IN THE SUPREME COURT **UKSC 2021/0079; UKSC 2021/0080**

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (INCORPORATION) (SCOTLAND) BILL – A reference by the Attorney General and Advocate General for Scotland

EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT (INCORPORATION) (SCOTLAND) BILL - A reference by the Attorney General and Advocate General for Scotland

ATTORNEY GENERAL

ADVOCATE GENERAL FOR SCOTLAND

Applicants

-v-

LORD ADVOCATE

COUNSEL GENERAL FOR WALES

Respondents

CASE FOR COUNSEL GENERAL FOR WALES

Introduction & Summary

1. Counsel General for Wales ('the Counsel General') is primarily concerned with issues of constitutional principle raised by the reference under s33(1) of the Scotland Act 1998 ('SA') of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ('UNCRC Bill') and their implications for the interpretation of Senedd legislation.

2. The Counsel General's written case develops the following submissions:
    a. The interpretive principle in s19(1) UNCRC Bill gives effect to the common law presumption that Parliament intends to legislate consistently with

international obligations. It is not a modification of s28(7) SA ('the interpretative principle');

b. The Scottish Parliament and the Senedd ('the devolved Parliaments') are competent to enact legislation which imposes conditions on the legal effect of Acts of the UK Parliament, whether expressly or implicitly. Such legislation does not modify the power of UK Parliament to make laws for Scotland and Wales recognised in s28(7) SA and s107(5) of the Government of Wales Act 2006 ('GoWA');

c. Section 101(2) SA and s154(2) GoWA (which are materially similar) require courts to construe legislation of the devolved Parliaments narrowly where such a reading is a possible one; is necessary to render it within competence; and goes with the grain of the legislation. This statutory canon of construction, which is required to give effect to the purpose of the devolution legislation, goes further than common law principles of legislative construction (such as the principle of validity), in that its use does not depend on legislative ambiguity.

Issue 1 - The interpretive principle

3. Section 19(1) UNCRC Bill requires interpretation of legislation compatibly with the UNCRC "*so far as is possible to do so*". Courts already use this approach where statutory language is ambiguous. International treaties are used as an aid to interpretation and there is a presumption that Parliament intended to legislate consistently with its international obligations; *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449 per Lord Carnwath at §§ 115, Lord Hughes at §137 and Baroness Hale at §§ 239 - 240. If the statutory language is not ambiguous, then it may not be possible to interpret it consistently with the UNCRC. Consequently, s19(1) does not offend against any established principle.

4. A well-known example of domestic legislation being read consistently with the UNCRC is s55 of the Borders, Citizenship and Immigration Act 2009 which provides that the Secretary of State for the Home Department must exercise her immigration functions

"*having regard to the need to safeguard and promote the welfare of children*". This has been read as reflecting the requirement in article 3 UNCRC to treat the best interests of the child as a primary consideration. In *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2019] EWHC 3536 (Admin), [2020] 1 WLR 1486 Jay J described the duty in this way at §§ 82 – 83 (approved on appeal [2021] EWCA Civ 193 at §70):

> "*… First, the UNCRC is an international treaty which is not directly justiciable in our courts (cf section 55) although in the appropriate context it falls to be taken into account. Secondly, section 55 of the 2009 Act is narrower than article 3.1 of the UNCRC to the extent that it applies only to the particular functions itemised in subsection (2). Thirdly, although section 55 does not refer in terms to the best interests of children being a primary consideration, the analysis of Baroness Hale DPSC in MM (Lebanon), at paras 91 and 92, indicates that the same approach is applicable. The welfare of the child is a primary consideration, capable of being outweighed by the combined force of other countervailing considerations. Fourthly, the duty under section 55 is expressly on the Secretary of State. It applies when she makes subordinate legislation although parliamentary oversight may be a relevant factor in ascertaining whether the duty has been discharged. Fifthly, I discern no material difference between section 55 and article 3.1 as regards the entity on whom the obligation is imposed.*
>
> *The key jurisprudence on the context and discharge of the welfare duty is directed to article 3.1 of the UNCRC and not to section 55 of the 2009 Act. In my judgment, this has no implications for the destiny of this case. The core issue is whether the Secretary of State discharged her duty under section 55 by having regard to the best interests of children. The cases on article 3.1 throw clear light on this question; and, if anything, claimants who are able to invoke the statutory provision are in a stronger position because there has been some debate as to whether the UNCRC confers a freestanding requirement*."

5. This approach was also adopted in *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, [2021] 1 WLR 1327 per Underhill LJ at §9:

> "*It is now usual in the immigration context to use the "best interests of the child" language of the UNCRC rather than the "welfare of children" language of the statute; but the two formulations connote the same obligation.*"

6. In a different context, s11 of the Children Act 2004 requires public bodies in England to make arrangements to ensure "*their functions are discharged having regard to the*

need to safeguard and promote the welfare of children". In *Nzolameso v Westminster City Council* [2015] UKSC 22; [2015] 2 All ER 942 at §29, Baroness Hale recognised that this may well require a reading consistent with article 3 UNCRC. In *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73, [2019] AC 845 at §49 she observed:

> "*Article 24(2) [of the EU Charter of Fundamental Rights] requires that "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". **This obligation is obviously derived from article 3(1) of the United Nations Convention on the Rights of the Child, as was the obligation in section 11 of the 2004 Act. Properly understood, they should amount to the same thing***."

7. Accordingly, the interpretive principle in s19(1) UNCRC Bill gives clear effect to what is already a common law presumption, displaced only by clear words to the contrary, that Parliament legislates consistently with its international obligations and does not amount to a modification of s28(7) SA.

Issue 2 - The competence of devolved Parliaments to condition the effect of UK Parliament legislation in Scotland and Wales

8. The Applicants seek to submit that the interpretive principle in s19(1) UNCRC Bill and the duty on public authorities to act compatibly with the UNCRC in s6 UNCRC Bill impermissibly modify the ability of the UK Parliament to make laws for Scotland (s28(7) SA); see the Applicants' case at §§ 58(1), 59, 60, 68, 70, 73, 80, 95 and **96**. This assertion is based on the contention that those provisions impose an impermissible condition on the legal effect of an UK Act so as to impliedly modify it. It is said that such modification is contrary to the intention of UK Parliament and parliamentary sovereignty.

9. This submission is misconceived.

10. *First,* as the Applicants accept, the devolved Parliaments are expressly empowered by the scheme of the devolution legislation itself to modify the application of UK Acts in areas of devolved competence. That is the combined effect of ss 28 – 29 SA and ss 107

– 108A GoWA. In Wales, the Senedd is empowered to modify functions exercisable otherwise than in relation to Wales so long as such modification is ancillary to devolved legislation and has no greater effect than is necessary to give effect to the purpose of the relevant provision: s108A(3) GoWA. The Senedd is also empowered to modify 'the law on reserved matters'[1] so long as such modification is ancillary to a provision which does not relate to reserved matters and has no greater effect on reserved matters than is necessary to give effect to the purpose of the relevant provision: §2 of Schedule 7B GoWA.

11. Since (as the Applicants accept) express modification of UK Acts by the devolved Parliaments is not inconsistent with the recognition of parliamentary supremacy in s28(7) SA and s107(5) GoWA, it necessarily follows that implied modification is similarly not inconsistent. The analogy the Applicants seek to draw at §71 of their written case between devolved legislation and regulations under a UK statute in reliance on *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531 is inapposite. Primary legislation of a devolved, democratically elected Parliament is not in any way akin to secondary legislation of the executive. Unlike the executive (which may only exercise powers for specified statutory purposes), the devolved Parliaments' powers do not have to be exercised having regard to any particular mandatory policy goals dictated by a UK statute: see *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 per Lord Hope at §§ 46 – 49 and Lord Reed at §§ 145 - 147.

12. *Second*, there are other safeguards within SA and GoWA which protect parliamentary sovereignty. S29(2)(c) SA and s108A(2)(d) GoWA provide that an Act of the devolved Parliaments **is not law** insofar as any provision is in breach of a restriction in Schedule 4 SA or Schedule 7B GoWA. Those schedules list Acts of the UK Parliament which *cannot* be modified by the devolved Parliaments such as the Human Rights Act 1998 and, most recently, the United Kingdom Internal Market Act 2020. Thus, UK Parliament can protect any of its legislation by amending those schedules. Moreover,

[1] See §1 of Schedule 7B GoWA.

§2 of Schedule 4 SA and §1 of Schedule 7B of GoWA provide that the devolved Parliaments cannot legislate to modify legislation on reserved matters.

13. The end result of these statutory safeguards for parliamentary sovereignty is that, within their boundaries, they leave space within which the devolved Parliaments may legislate. Save where the statutory safeguards apply, the Senedd and Scottish Parliament may legislate free from restrictions. When it passed the devolution legislation, the UK Parliament did not legislate to prevent the devolved Parliaments *either* from modifying UK Parliament legislation in non-reserved (devolved) areas; *or* modifying reserved UK Parliament legislation when ancillary to a devolved purpose.

14. *Third*, the objective legislative intention of the devolution statutes is to allow the devolved Parliaments to modify the legal effect of other UK Acts in Scotland and Wales respectively. This intention is to be derived from the words of the SA and GoWA, read in their statutory context and having regard to the purpose of the devolution settlement. Both these canons of statutory construction are in play. In ascertaining the legislative intention, the Court seeks to arrive at an objective intention consistent with the language used: see *R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Ltd* [2001] 2 AC 349 per Lord Nicholls at 396. In construing SA and GoWA, the Court must have regard to the statutory purpose to achieve a constitutional settlement and to create a democratically elected legislature with plenary legislative powers: see *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 per Lord Bingham at §11; *Local Government Byelaws (Wales) Bill 2012 – reference by the Attorney General for England and Wales* [2012] UKSC 53, [2013] 1 AC 792 per Lord Hope at §80.

15. In relation to §§ 63 – 65 and 70 of the Applicant's case, the rule of law means that independent courts must interpret legislation in accordance with established canons of construction, including the principle of legality: *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491 per Lord Carnwath at §132 and Lord Lloyd-Jones at §160. The concept of parliamentary sovereignty does not detract from this essential constitutional foundation or suggest that what the

executive or any particular group of Parliamentarians subjectively intended should be privileged over the proper construction of the statute itself. As the late Sir John Laws wrote in his book, *The Constitutional Balance* (published posthumously) at p103:

> "*If it is possible, the Rule of Law and the traditional English doctrine of legislative supremacy should lie in the same bed.* ***The concept of parliamentary intention impedes such an outcome. The concept of a statute's purpose does not.*** *Our constitutional principles – [reason, fairness and presumption of liberty] – apply to statutes generally, and are separate and distinct from the specific purpose of any particular statute, though the general principles and the specific purpose have to live together."* [emphasis added]

16. In light of these principles of statutory construction, the proper construction of SA and GoWA is that devolved Parliaments are competent to modify the effect of earlier acts of UK Parliament within their areas of devolved competence whether by express statutory language in a devolved statute or necessary implication where the language of the earlier statute is inconsistent with the later Act of the devolved Parliaments. The common law rule of implied repeal is based on parliamentary sovereignty and the principle that no parliament can bind its successor. The concept of legislative competence within the identified spheres of the devolved Parliaments achieves the same result: see *Bennion, Bailey and Norbury on Statutory Interpretation* (8th Ed, 2020) at §8.9.

17. This conclusion is consistent with the decision of the Supreme Court in *Martin v Most* [2010] UKSC 10, [2010] SC (UKSC) 40. In that case, a devolved sentencing provision increasing the maximum sentence on summary conviction impliedly modified a stipulated maximum sentence in the Road Traffic Offenders Act 1988. It is also consistent with *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; [2019] AC 1022 where the Court stated at §51:

> "*Without attempting an exhaustive definition, a protected enactment will be modified by a later enactment,* ***even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part****. That will be the position if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as before, so that the protected enactment has to be*

understood as having been in substance amended, superseded, disapplied or repealed by the later one." [emphasis added]

18. *Fourth*, the consequences of the alternative interpretation would create very significant practical difficulties for the operation of the devolved Parliaments. It would mean that an Act of a devolved Parliament, like the UNCRC Bill, could only be capable of modifying UK legislation by identifying and listing every piece of UK legislation potentially affected by the new devolved Act and expressly stating how it modifies the prior legislation. If that were the proper approach, modification of UK Acts in areas of devolved competence would be unstable and unworkable as the devolved Parliament could not establish interpretative principles of general application. If necessary modifications were omitted, the consequence would be an unnecessary proliferation of devolution issues being referred to the higher courts. Further, that process would have an unnecessary impact on UK-wide Acts because the doctrine of implied amendment applies only if and insofar as it is necessary to give effect to the later devolved Act: see *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 per Laws J at §43.

19. In summary, the concept of UK Acts of Parliament (other than those protected by Schedule 4 SA and Schedule 7B GowA) being capable of express or implied modification by a subsequent Act of a devolved Parliament is not contrary to parliamentary sovereignty, but a fulfilment of it, and gives effect to the purpose the statutory schemes of SA and GoWA.

<u>The position in Wales</u>

20. This reference is of particular concern to Welsh Government because Senedd legislation already imposes conditions on the legal effect of UK-wide Acts in Wales.

Rights of Children and Young Persons (Wales) Measure 2011

21. Section 1(1) of the Rights of Children and Young Persons (Wales) Measure 2011 ('the 2011 Measure') provides that "*the Welsh Ministers must, when exercising any of their functions, have due regard to the requirements of (a) Part 1 of [UNCRC]".* As explained at §§ 3 - 7 above, this amounts to a substantive duty to comply with article 3 UNCRC. That duty is comprised of three elements, as explained by Lord Wilson in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 at §§ 67 – 68:

> "*67 Article 3 of the UNCRC provides: "1. In all actions concerning children, whether undertaken by . . . courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." A move is afoot, exemplified by Lord Kerr JSC's judgment in the first benefit cap case [2015] 1 WLR 1449, paras 247—257, for UK courts to treat the UNCRC, which the UK has ratified, as being, exceptionally, part of our domestic law. At present, however, it forms no part of it.*
>
> *68 What does the concept of the best interests of the child in article 3.1 encompass? In the Mathieson case [2015] 1 WLR 3250, para 39 this court approved a suggestion which Lord Carnwath JSC had made in para 105 of the first benefit cap case to the effect that authoritative guidance was to be found in para 6 of General Comment No 14 (2013) of the UN Committee on the Rights of the Child. There the committee had suggested that the concept had three dimensions**: (a) a substantive right of the child to have his or her best interests assessed as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake; (b) an interpretative principle, irrelevant to the present appeals; and importantly; (c) a rule of procedure that, whenever a decision is to be made that will affect an identified group of children, the decision-making process must include an evaluation of the possible impact of the decision on them***." [emphasis added]

22. Thus, when the Welsh Ministers are exercising functions[2] under UK Acts such as the Town and Country Planning Act 1990 and the Environmental Protection Act 1990 (which include powers to make secondary legislation, for example, s71 of the former and s140 of the latter). The 2011 Measure imposes a condition on the legal effect of

[2] E.g. those transferred under the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) art 2 and schedule 1.

UK Acts, because the Welsh Ministers cannot lawfully act other than in accordance with its terms.

23. Further, given that article 3 UNCRC includes an interpretive principle (that where a legal provision is open to more than one interpretation, that which more effectively serves the best interests of an affected child or children should be adopted), the Welsh Ministers are required to apply that interpretive principle when discharging functions under UK Acts and when making secondary legislation. When reviewing the actions of the Welsh Ministers, the courts are obliged to "*have regard*" to the UNCRC in the same way as the Welsh Ministers: *R (Risk Management Partners Ltd) v Brent London Borough Council* [2009] EWCA Civ 490, [2010] PTSR 349 per Pill LJ at §110.

The Wellbeing of Future Generations (Wales) Act 2015

24. Section 3 of the Well-being of Future Generations (Wales) Act 2015 provides so far as material:

> "***Well-being duty on public bodies***
> *(1) Each public body must carry out sustainable development.*
> *(2) The action a public body takes in carrying out sustainable development must include—*
> *(a) setting and publishing objectives ("well-being objectives") that are designed to maximise its contribution to achieving each of the well-being goals, and*
> *(b)* ***taking all reasonable steps (in exercising its functions) to meet those objectives****.*" [emphasis added]

25. A 'public body' includes the Welsh Ministers: s6(1). This provision also imposes a condition on the legal effect of UK Acts when the Welsh Ministers are exercising functions.

26. In the area of planning, this duty is reinforced by s2 of the Planning (Wales) Act 2015 which provides:

> "***Sustainable development***

(1) This section applies to the exercise by the Welsh Ministers, a local planning authority in Wales or any other public body—

(a) of a function under Part 6 of Planning and Compulsory Purchase Act 2004 in relation to the National Development Framework for Wales, a strategic development plan or a local development plan;

(b) of a function under Part 3 of Town and Country Planning Act 1990 in relation to an application for planning permission made (or proposed to be made) to the Welsh Ministers or to a local planning authority in Wales.

(2) The function must be exercised, as part of carrying out sustainable development in accordance with the Well-being of Future Generations (Wales) Act 2015 (anaw 2), for the purpose of ensuring that the development and use of land contribute to improving the economic, social, environmental and cultural well-being of Wales.

(3) In complying with subsection (2), a public body must take into account guidance issued by the Welsh Ministers (including relevant guidance issued under section 14 of the Well-being of Future Generations (Wales) Act 2015).

(4) In this section, "public body" has the meaning given by section 6 of the Well-being of Future Generations (Wales) Act 2015.

(5) Nothing in this section, as it applies in relation to functions under Part 3 of TCPA 1990, alters—

(a) whether regard is to be had to any particular consideration under subsection (2) of section 70 of that Act (determination of applications for planning permission), or

(b) the weight to be given to any consideration to which regard is had under that subsection."

27. As the Applicants argue at §91 of their case, the 2015 Act creates "*new legal duties effectively read into every other set of statutory functions which might relate to children and young people*." The sustainable development duty has to be complied with by local planning authorities exercising functions under the Town and Country Planning Act 1990 so that the discharge of those functions varies as between Wales and England.

28. Consequently, the Applicants' bold submission that the devolved Parliaments lack competence to impose conditions on the legal effect of UK Acts in the devolved nations is a misreading of the scheme of SA and GoWA respectively.

Issue 3: The effect of section 101(2) SA (and s154(2) GoWA) on interpretation of devolved legislation

The Provisions analysed

29. S 101(2) SA and s154(2) GoWA are materially identical. By virtue of s101(2) SA, an Act of the Scottish Parliament or Bill (among other things) which could be read in such a way as to be outside competence "*is to be read as* ***narrowly*** *as is required for it to be within competence****, if such a reading is possible****, and is to have effect accordingly*" [emphasis added]. S 154(2) GoWA provides similarly in respect of an Act of the Senedd or Bill.

30. The Explanatory Notes to the SA suggest that the purpose of s101(2) SA is to enable the courts to give effect to legislation rather than invalidate it "*merely because it could be read in such a way"* as to be outside the competence under which it was made.[3] This same wording is used in the Explanatory Notes to GoWA in relation to s154(2) GOWA.[4]

31. S 101(2) SA was described by Lord Hope in *Anderson v Scottish Ministers* [2001] UKPC D5; 2002 SC (PC) 63 as being a "*corresponding obligation*" to that contained in s3 Human Rights Act 1998 ("HRA"). S 3(1) HRA provides that "***[s]o far as it is possible to do so****, primary legislation and subordinate legislation must be read and given effect* ***in a way*** *which is compatible with the Convention rights*" [emphasis added].

[3] SA, Explanatory Notes, section 98: Devolution Issues.
[4] GoWA, Explanatory Notes, para. 541.

32. However, s101(2) SA and s154(2) GoWA operate differently to s3 HRA in one important respect. All three provisions define the *purpose* of the interpretative obligation similarly, namely to adopt a "*possible*" reading of the legislation to enable it to be given effect. However, as Lord Hope noted in *DS v HM Advocate* [2007] UKPC D1; 2007 (SC) PC 1 at §22, s3 HRA "*defines the purpose of the exercise, not the way of achieving it. This is left to the court to work out according to the demands of each case"*. Thus, judges may (for example) adopt either a narrow or a broad reading of a provision in order to achieve the purpose under s3 HRA. By contrast, s101(2) and s154(2) GoWA define both the purpose *and* the method of achieving it, limiting the method solely to a narrow reading of the relevant provision.

No legislative ambiguity is necessary

33. No legislative ambiguity is necessary for the interpretative obligation in s101(2) SA and s154(2) GoWA to apply, contrary to the suggestion at §101 of the Applicants' case that "*s101(2) is not intended to be capable of being applied to language which is not ambiguous"*.

34. *First*, there is no reason on a plain reading of s101(2) SA and s154(2) GoWA to limit their application to such circumstances: nothing in the statutory language excludes the possibility that even unambiguous express words in a statute may be read more narrowly than an apparent textual meaning requires so as to arrive at a possible interpretation that is within competence.

35. *Second*, it is well established that the application of s3 HRA – which, as Lord Hope observed in *Anderson,* is a close analogy - does not depend on the presence of ambiguity. See, for example, *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at §§28-29 per Lord Nicholls:

> "*One tenable interpretation of the word "possible" would be that section 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the Convention-*

> *compliant meaning is to prevail. Words should be given the meaning which best accords with the Convention rights.*
>
> *This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed.* ***It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may none the less require the legislation to be given a different meaning****."* [emphasis added]

Given the similarity in purpose between s3 HRA, s101(2) SA and s154(2) GoWA, there is no reason why they should apply in differently.

36. *Third*, there is authority for the use of s101(2) SA and s154(2) GoWA to interpret legislation narrowly where there is no ostensible ambiguity. In *Henderson v HMA* 2011 JC 96, the relevant provision was s210F of the Criminal Procedure (Scotland) Act 1995 ("CP(S)A 1995") which provided that where certain conditions were met, the High Court may make an order for "*lifelong restriction*" constituting a sentence of imprisonment (or detention) for an indeterminate period. The Court held at §10:

> "*notwithstanding the broad terms of sec 1 of the Criminal Justice (Scotland) Act 2003 (which inserted among other sections sec 210F of the 1995 Act), the latter section is to be read and have effect as not extending the requirement to make an order for lifelong restriction to a situation in which the offender has been convicted of an offence under [the Firearms Act 1968] (as amended) which prescribes a determinate number of years as the maximum penalty by way of imprisonment*."

37. The use of the phrase "*notwithstanding"* demonstrates that High Court of Justiciary recognised that the wording of s210F CP(S)A 1995 was not ambiguous, yet the Court did not regard this as a bar to using the interpretative obligation in s101(2) SA to narrow the meaning of these broad words to bring the provision within competence.

38. Similarly, in *Martin v Most* (*ibid*) there was no ambiguity in s45(7) SA, which explicitly defined "*relevant enactment*" as "*an Act passed before this Act"* (§24). It was common

ground that s103(1)(b) of the Road Traffic Offenders Act 1988 was a 'relevant enactment' on ordinary principles (§25). However, Lord Rodger (contrary to the majority) would have found that the implied modification of s103(1)(b) was outside of legislative competence but at §153 went on to apply s101(2) SA to read down the definition of 'relevant penalty provision' so that 'a relevant enactment' did not include a provision "*which is special to a reserved matter within the meaning of para 2(3) of Pt I of sch 4 to the [SA]"*.

39. Accordingly, s101(2) SA and s154(2) GoWA go further than the ordinary common law presumption of validity in that their application does not depend on legislative ambiguity.

Purposive interpretation

40. The Applicants seek to suggest in their case at §116 that s101(2) SA cannot be used to bring ss 4 - 5 of the European Charter of Local Self-Government (Incorporation) (Scotland) Bill ("the ECLSG Bill") within competence, submitting that "*to do so would be incompatible with the intention of the SP when enacting the ECLSG Bill."* In purporting to identify "*the intention of the Scottish Parliament"*, the Applicants refer to various documents that accompanied the Bill on its introduction in the Scottish Parliament, including the Policy Memorandum and Explanatory Notes.

41. However, the Counsel General submits that this is to take the wrong approach to s101(2) SA and s154(2) GoWA. These are statutory requirements created by the UK Parliament which expressly require courts interpreting Bills of the devolved Parliaments to adopt a purposive approach to the interpretation of Bills so as to prefer an *intra vires* reading – where such a reading is possible. Thus, a reading of a piece of devolved legislation which renders it *intra vires* the relevant devolution statute is the best reading of the devolved Parliament's intention notwithstanding other materials which may point to a different, wider reading of the relevant provision or provisions of a devolved Bill. This is because, while s101(2) SA and s154(2) GoWA are in force, it

is to be presumed that the intention of the Scottish Parliament and the Senedd is to act within their devolved competence (on the need for the court to identify an *objective* legislative intention, see at §14 above).

42. This is analogous to the approach adopted in relation s3 HRA. As Lord Nicholls explained in *Ghaidan* at §30 and §33:

> "*30... In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question.* ***Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation****. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3…*
>
> *33… Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve [between interpretation and amendment]... The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, '****go with the grain of the legislation****'."*
> [emphasis added]

43. Given the purpose of s101(2) SA, s154(2) GoWA and s3 HRA is essentially the same, this approach should also be adopted in respect of s101(2) SA and s154(2) GoWA. Indeed, the Counsel General notes that in *Anderson* at §36 Lord Hope expressly followed his reasoning in *R v Lambert* [2002] 2 AC 545, 584-586 at §§78-81 as to when s3 HRA ought to be used when considering how to apply s101(2) SA. Applying this reasoning, Lord Hope in *Anderson* held that the word "*public"* in s1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 was to be narrowly interpreted as "*section of the public*" (see at §§37-38). In reaching this conclusion, he did not consider whether this was the intention of the SP by reference to the Explanatory Notes or similar; it was sufficient that it was a *possible* interpretation that rendered the provision within competence.

44. Similarly, in *Re Local Government Byelaws (Wales) Bill* (*ibid*) at §64, Lord Neuberger held that s154(2) of GoWA could be used to interpret s9 of the Local Government Byelaws (Wales) Bill as a narrow interpretation was "*consistent with the thrust of the Bill as a whole, and it does not conflict with any other provision of the Bill.*"

45. Further support for the approach proposed by the Counsel General is derived from the cases of *Henderson v HMA* (where s101(2) SA was used to interpret a provision narrowly "*notwithstanding"* the broad terms used by the SP) and *Martin v Most* (where s101(2) SA was used by Lord Rodger to give a narrow meaning to a provision, contrary to the broader effect which he regarded as the SP's "*purported"* intention (see at §§152-154)), as set out above.

46. Such an approach, applied correctly, does not to lead to legislative uncertainty as suggested by the Applicants at §109 of their case – just as careful use of s3(1) HRA does not lead to any legislative uncertainty. As Lord Hope observed in *Lambert* at §80 in relation to s3(1) HRA (observations which he explicitly relied on when applying s101(2) SA in *Anderson*):

> *"…great care must be taken, in cases where a different meaning has to be given to the legislation from the ordinary meaning of the words used by the legislator, to identify precisely the word or phrase which, if given its ordinary meaning, would otherwise be incompatible. Just as much care must then be taken to say how the word or phrase is to be construed if it is to be made compatible. The justification for this approach to the use of section 3(1) is to be found in the nature of legislation itself. Its primary characteristic, for present purposes, is its ability to achieve certainty by the use of clear and precise language. It provides a set of rules by which, according to the ordinary meaning of the words used, the conduct of affairs may be regulated.* ***So far as possible judges should seek to achieve the same attention to detail in their use of language to express the effect of applying section 3(1) as the parliamentary draftsman would have done if he had been amending the statute. It ought to be possible for any words that need to be substituted to be fitted in to the statute as if they had been inserted there by amendment. If this cannot be done without doing such violence to the statute as to make it unintelligible***

or unworkable, the use of this technique will not be possible." [emphasis added]

47. If the conventional approach to s3(1) HRA is not contrary to the requirement for legal certainty, then, *a fortiori,* neither is adopting a similar approach for s101(2) SA and s154(2) GoWA which permit only a narrow interpretation in contrast to the broader range of interpretative tools available to judges under s3(1) HRA.

48. In short, s101(2) SA and s154(2) GoWA can be invoked to construe legislation narrowly where the proposed reading is one which is within competence and goes with the grain of the legislation, even where such a reading departs from what might otherwise be taken to be the intention of the relevant devolved Parliament on a textual reading of the legislation in question.

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28 May 2021