FIRST DIVISION, INNER HOUSE, COURT OF SESSION

P1293/17

Lord President
Lord Menzies
Lord Drummond Young

STATEMENT OF REASONS

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

by

ANDY WIGHTMAN MSP AND OTHERS

Petitioners and Reclaimers

against

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondent

Petitioners and Reclaimers: O'Neill QC, Welsh; Balfour & Manson LLP
Additional Parties: Ross QC; Harper Macleod LLP
Respondent: The Advocate General (Lord Keen QC), Johnston QC, Webster QC; Office of the Advocate General

8 November 2018

[1] By interlocutor dated 21 September 2018 the court allowed a reclaiming motion against the interlocutor of the Lord Ordinary, dated 8 June 2018, which refused the petition. The court determined to make a reference to the Court of Justice of the European Union on the question of whether EU law permits a notice of withdrawal from the EU, which was made in accordance with Article 50 of the EU Treaty, to be revoked unilaterally. The form of reference was settled after a hearing on 3 October 2018.

[2] The reference has been made and the CJEU has applied its expedited procedure to the case. An oral hearing has been fixed for 27 November 2018. The court was advised by the respondent that the United Kingdom Supreme Court may be in a position to have an oral hearing, should permission be granted for leave to appeal, on either 22 or 26 November; that is almost immediately before the scheduled CJEU hearing.

[3] The application for permission to appeal against the court's interlocutor was made on 16 October 2018. It proceeded upon two grounds, *viz.* that the court erred in rejecting the respondent's propositions that: (1) the question posed in the reference was academic or hypothetical; and (2) answering the question posed constituted a breach of parliamentary privilege. It is contended, of course, that the appeal raises arguable points of law of general public importance. The application, at least in its written form, is largely a rehearsal of the points made in the reclaiming motion and statements explaining the nature of the disagreement which the respondent has with the court's reasoning. The respondent argues that the court's decisions are not merely interlocutory and that, if permission were not granted, he would not be able to challenge the court's decision on parliamentary privilege in advance of the prospective vote in Parliament. In terms of the European Union (Withdrawal) Act 2018, that vote is likely to take place, at the latest, early in the New Year. The court's decision, it was added, effectively enabled private individuals to raise matters relating to the functioning of the EU, with the CJEU, in circumstances when member states could not do so.

[4] The petitioners resisted the motion by maintaining that the appeal did not involve an arguable point of law, nor one of general public importance. The test in relation to academic or hypothetical questions was clear. The court had simply applied that test in the particular circumstances. The decision was interlocutory. In so far as it related to the scope of the

jurisdiction of this court, that was not a matter for the UKSC to determine. There was no reason for the UKSC to consider the issue of parliamentary privilege at this stage. The matter could be appealed once that had been determined, following upon receipt of the answer to the reference. The petition, which had been made to the national court, and the subsequent reference accorded with the structure of EU law and its institutions. Denial of the ability to make the reference would have been a breach of the duty of sincere co-operation.

[5] For the interested parties, it was said that the statutory test had not been met and, in particular, that there was no single compelling reason advanced as to why permission should be granted. There was no fundamental dispute on the law. The respondent had not dealt with the reasons given by the court on the question of whether the issue was hypothetical or academic. The real issue was whether the court had misstated the law on either the question of hypothesis or parliamentary privilege. The answer to that was in the negative. There had been no encroachment on parliamentary privilege. It was legitimate for this court to seek the assistance of the CJEU on the point of EU law which had been referred.

[6] The points of law in this appeal may well be arguable and the matters raised are of great constitutional significance. However, if permission were granted, and the CJEU were thereby required to await the decision of the UKSC, then even if the UKSC were able to hear the case on the dates provisionally fixed, there would seem to be little prospect of the CJEU being able to answer the question in the reference in advance of the prospective parliamentary vote. It has to be assumed that, whatever the date of the oral hearing, the UKSC would require some time to consider the points raised. Permission would, in short, render the reference, and indeed the petition, academic. For this reason, permission to appeal must be refused.

[7] As permission is thus refused, if the CJEU answer (or decline to answer) the reference, the first ground of appeal will be resolved in terms of EU law at least. Depending upon the answer, and the circumstances then prevailing, whether the question raised in the petition is academic will be capable of being answered in the petition process. The normal route of appeal will then be open in relation to any matters remaining to be determined by the court. Whether this court's decision amounts to a breach of parliamentary privilege will be capable of being the subject of an application for permission to appeal once this court's procedures have been exhausted. The court does not consider that its decision in any way fetters the options open to Parliament or freedom of speech within its walls. If it transpires that it has done so, that question would be better answered, after due consideration, then rather than now.

[8] The application is therefore refused.