



Form 65.3

Form of reference to the European Court

REQUEST

For

PRELIMINARY RULING UNDER THE EXPEDITED PROCEDURE

of

THE COURT OF JUSTICE OF THE EUROPEAN UNION

from

THE COURT OF SESSION IN SCOTLAND

in the cause

ANDY WIGHTMAN MSP AND OTHERS

Petitioners and Reclaimers

Against

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondent

The Referring Court and the Parties

[1] The referring court is the First Division of the Court of Session. The court's contact details are: Mrs Diane Machin, Deputy Principal Clerk of Session, Court of Session, Parliament House, Parliament Square, Edinburgh, EH1 1RQ. Tel: 0044 131 225 2595 (ext. 406834); Fax: 0044 131 240 6746; Email: dmachin@scotcourts.gov.uk.

[2] The petitioners are Andy Wightman MSP, Ross Greer MSP, Alyn Smith MEP, David Martin MEP, Catherine Stihler MEP, Jolyon Maugham QC and Joanna Cherry QC MP, represented by Aidan O'Neill QC and David Welsh, Advocate, instructed by Elaine Motion, Balfour & Manson, with an address for service at 56 - 66 Frederick Street, Edinburgh, EH2

1LS. Tel: 0044 131 200 1254; Fax: 0044 131 200 1300; Email: elaine.motion@balfour-manson.co.uk.

[3] Additional parties are Tom Brake MP and Chris Leslie MP, represented by Morag Ross QC, instructed by Jennifer Jack, Harper Macleod LLP, with an address for service at Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD. Tel: 044 131 247 2548; Fax: 0044 131 247 2501; Email: Jennifer.jack@harpermacleod.co.uk.

[4] The respondent is the Secretary of State for Exiting the European Union, represented by David Johnston QC and Andrew Webster QC, instructed by the Office of the Advocate General. The agent for the United Kingdom before the CJEU is Clare Brodie, Government Legal Department, with an address for service at 1 Horse Guards Road, London, SW1A 2HQ. Tel: 0044 207 276 0007; Email: clare.brodie@dexeu.gov.uk.

The Subject Matter and Relevant Facts

[5] On 23 June 2016, a referendum of the United Kingdom electorate produced a majority in favour of leaving the European Union. The European Union (Notification of Withdrawal) Act 2017 authorised the Prime Minister to notify the United Kingdom's intention to withdraw from the European Union under Article 50 of the Treaty on European Union. On 29 March 2017, the Prime Minister so notified the European Council.

[6] On 19 December 2017, a petition was lodged in the Court of Session, in which the petitioners, who include members of the Scottish, United Kingdom and European Parliaments, seek a declarator specifying: "whether, when and how the notification ... can unilaterally be revoked". The legal question, which the petitioners wish answered, is whether the notification can unilaterally be revoked in advance of the expiry of the two year period under Article 50; with the effect that, if the notice were revoked, the United Kingdom would remain in the European Union. The respondent's position has been that the question is hypothetical and academic, in the face of the United Kingdom Government's stated position that the notification will not be revoked.

[7] By interlocutor (order) and relative opinion dated 8 June 2018 (2018 SLT 657), the Lord Ordinary (first instance judge) declined to make a reference to the CJEU and refused the petition upon three grounds. First, the issue was hypothetical in light of the UK Government's position. Secondly, the matter encroached upon parliamentary sovereignty and was outwith the national court's jurisdiction. Thirdly, the issue was hypothetical because the facts upon which the CJEU would be asked to give an answer could not be ascertained.

[8] On 26 June 2018, the European Union (Withdrawal) Act 2018 received Royal Assent. Section 13 of this Act sets out, in considerable detail, the means by which parliamentary approval is to be sought of the outcome of negotiations between the United Kingdom and the European Union under Article 50. In particular, the withdrawal agreement can only be ratified if it, and the framework for the future relationship between the United Kingdom and European Union, have been approved by a resolution of the House of Commons and been debated in the House of Lords. If no approval is forthcoming, the Government must state how they propose to proceed in relation to negotiations. If the Prime Minister states, prior to 21 January 2019, that no agreement in principle can be reached, the Government must, once again, state how they propose to proceed. They must bring that proposal before both Houses of Parliament.

[9] Following negotiations under Article 50, there may or may not be an agreement. If there is an agreement, the House of Commons will have to decide whether to approve it. If it is not approved, and nothing further occurs, the treaties will cease to apply to the United Kingdom on 29 March 2019. In terms of the 2018 Act, MPs will be required to vote on whether to ratify any agreement between the UK Government and the EU Council. If no other proposal is proffered, a vote against ratification will result in the UK's departure from the EU on 29 March 2019.

[10] By interlocutor and relative opinions ([2018] CSIH 62) dated 21 September 2018, this court allowed a reclaiming motion (appeal) against the Lord Ordinary's interlocutor, and acceded to the petitioners' request to make a reference under Article 267 of the Treaty on the Functioning of the European Union. The nature of the arguments and the views of the judges thereon are set out in the opinions. In summary, the court considered that it was neither academic nor premature to ask whether it is legally competent to revoke unilaterally the notification and to remain in the European Union. The court considered that the matter is uncertain. The answer will have the effect of clarifying the options open to MPs when casting their votes. Whatever the interest of MSPs and MEPs, MPs have an interest in the issue being determined.

Grounds for the Reference

[11] The court has been asked the question of "whether, when and how the notification ... can unilaterally be revoked" in advance of the expiry of the two year period under Article 50. The petitioners argue that, at least until 29 March 2019, EU law does *not* preclude a unilateral decision being made by the United Kingdom, in accordance with its own constitutional requirements, to remain a member of the European Union by revoking the Article 50 notification in good faith. The United Kingdom Government has maintained that

the question is hypothetical and academic in the face of the United Kingdom Government's stated position that the notification will not be revoked.

[12] Whether and, if so, when and how the notification can unilaterally be revoked can only be answered definitively by the CJEU. Because of this, parties did not address the court on the correct interpretation of Article 50 and the court has therefore not expressed a view on that interpretation. An answer from the CJEU is required before this court could grant the declarator sought. In these circumstances, a reference to the CJEU for a preliminary ruling under Article 267 of the TFEU is in the view of this court "necessary".

[13] The preliminary ruling of the Court of Justice of the European Union is accordingly requested on the following question:

"Where, in accordance with Article 50 of the Treaty on European Union, a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the European Union?"

Request for the application of the expedited procedure under Article 105.1 of the Rules of the Procedure

[14] In light of the urgency of the issue in terms of the two-year timetable imposed by Article 50 of the Treaty on European Union and the parliamentary consideration and voting that must occur well in advance of 29 March 2019, the President is requested to appoint this request to the expedited procedure under Article 105.1 of the Rules of Procedure.

Dated the 3rd day of October 2018.

CJM Sutherland
The Rt Hon Lord Carloway
Lord President of the Court of Session