Michaelmas Term
[2021] UKSC 42

JUDGMENT

REFERENCE by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill
REFERENCE by the Attorney General and the Advocate General for Scotland - European Charter of Local Self-Government (Incorporation) (Scotland) Bill

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Sales
Lord Stephens

JUDGMENT GIVEN ON

6 October 2021

Heard on 28 and 29 June 2021

Applicants
Sir James Eadie QC
David Johnston QC
Christopher Pirie
Christopher Knight
(Instructed by Office of the Advocate General for Scotland)

1st Respondent
James Mure QC
Paul Reid
Lesley Irvine

(Instructed by Scottish Government Legal Directorate)

2nd Respondent
Helen Mountfield QC
Christian J Howells
Mark Greaves
(Instructed by Welsh Government Legal Services Department)

Applicants:
(1) Her Majesty's Attorney General
(2) Her Majesty's Advocate General for Scotland

Respondents:
(1) Lord Advocate
(2) Counsel General for Wales

LORD REED: (with whom Lord Hodge, Lord Lloyd-Jones, Lord Sales and Lord Stephens agree)

Introduction

1. On 16 March 2021 the Scottish Parliament passed the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ("the UNCRC Bill"). On 23 March 2021 it passed the European Charter of Local Self-Government (Incorporation) (Scotland) Bill ("the ECLSG Bill").

2. Her Majesty's Attorney General and Her Majesty's Advocate General for Scotland have referred to the Supreme Court the question whether certain provisions of those Bills would be within the legislative competence of the Scottish Parliament, under section 33(1) of the Scotland Act 1998 ("the Scotland Act"). The references have been made in respect of sections 6, 19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) of the UNCRC Bill, and sections 4(1A) and 5(1) of the ECLSG Bill, all of which are set out below.

3. The Bills are designed to give effect to two treaties to which the UK is a signatory: the United Nations Convention on the Rights of the Child ("the UNCRC") and the European Charter of Local Self-Government ("the ECLSG"). The UNCRC was ratified by the UK in 1991. It is reflected in a number of provisions of domestic law, but has not been incorporated as a whole. The UNCRC Bill would incorporate a version of the UNCRC as scheduled to the Bill. The ECLSG was ratified by the UK in 1998. It too is reflected in a number of provisions of domestic law, but has not been incorporated as a whole. The ECLSG Bill would incorporate a version of the ECLSG as scheduled to the Bill.

4. Neither reference takes issue with the Scottish Parliament's decision to incorporate the UNCRC and the ECLSG. That is recognised to be a matter for the Scottish Parliament. The references reflect concerns that some of the provisions of the Bills would impinge on matters which lie outside the legislative competence of the Scottish Parliament.

5. In broad terms, two principal questions of law are raised. The first is whether certain of the provisions would affect the power of Parliament to make laws for Scotland, thereby modifying section 28(7) of the Scotland Act, in breach of the limitation on the Scottish Parliament's competence imposed by section 29(2)(c) of that Act. The second question is whether certain provisions which, on their face,

admittedly exceed the legislative competence of the Scottish Parliament, can be interpreted as being within its competence by means of recourse to the interpretative obligation set out in section 101(2) of the Scotland Act.

6. The answers to these questions are potentially relevant not only to the Scottish Parliament but also to the other devolved legislatures of the UK. The Counsel General for Wales has therefore been represented in these proceedings and has presented submissions to the court. We are grateful for his assistance.

The Scotland Act

7. Since the Scottish Parliament commenced its work on 2 July 1999, the courts have had a number of occasions to interpret the law by which it is governed. The main principles were summarised by this court in the *Continuity Bill* case (*In re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; [2019] AC 1022, para 12). 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.

8. Section 28(1) of the Scotland Act provides:

> "Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament."

The opening words of that provision make it clear that the legislative competence of the Scottish Parliament is not unlimited. Section 28(7) provides:

> "This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."

That provision makes it clear that the power of the Scottish Parliament to make laws, conferred by section 28(1), does not affect the power of Parliament also to make laws for Scotland. That reflects the nature of devolution, and the fact that the people of Scotland continue to be democratically represented at Westminster as well as at Holyrood.

9. Section 29(1) provides:

> "An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament."

Section 29(2) provides, so far as material:

> "A provision is outside that competence so far as any of the following paragraphs apply -
>
> (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
>
> (b) it relates to reserved matters,
>
> (c) it is in breach of the restrictions in Schedule 4."

10. Schedule 4 lists provisions which are protected from modification by an Act of the Scottish Parliament. In particular, paragraph 2(1) provides:

> "An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters."

Reserved matters are defined by Schedule 5. It is also necessary to note paragraph 4(1) of Schedule 4, which provides:

> "An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, this Act."

Paragraph 4(2) creates a number of exceptions to that general rule, but the exceptions do not include section 28(7). Accordingly, an Act of the Scottish Parliament cannot modify section 28(7).

11. The meaning of "modify" was considered in the *Continuity Bill* case. The court stated at para 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."

Applying that approach, the court held that a provision in the Bill there in question, which made the legal effect of subordinate legislation made under powers conferred by Parliament conditional on the consent of the Scottish Ministers, would modify section 28(7) of the Scotland Act, since it would render the effect of laws made by Parliament conditional on the consent of the Scottish Ministers. As will appear, that decision provides the answer to several of the questions raised in the present proceedings.

12. In relation to the enforcement of the limitations upon the legislative competence of the Scottish Parliament, the Scotland Act creates a number of safeguards. The first two safeguards apply on or before the introduction of a Bill. First, section 31(1) requires that the person in charge of the Bill must make a statement that in his view the provisions of the Bill would be within the legislative competence of the Scottish Parliament. The Scottish Ministerial Code requires that, in the case of a Government Bill, the statement by the sponsoring Minister to that effect will have been cleared by the Law Officers (Scottish Ministerial Code, 2018 edition, para 3.4).

13. Secondly, section 31(2) requires that the Presiding Officer of the Scottish Parliament must decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Scottish Parliament, and state his decision. An adverse decision by the Presiding Officer does not prevent the Bill from being introduced, but it is an important signal to the Scottish Parliament, and

to the Law Officers of both the Scottish and the UK Governments, and may influence their decision whether, in due course, to make a reference to this court.

14. It follows from the existence of these two safeguards that it must be possible for the person in charge of the Bill, and for the Presiding Officer, to decide whether a Bill would be within the competence of the Scottish Parliament at the time when it is introduced (subject to the effect of any subsequent amendments of the Bill during its passage, or material alterations to other relevant laws).

15. Further safeguards are provided by sections 32 and 33 of the Scotland Act once the Bill has completed its passage. Section 33(1) provides for the scrutiny of Bills by the Supreme Court, on a reference being made by the Advocate General, the Lord Advocate or the Attorney General:

> "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."

16. Under section 32, the Presiding Officer cannot submit a Bill for Royal Assent at any time when the Advocate General, the Lord Advocate or the Attorney General is entitled to make a reference under section 33, or when any such reference has been made but not yet decided or otherwise disposed of by the Supreme Court, or if the Supreme Court has decided that the Bill or any provision of it would not be within the legislative competence of the Scottish Parliament, and the Bill has not been amended. The amended Bill can itself be the subject of a further reference to the Supreme Court under section 33(2).

17. It follows from section 33 that it must be possible for the Supreme Court to decide whether the Bill would be within legislative competence. It cannot, for example, take the view that that question can only be resolved by the courts in future proceedings.

18. In addition to the pre-enactment safeguards which I have described, section 98 and Schedule 6 to the Scotland Act enable a question whether an Act of the Scottish Parliament or any provision of such an Act is within the legislative competence of the Scottish Parliament to be raised in legal proceedings after enactment. Special provisions of an analogous nature apply in relation to "compatibility challenges" raised in criminal proceedings.

19. The final provision of the Scotland Act which it is necessary to note is section 101, which is headed "Interpretation of Acts of the Scottish Parliament etc". So far as material, it provides:

> "(1) This section applies to -
>
> (a) any provision of an Act of the Scottish Parliament, or of a Bill for such an Act, and
>
> (b) any provision of subordinate legislation made, confirmed or approved, or purporting to be made, confirmed or approved, by a member of the Scottish Government,
>
> which could be read in such a way as to be outside competence.
>
> (2) Such a provision 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."

20. Against that background, I can now turn to the questions referred to the Supreme Court under section 33(1).

Questions relating to the UNCRC Bill

21. The reference in relation to the UNCRC Bill raises four questions. The first three concern sections 19 to 21 of the Bill, and raise the question whether the provisions in question modify section 28(7) of the Scotland Act (para 8 above), which preserves the unqualified power of Parliament to make laws for Scotland. If they do, it follows that they contravene section 29(2)(c) of the Scotland Act (para 9 above) read together with paragraph 4(1) of Schedule 4 (para 10 above), and are therefore outside the competence of the Scottish Parliament. The fourth question concerns section 6 of the Bill, which on its face is admittedly outside the competence of the Scottish Parliament. The question is whether it can be interpreted in such a way as to be within competence, by applying section 101(2) of the Scotland Act (para 19 above).

The first question - section 19(2)(a)(ii)

22. The first question referred is:

> Whether section 19(2)(a)(ii) of the Bill is outside the legislative competence of the Scottish Parliament because it modifies section 28(7) of the Scotland Act and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) of the Scotland Act.

23. Section 19 of the Bill is headed "Interpretation of legislation". It provides:

> "(1) So far as it is possible to do so, legislation mentioned in subsection (2) must be read and given effect in a way which is compatible with the UNCRC requirements.
>
> (2) That legislation is an enactment (whenever enacted) that it would be within the legislative competence of the Scottish Parliament to make -
>
> (a) that comprises -
>
> (i) an Act of the Scottish Parliament,
>
> (ii) an Act of Parliament, or
>
> (b) that is wholly or partly made by virtue of an enactment mentioned in paragraph (a).
>
> (3) For the purposes of subsection (2), an enactment that extends to Scotland and other jurisdictions is not, for that reason alone, to be regarded as outside the legislative competence of the Scottish Parliament.
>
> (4) Subsection (1) does not affect -

> (a) the validity, continuing operation or enforcement of any incompatible Act of the Scottish Parliament or Act of Parliament,
>
> (b) the validity, continuing operation or enforcement of any incompatible enactment mentioned in subsection (2)(b) made by virtue of an enactment mentioned in subsection (2)(a) ('primary legislation') if (disregarding any possibility of revocation) the primary legislation prevents removal of the incompatibility."

24. As counsel for the Lord Advocate informed the court, section 19 is modelled on section 3 of the Human Rights Act 1998, and imposes a similar duty of interpretation upon the courts. This is confirmed by the Explanatory Notes on the Bill, which state at para 74:

> "Section 19(1) requires that certain types of legislation must, if possible, be given an interpretation that is compatible with the UNCRC requirements. This interpretative obligation is analogous to the obligation created by section 3 of the Human Rights Act 1998, the effect of which has been the subject of judicial consideration in a number of cases (see for example *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557)."

Counsel also cited *Ghaidan v Godin-Mendoza* as providing guidance as to the effect of section 19.

25. Section 3 of the Human Rights Act was interpreted in *Ghaidan v Godin-Mendoza* as imposing a remarkably powerful interpretative obligation, which goes well beyond the normal canons of statutory construction. The nature of the obligation was explained by Lord Nicholls of Birkenhead at para 30:

> "… the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. 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."

Lord Nicholls added at para 32:

> "… the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation."

26. The House of Lords accordingly held that section 3 required, where necessary, that the courts, and other public authorities, should give to provisions in statutes, including statutes enacted subsequent to the Human Rights Act, a meaning and effect that conflicted with the legislative intention of the Parliaments enacting those statutes. The question is whether the Scottish Parliament has a similar power to subject Acts of Parliament to the modification of their intended meaning at the hands of the courts.

27. The answer to that question can be found by applying the reasoning of this court in the *Continuity Bill* case. The context in that case was the purported imposition, under section 17 of the Bill there in question, of a requirement that subordinate legislation made under Acts of Parliament should have no effect in Scotland unless the Scottish Ministers gave their consent. The court stated at para 52:

> "An enactment of the Scottish Parliament which prevented such subordinate legislation from having legal effect, unless the Scottish Ministers gave their consent, would render the effect of laws made by the UK Parliament conditional on the consent of the Scottish Ministers. It would therefore limit the power of the UK Parliament to make laws for Scotland, since Parliament cannot meaningfully be said to 'make laws' if the laws which it makes are of no effect. The imposition of such a condition on the UK Parliament's law-making power would be inconsistent with the continued recognition, by section 28(7) of the Scotland

> Act, of its unqualified legislative power. Thus, in order for section 17 of the Bill and section 28(7) of the Scotland Act to operate concurrently, the former would have to be treated as impliedly amending the latter, so that it read:
>
> > '(7) Subject to section 17 of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Act 2018, this section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.'"

28. Counsel sought to distinguish the present case from the *Continuity Bill* case on the basis that the legislation enacted by Parliament would not be rendered totally ineffective by section 19 of the UNCRC Bill, as in the *Continuity Bill* case, but would only be given a different meaning and effect from those that Parliament intended. However, the distinction is merely one of degree, and does not affect the legal analysis. A provision which required the courts to modify the meaning and effect of legislation enacted by Parliament would plainly impose a qualification upon its legislative power. The qualification would be lesser in degree than in the *Continuity Bill* case, but equally inconsistent with section 28(7) of the Scotland Act. The result would be that section 28(7) would be impliedly amended, so as to read:

> "(7) Subject to section 19 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2021, this section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."

29. Counsel argued in addition that section 19 of the Bill would not modify section 28(7) of the Scotland Act because it would remain within the power of Parliament to disapply section 19, or to repeal it altogether. The same argument was advanced, and rejected, in the *Continuity Bill* case. The court stated at para 53:

> "… a provision which made the effect of laws made by the UK Parliament for Scotland conditional on the consent of the Scottish Ministers, unless it disapplied or repealed the provision in question, would for that very reason be inconsistent with the continued recognition of its unqualified sovereignty, and therefore tantamount to an amendment of section 28(7) of the Scotland Act … the question before the court is whether, if the Bill were to receive Royal Assent, section 17 would be law. If not, there would be no question of its having to be disapplied or repealed by the UK Parliament: it

> would be of no legal effect whatsoever ('not law', in terms of section 29(1) of the Scotland Act). It is therefore no answer to an argument that section 17 of the Bill would be outside legislative competence, to say that it could be disapplied or repealed."

30. A further argument advanced by counsel was that the Scottish Parliament could lawfully amend or repeal legislation enacted by Parliament which it considered to be incompatible with the UNCRC, so far as it fell within the scope of the Scottish Parliament's legislative competence. If it could do that, then (it was argued) it must also be able to authorise another body to alter the meaning and effect of legislation enacted by Parliament. But that does not follow. As the judgment in the *Continuity Bill* case made clear, the Scottish Parliament cannot make the effect of Acts of Parliament conditional on decisions taken by other institutions, since to do so is to restrict Parliament's power to make laws for Scotland.

31. In his written submissions, counsel also emphasised that the Bill had been passed unanimously by the Scottish Parliament. The court understands that. It is, of course, entirely respectful of the Scottish Parliament, whatever the size of the majority by which its enactments have been passed. But the fact that an enactment has been passed by the Scottish Parliament, even unanimously, has no bearing on the legal questions which this court has to decide. Section 33 of the Scotland Act only applies where an enactment has been passed by the Scottish Parliament. The question which the court is required to answer is whether the provision in question would be outside the Parliament's legislative competence. The answer to that question does not depend on the number of MSPs who voted for it.

32. Counsel's written submissions also emphasised the importance of the UNCRC. But that is not in question. No-one disputes the right of the Scottish Parliament to regard the UNCRC as an important convention and to give effect to it, provided that it does so within the limits of its legislative competence.

33. Counsel also pointed out that the Welsh Assembly (as it was then known) had given effect to the UNCRC under section 1 of the Rights of Children and Young Persons (Wales) Measure 2011. The suggestion seemed to be that the fact that the legislative competence of that provision had not been challenged had some bearing on the present proceedings. But that provision is much more limited in scope than the Scottish UNCRC Bill. It imposes a duty on the Welsh Ministers, when exercising any of their functions, to have due regard to the requirements of the UNCRC and its first two protocols.

34. In his written submissions, counsel for the Lord Advocate also advanced a further argument, which was developed in oral submissions by counsel appearing on behalf of the Counsel General for Wales. The argument was that section 19 of the Bill did nothing more than reflect the approach which the courts would take in any event to the interpretation of legislation. That is not correct. The obligation imposed by section 19, construing it, as the court is invited to do, as having the same effect in relation to the UNCRC requirements as section 3 of the Human Rights Act has in relation to the rights guaranteed by the European Convention on Human Rights ("the ECHR"), is much more far-reaching than the ordinary effect of unincorporated international treaties on the interpretation of legislation (as to which, see for example *Salomon v Comrs of Customs and Excise* [1967] 2 QB 116, 143 and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 500). It is because section 3 of the Human Rights Act has been construed as going much further than the ordinary approach to statutory interpretation, including the impact of international law on the interpretation of statutes, that Lord Nicholls described it as imposing an obligation which was "of an unusual and far-reaching character" (para 25 above).

35. I should also record that counsel for the Lord Advocate accepted that if sections 19 to 21 of the Bill were outside the legislative competence of the Scottish Parliament, they could not be read narrowly under section 101(2) of the Scotland Act so as to bring them within competence. I have no doubt that that concession was rightly made.

36. For the foregoing reasons, the answer to question 1 is "Yes". Section 19(2)(a)(ii) of the Bill is outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c).

The second question - section 20(10)(a)(ii)

37. The second question referred is:

> Whether section 20(10)(a)(ii) of the Bill is outside the legislative competence of the Scottish Parliament because it modifies section 28(7) of the Scotland Act and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) of the Scotland Act.

38. Section 20 of the Bill is headed "Strike down declarators". It provides:

"(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of relevant legislation is compatible with the UNCRC requirements.

(2) If the court is satisfied that the provision is incompatible with the UNCRC requirements, it may make a declarator stating that the provision ceases to be law to the extent of the incompatibility (a 'strike down declarator').

(3) Where the incompatible provision of relevant legislation is an enactment mentioned in subsection (10)(b) ('subordinate legislation') made by virtue of an enactment mentioned in subsection (10)(a) ('primary legislation'), the court may make a strike down declarator in relation to the subordinate legislation only if the court is satisfied that (disregarding any possibility of revocation) the primary legislation prevents removal of the incompatibility.

(4) A strike down declarator has effect only from the date of the declarator and does not affect anything previously done under the provision.

(5) The court may make an order suspending the effect of a strike down declarator for any period and on any conditions to allow the incompatibility to be remedied.

(6) In deciding whether to make an order under subsection (5), the court must (among other things) have regard to the extent to which persons who are not parties to the proceedings would be adversely affected.

(7) Where a court is considering whether to make an order under subsection (5), intimation of that is to be given to the Lord Advocate (unless the Lord Advocate is a party to the proceedings).

(8) The Lord Advocate may, on giving notice, take part as a party in the proceedings so far as the proceedings relate to the making of the order.

(9) Where the determination mentioned in subsection (1) is a decision by the Supreme Court in relation to a UNCRC compatibility issue, the power to make an order under subsection (5) is exercisable by the High Court of Justiciary instead of the Supreme Court.

(10) In this section, 'relevant legislation' means an enactment that it would be within the legislative competence of the Scottish Parliament to make -

(a) that comprises -

(i) an Act of the Scottish Parliament the Bill for which received Royal Assent before the day on which this section comes into force,

(ii) an Act of Parliament the Bill for which received Royal Assent before the day on which this section comes into force, or

(b) that is wholly or partly made (at any time) by virtue of an enactment mentioned in paragraph (a).

(11) For the purposes of subsection (10), an enactment that extends to Scotland and other jurisdictions is not, for that reason alone, to be regarded as outside the legislative competence of the Scottish Parliament.

(12) In subsection (10)(a)(i) and (ii), the reference to an Act of the Scottish Parliament or (as the case may be) an Act of Parliament is to such an Act of the Scottish Parliament or (as the case may be) such an Act of Parliament as at the day on which this section comes into force.

(13) In this section and section 21, 'court' means -

(a) the Supreme Court,

(b) the High Court of Justiciary sitting otherwise than as a trial court,

(c) the Court of Session."

39. Just as section 19 of the Bill is modelled on section 3 of the Human Rights Act, sections 20 and 21 are modelled on section 4 of that Act, which enables the courts to make a declaration of incompatibility where legislation cannot be interpreted compatibly with Convention rights, even having recourse to section 3. Section 20 is, however, much more drastic in effect than section 4 of the Human Rights Act. A declaration of incompatibility under section 4 does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given: section 4(6)(a). Section 20 of the Bill, on the other hand, would confer on the courts mentioned in subsection (13) the power to make a declarator stating that a provision of relevant legislation which is incompatible with the UNCRC requirements ceases to be law, to the extent of the incompatibility. By virtue of subsection (10)(a)(ii) read together with subsection (12), that power applies to Acts of Parliament which received Royal Assent before the day on which section 20 came into force, as the Act stood on that day. By virtue of section 40(2) of the Bill, section 20 comes into force six months after the Bill receives Royal Assent, or on such earlier day as the Scottish Ministers may by regulations appoint.

40. Put shortly, therefore, section 20 enables the courts to strike down and invalidate provisions of Acts of Parliament which are incompatible with the UNCRC requirements, provided they were enacted before section 20 comes into force. At first sight, that is an obvious qualification of the "unqualified legislative power" of Parliament, as it was described in the *Continuity Bill* case, para 52 (para 27 above). As Lord Reid said in *Pickin v British Railways Board* [1974] AC 765, 782, "[t]he idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution". It is true that a qualification of Parliamentary sovereignty was introduced by the European Communities Act 1972, but Parliament itself effected that qualification of its sovereignty in order to meet the requirements of membership of the European Communities.

41. Counsel for the Lord Advocate argued, however, that the fact that the scope of section 20(10)(a)(ii) is restricted to Acts of Parliament enacted before section 20 comes into force renders it within competence. This argument assumes that "the power of the Parliament of the United Kingdom to make laws for Scotland", within the meaning of section 28(7) of the Scotland Act, is confined to the future enactment of Acts of Parliament, as from a date which can be selected by the Scottish Parliament or the Scottish Ministers. So understood, section 28(7) provides no

protection to the body of legislation which Parliament enacted prior to the selected date, and permits such legislation to be deprived of effect by the Scottish courts.

42. It is difficult to accept that section 28(7) was intended to be given such a narrow interpretation. In the first place, each successive Parliament inherits the body of legislation enacted by its predecessors. Those statutes form the starting point of its exercise of its power to make laws for Scotland. It may decide to enact new legislation, or to amend or repeal existing legislation, or to allow existing legislation to continue in force unamended. As a matter of practical reality, the latter choice, as much as the other two, can reasonably be regarded as one of the ways in which Parliament exercises its power to make laws for Scotland. If, for example, Parliament ignored calls to repeal a controversial Act of Parliament which applied in Scotland, it might well be considered unrealistic for it to deny that, in doing so, it was exercising its power to make laws for Scotland. Section 20 of the Bill would qualify Parliament's power to allow existing legislation to remain in force unamended. It would be compelled either to legislate in order to ensure the continuing effect of the body of statutes which were enacted before section 20 came into force, or to allow the decision as to which statutory provisions should subsequently continue to be law in Scotland to be made by the Scottish courts, applying section 20 of the Bill, rather than by Parliament itself. Either way, it would be reasonable to conclude that Parliament's power to make laws for Scotland would be affected.

43. Secondly, and decisively as a matter of law, counsel's argument proves too much. If it were correct, the Scottish Parliament could enact a provision such as section 20 of the Bill at regular intervals, so as to enable the courts to strike down Acts of Parliament enacted during the intervening period. Parliament would then be confined to enacting legislation for Scotland with a limited life expectancy, unless it received the approval of the courts. The Scottish Parliament could, for example, re-enact section 20 every year, thereby imposing a 12 month "sunset clause" on legislation enacted by Parliament, unless it complied with the courts' assessment of the UNCRC requirements. That would plainly be a modification of Parliament's "unqualified legislative power", as it was described in the *Continuity Bill* case at para 52 (para 27 above).

44. Counsel also relied on the arguments discussed, and rejected, at paras 29-33 above. He emphasised that the Scottish Parliament could have lawfully amended or repealed any legislation enacted by Parliament which it was within the legislative competence of the Scottish Parliament to make, if it considered the legislation to be incompatible with the UNCRC requirements. But the fact that the Scottish Parliament has the power to repeal an Act of Parliament does not entail that it has the power to authorise the courts to declare that unrepealed Acts of Parliament have ceased to be law.

45. For the Scottish Parliament to make the continuation in force of Acts of Parliament enacted prior to section 20 of the Bill conditional on the courts' decision that they were compliant with the UNCRC requirements would therefore affect Parliament's power to make laws for Scotland, resulting in a modification of section 28(7) of the Scotland Act. The situation is analogous to that in the *Continuity Bill* case, where the effect of subordinate legislation authorised by Acts of Parliament was made conditional on the consent of the Scottish Ministers. In the present case, section 20 of the Bill makes the effect of Acts of Parliament conditional on the courts' being satisfied as to their compatibility with the UNCRC requirements.

46. For the foregoing reasons, the answer to question 2 is "Yes". Section 20(10)(a)(ii) of the Bill is outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c).

The third question - section 21(5)(b)(ii)

47. The third question referred is:

> Whether section 21(5)(b)(ii) of the Bill is outside the legislative competence of the Scottish Parliament because it modifies section 28(7) of the Scotland Act and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) of the Scotland Act.

48. Section 21 of the Bill is headed "Incompatibility declarators". It provides:

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of future legislation is compatible with the UNCRC requirements.
>
> (2) If the court is satisfied that the provision is incompatible with the UNCRC requirements, it may make a declarator stating that incompatibility (an 'incompatibility declarator').
>
> (3) Where the incompatible provision of future legislation is an enactment made by virtue of an enactment mentioned in sub-paragraph (i) or (ii) of subsection (5)(b) ('subordinate legislation'), the court may make an incompatibility declarator in relation to the subordinate legislation only if the court is satisfied that (disregarding any possibility of revocation) the

enactment by virtue of which the subordinate legislation is made prevents removal of the incompatibility.

(4) An incompatibility declaratory -

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is made, and

(b) is not binding on the parties to the proceedings in which it is made.

(5) In this section, ‘future legislation’ means an enactment -

(a) that it would be within the legislative competence of the Scottish Parliament to make, and

(b) that comprises, or is wholly or partly made by virtue of -

(i) an Act of the Scottish Parliament the Bill for which receives Royal Assent on or after the day on which this section comes into force,

(ii) an Act of Parliament the Bill for which receives Royal Assent on or after the day on which this section comes into force.

(6) For the purposes of subsection (5)(a), an enactment that extends to Scotland and other jurisdictions is not, for that reason alone, to be regarded as outside the legislative competence of the Scottish Parliament.

(7) In subsection (5)(b)(i) and (ii), the reference to an Act of the Scottish Parliament or (as the case may be) an Act of Parliament includes provision in such an Act of the Scottish Parliament or (as the case may be) such an Act of Parliament

> which modifies an Act of the Scottish Parliament or (as the case may be) an Act of Parliament which has become relevant legislation by virtue of section 20(10) and (12)."

49. As has been explained, section 21 of the Bill, like section 20, is modelled on section 4 of the Human Rights Act. Where legislation cannot be interpreted compatibly with the UNCRC requirements, even with recourse to section 19 of the Bill, section 21 would confer on the courts the power to issue a declarator that the legislation is incompatible with the UNCRC requirements. By virtue of subsection (5)(b)(ii), that power expressly applies to Acts of Parliament which receive Royal Assent after section 21 comes into force. Section 21 would therefore confer on the courts the power to pass judgment on the compatibility of Acts of Parliament with provisions of an international treaty to which the Scottish Parliament, but not Parliament itself, has chosen to give domestic effect.

50. The ordinary principle is that the courts cannot question or impugn an Act of Parliament. As Lord Hope observed in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868, para 49, "[a] sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty". Parliament can itself qualify its own sovereignty, as it did when it conferred on the courts the power to make declarations of incompatibility with rights guaranteed by the ECHR, under section 4 of the Human Rights Act. The Scottish Parliament, on the other hand, cannot qualify the sovereignty of Parliament, which is protected by a number of provisions of the Scotland Act, including, as counsel for the Lord Advocate acknowledged in his written submissions, section 28(7).

51. As counsel emphasised, an incompatibility declarator would not in itself affect the validity of an Act of Parliament: see section 21(4). That does not, however, exclude the possibility that section 21 would affect Parliament's power to legislate for Scotland, as guaranteed by section 28(7) of the Scotland Act. Three points are particularly significant in that regard.

52. First, the object and effect of section 21, so far as it concerns Acts of Parliament, is to subject legislation enacted by Parliament to judicial condemnation if it fails to meet a legal standard embodying international obligations to which Parliament has not chosen to give domestic legal effect. A declarator of incompatibility under section 21 would be a judicial finding that an Act of Parliament is incompatible with those obligations. The possibility - and, a fortiori, the actuality - of such a finding would plainly affect Parliament's power to make laws for Scotland, since it would impose pressure on Parliament to avoid the opprobrium which such a finding would entail.

53. Secondly, although the relationship between section 21(4) and sections 6 to 8 of the Bill is not altogether clear, counsel made his submissions on the basis that a finding that a provision of an Act of Parliament was incompatible with the UNCRC requirements would imply that public authorities implementing that provision were acting in a way which was incompatible with those requirements, and was therefore unlawful by virtue of section 6 of the Bill (set out at para 57 below). That would mean that they could be sued under section 7 of the Bill, and potentially found liable in damages under section 8. Counsel accepted that a finding of incompatibility could thus affect the continuing application or enforcement of the legislation in question. The result would be to make it difficult if not impossible in practice for public authorities to implement provisions of Acts of Parliament which were declared to be incompatible with UNCRC requirements under section 21 of the Bill. Provisions enacted by Parliament might consequently be deprived of practical effect. That is sufficient to justify the conclusion that section 21 would result in a modification of section 28(7) of the Scotland Act.

54. Thirdly, a declarator of incompatibility under section 21 of the Bill would impose an obligation on the Scottish Ministers to report under section 23 of the Bill on the steps, if any, which they intended to take in response to the declarator. Those steps could include the amendment or repeal of the legislation by remedial regulations made by the Scottish Ministers under section 32 of the Bill. As in the *Continuity Bill* case, Parliament's power to make laws for Scotland would thus be made conditional: in this instance, on decisions taken by the courts and the Scottish Ministers.

55. For the foregoing reasons, the answer to question 3 is "Yes". Section 21(5)(b)(ii) of the Bill is outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c).

The fourth question - section 6

56. The fourth question is:

> Whether section 6 of the Bill is outside the legislative competence of the Scottish Parliament because:
>
> > (a) It constitutes a modification in breach of the restriction in paragraph 2(1) of Schedule 4, falling under section 29(2)(c) of the Scotland Act; and/or

(b) It "relates to" various reserved matters set out in Schedule 5, falling under section 29(2)(b) of the Scotland Act; and/or

(c) It modifies section 28(7) of the Scotland Act and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) of the Scotland Act; and

(d) It cannot be read down using section 101(2) of the Scotland Act so as to render it within competence.

57. Section 6 of the Bill is headed "Acts of public authorities to be compatible with the UNCRC requirements". It provides:

"(1) It is unlawful for a public authority to act in a way which is incompatible with the UNCRC requirements.

(2) In subsection (1), 'act' includes fail to act.

(3) In this section, 'public authority' -

(a) includes, in particular -

(i) the Scottish Ministers,

(ii) a court or tribunal,

(iii) any person certain of whose functions are functions of a public nature (but see subsection (4)),

(b) does not include the Scottish Parliament or a person carrying out functions in connection with proceedings in the Scottish Parliament.

(3A) For the purposes of subsection (3)(a)(iii), 'functions of a public nature' includes, in particular, functions carried out under a contract or other arrangement with a public authority.

> (3B) Functions are not excluded from being functions of a public nature for the purposes of subsection (3)(a)(iii) solely because they are not publicly funded.
>
> (4) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(a)(iii) if the nature of the act is private."

58. On its face, section 6 makes it unlawful for any public authority, carrying out any function, to act in a way which is incompatible with the UNCRC requirements. If it is believed to have done so, proceedings can be brought against it under section 7, and damages can be awarded under section 8. The only exceptions are the Scottish Parliament and persons carrying out functions in connection with proceedings in the Scottish Parliament.

59. It is not in dispute that section 6 is, on its face, outside legislative competence, having regard to sections 28(7) and 29(2)(b) and (c) of the Scotland Act, and to Schedules 4 and 5. No attempt has been made to confine its scope to matters falling within the legislative competence of the Scottish Parliament. On its face, it would apply without limitation, for example, to UK Ministers applying Acts of Parliament relating to reserved matters. It also imposes a condition - namely, compliance with the UNCRC requirements - upon the lawfulness of the discharge of functions required or authorised by Parliament, whether those functions fall within the legislative competence of the Scottish Parliament or not.

60. Counsel for the Lord Advocate explained to the court that this approach to the drafting of section 6, taking no account of limitations on legislative competence, had been adopted as a matter of policy. The Policy Memorandum relating to the Bill explains at para 60 that the Bill takes a "maximalist approach" so as to ensure the incorporation of the UNCRC is "delivered up to the absolute limits of what is possible within the boundaries of the devolution settlement". Accordingly, rather than the scope of the duty under section 6 being expressed in terms which reflect the limits of legislative competence, para 124 recognises that "there will be circumstances in which the application of the compatibility duty would be beyond the legislative competence of the Scottish Parliament", but states that "[t]he question [whether the application of the compatibility duty would be within legislative competence] will therefore fall to be analysed on a case-by-case basis". The apparent implication is that the legislation has been drafted in terms which deliberately exceed the legislative competence of the Scottish Parliament, with reliance being placed on the courts to impose corrective limitations in individual cases.

61. As counsel acknowledged, a series of cases in the courts would be required before the legal effect of section 6 became clear. As counsel put it, it would be elucidated by the courts over time (and, one might add, at public expense). In the meantime, public authorities performing functions in relation to reserved matters would be exposed to the risk of proceedings under section 7 for a breach of section 6, and claims for damages under section 8.

62. Counsel suggested that it would be too difficult to draft the legislation otherwise, but that was not demonstrated, and is not self-evident. He also argued that the drafting technique which had been adopted was appropriate where the outer limits of legislative competence could not be precisely defined at the outset. However, the limits of legislative competence are defined by the Scotland Act, and it is implicit in sections 31 to 33 of that Act, as was explained at paras 14 and 17 above, that it must be possible to determine at the outset whether the provisions of a Bill fall within those limits or not. In that regard, section 6 of the Bill might be contrasted with sections 19 to 21, which expressly confine their scope to legislation which it would be within the legislative competence of the Scottish Parliament to make. Counsel also argued that the court should accept this technique of drafting, because it has been adopted repeatedly in earlier legislation. That was not shown to be the case. But the argument is not persuasive in any event. The question is whether this method of drafting results in legislation which is outside legislative competence. If it does, persistence in adopting it can scarcely alter that outcome.

63. The solution proposed by counsel in argument, and in the Explanatory Notes on the Bill (para 26), is that the interpretation rule set out in section 101(2) of the Scotland Act can be applied so as to render section 6 within competence.

64. Section 101(2), set out at para 19 above, is a provision concerned with interpretation, as the headnote to the section indicates. It is subject to the conditions that the provision "could" be read in such a way as to be outside competence, and that a narrower reading, within competence, is "possible". It has been deployed in the past where a provision was capable of being read as extending to a matter outside legislative competence, but was also capable of being read as applying only to matters within legislative competence.

65. For example, the *Welsh Byelaws* case (*Attorney General v National Assembly for Wales Commission and others* [2012] UKSC 53; [2013] 1 AC 792) concerned two provisions. One removed the need for confirmation by Welsh Ministers or by the Secretary of State of byelaws made under specified enactments. The other provision empowered the Welsh Ministers to add to those enactments. It was argued by the Attorney General that the latter provision was outside competence because, if read literally, it could be used to add enactments falling outside the Welsh Assembly's powers. There was, however, no indication that the provision had been

intended to have that effect. The Attorney General's argument was rejected. Lord Neuberger of Abbotsbury observed at paras 63-64 that, as a matter of ordinary interpretation, the provision would naturally be understood as being limited to enactments falling within the Assembly's legislative competence, and the same conclusion could also be arrived at by invoking section 154 of the Government of Wales Act 2006, the Welsh equivalent of section 101 of the Scotland Act. In that regard, he stated at para 64 that "[i]t would not be permissible to invoke that statutory provision if it was inconsistent with the plain words of [the provision in question]", but that "it would, in my view, be permissible to invoke it to limit the apparently unlimited and general effect of that briefly expressed section".

66. Section 101 was used in a broadly similar way in an ex tempore judgment of the High Court of Justiciary, by concession and without detailed argument, in *Henderson v HM Advocate* 2011 JC 96. In that case, a general provision creating a new order for lifelong restriction was read as not extending to certain convictions under the Firearms Act 1968, since the sentences applicable to such convictions fell outside the legislative competence of the Scottish Parliament.

67. In *Anderson v Scottish Ministers* [2001] UKPC D5; [2003] 2 AC 602; 2002 SC (PC) 63, Lord Hope of Craighead used section 101(2) to interpret the word "public" in section 1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 as meaning "a section of the public". His reasoning, at para 37, was that "[t]he word 'public' in the phrase 'in order to protect the public from serious harm' … is capable of meaning either the public in general or a section of the public, as the context requires". So, for example, a prisoner would not present a risk to the general public, but he might present a risk to prison officers, other inmates and social workers and the like who visited the prison. On that narrower reading of the provision, it was compatible with the ECHR and therefore within legislative competence.

68. The present case raises a different type of problem. It is not through inadvertence that section 6 raises a competence concern, as appears to have been the position in the cases just discussed. Section 6 is a carefully drafted provision. The implication of the language used by the Scottish Parliament is that section 6 is of general application in Scots law, subject to the exclusion of the Scottish Parliament and persons carrying out functions in connection with proceedings in the Scottish Parliament. It appears from the Policy Memorandum to have been envisaged by the Scottish Government that the courts would set further limits on a case by case basis, according to their assessment of how the limits of the legislative competence of the Scottish Parliament applied to the facts of individual cases brought before them. Following that approach, however, the courts are not being asked to read section 6 in a way which is a possible reading of the provision which the Scottish Parliament enacted, but rather to give effect to that provision subject to the various limitations set out in section 29 of the Scotland Act, and Schedules 4 and 5. This is not in reality

the interpretation of the provision which the Scottish Parliament enacted, but its modification or amendment by another enactment.

69. In support of the view that section 101(2) might be used in that way, counsel for the Lord Advocate and the Counsel General for Wales sought to draw a parallel with section 3(1) of the Human Rights Act, which provides:

> "So 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."

They emphasised that section 101(2) also contains the word "possible" ("Such a provision 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"). They pointed out that, in the context of section 3 of the Human Rights Act, the courts had given the limits of what was "possible" a very wide ambit, which was not constrained by textual considerations, such as the need to find an ambiguity in the language of the provision under consideration.

70. The cases in which section 101 of the Scotland Act and section 154 of the Government of Wales Act have been discussed, such as those mentioned in paras 65-67 above, do not suggest that their scope is confined to the resolution of linguistic ambiguities. In the *Welsh Byelaws* case, for example, the possibility of the provision being read in more than one way did not arise from an ambiguity in the language used, but from the fact that, although the provision was expressed in general terms, the context in which it was enacted strongly suggested that it was not intended to be read literally.

71. Nevertheless, section 101 of the Scotland Act and section 154 of the Government of Wales Act are fundamentally different from section 3 of the Human Rights Act. As Lord Hope pointed out in *DS v HM Advocate* [2007] UKPC D1; 2007 SC (PC) 1, para 21, the wording of section 101 of the Scotland Act is to be contrasted with that of section 3 of the Human Rights Act. The word "narrowly" would not be in place in section 3, which may require a variety of techniques to be applied to a provision in order to render it compatible with Convention rights. It is, however, appropriate in the context of the limits of legislative competence of the Scottish Parliament, as defined in section 29 of the Scotland Act. Those limits extend well beyond compatibility with Convention rights (which is addressed by section 3 of the Human Rights Act, since it applies to Acts of the Scottish Parliament), and include legislation which relates to reserved matters as defined in Schedule 5 or is in breach of the restrictions in Schedule 4. Accordingly, as Lord Hope stated at para 22 of *DS*, section 3 of the Human Rights Act "defines the purpose of the exercise, not the way

of achieving it", which "is left to the court to work out according to the demands of each case". Section 101 of the Scotland Act, on the other hand, specifies that the task of the court is to "read [the provision] as narrowly as is required for it to be within competence, if such a reading is possible". As those words make clear, the court's task is focused upon the interpretation of the legislative text.

72. In practice, section 101 of the Scotland Act and section 154 of the Government of Wales Act have not been given as far-reaching an effect as section 3 of the Human Rights Act. For example, Lord Neuberger's statement in the *Welsh Byelaws* case that "[i]t would not be permissible to invoke [section 154 of the Government of Wales Act] if it was inconsistent with the plain words of [the provision in question]" gives section 154 a more restricted scope than section 3 of the Human Rights Act, as interpreted in *Ghaidan v Godin-Mendoza* (para 25 above).

73. There are two further reasons why section 101(2) cannot be construed as providing such a wide power to modify legislation. The first is that section 101(2) has to be construed in the context of the Scotland Act as a whole. As was explained at paras 12-17 above, sections 31, 32 and 33 of the Act establish a system of pre-enactment scrutiny of Bills by the person in charge of the Bill, the Presiding Officer, and, if a reference is made, the Supreme Court. Each of them has to decide whether the provisions of the Bill would be within the legislative competence of the Scottish Parliament.

74. Counsel for the Lord Advocate drew attention to the importance of those safeguards. However, if section 101(2) is applied in the way for which he contends, those safeguards are deprived of much if not all of their effect. As I have explained, it is argued that even a provision which is plainly outside competence on its face, such as section 6 of the Bill, must be treated as being within competence, on the basis that section 101(2) requires it to be understood as being subject to all the limitations upon the Scottish Parliament's competence. If that argument is accepted, then the person in charge of the Bill, and the Presiding Officer, can be satisfied that the provisions of a Bill are within competence, even where they plainly exceed competence on their face, by relying on the future application of section 101(2) by the courts. On that basis, their statements of compatibility are liable to be reduced to a formality. It is also liable to be a waste of time, on that basis, for a reference to be made to the Supreme Court under section 33, because even if the court considers that the provision is outside competence on its face, section 101(2), applied in the manner for which counsel contends, will usually, if not invariably, solve the problem. That cannot be right. Section 101(2) cannot have been intended to be construed as having the effect of rendering nugatory the pre-enactment safeguards provided by the Scotland Act.

75. The second reason for giving section 101(2) a less expansive construction reflects a wider aspect of the constitutional settlement effected by the Scotland Act. In the *AXA* case, Lord Hope observed at para 49 that "[t]he dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy". He went on to conclude at paras 51-52 that judicial review would be available if legislation enacted by the Scottish Parliament was incompatible with the rule of law. I added at para 153, in relation to the Scotland Act:

> "Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law."

76. One aspect of the rule of law - indeed, the first characteristic identified by Lord Bingham in *The Rule of Law* (2010), p 37 - is that "the law must be accessible and so far as possible intelligible, clear and predictable". That principle is fundamental to liberal democracies. As Lord Diplock observed in *Fothergill v Monarch Airlines Ltd* [1981] 1 AC 251, 279:

> "Elementary justice or, to use the concept often cited by the European Court [of Justice], the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible."

The same principle applies under the European Convention on Human Rights. As the European Court of Human Rights held in *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49, when considering the concept of "law" as employed in the Convention:

> "First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

77. This objective is not always fully attained in practice. But what is striking in the present case is that there has been no attempt to draft section 6 of the Bill in such a way as to provide a clear and accessible statement of the law. On the contrary, there has been a decision to draft and enact a provision whose plain meaning does not accurately represent the law, and to rely on the courts, applying section 101(2) of the Scotland Act, subsequently to impose a variety of qualifications upon the provision, on a case by case basis, so as to give it a different effect which is lawful. For the reasons which I have explained in paras 69-76 above, that cannot be how Parliament intended section 101(2) to be interpreted and applied.

78. A comparison can be made between the present case and the "Named Persons" case (*Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29). The information-sharing provisions in the Children and Young People (Scotland) Act 2014 ("the 2014 Act") had been enacted by the Scottish Parliament in a form which took no account of the existing UK law relating to data protection, which was a reserved matter. As a result, there were very serious difficulties in accessing the relevant legal rules: it was necessary to read together the 2014 Act and the UK legislation on data protection, cross-refer between them and work out the relative priority of their provisions. For example, the court noted at para 83 that although a number of duties were purportedly imposed by the 2014 Act, in reality no such duties existed when regard was had to the UK legislation. The court noted at para 79 that, in order to meet the standard of "law" within the meaning of article 8 of the ECHR, measures had to be accessible to the person concerned and foreseeable as to their effects. As that standard was not met, the court concluded that the provisions in question were outside legislative competence. Importantly for present purposes, the court concluded at para 106 that the material provisions could not be read down under section 101(2) of the Scotland Act, so as to cure the problem.

79. The same conclusion must be reached in the present case. Section 101(2) cannot have been intended to enable the courts to undertake, in substance, a rewriting of provisions enacted by the Scottish Parliament, which on their face are plainly and unambiguously outside its legislative competence, so as eventually, if sufficient cases are decided, to produce an outcome which accurately reflects the limits on legislative competence set out in the Scotland Act. That would give section 101(2) a function going beyond interpretation as ordinarily understood. As the "Named Persons" case illustrates, such an approach to section 101(2) would also be liable to contravene key provisions of the ECHR in cases where they were relevant. As I have explained, it would also result in the circumvention of the safeguards intended to be provided by sections 31 to 33 of the Scotland Act, whose operation is dependent on legislative provisions being drafted with sufficient clarity to enable the requisite assessments to be made.

80. For all the foregoing reasons, the answer to question 4 is "Yes". Section 6 of the Bill is outside the legislative competence of the Scottish Parliament, because it

"relates to" reserved matters, contrary to section 29(2)(b) of the Scotland Act, would modify section 28(7), contrary to section 29(2)(c), and would modify the law on reserved matters, contrary to section 29(2)(c).

Questions relating to the ECLSG Bill

81. The questions relating to the ECLSG Bill can be dealt with much more briefly. They were not the subject of separate oral argument, as it was recognised that they would fall to be decided in the same way as the corresponding questions in relation to the UNCRC Bill. They concern sections 4 and 5 of the ECLSG Bill.

The first question - section 4(1A)

82. The first question is as follows:

> Whether section 4(1A) of the Bill is outside the legislative competence of the Scottish Parliament because:
>
> > (a) Insofar as it refers to Acts of the United Kingdom Parliament, it modifies section 28(7) of the Scotland Act and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) of the Scotland Act; and
> >
> > (b) It cannot be read down using section 101(2) of the Scotland Act so as to render it within competence.

83. Section 4 of the Bill is headed "Interpretation of legislation". It provides:

> "(1) So far as it is possible to do so, legislation mentioned in subsection (1A) must be read and given effect in a way which is compatible with the Charter Articles.
>
> (1A) That legislation is an Act or subordinate legislation (whenever enacted) to the extent that its provisions are within the legislative competence of the Scottish Parliament.
>
> (2) This section does not affect the validity, continuing operation or enforcement of any incompatible subordinate

> legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

84. Section 4 of the Bill is similar to section 19 of the UNCRC Bill. The effect of subsection (1A) is that section 4 requires the courts to modify the meaning and effect of Acts of Parliament, producing results which Parliament did not intend. It is outside the legislative competence of the Scottish Parliament, for the same reasons as section 19(2)(a)(ii) of the UNCRC Bill. The reasoning set out in paras 24-34 above is equally applicable in this context, mutatis mutandis.

85. The answer to question 1 is therefore "Yes". Section 4(1A) of the Bill is outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c).

The second question - section 5

86. The second question is:

> Whether section 5(1) of the Bill is outside the legislative competence of the Scottish Parliament because:
>
> (a) Insofar as it refers to Acts of the United Kingdom Parliament, it modifies section 28(7) of the Scotland Act and is accordingly in breach of the restriction in paragraph 4(1) of Schedule 4, falling under section 29(2)(c) of the Scotland Act; and
>
> (b) It cannot be read down using section 101(2) of the Scotland Act so as to render it within competence.

87. Section 5 of the Bill is headed "Declaration of incompatibility". It provides:

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of an Act is compatible with the Charter Articles.
>
> (2) If the court is satisfied that the provision is incompatible with the Charter Articles, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation is incompatible with the Charter Articles.

(4) If the court is satisfied -

(a) that the provision is incompatible with the Charter Articles, and

(b) that (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section 'court' means -

(a) the Supreme Court of the United Kingdom, or

(b) the Court of Session.

(6) A declaration under this section ('a declaration of incompatibility') does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given.

(7) A declaration of incompatibility may be made in respect of a provision (whether of an Act or of subordinate legislation) only if the provision is within the legislative competence of the Scottish Parliament."

88. Section 5 of the Bill is similar to section 21 of the UNCRC Bill, although not limited to Acts of Parliament enacted after its entry into force. The reasoning set out in paras 49-54 above is equally applicable in this context, mutatis mutandis.

89. The answer to question 2 is therefore "Yes". Section 5(1) of the Bill is outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act, contrary to section 29(2)(c).

Conclusion

90. I therefore propose that the court should answer the reference as follows:

(i) Section 19(2)(a)(ii) of the UNCRC Bill would be outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act: paras 24-35 above.

(ii) Section 20(10)(a)(ii) of the UNCRC Bill would be outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act: paras 40-45 above.

(iii) Section 21(5)(b)(ii) of the UNCRC Bill would be outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act: paras 49-54 above.

(iv) Section 6 of the UNCRC Bill would be outside the legislative competence of the Scottish Parliament, because it "relates to" reserved matters, would modify section 28(7) of the Scotland Act, and would modify the law on reserved matters: paras 58-79 above.

(v) Section 4(1A) of the ECLSG Bill would be outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act: para 84 above.

(vi) Section 5(1) of the ECLSG Bill would be outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act: para 88 above.