clear factual matrix, rather than as theoretical or academic issues of law*": at §28.

    (2) In *Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court* [2020] UKSC 2, Lord Kerr reiterated at §12 that the Supreme Court "*must retain a discretion to deal with a reference on a devolution issue where that issue is to be raised in proceedings where the actual claimed incompatibility of the measure occupies centre stage, as opposed to its appearance via a side wind as here*". One reason for refusing the reference in that case was because the substance of the Convention issue was to be raised in an appeal from England and Wales.

    (3) Neither of the Northern Ireland references arose in precisely the present context, but both reflect this Court's stance that – notwithstanding the absence in Schedule 6 (or the Northern Ireland equivalent) of any specific power to refuse the reference – it retains a general discretion to decline to hear a reference where it is not an appropriate vehicle for the issue.

38. The Reference seeks from the Court a form of advisory opinion on the terms of the Draft Bill, predicated on the hypothesis that the Draft Bill will be introduced into the Scottish Parliament in the same terms and that it will then be passed in the same terms. Yet recent attempts to engage the courts of Scotland and of England and Wales in giving advisory declarations on abstract questions of law connected to the devolution settlement have been rejected, rightly, as a matter of principle: *Keatings* and *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 118.

39. In *Counsel General*, a claim for judicial review which concerned the relationship between the United Kingdom Internal Market Act 2020 and the Government of Wales Act 2006, the Court of Appeal relied, at §§25-25, on the reasoning of the Divisional Court in *R (Yalland) v Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin). There, the Court (Lloyd-Jones LJ, Lewis J) explained at §§23-25 that:

> "*As a general rule, the courts are concerned in judicial review with adjudicating on issues of law that have already arisen for decision and where the facts are established. The courts will not generally consider cases which are brought prematurely because, at the time the claim is made, the relevant legal or factual events to which the claim relates have not yet occurred.*
>
> *The courts may have jurisdiction to grant what is sometimes referred to as advisory declarations. That is declarations on points of law of general importance where there are important reasons in the public interest for doing so. Even here, the courts proceed with caution.*
>
> *It will rarely be appropriate to consider such issues when they may depend in part on factual matters or future events since until those factual matters are established or the events occur, the courts will not be in a position to know with sufficient certainty what issues do arise in a particular case. Similarly, when matters may depend upon or be affected by future legislation, it would generally not be appropriate to make rulings on questions of law until the precise terms of any legislation are known.*" (emphasis added)

40. The Divisional Court (Lewis LJ, Steyn J) in *Counsel General* ([2021] EWHC 950 (Admin)) made the following observations of significance to the present context at §33:

> "*It may well be that the issues raised will prove to be ones of importance. But that does not justify seeking to deal with them in the abstract without a proper legal and factual context to assess the relevant issues. The fact that the Counsel General, and the Welsh Government, would wish to know the extent of the Senedd's legislative powers before the Senedd considers proposed*

legislation does not justify the granting of advisory declarations either generally or in this particular case. Legislatures, and governments, must inevitably form a view as to whether proposed legislation is, for example, compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The courts may, ultimately, be asked to rule on whether or not a particular provision is compatible with a Convention right. That exercise occurs after the legislation has been enacted not before. Neither ministers, officials nor members of the legislature seek advisory declarations in advance as to what legislation may or may not be compatible with Convention rights. The same is true of Acts of the Senedd. The promoter of a Bill, and the Presiding Officer, will have to take a view as to whether proposed legislation is within legislative competence. The Counsel General may have to decide whether there is a question as to whether the provisions are within legislative competence and whether it is appropriate to refer a question to the Supreme Court. That has occurred on a number of occasions. However, neither the Counsel General, the Presiding Officer, nor members of the Senedd seek advisory declarations prior to the passing of Bills. The reason is that the role of the courts is to adjudicate on issues and determine questions of law which have arisen: not to give advisory declarations in the abstract."

41. That assessment of the proper approach to be taken to considerations of competence and legality prior to the introduction of a Bill is a powerful and accurate one. It would, as the Divisional Court intimated, be a matter of surprise if Law Officers were to regard the seeking of advisory opinions from the Supreme Court – whether by way of devolution issue reference or judicial review – as an appropriate recourse when faced with a legislative proposal of any degree of nuance or complexity. It is still more surprising when, as addressed below, the substantive issue is not in fact nuanced or especially complex.

42. *Keatings* concerned an attempt by way of an ordinary action to obtain an advisory declaration from the Court of Session as to the legislative competence of the Scottish Parliament to legislate for an advisory referendum on independence. In the course of the proceedings, the Scottish Government published a draft Bill, in slightly different terms to the Draft Bill now in issue on this Reference. Both the Outer House and the Inner House held that it was inappropriate to entertain the action on the basis of its hypothetical and premature nature. In the Inner House, the Lord President summarised the practical objections to such a course at §55:

"*At present, there is no Bill before the Parliament, although there is a draft Bill. A draft Bill has no legal status. The result of the election is not yet known. A Bill may or may not be introduced, depending upon the Government formed as a consequence of the election. If introduced, a Bill may or may not be passed by the Parliament, depending upon that institution's composition. If a*

Bill is introduced, it may or may not be in the form which is contained in the draft. No matter what its initial form, it may be amended. The UK Government may or may not be prepared to obtain an Order in Council under section 30 of the 1998 Act, which would, in any event, allow the Bill to proceed to Royal Assent. If the Bill were passed without such an Order, it is highly probable that the UK Government's law officers would refer the Bill for scrutiny by the UK Supreme Court. All of these eventualities render the current remedies sought premature, hypothetical and academic. A decision by this court on the matters litigated would serve no practical purpose."

43. Most of these objections apply with the same force to the present Reference. Many of the submissions made in connection with the jurisdiction of the Court apply with equal force to the issue of discretion. For instance, a real practical problem posed by the Reference is the absence of the documents which must accompany the Draft Bill and which might assist its legal assessment. In addition, not only may the Court's answer to the Reference not preclude a subsequent s.33 reference because the terms of the Draft Bill are amended during its passage, but the Lord Advocate accepts that the Reference cannot jurisdictionally encompass all of the potential competence objections to the Draft Bill. At best, the answer to the Reference will perform only part of the job.

44. It is of course correct that Parliament might have enacted §34 of Schedule 6 to create a jurisdiction which operates as an exception to the usual principles applicable to judicial review applied in *Yalland*, *Counsel General* and *Keatings*. But this Court has already held in the Northern Ireland references that the jurisdiction does not operate so widely.

45. The AGS notes the public interest arguments advanced by the Lord Advocate as to why the Reference is justified. Those are not a sufficient basis for the present exceptional course to be warranted. Whether or not an issue has formed part of a political manifesto is a matter of politics (and party politics) rather than of law. The need for consideration of the issue must also be considerably reduced in circumstances where the Lord Advocate's own apparent view – shared in this instance with the AGS – is that the Draft Bill or any equivalent would be outside competence: it is not necessary to obtain the Court's specific view where the application of the existing case law to a factual scenario produces a clear answer. That is the day-to-day stuff of legal advice and of the role of the Law Officers across the United Kingdom.

46. In the context of the present Reference, if the Court has jurisdiction it should nonetheless refuse the Reference in its inherent discretion to decline to determine abstract and premature issues in connection with a draft of a Bill which has yet to be introduced into and yet to be passed by the Scottish Parliament.

II. THE LEGISLATIVE COMPETENCE OF THE SCOTTISH PARLIAMENT

The 1998 Act

47. The Supreme Court reiterated the basic principles from its jurisprudence applicable to the 1998 Act in *UNCRC Bill* at §7:

> "*The Scottish Parliament is a democratically elected legislature with a mandate to make laws for Scotland. It has plenary powers within the limits of its legislative competence. But it does not enjoy the sovereignty of the Crown in Parliament: rules delimiting its legislative competence are found in section 29 of and Schedules 4 and 5 to the Scotland Act, to which the courts must give effect. And Parliament also has an unlimited power to make laws for Scotland, a power which the legislation of the Scottish Parliament cannot affect: section 28(7) of the Scotland Act. The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving the Scotland Act a consistent and predictable interpretation, so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. That is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used.*"

48. In *Whaley v Lord Watson* 2000 SC 340, the Lord President (Lord Rodger) referred at pp.348-349 to the

> "*... fundamental character of the Parliament as a body which – however important its role – has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law.*"

49. Section 28(1) of the 1998 Act provides: "*Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament.*"

50. Section 29(1) provides that an ASP is "*not law so far as any provision of the Act is outside the legislative competence of the Parliament*". Section 29(2) provides, in relevant part, that a provision is outside that competence so far as it "*relates to reserved matters*": s.29(2)(b). Section 29(3) provides that:

> "*For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.*"

51. Section 30(1) provides that: "*Schedule 5 (which defines reserved matters) shall have effect.*" Schedule 5 to the 1998 Act accordingly contains the comprehensive list of reserved matters.

52. Section 30 also addresses how the list contained in Schedule 5 may be amended. By s.30(2), an Order in Council may make any modifications to Schedule 5 which Her Majesty considers necessary or expedient. On 13 February 2013, the Scotland Act 1998 (Modification of Schedule 5) Order 2013 came into force, which specified that §1 of Schedule 5 did not reserve a referendum on the independence of Scotland from the rest of the United Kingdom, where certain prescribed conditions were met. In short, the effect of the Order was to ensure the competence of the Scottish Parliament to legislate for the referendum on Scottish independence which subsequently took place on 18 September 2014. That Order has no continuing effect.

53. Part I of Schedule 5 contains general reservations. The first category of these general reservations, addressed in §§1-5, is headed "*The Constitution*". §1 of Schedule 5 provides:

> "*The following aspects of the constitution are reserved matters, that is—*
> *(a) the Crown, including succession to the Crown and a regency,*
> *(b) the Union of the Kingdoms of Scotland and England,*
> *(c) the Parliament of the United Kingdom,*
> *(d) the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal,*
> *(e) the continued existence of the Court of Session as a civil court of first instance and of appeal.*"

54. In *Continuity Bill*, this Court explained at §60 that §1 of Schedule 5 reserves five aspects of the constitution of the United Kingdom: "*They are all fundamental elements of the constitution of the UK, and of Scotland's place within it: the Crown, the Union, the UK Parliament, and the existence of Scotland's higher civil and criminal courts.*"

55. It is §§1(b)-(c) which are in issue on this Reference.

(1) §1(b) reserves the Union of Scotland and England. It will be noted that the reservation is not of the dissolution of that Union, but simply of the Union itself. Other than in *Keatings*, in which the issue was only briefly addressed by the Inner House (see below), the §1(b) reservation has not been the subject of judicial consideration.

(2) §1(c) reserves the Parliament of the United Kingdom, in which the people of Scotland are represented. This "*encompasses, amongst other matters, the sovereignty of Parliament, since that is an attribute of Parliament which is relevant - indeed, fundamental - to the constitution*" (i.e. "*the fundamental constitutional principle that the Crown in Parliament is the ultimate source of legal authority*") and "*the constitutional functions, powers or privileges of Parliament*": *Continuity Bill*, §§61-63.

"*Relates to Reserved Matters*"

56. The correct approach in order to determine whether a provision of the Bill "*relates to*" a reserved matter is now "*well established*": see especially the summary in *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29 at §§29-32. The Lord Advocate's Case (which does not relevantly address *Christian Institute*) seeks, with respect, to suggest differences of approach which are neither intended by the case law of the Court nor supported by a fair reading of that case law.

57. **First**, the phrase "*relates to*" is "*familiar in this sort of context, indicating more than a loose or consequential connection, and the language of section 29(3), referring to a provision's purpose and effect, reinforces that*": *Martin v Most* [2010] UKSC 10; 2010 SC (UKSC) 40 at §49 *per* Lord Walker. Lord Hope in *Imperial Tobacco* specifically endorsed Lord Walker's analysis that the test "*indicates something more than a loose or consequential connection*": at §16.

58. The concept of "*relates to*" encompasses a spectrum of linkage, or 'connection'. Lord Walker was evidently giving a sense of the broad boundaries of the necessary degree of connection between the purpose of the provision (per s.29(3)) and the reserved matter in question (*Imperial Tobacco*, §16). As Lord Reed noted in the Inner House in *Imperial Tobacco* [2012] CSIH 9; 2012 SC 297 at §120: "*In*

ordinary English, "relates to" does not mean the same as "affects"; and, although it is a wide expression, it cannot be intended to be given such a wide construction as to invalidate all legislation affecting matters listed in Schedule 5, however slight, indirect or remote the effect may be." More than a loose or consequential connection provides an indicative yardstick, providing a concept of relation or connection which goes beyond *de minimis*, whilst being capable of application in the wide array of contexts in which it might be required. That yardstick has been repeatedly considered of assistance, and applied, by this Court.

59. Nothing in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016 ("*Medical Costs Bill*") purports to create any different approach. That reference was made under the Government of Wales Act 2006, in a context where the Welsh Assembly (as it then was) was required to identify a specific basis of competence for its legislation (i.e. the conferred powers model, as then applied in Wales). The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill imposed a charge on persons liable for causing asbestos-related diseases in respect of the NHS services provided to victims as a result. This liability was extended to insurers of the liable persons. The claimed competence was said to be §9 of Part 1 of Schedule 7, which included "*Provision of health services*" and "*Organisation and funding of national health service*" (at §12). At §25, Lord Mance summarised the case law arising under the 1998 Act on the same language of "*relates to*" and held that it should apply equally in the, slightly different, Welsh context. At §26, he explained the concern that the boundaries of the competence could not extend to permit the general raising of money by the Assembly, on the basis that some of it would go into the Welsh NHS. In that context, Lord Mance held at §27 that "*any raising of charges permissible under para 9 would have, in my opinion, to be more directly connected with the service provided and its funding. The mere purpose and effect of raising money which can or will be used to cover part of the costs of the Welsh NHS could not constitute a sufficiently close connection*". The use of the phrases 'direct' and 'indirect' connection in the remainder of that paragraph are not to be taken out of the particular context of the issue and the way in which it arose in that case. Nothing in the judgment of Lord Mance indicates that a specific test of a 'direct connection' is imposed by s.29(2)(b), and no subsequent case of the Court has interpreted it to have done so.

60. **Secondly**, the requirement of s.29(3) to examine the purpose of a provision means the Court must consider "*not merely…what can be discerned from an objective consideration of the effect of the terms of the provision*": *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43; [2014] 1 WLR 2622 ("*Agricultural Bill*"), §50. The purpose may be derived from a report that gives rise to the legislation, or of a committee of the Scottish Parliament, or from a preceding consultation process, but it may also be clear from its context, including the headings within the legislation itself: *Imperial Tobacco*, §§16-17; *Martin*, §75 *per* Lord Rodger; *Agricultural Bill*, §52.

61. The identification of the purpose of a provision, or a Bill, is a specific statutory concept in s.29(3) in a particular context. It is not akin to the ordinary exercise of statutory interpretation, in which the courts are concerned only with the objective meaning of the language Parliament used. The purpose, and the effect, may be "*derived from a consideration of both the purpose of those introducing it and the objective effect of its terms*" (*Agricultural Bill*, §54) in a manner quite unlike the different exercise of interpretation. In identifying the purpose when considering the competence of the Scottish Parliament, the core of the question is to ask what the provisions are really about: *Imperial Tobacco*, §43. The Lord Advocate's Case at §118 draws an incorrect analogy which cannot be relied upon.

62. **Thirdly**, the purpose of a provision may extend beyond its legal effect but is not the same thing as the political motivation behind it: *Continuity Bill*, §27. For example, in that case, it was relevant to the Court's determination both that the Bill did not purport to deal with any legal rule affecting the conduct of relations with the EU, and that it did not purport to affect the way in which negotiations (i.e. political rather than legal acts) were being conducted: §33.[9] The relevant effects in s.29(3) include both the "*legal and practical effects*": *Agricultural Bill*, §53.

63. Similarly, in *Imperial Tobacco*, the legal effect of the provisions under challenge was to prohibit the display of tobacco products and prohibit their sale in vending machines. But the purpose for which these legal effects were imposed, i.e. "*what these provisions are really about*", was the promotion of public health: §43 *per*

[9] The Lord Advocate's Case at §98 (and again at §117) states that the Court emphasised the need for there to be "*some form of legal or direct practical effect of law on the reserved matter*". This formulation is not accepted. The Court did not in *Continuity Bill* apply a test requiring a "*direct practical effect*" and it does not refer to a "*practical effect of law*", the meaning of which is not understood.

Lord Hope. The extent to which that policy aim will be realised in practice does not matter: *Imperial Tobacco*, §39.

64. The provision does not have to modify the law applicable to the reserved subject matter in order to relate to it: *Christian Institute*, §§33 and 63. Where a Bill contains multiple relevant provisions, it may be appropriate to consider the overall purpose of the Bill: at §64.

65. **Fourthly**, the analysis of the application of the test is to be structured by means of two questions: *Imperial Tobacco*, §26 and *Continuity Bill*, §27. These are:

    (a) What is the scope of the subject matter of the relevant matter reserved by Schedule 5?

    (b) By reference to the purpose of the provision under challenge, having regard to its effect, does that provision relate to the reserved matter?

66. Some of the case law discussed has been effectively determined by the Court's analysis of the issue in (a) (e.g. *Continuity Bill*, §28; and, on a proper analysis, *Medical Costs Bill*); some has been determined by a focus on the analysis of (b) (e.g. *Agricultural Bill*, §§51-54); some has required a mixture of the two (e.g. *Imperial Tobacco*).

67. **Fifthly**, if the provision has two or more purposes, one of which relates to a reserved matter, then the provision is outside competence unless that purpose can be regarded as consequential and of no real significance when regard is had to what the provision overall seeks to achieve: *Imperial Tobacco*, §43. This analysis was *obiter* but was repeated with approval in *Christian Institute* at §31.

Submissions on Competence

68. The Inner House did not directly decide the substantive issue of competence to legislate for an advisory referendum on independence raised in *Keatings*. It did not need to do so, having dismissed the claim as premature and hypothetical. Nonetheless, and having heard full argument on the point, the Lord President commented at §66, having set out the applicable legal test, that "*it may not be too difficult to arrive at a conclusion*" – evidently that doing so would be outside competence.

69. It is submitted that the Scottish Parliament plainly does not have the competence to legislate for an advisory referendum on the independence of Scotland from the United Kingdom, including in the form adopted in the Draft Bill. To do so impermissibly relates to both §1(b) and §1(c) of Schedule 5 to the 1998 Act (regardless of additional competence restrictions which might apply).

The reservation of matters relating to the Union of the Kingdoms of Scotland and England in §1(b)

70. The Draft Bill, and clause 2 of it in particular, would 'relate to' the reservation of the Union of the Kingdoms of Scotland and England for the following reasons.

71. The scope of the reservation is self-evident: it is the Union. It is not the dissolution of the Union: whether a referendum were to support or reject independence, it would equally relate to the Union. The way in which the question on the referendum is framed, neutral or otherwise, does not affect the connection to the reserved matter. Nor is this surprising: the Union of Scotland and England and matters connected to it are not of interest only to the people of Scotland. They are, *par excellence*, "*matters in which the United Kingdom as a whole has an interest*" and which Parliament therefore reserved so that they "*continue to be the responsibility of the UK Parliament at Westminster*": *Imperial Tobacco*, §29; *Christian Institute*, §65.[10] As Lord Neuberger noted in *Moohan v Lord Advocate* [2014] UKSC 67; [2015] 1 AC 901; 2015 SC (UKSC) 1 at §47, Scottish independence is ultimately (at the very least) also a matter for the United Kingdom Parliament.

72. In that context, applying the test set out in ss.29(2)(b) and 29(3) of the 1998 Act, does clause 2 of the Draft Bill relate to the Union of the Kingdoms of Scotland and England? To put the issue in the terms of the referendum question in clause 2: does holding a referendum on the question "*Should Scotland be an independent country*" relate to the Union of the Kingdoms of Scotland and England? The AGS submits that it does.

[10] These observations were both made by reference to the reserved matters set out in Part II of Schedule 5 to the 1998 Act, but there is no reason of principle why the reasoning does not apply equally to Part I of Schedule 5.

73. **First**, the objective purpose of the Draft Bill is to hold a referendum on independence, i.e. the termination of the Union of the Kingdoms of Scotland and England. That is obvious from clause 2. That clause 1 describes the referendum as "*ascertaining the views of the people of Scotland*" is of no assistance to the Lord Advocate. All electoral exercises concern the ascertainment of the views of the electorate, with referendums doing so with particular specificity. Such an ascertainment of views would itself be more than sufficient to satisfy the s.29(2)(b) test.

74. However, the Court is not limited by the way in which the purpose of the Draft Bill is framed in clause 1. When one asks, as the Court rightly did in *Imperial Tobacco*, what the Draft Bill is really about (i.e. substance and not form), the answer can only be: to hold a referendum on whether the Union of the Kingdoms of Scotland and England should end. Just as restrictions on tobacco advertising and vending machine sales were a means to achieve the public health protection end, the holding of a referendum on independence is the means to achieve the aim of independence itself.[11]

75. There is no secret or obscurity about this. It is not the policy of the Scottish Government, as presently constituted, simply to hold a referendum. It is the policy of the Scottish Government to achieve independence for Scotland: see, e.g., the materials cited in the Lord Advocate's Case at §109. The official statement of the Scottish Government in connection with the Draft Bill and this Reference include the confirmation that: "*Our focus remains clear – we will continue to set out the strong and compelling case for Scotland to become an independent country*",[12] and the First Minister's Statement to the Scottish Parliament on 28 June 2022 was to even clearer effect.[13] The purpose of those who would introduce the Draft Bill is relevant to identifying the true purpose of the Bill itself: *Agricultural Bill*, §54. The political motivation of those introducing the Draft Bill is not necessarily the same as its purpose (*Continuity Bill*, §27), but that is not the same thing as saying that the

[11] There may in some contexts be a distinction between the subject matter of a provision and its purpose, having regard to its effect, but that will not always be the case and it is not possible to discern any sensible difference between the purpose of the Draft Bill and its subject matter (cf Lord Advocate's Case, §115). Such a focus is not consistent with the analysis in, for example, *Imperial Tobacco*.
[12] https://www.gov.scot/news/reference-to-the-supreme-court-on-independence-referendum-published/
[13] https://www.gov.scot/publications/ministerial-statement-independence-referendum/

political motivation is irrelevant: where it is the same as, or indistinguishable from, the purpose, it is relevant.[14]

76. It is striking that the Lord Advocate's arguments that the s.29(2)(b) test is not met seeks to answer the second stage of the *Imperial Tobacco/Christian Institute* test – whether the Draft Bill relates to the reserved matter – primarily by reference to case law (especially *Continuity Bill* and *Medical Costs Bill*) which was particularly focussed on the first stage of the test – determining the proper scope of the reservation. That is an erroneous analysis. Once understood, any perceived force of the Lord Advocate's arguments falls away.

77. **Secondly**, the effect of the Draft Bill is significant. The legal effects of it are not "*relevantly, nil*", as the Lord Advocate's Case suggests at §128(3). On the contrary, legislation for a referendum on independence is required precisely because statutory authority is necessary to authorise the expenditure of significant financial resources on the exercise, and to direct the performance of the functions of counting officers and registration officers to conduct the referendum. The mechanics of this are addressed in the Referendums (Scotland) Act 2020, but clause 4 of the Draft Bill is required to apply those provisions.

78. It is, of course, right that the outcome of the referendum provided for by the Draft Bill has no legal effect: it is not 'self-executing'. But nor can it credibly be suggested that the outcome of the referendum will be 'advisory' in the sense of being treated as a matter of academic interest only: a referendum is not, and is not designed to be, an exercise in mere abstract opinion polling at considerable public expense. Were the outcome to favour independence, it would be used (and no doubt used by the SNP as the central plank) to seek to build momentum towards achieving that end: the termination of the Union and the secession of Scotland. It is in precisely that hope that the Draft Bill is being proposed.

79. It is not inappropriately speculative to have regard to that as an aspect of the effect of the Draft Bill: it is unavoidable. As Lord Hodge noted in *Moohan* at §17, "*the referendum is a very important political decision for both Scotland and the rest of*

[14] There might be circumstances, for example, in which it could be inferred that the political motivation behind a piece of legislation was quite separate from the legal and practical purpose and effect of a Bill, such as where the political motivation was to provoke a confrontation with the UK Government for party political purposes. That would be irrelevant, because it would draw the Court into a purely political dispute, divorced from the legal question of legislative competence.

the United Kingdom". It would be speculative to assess whether the aim of independence would be achieved, on what terms and in what timeframe, but none of those matters need be considered to answer the Question. The connection to the reserved matter of the Union does not depend on whether that Union is in fact dissolved, or when. But nor is the Court required to ignore obvious practical realities in considering the question of effect: see also, by analogy, *UNCRC Bill*, §52. Indeed, there is an air of unrealistic casuistry about a contention which emphasises that the question of competence to legislate for a referendum on independence is of exceptional public importance where a further referendum on independence is a central manifesto pledge of the governing political party (Lord Advocate's Case, §23), whilst also characterising the legal effects as nil and the practical effects as limited and speculative (Lord Advocate's Case, §§122, 125, 128).

80. **Thirdly**, it is difficult rationally to suggest that a Draft Bill which makes provision for a referendum on independence – on the ending of the Union – has only a loose or consequential degree of connection with the reserved matter of that Union. The effect of such a referendum, and the purpose of the Draft Bill, only reinforce that conclusion. Indeed, although the Lord Advocate's Case is wrong to posit that a test of 'direct' connection is required, even if that were the test, it would be met in the present context.

81. **Fourthly**, significant support can also be drawn from the terms of the Explanatory Notes to the 1998 Act in connection to s.101. Section 101 provides for a particular interpretative approach to ASPs, to give effect to devolved legislation rather than invalidate on competence grounds, where possible (see the detailed analysis in *UNCRC Bill*). In discussing how s.101 operates, and does not operate, the Explanatory Notes give the following example of significance:

> "*For example an ASP which purports to confer a power on the Scottish Ministers to hold a referendum on any matter could be read as enabling the Ministers to hold a referendum on independence or the Monarchy. Those are reserved matters and the ASP might therefore be read as relating to those reserved matters and therefore outside the legislative competence of the Parliament under section 29(2)(b). Rather than invalidating the ASP (or invalidating it to the extent that it could be so read), this section would require the ASP to be read, if it is possible to do so, as conferring a power to hold a referendum only on matters within the competence of the Parliament. <u>However, if a provision clearly cannot be read to be within competence, for example an ASP providing only for a referendum on independence, then the</u>*

section will not allow it to be read as being within competence." (emphasis added)

82. **Fifthly**, the AGS does not consider that the terms of §1(b) of Schedule 5, and its application to the Question referred, are in any way unclear or ambiguous. Accordingly, resort to Hansard is neither necessary nor justified. The tripartite test set out in *Pepper v Hart* [1993] AC 593, 640 *per* Lord Browne-Wilkinson continues to govern admissibility of Parliamentary material of this kind: *R (O)*, §32 *per* Lord Hodge.

83. However, if the Court considers that the terms of §1(b), or of s.29(2)(b), are ambiguous, then the potentially admissible Hansard material of the responsible Ministers in Parliament (the Secretary of State for Scotland (Rt Hon Donald Dewar MP), the Parliamentary Under-Secretary of State at the Scottish Office (Lord Sewel) and the Lord Advocate (Lord Hardie)) clearly and unequivocally set out that the Scottish Parliament did not have competence under the scheme of the 1998 Act (as it became) to legislate for a referendum on independence. These passages are quoted at §49 of the Lord Advocate's Case and are not repeated. They provide further weight that the construction and analysis submitted by the AGS is the correct one.

84. The Lord Advocate's Case also quotes, at §50, part of comments made by Lord Mackay, then Shadow Lord Advocate during the early stages of the passage of the Bill, which are said to be supportive of the contrary view. But these passages could never meet the *Pepper v Hart* test: they are not a statement from a Minister or promoter of the Bill. On the contrary, they are statements of an opponent of the Bill. They are irrelevant to the legal issue on the Reference.

85. **Sixthly**, the White Paper which preceded the 1998 Act, '*Scotland's Parliament*' (Cm 3658) explained at §3.4 that "*The Government believe that reserving power in these areas* [those set out in Schedule 5] *will safeguard the integrity of the UK*". That language is inconsistent with an interpretation of Schedule 5 which would lead to the Draft Bill being within competence. White Papers are admissible aids to construction because they cast light on the purpose and aim of the legislation in question: *R (O)*, §30; *Wilson v First County Trust Ltd (No.2)* [2004] 1 AC 816, §56.

The reservation of matters relating to the Parliament of the United Kingdom in §1(c)

86. The AGS recognises that the answer to the Question referred is unlikely to differ as between §1(b) and §1(c) of Schedule 5. Nonetheless, the Draft Bill would also be outside the legislative competence of the Scottish Parliament because it relates to the reserved matter, in §1(c) of Schedule 5, of "*the Parliament of the United Kingdom*".

87. The scope of the reservation has been addressed above. It encompasses the sovereignty of Parliament: *Continuity Bill*, §§61-63. That sovereignty encompasses being the ultimate source of legal authority in Scotland. The secession of Scotland from the Union would necessarily bring that sovereignty in relation to Scotland to an end: Parliament would no longer be able to make laws for Scotland. The position encapsulated in s.28(7) of the 1998 Act would be reversed. A referendum on such independence has the purpose, in the context of s.29(3), of bringing that end about.

88. For materially the same reasons as those set out above in connection with §1(b) of Schedule 5, the Draft Bill would impermissibly relate to the reserved matter set out in §1(c) of Schedule 5.

CONCLUSION

89. It is submitted that the Reference should not be accepted for the following amongst other **REASONS**:

    (1) On a proper interpretation of §§1(f) and 34 of Schedule 6 to the Scotland Act 1998, read in the context of the Scotland Act 1998 as a whole, a question concerning a draft of a proposed Bill which has not been introduced into the Scottish Parliament does not give rise to a "*devolution issue*".

    (2) In the alternative, the Court should exercise its inherent discretion to refuse a reference made under §34 of Schedule 6 to the Scotland Act 1998 where it concerns a draft of a Bill which has not yet been introduced into or passed by the Scottish Parliament.

90. In the alternative, it is submitted that the Question which is the subject of the Reference must be answered in the affirmative for the following amongst other **REASONS**:

(1) The provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be "*Should Scotland be an independent country?*" relates to the reserved matter of the Union of the Kingdoms of Scotland and England (§1(b) of Schedule 5 to the Scotland Act 1998).

(2) The provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be "*Should Scotland be an independent country?*" relates to the reserved matter of the Parliament of the United Kingdom (§1(c) of Schedule 5 to the Scotland Act 1998).

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CHRISTOPHER PIRIE

CHRISTOPHER KNIGHT

9 August 2022

UKSC 2022/0098

IN THE SUPREME COURT OF THE UNITED KINGDOM

IN THE MATTER OF

A REFERENCE BY THE LORD ADVOCATE

UNDER PARAGRAPH 34 OF SCHEDULE 6 TO THE SCOTLAND ACT 1998

BETWEEN

THE LORD ADVOCATE
Appellant

-and-

HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND
Respondent

CASE ON BEHALF OF HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

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