FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 18
P1293/17

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

ANDY WIGHTMAN, MSP and others

Petitioners and Reclaimers

against

THE ADVOCATE GENERAL

Respondent

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

20 March 2018

Introduction

[1] The petitioners have lodged a petition seeking judicial review of the United Kingdom Government's "position" on the revocability of a notice of intention to withdraw from the European Union in terms of Article 50.2 of the Treaty on European Union. They seek a reference to the Court of Justice of the European Union (CJEU) under Article 267 of the Treaty on the Functioning of the European Union to determine whether such revocation

is lawful. In the event of guidance being provided by the CJEU, the petitioners seek reduction of a letter from the respondent, dated 7 December 2017, and a declarator specifying the manner in which a notification of withdrawal can be revoked by the United Kingdom. The Lord Ordinary has refused permission to proceed with the petition. This reclaiming motion challenges that decision.

The Test

[2] The petitioners applied for permission to proceed with the application for judicial review in terms of section 27B of the Court of Session Act 1988. In order to obtain such permission, the court requires to be satisfied that the application has "a real prospect of success" (s 27B(2)(b)). This sub-section was introduced by the Courts Reform (Scotland) Act 2014 (s 89). It is important to understand its meaning; the phrase deriving from the terms of the Report of the Scottish Civil Courts Review (2009) (SCCR).

[3] Prior to the 2014 Act, *EY* v *Secretary of State for the Home Department* 2011 SC 388 had set the hurdle to be overcome in order to obtain first orders (for service etc) in judicial review petitions at a "low" level; reversing the selection at first instance of a test of "arguable case". The power to refuse first orders was to be exercised only in "exceptional circumstances", such as where there was an obvious incompetency or the averments were "incomprehensible or gibberish" (*ibid,* Lord Clarke, delivering the Opinion of the Court, at para [16]). Even where the averments were out of step with received and long understood canons of the law, caution was still needed because "the law is always developing and, in particular, … can develop quite quickly and dramatically"(*ibid*). The test of "manifestly without substance", used in *Eba* v *Advocate General* 2011 SC 70 (LP (Hamilton), delivering the Opinion of the Court, at para [35]), was said to reflect the same approach (*ibid*).

[4] The court in *EY* had been aware of the contrasting recommendation made earlier in the SCCR report. The SCCR (at chapter 12, para 42) had looked at the position in England and Wales, where permission to proceed was already a requirement (Civil Procedure Rule 54.4). The test applied in that jurisdiction was whether the papers disclosed "an arguable ground ... having a realistic prospect of success" (*Sharma* v *Brown-Antoine* [2007] 1 WLR 780, Lords Bingham and Walker at para 14(4)). Arguability was to be judged with reference to the nature and gravity of the issue. The test had to be flexible (*ibid*). The SCCR drew (at para 44) on a similar test used by the courts in England and Wales when setting aside decrees by default. In that situation, "real" was said to be in contrast to "fanciful" (*Swain* v *Hillman* [2001] 1 All ER 91, Lord Woolf at 92). The requirement for permission was designed to:

> "prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error" (*R* v *Inland Revenue Commissioners* [1982] AC 617, Lord Diplock at 642).

[5] The SCCR (para 51) recommended the introduction of a permission stage at which the Lord Ordinary would consider whether the case was "arguable", but where the test was to be whether the petition had "a real prospect of success, in the sense that it is not fanciful" (*ibid* para 52). A petitioner would require to demonstrate that his case was more than "stateable" (*ibid* para 53), but a "real" prospect was not the same as a "reasonable" prospect. The Lord Ordinary did not have to be satisfied that the petition would probably succeed (*ibid* para 54).

[6] In *Carroll* v *Scottish Borders Council* 2014 SLT 659, Lord Drummond Young considered (at para [26]) the meaning of "real prospect of success" in the different context of Protective Expenses Orders (RCS 58A.2(6)(b), see now 58A.2A(5)). Echoing *EY* v *Secretary of State for*

the Home Department (*supra*) to a degree, he described it as involving "a fairly low hurdle"; it being sufficient if a ground were "*prima facie* to be stateable". He had earlier (para [14]) commented that the phrase meant that there "should exist an arguable case: something that has more than a remote prospect of success". This is a higher hurdle than that set in *EY*. Lord Drummond Young considered it important not to indulge in a "stringent and detailed examination" of an applicant's case at what was a preliminary stage (*ibid*).

[7] In *O* v *Secretary of State for the Home Department* 2016 SLT 545, Lady Wolffe adopted (at para [36]) Lord Drummond Young's low hurdle in relation to applications for permission to proceed with judicial review petitions. "Real prospect of success" was, adopting Lord Woolf in *Swain* v *Hillman* (*supra*), to be contrasted with those which were fanciful. Lady Wolffe thought that the language of the test was clear and should be applied in a flexible manner. In *CF (China) Petitioner* [2016] CSOH 28, Lord Boyd agreed (at para [15]) with Lady Wolffe about the clarity of the language. He expressed the view that there was "a danger ... in over-analysing the clear words of a statute". The language directed the court to the prospects of success rather than whether a case was arguable or stateable. The court ought to concentrate on the mischief which the section is designed to address; that is unmeritorious claims proceeding. The word "real" meant "genuine rather than fanciful or speculative" (*ibid* para [17]).

[8] In the present case ([2018] CSOH 8) the Lord Ordinary (Doherty) also described (para [9]) the hurdle to be crossed as "low". More recently, in *Ineos Upstream* v *Scottish Ministers* [2018] CSOH 15 Lord Pentland agreed with Lord Boyd on the meaning of "real" and continued (at para [14]):

> "... in order to show that he or she has a real prospect of success the applicant ... need only demonstrate that he or she has a case which enjoys a realistic chance of succeeding in the sense that the applicant's contentions are not fanciful or unrealistic.

> Perhaps another way to put the issue would be to ask if the petitioners' case is manifestly devoid of merit."

As Lord Drummond Young had done in *Carroll* v *Scottish Borders Council* (*supra*), Lord Pentland (at para [15]) cautioned against being drawn into a substantive evaluation of the parties' competing contentions on the merits, especially when faced with "detailed and elaborate written submissions".

[9] As Lord Boyd said in *CF (China) Petitioner* (*supra*), it is important not to over-analyse the clear words of the statute. The words "real prospect of success" mean what they say. However, they were introduced against the background of *EY* v *Secretary of State for Scotland* (*supra*) and were intended to replace the former "manifestly without substance" test for first orders. They were designed to set a higher hurdle than that which was described in *EY* as "low". The new test is certainly intended to sift out unmeritorious cases, but it is not to be interpreted as creating an unsurmountable barrier which would prevent what might appear to be a weak case being fully argued in due course. Of course the test must eliminate the fanciful, but it is dropping the bar too low to say that every ground of review which is not fanciful passes the test. It is not enough that the petition is not "manifestly devoid of merit", since that, in essence, reflects the "manifestly without substance" test adopted in *EY*. The applicant has to demonstrate a real prospect, which is undoubtedly less than probable success, but the prospect must be real; it must have substance. Arguability or statability, which might be seen as interchangeable terms, is not enough (SCCR c 12, para 53). The substance, or the lack of it, is something which the court has to determine as a preliminary issue; not after a full consideration of elaborate pleadings. It is important therefore that those seeking permission are able to plead their cases accurately and, crucially, succinctly both in relation to the facts and the propositions in law.

The Issue

[10] Identifying the issue which this petition seeks to raise is not straightforward. The averments do not follow the principles of pleading for judicial review set out in *Somerville* v *The Scottish Ministers* 2008 SC (HL) 45 (Lord Hope at para 65), *viz.* that:

> "The factual history should be set out succinctly and the issues of law clearly identified. The aim is to focus the issues so that the court can reach a decision upon them, in the interests of sound administration and in the public interest, as soon as possible."

If the court is faced with a morass of factual averment and bombarded with authorities, which turn out to be mere examples of, or variants on, the same theme, it will find processing the application for permission extremely time consuming. Especially at the permission stage the issues of fact and law ought to be more or less instantly verifiable and not concealed within that morass or under that bombardment.

[11] This petition is almost 40 pages long. It contains 115 paragraphs. It is hampered by the inclusion of aphorisms derived from isolated judicial *dicta*. It is dotted with references to over 50 cases, which, if the court were actually expected to look at them in any meaningful way, would take days to absorb. The only plea-in-law on the merits is in entirely bland, and thus almost meaningless, terms, *viz*. that the UK Government's "position" on revocability is "unlawful *et separatim* wrong in law".

[12] One option would have been for the court to refuse permission simply on the basis that the court cannot, within a reasonable time, identify any point of possible substance to assess. That was seriously considered. However, the court is conscious that the petition proceeds at the instance of members of the Scottish, United Kingdom and European Parliaments and relates to a matter of very great constitutional importance; that being the

United Kingdom's relationship with the European Union. The petition is presented by responsible counsel and agents. The court has therefore elected to take quite some time to consider the petition and the written and oral arguments in an attempt to identify what potentially relevant facts are averred and what possible legal argument may be hidden in the petition's many paragraphs. This is, however, an exceptional course and it is not one which a court should follow in the ordinary case.

[13] Article 50 of the TEU provides:

> "1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
>
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. ... the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal ...
>
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

Although it has sometimes been reported that what Article 50 requires is two years notice of withdrawal, that is not what it says. The member state first has to decide to withdraw. Having made that decision, it notifies the Council of its "intention". This triggers a state of affairs in which the EU requires to negotiate and conclude a withdrawal agreement with the state. The treaties cease to apply to the state when the agreement comes into force. If no agreement is reached, they cease to have effect after the expiry of two years from the date of notification, unless the EU and the state decide to extend that period.

[14] Section 1 of the European Union (Notification of Withdrawal) Act 2017 allowed the Prime Minister to notify the United Kingdom's intention to withdraw from the Union under Article 50.2. On 29 March 2017, the Prime Minister gave notification of the UK's "intention to withdraw from the European Union".

[15] On 28 November 2017, the petitioners wrote to the respondent, giving notice of a proposed challenge to the "position" of the UK Government on the revocability of the notification. This said that the Government's position was that it was not possible, as a matter of EU law, for the UK to withdraw its Article 50.2 notification. It asked the Government to confirm that it accepted that it was legally possible to withdraw, at least until the expiry of the notification period. On 7 December 2017, the respondent wrote:

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

The letter stated that the Government did not recognise having taken any position on the legality of unilateral revocation of the notification.

[16] The petitioners make reference to a number of statements made in Parliament, which, they say, demonstrate that the Government's position is that Article 50.2 notification is not revocable. These include a statement on 13 November 2017 in the House of Commons by David Davis MP, the Secretary of State for Exiting the EU, that reversal of the decision "is not available to us". The reference to the "decision" appears to be (although it may not be) to that taken in the referendum on leaving the EU of 23 June 2016, rather than to the later notification. On the same day in the House of Lords Lord Callanan, the Minister of State for Exiting the EU, had said that:

> "it has been stated by legal opinion on this side of the water and in the EU that Article 50 is not revocable".

The import of such a statement may not be immediately clear. However, it is the petitioners' position that the ministerial statements are inconsistent with the terms of the respondent's letter of 7 December 2017. They maintain that they are entitled to look at Hansard to

uncover Government policy (*Toussaint* v *A-G of St Vincent and the Grenadines* [2007] 1 WLR 2825).

[17] The petitioners complain that the UK Government is proceeding to negotiate on the erroneous basis that, once the two year period has expired, the UK "is irrevocably committed to withdrawing" whether or not an agreement has been concluded. Whether the Government is correct is a matter which can only be determined by the CJEU. Such a determination, it is argued, is necessary "to allow all parties to act with certainty in regard to the question of the good faith unilateral revocability (*sic*) of the… notice" (Statement of Fact 19). Alternatively, if the Government had expressed no view on the matter, its failure to make its position clear was unlawful and its refusal could be judicially reviewed. This argument is phrased as follows:

> "The constitutional function of the courts in the field of public law is to ensure that public authorities respect the rule of law both in their actions and in their inactions or failures to act. One of the principal functions of the courts in enforcing the rule of law is to settle disputes on the law when they arise, so that the parties may act with certainty and not under the threat of legal uncertainty".

This central proposition of the petitioners' alternative case is remarkable, in the context of a petition otherwise peppered with precedent, in being devoid of authoritative support.

[18] Meantime, the European Union (Withdrawal) Bill is currently proceeding though the UK Parliament, designed to preserve, for the moment, existing EU law once the treaties cease to have effect. The Government have stated their intention to bring any agreement before Parliament in a "withdrawal agreement and implementation Bill". Parliament is to be given time to "debate, scrutinise and vote on the final agreement" and "The agreement will hold only if Parliament approves it".

The Lord Ordinary's Decision to Refuse Permission

[19] In refusing permission to proceed, the Lord Ordinary held that the UK Government's policy was clear; that notification under Article 50.2 would not be withdrawn. There was no need to look further to determine what their policy was. Parliament had not enacted legislation directed towards withdrawal of the notification. Neither Parliament nor Government sought to have the notification withdrawn. In these circumstances the issue, which the petitioners wished the court to determine, was hypothetical and academic. The suggestion that the Government were acting unlawfully, in declining to respond to the petitioners' request that it accept that it was legally possible to withdraw the notification, was not well founded.

Submissions

[20] The petitioners argued that the Lord Ordinary had not correctly adopted the low hurdle applicable in determining a real prospect of success. He had erred in holding that the question was hypothetical and academic. The Government would have to withdraw the notification, if it were instructed to do so by Parliament. The legal question was whether EU law allowed it to do so. The Lord Ordinary had erred in stating that Parliament had no wish to withdraw the notification. They had not yet voted on that issue. A decision on whether unilateral withdrawal was possible would inform and guide Parliament's vote. The issue was no more hypothetical than that in *R (Miller)* v *Secretary of State* [2017] 2 WLR 583. The petition raised issues of "reality, ... concern and ... practical utility" (*Law Hospital NHS Trust* v *Lord Advocate* 1996 SC 301 at 323; *Airedale NHS Trust* v *Bland* [1993] AC 789 at 880-881; *Macnaughton* v *Macnaughton's Trs* 1953 SC 387 at 392; cf *R (Rusbridger)* v *Attorney General* [2004] 1 AC 357). A ruling was required in order to allow the democratic constitution of the

UK to function properly and efficiently (*R (Unison)* v *Lord Chancellor* [2017] ICR 1037 at para 68). A number of examples of the court deciding what were said to be academic questions were given (eg *Napier* v *Scottish Ministers* 2005 SC 307; *R* v *Home Secretary* (*ex p Salem*) [1999] 1 AC 450).

[21] The petitioners accepted that the CJEU had no jurisdiction to answer questions, where the answers were not necessary to enable the courts to settle genuine disputes brought before them (C104/79 *Foglia* v *Novello* [1981] 1 CMLR 45 at para 11). However, if a reference were made, the CJEU would be bound to reply to any request for a preliminary ruling (C62/14 *Gauweiler* v *Deutscher Bundestag* [2016] 1 CMLR 1; C415/93 *ASBL* v *Bosman* [1996] 1 CMLR 645; C470/12 *Pohotovost'sro* v *Vasuta* [2014] 1 All ER (Comm) 1016 at para 27.) Here, the parties were not seeking an advisory opinion, but a ruling on an unresolved point of EU law which the court would be obliged to apply. Even if there was no dispute between the parties about the proper construction of Article 50.2, it was nevertheless a matter which required to be authoritatively resolved in order to enable the petitioners to carry out their constitutional duties as members of their respective parliaments.

[22] The Lord Ordinary had not dealt with the respondent's plea of time bar; that is that the period of 3 months in section 27A(1) of the 1988 Act had expired, given that the relevant date was that of notification (29 March 2017). The relevant date was that of the letter of 7 December 2017. The notification of withdrawal was not itself unlawful.

[23] In their detailed written note of argument in the reclaiming motion, the petitioners raised a number of new issues regarding future procedure. This contends that no period of adjustment is needed and no "further" procedural hearing is required. Rather, the petition ought to proceed to a determination in the Inner House. The petitioners seek a Protective Expenses Order (*McGinty* v *Scottish Minister* 2014 SC 81).

[24] The respondent maintained that the petitioners had not demonstrated that they had a real prospect of success. As distinct from the position in *Law Hospital NHS Trust* v *Lord Advocate* (*supra*), *Napier* v *Scottish Ministers* (*supra*), *Airedale NHS Trust* v *Bland* (*supra*) and *R (Miller)* v *Secretary of State* (*supra*), the issue here was hypothetical and academic. There was no genuine dispute about the proper construction of Article 50.2 or any reason for the court to entertain the issue of the unilateral revocability of a notice of withdrawal. In any event, the application was time barred in terms of section 27A.

[25] The UK Government's policy was that the notification will not be withdrawn. It was not necessary to go further and refer to statements given in Parliament to ascertain the Government's policy. It was not competent to do so (*Coulson* v *HM Advocate* 2015 SLT 438 at paras [11] and [20]). The Government had committed itself to holding a vote in Parliament on the final agreement reached, once negotiations had been concluded. Parliament could accept the agreement or move forward without one. Neither option involved revocation of the withdrawal notification. The question, whether the Government could withdraw the notification, would not arise. Even where public law issues were involved, the court did not normally answer hypothetical or academic questions. Exceptional circumstances were required to do so.

[26] The CJEU did not admit requests for advisory opinions. There had to be a genuine dispute. The reference had to be necessary for the effective resolution of that dispute (*Foglia* v *Novello (supra*), C470/12 *Pohotovost'sro* v *Vasuta* (*supra*), C62/14 *Gauweiler* v *Deutscher Bundestag* (*supra*), C415/93 *ASBL* v *Bosman* (*supra*)).

[27] The proposition that a decision was necessary to allow the petitioners to perform their roles was fallacious. Following upon the referendum, the Government had committed

itself to leaving the European Union. MPs would be able to take an informed view on that question. A ruling on a theoretical withdrawal would not alter that.

Decision

[28] This petition has significant problems; notably those identified by the Lord Ordinary. It is not clear from the averments in the petition that the UK Government does have a stated policy on the competency of revoking the notification of withdrawal. The statements from the Secretary and Minister of State for Exiting the EU are, at best for the petitioners, ambiguous. Whether it is possible to review a Government's "position", especially an unstated one, is highly questionable. The purpose of having a CJEU, or domestic, ruling on whether a notification of withdrawal can be revoked is uncertain. There is no obvious legal requirement on a Government to respond to enquiries about what their understanding of EU law might be.

[29] The judicial *dictum* founded upon from *Law Hospital NHS Trust* v *Lord Advocate* 1996 SC 301 (Lord Clyde at 323) was not made in the context of judicial review. This petition is far removed from that in *R (Miller)* v *Secretary of State* [2017] 2 WLR 583, in which the Government had stated its intention to notify the EU under Article 50.2 and the claimants maintained that this was, without Parliamentary approval, unlawful. Lord Reed's *dictum* in *R (Unison)* v *Lord Chancellor* [2017] ICR 1037 (at para 68) was about access to justice when tribunal fees had been set at prohibitively high levels by statutory instrument. It has little relevance in the present context in which the petitioners seek to review a "position". *Napier* v *Scottish Ministers* 2005 SC 307 did not involve an academic question but a real dispute about the standard of proof in relation to prisoners' conditions. The decision was important, even if the petitioner's claim had been settled, given the many other potential claims (LP

(Cullen), delivering the Opinion of the Court, at para [7]). The citation of these cases is illustrative of the use of isolated *dicta* out of their true contexts and is of little assistance in a determination of this application for permission.

[30] Nevertheless, if this petition were shorn of its rhetoric and extraneous and irrelevant material and were reduced, after adjustment, to a manageable size which conformed to Lord Hope's guidance in *Somerville* v *Scottish Ministers* (*supra*), a case of substance, albeit not necessarily one which is likely to succeed, can be discovered. The issue of whether it is legally possible to revoke the notice of withdrawal is, as already stated, one of great importance. On one view, authoritative guidance on whether it is legally possible to do so may have the capacity to influence Members of Parliament in deciding what steps to take in advance of, and at the time of, a debate and vote on the European Union (Withdrawal) Bill. After all, if Parliament is to be regarded as sovereign, the Government's position on the legality of revoking the notice may not be decisive. Whether such guidance falls within the proper scope of judicial review raises yet another issue. However, that scope is wide and, returning to the cautionary words in *EY* (*supra*), the law is always developing and, in certain areas, it can do so quickly and dramatically. The scope of judicial review of Government policy may be one such area, at least where no issue of questioning what is said in Parliament arises.

[31] Whether the CJEU will entertain a question of the type proposed is dependent upon whether this court considers that there is a genuine dispute requiring settlement (see Article 267 of the Treaty on the Functioning of the EU; *Foglia* v *Novello* [1981] 1 CMLR 45, Opinion of the Court at para [11]). That is the *de quo* of the petition itself. If this court sought a reference, the CJEU would be bound to reply to the questions asked (C62/14

Gauweiler v *Deutscher Bundestag* [2016] 1 CMLR 1, Opinion of the Grand Chamber at paras 15 to 17; C415/93 *ASBL* v *Bosman* [1996] 1 CMLR 645, Opinion of the Court at para 65).

[32] In short therefore, having regard to all the circumstances, the court is of the view that the Lord Ordinary erred in holding that there is no "real prospect of success" in this petition, as that phrase has been explained above. There is a point of substance, albeit one heavily concealed by the averments, which should be argued in the normal way. The court's decision, having heard full argument, may ultimately reflect the Lord Ordinary's view, but that is for another day.

[33] So far as time bar is concerned, the 3 month limit in section 27A of the 1988 Act cannot be circumvented simply by persuading a person to repeat a decision or other act complained of. That is essentially the petitioners' argument relative to the letter of 7 December 2017 which, in any event, is a document containing a statement of unchallenged policy and is hardly susceptible to reduction. However, the issues raised in the petition concern the effects of what is said to be an ongoing "position" which has the potential to influence future Government and Parliamentary action. In such circumstances, there is a substantial argument that the 3 month period should be extended under section 27A(1)(b).

[34] The court will allow the reclaiming motion, recall the interlocutor of the Lord Ordinary dated 6 February 2018 and grant permission to proceed. The procedure to be followed is set out in the Rules of Court, notably RCS 58.11. It requires a procedural and a substantive hearing. For reasons which will be evident from this decision, there ought to be a period of adjustment to enable the petitioners to plead their case in the manner stipulated in *Somerville* v *The Scottish Ministers* (*supra*). If the petitioners seek a Protective Expenses Order, they should enrol the appropriate motion to do so in the Outer House.