IN THE SUPREME COURT OF THE UNITED KINGDOM

UKSC 2016/0205

REFERENCE BY THE COURT OF APPEAL (NORTHERN IRELAND) – IN THE MATTER OF AN APPLICATION BY RAYMOND MCCORD FOR JUDICIAL REVIEW (NORTHERN IRELAND)

Between:

RAYMOND MCCORD

Applicant

and

(1) HER MAJESTY'S GOVERNMENT

(2) THE SECRETARY OF STATE FOR NORTHERN IRELAND

(3) THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondents

THE APPLICANT'S CASE

I.
INTRODUCTION

1. Raymond McCord ('the Applicant') comes before the Supreme Court by way of a reference on a 'devolution issue' made pursuant to paragraph 9 of Schedule 10 of the Northern Ireland Act 1998 **[Northern Ireland ('NI') bundle – N-3]** by the Court of Appeal in Northern Ireland with the consent of the parties on 18 November 2016. This is the Applicant's case in support of answering the referred question in the affirmative. The question referred is:

> Does the triggering of Article 50 Treaty of European Union ('TEU') by the exercise of the prerogative power without the consent of the people of Northern Ireland impede the operation of section 1 of the Northern Ireland Act 1998? **[APPENDIX ('APP') pp 1-4]**

2. Section 1 of the Northern Ireland Act 1998 provides:

> 1 Status of Northern Ireland.
> (1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of

> Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1. [Sch 1 governs the poll for this purpose]
>
> (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

3. This Reference is made following delivery of judgment on 28 October 2016 by Maguire J in the High Court in Northern Ireland in which he dismissed the Applicant's application for judicial review. **[APP 12-46]** The matter in issue was the expressed intention of Her Majesty's Government to use the Royal Prerogative to give notice to the European Council under Article 50 (2) TEU of the UK's intention to withdraw from the EU following the referendum held in the United Kingdom on 23 June 2016. This application was heard as a rolled-up hearing on 13, 17 and 18 October 2016 together with another similar application by *Agnew and others* (which is also before the Supreme Court by way of a reference of the Attorney General of Northern Ireland). Maguire J dealt with 'Northern Ireland-only' issues and then decided to stay those aspects of the Applicant's challenge that would be addressed by the Divisional Court in the *Miller* proceedings. The Applicant issued and served a notice of appeal to the Court of Appeal in Northern Ireland on 9 November 2016. The question referred by the Court of Appeal on 18 November 2016 reflects one of the grounds argued by the Applicant in the High Court.

II.
SUMMARY OF ARGUMENT

4. As will be set out in this submission, there are four contexts in which the binding nature of the Good Friday Agreement ('GFA') **[NI-14]** and Northern Ireland Act ('NIA') can be viewed. Firstly, and quite simply, the GFA is a written constitutional document which any act of the Government or Parliament (including the NIA) must be consistent with, similar to the status of the constitution of any country with a written constitution. Secondly, the GFA is an international treaty binding in international law which has been incorporated into domestic law. Thirdly, the GFA is an expression of the *de facto* constitutional position of a devolved country with the recognised right to self-determination within a federal system where simple majorities cannot trump the rights and interests of minorities and states within the federal structure. (This argument is made independent of the rights and terms expressly set out in the

GFA). Fourthly, the GFA can be viewed as a species of substantive legitimate expectation. The structure of the argument is:

- **III. BACKGROUND** – Sets out the background to the Reference.
- **IV. THE NATURE OF THE GFA AND NIA** – Establishes that: (a) the GFA is a binding treaty and has constitutional status; (b) the NIA has constitutional status; (c) the NIA must be 'read down' with the GFA; (d) where there is a conflict between the GFA and NIA, the GFA has primacy; (e) and that the GFA is a treaty justiciable domestically.
- **V. THE GFA'S 'CONSTITUTIONAL ISSUES'** – Establishes that: (a) the GFA is a document affirming and enabling a standing right to 'the people of Northern Ireland' of self-determination; (b) it can be applied and interpreted with reference to international law; (c) when interpreted this way, there can be no impediment to the exercise of the people of Northern Ireland's right to self-determination in respect of political status and their right to economic, social and cultural development; (d) conclusions including that the people of Northern Ireland are sovereign on *any* change to the constitutional status of Northern Ireland.
- **VI. NORTHERN IRELAND AS A CONSTITUENT PART OF THE UK** – Established that: (a) introduction; (b) parliamentary sovereignty is limited, the UK is now a federal entity and that in certain circumstances the courts could declare an Act of Parliament unconstitutional; (c) that there is a constitutional compact that must be respected as between the constituent parts of the UK; (d) conclusions on this section.
- **VII. CONCLUSIONS** – (a) GFA is not merely a political peace settlement; (b) GFA is expressly and impliedly premised upon continuing EU membership; (c) Both states bound by GFA; (d) Status of Northern Ireland; (e) Could the Republic of Ireland withdraw from the EU?; (f) Withdrawal would be unconstitutional; (g) Legitimate expectation; (h) Answering the question posed in the affirmative.

III.
BACKGROUND

(a) The parties

5. The Applicant is a 62-year-old male British and European citizen resident in Northern Ireland who identifies as a working-class unionist. He has for many years acted as a victims' campaigner following the murder of his son, Raymond McCord Jnr, by loyalist paramilitaries

on 9 November 1997. On 22 January 2007, the then Police Ombudsman of Northern Ireland, Baroness Nuala O'Loan, published a report following an investigation (known as *Operation Ballast*) into Raymond Jnr's murder. The report concluded that there was collusion between certain police officers and a UVF unit, that a police agent had ordered Raymond's Jnr's murder and that there were many police failures in the investigation of the murder. **[APP 153-157]** The First Respondent is the official collective name for members of the current United Kingdom government, headed by the Prime Minister. The Second Respondent is the principal secretary of state in that government with responsibilities for Northern Ireland and in that role is accountable to Parliament. The Third Respondent is the Secretary of State responsible for the UK's negotiations to leave the European Union and for working very closely with the UK's devolved administrations in that regard.

(b) The EU Referendum

6. In the EU Referendum held on 23 June 2016, the people of Northern Ireland voted to remain in the EU with by 55.8% to 44.2% of the valid ballots.[1] The population of the UK as whole voted to leave 51.89% to 48.11%. As a victim of the most recent conflict in Northern Ireland, the Applicant is concerned about the effect that a unilateral withdrawal of the UK from the EU would ultimately lead to destabilization leading to further cycles of instability and violence in Northern Ireland and the rest of the UK. The Applicant asserts that any withdrawal would be contrary to the UK's international law obligations pursuant to the Good Friday Agreement. He is also concerned about the abrogation of his fundamental rights that withdrawal will entail and erosion of his British identity/citizenship.

(c) *Miller* and *Agnew* cases

7. The Applicant's case made in the High Court in Northern Ireland makes many of the arguments made by the applicant parties in the *Miller* and *Agnew* cases. For the purposes of clarity, the Applicant supports and adopts their grounds and arguments where relevant, but reserves his right to respectfully disagree should the need arise in oral argument.

(d) Art 50 TEU

8. Without setting out the text in full, the decision to withdraw from the EU under Art 50(1) must be made prior to the notification under Art 50. That decision must be made in accordance with

[1] Source: http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information

the UK's 'constitutional requirements' (Art 50(2)). Therefore, a notification which is given based on a decision made in breach of the UK's constitutional requirements is an invalid one. As will be seen below, 'constitutional requirements' concern not just whether the decision is made by Parliament or by Prerogative, but whether it is made in accordance with the constitutional settlement as between the constituent countries of the UK and with the consent of the people of Northern Ireland.

IV.

THE NATURE OF THE GOOD FRIDAY AGREEMENT AND NORTHERN IRELAND ACT

(a) Good Friday Agreement

(i) Background

9. The Belfast Agreement/Good Friday Agreement (Command Paper 3883) ('GFA') was passed by referendum in Northern Ireland on 22 May 1998 with a majority of the population 71.1% on a high turnout of 81.1%. The GFA is composed of three strands: Strand One - internal political arrangements within Northern Ireland; Strand Two - bi-lateral relationships between Northern Ireland and the Republic of Ireland; and Strand Three - multi-lateral relationships between Northern Ireland, the UK and the Irish Republic. The context in which the GFA was enabled, negotiated and implemented was both Ireland and the UK's membership of the EU. That membership was the *sine qua non* of the capacity to engage in such negotiation and created the conditions conducive to the negotiation and conclusion of the treaty. It is underpinned by the law and institutions of the EU: in the preamble to the agreement between the UK and Republic of Ireland governments, the UK government commits itself to developing the relationship and co-operation with the Republic of Ireland 'as friendly neighbours and as partners in the European Union' and to co-operate with the Irish government through the British-Irish Council on 'approaches to EU issues'. Further, in relation to the North-South Council **[NI-14]**:

> 17. The Council to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings.

It is therefore submitted that the whole GFA was negotiated and predicated upon the parties' mutual membership of the EU at the time and assumed membership into the future. This

submission is fortified when it is considered that during the years of negotiations and on the date which the GFA became effective, 2 December 1999, the EU had no exit mechanism. It was only when Art 50 TEU came into force on 1 December 2009 through the Lisbon Treaty was an exit from the EU reasonably possible. Article 50 is therefore the 'later in time' provision. The Applicant therefore submits that mutual membership of the EU is an express and implicit provision of the GFA.

(ii) GFA as an international treaty

10. The Attorney General for Northern Ireland argues that the GFA 'while of great political significance, does not have the force of national or international law'. As will be seen, on this analysis, the GFA may not be regarded as a treaty. It is therefore necessary to establish that the GFA has the status of a binding treaty.

11. The law of treaties is now generally governed by the Vienna Convention on the Law of Treaties ('VCLT') **[NI-13]** which largely reflects customary international law. It defines a treaty as being: 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'[2] This definition is consistent with United Kingdom's law and practice, in which no distinction is made between a treaty expressly so called and an international agreement called by another name. Such treaties do not always describe themselves as such, and may be termed, for example, Act, agreement, charter, concordat, constitution, convention, covenant, declaration, protocol or statute.[3] The Charter of the United Nations provides that every treatyand every international agreement entered into by any member of the United Nations must be registered with the secretariat and published by it (Charter of the United Nations art 102 para 1). The VCLT provides that unless the treaty provides otherwise, the deposit of the instruments of ratification, acceptance, approval or accession establishes the consent of a state to be bound by the treaty.[4] Moreover, no party to any treaty or agreement not so registered may invoke it before any organ of the United Nations.[5] It is clear the GFA fulfils the VCLT definition of a treaty. It has also been

[2] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) art 2 para 1(a)
[3] *Halsbury's Laws of England* > INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010)) > 6. TREATIES AND INTERNATIONAL AGREEMENTS > (1) ENTERING INTO TREATIES > 71. Meaning of 'treaty'. **[NI-68]** And see http://www.un-documents.net/a25r2625.htm
[4] Ibid and see Arts 16, 76 and 77, VCLT **[NI-13]**
[5] Ibid, INTERNATIONAL RELATIONS LAW (VOLUME 61 (2010)) > 6. TREATIES AND INTERNATIONAL AGREEMENTS > (5) DEPOSIT AND REGISTRATION OF TREATIES > 105. Registration of treaties. **[NI-68]**

registered with the secretariat of the United Nations.[6] The text of the GFA itself states the 'binding obligation'[7] on the parties to give effect to the outcome of a poll on unification with the Republic of Ireland. The registration of the GFA with the UN and the use of the express words 'binding obligation' are unambiguous statements of intent of the UK and the Republic of Ireland to treat the GFA as binding and subject to the purview of public international law, including the VCLT. Therefore, contrary to the bald submission that GFA is not, the GFA plainly falls be determined and interpreted in accordance with the VCLT and/or customary international law and thereby has the force of international law in accordance with the intention of the parties. As will be seen, and again contrary to the Attorney's submission, the GFA also has the force of domestic law.

(iii) GFA as a constitutional document

12. For the reasons given below, the GFA is a treaty that also enjoys status as a central constitutional document within the UK (and indeed within the Republic of Ireland).[8] It is a document that regulates the operation of governance and rights within Northern Ireland, provides for the position of Northern Ireland as a constituent part of the UK and the relationship between those parts, and provides for a unique pooling of aspects of sovereignty with the people of Northern Ireland and the Republic of Ireland. From this perspective, the GFA forms part of the UK constitution that is written or codified.

(b) Northern Ireland Act 1998

(i) A 'constitutional act'

13. The GFA was given effect and incorporated into UK domestic law by way of the Northern Ireland Act 1998 ('NIA'). Reference to 'Community law' (EU law) is made throughout.

14. The NIA has been recognised to be a constitutional statute. In *Robinson v Secretary of State for Northern Ireland* **[Miller Authority - 81]**[9], Lord Hoffman said:

> [The GFA] was the product of multi-party negotiations to devise constitutional arrangements for a fresh start in Northern Ireland. A key element in the agreement was the concept of decisions being made with cross-community support, that is, by representatives of majorities of both the unionist and nationalist communities. The 1998 Act is a constitution for Northern

[6] http://peacemaker.un.org/uk-ireland-good-friday98
[7] GFA, 'Constitutional Issue' 1(iv) **[NI-14]**
[8] The GFA is also to be read in the light of St Andrews and Hillsborough Agreements of 2006 and 2010.
[9] [2002] NI 390, 402, para 25

> Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast.

15. And in the same case, Lord Bingham famously acknowledged that: 'The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution.'[10] It is submitted that because, and only because, the NIA came into existence after the acceptance of the GFA by the people of Northern Ireland by referendum in 1998, any abrogation, amendment or repeal of the fundamental constitutional provisions of the NIA (including s 1 NIA) requires the consent of the people of Northern Ireland. Such abrogation, amendment or repeal cannot lawfully or constitutionally be imposed by the government or parliament of the UK and/or the Republic of Ireland.

(c) The interaction of the NIA and the GFA

(i) Reading down requirement

16. The long title of the NIA sets out in clear terms the legislative intent of the NIA: "An Act to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3883." [the GFA]

17. Lord Bingham sets out in *Robinson*[11] the necessary merger between the NIA and the GFA with specific reference to s 1 NIA:

> The 1998 Act, as already noted, was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the unionist and nationalist communities in shared political institutions, without precluding (see s 1 of the Act) a popular decision at some time in the future on the ultimate political status of Northern Ireland.

18. The GFA is not merely aspirational. This was expressly recognised by Kerr J (as he then was) in *McComb's Application*[12]**[NI-26]**. In disagreeing with the Belfast's Recorder view that the GFA was 'aspirational only' and that could not affect a court's approach to the application of the relevant provisions of the NIA, Kerr J relied upon the above passage of Lord Hoffman:

[10] Ibid at [11]
[11] Ibid at [10]
[12] [2003] NIQB 47 at [29]

> [31] Although these observations were made in relation to the effect that the agreement has on the nature of the Northern Ireland Act 1998, they reflect the importance to be attached to the terms of the agreement in the interpretation and application of statutory provisions made under its aegis.

19. Subsequently, in *Coláiste Feirste's Application*[13] **[NI-20]**, Treacy J accepted at [22] that 'Article 89 of the Education (Northern Ireland) Order 1998 in not merely aspirational: it gives statutory expression to the Belfast Agreement'.[14] In *Robinson* **[Miller-81]** at [11], Lord Bingham makes it clear that the NIA must be read against a broader constitutional background:

> The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the 1998 Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.

And Lord Hoffman concluded:

> So, in choosing between the two constructions of s 16 which have been put forward, I think it is reasonable to ask which result is more consistent with a desire to implement the Belfast Agreement
>
> […] In my opinion the rigidity of the first alternative is contrary to the agreement's most fundamental purpose, namely to create the most favourable constitutional environment for cross-community government. This must have been foreseen as requiring the flexibility which could allow scope for political judgment in dealing with the deadlocks and crises which were bound to occur.[15]

20. When their Lordships interpreted the NIA against the constitutional background in this 'generous and purposive' way, they found that the Northern Ireland Assembly had power to make a valid election, even though the six-week period prescribed under s 16(8) of the NIA had expired, that the election of the second and third respondents was lawful, and that the Secretary of State was entitled to propose as the date for the poll of the election of the next

[13] [2011] NIQB 98
[14] See also ibid [43] and [44]
[15] N9 at [29]-[30]

Assembly a date already fixed by s 31(2) of the 1998 Act. It is submitted that the GFA is part of that constitutional background. Therefore, when in interpreting the 'constitutional provisions' embodied by the NIA, it must be done in a way that is not only consistent with the GFA, but also done in a manner that is generous of and purposive to the GFA. It is understood that when the Attorney-General for Northern Ireland intervened in *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales*[16] **[NI-23]**, he relied upon the part of Lord Bingham's speech at paragraph [11] when he argued that the constitution of Wales should be interpreted as generously and purposively as any other constitution.[17] The Attorney's submission is a powerful one which the Applicant adopts as being applicable to the NIA and, by necessary extension, the GFA.

(ii) Conclusion on interaction of NIA and GFA

21. The long title of the NIA and the clear statements in *Robinson*, *McComb* and *Coláiste Feirste* show the symbiosis of the NIA and GFA. Plainly the provisions of the NIA must be read down with the GFA. When this is done, the preamble to the GFA – that the parties are 'friendly neighbours and as partners in the European Union' – and the assumption that mutual membership of the EU would continue explains the many references to EU law throughout the NIA. The NIA thereby provides the nuts and bolts of the mutual membership for domestic law purposes as is assumed or necessarily implied by the GFA. Arising from their bond, if the NIA is not just a 'constitutional act' but *is* a constitution, then the GFA must too have constitutional status and take its place within the UK constitution accordingly. Moreover, *Robinson* is high and strong authority for the proposition that where there is a conflict between the NIA and the GFA, that the GFA as part of the 'constitutional environment', has primacy and should prevail. This reading down of the NIA with the GFA is concordant with the settled law of requiring that an act domesticating an international treaty would be consistent with that treaty.[18] But it can further be said that not only is the GFA a minimum interpretative base for the NIA, the GFA is of a higher constitutional order than the NIA. After all, it was the GFA as a document upon which the people of Northern Ireland voted in the 1998 referendum, not the NIA. The high position that the GFA enjoys within the UK constitution means that the text of the GFA is justiciable on the domestic level from this perspective alone. However, as a domesticated treaty, it is also justiciable as a treaty.

[16] [2012] UKSC 53, [2013] 1 AC 792

[17] Lady Hale, 'The Supreme Court in the UK Constitution' at the Legal Wales 2012 conference on 12 October 2012 available at https://www.supremecourt.uk/docs/speech-121012.pdf **[NI-88]**

[18] See generally Michael Fordham, *Judicial Review Handbook* (6th edn, Hart 2013) para 6.3 **[NI-66]**

(d) Justiciability of the GFA as a treaty

(i) Domesticated treaties are justiciable

22. Historically, there was a reluctance of the courts to enter areas that involve foreign policy and international treaties. However, it is submitted, that over recent years, the role of the courts have enlarged to the point where there is no area of policy where an automatic bar to review exists, including pure foreign policy. For example, the House of Lords said in *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*[19] **[Miller-26]** that 'the issue of justiciability depends, not on general principle, but on subject matter and suitability in the particular case.'[20] Further, in a case that might be regarded as pure foreign policy, it was recognised by the Divisional Court in *R (on the application of Wheeler) v Office of the Prime Minister and another*[21]**[Miller-19]** that the process or procedure followed in reaching the decision to ratify a treaty rather than the policy itself was reviewable. The court further established that, rather than there being a blanket-ban on reviewability of the ratification of treaties, 'the limits of reviewability should be determined on a case by case basis if and when the need arises'.[22] In *R v Secretary of State for Foreign and Commonwealth Affairs, ex p British Council of Turkish Cypriot Associations*[23]**[Miller-76]** it was held that a decision involving foreign policy/affairs was justiciable if it engages a question of domestic UK law and that 'the powers of the Crown, even in its diplomatic function, may be constrained by statute.'

(ii) The GFA is a justiciable treaty

23. It is submitted that the GFA is justiciable for four reasons. Firstly, by reason of the NIA, the GFA is incorporated into domestic law making it justiciable in line with *British Council of Turkish Cypriot Associations* and the other relevant authorities[24]. Any breach of the GFA is likely to breach the correlative domesticating provisions of the NIA and vice versa where the constitutional provisions of the NIA are breached, including s 1 NIA. Secondly, as an international treaty incorporated domestically, any breach the GFA would be a breach of the Respondents' obligations at international law and could be reviewed in line with *Wheeler's* case-by-case test. Thirdly, as a constitutional document forming that part of the UK

[19] [2002] EWCA Civ 1598, [2003] 3 LRC 297
[20] Ibid at [85]
[21] [2008] All ER (D) 333 (Jun)
[22] Ibid at [55]
[23] [1998] COD 336
[24] N18 **[NI-66]**

constitution which is 'written', any breach of the GFA would be unconstitutional and/or unlawful. As will be seen, invoking Art 50 at all without the consent of 'the people of Northern Ireland' would be unconstitutional and/or unlawful. Finally, there is a legitimate expectation by the Applicant and the people of Northern Ireland and the Republic of Ireland when they accept the constitutional compromise that the UK would be bound by the implied and express terms of the GFA and that any breach would be enforceable by the courts domestically and internationally, and be enforceable at the very least by way of declarative relief. This argument now turns to the text of the GFA in an attempt to establish its implied and express terms.

V.

THE GFA'S 'CONSTITUTIONAL ISSUES'

(a) The text of the GFA

24. As has been established above, the NIA must be read down with the GFA **[NI-14]**. The GFA itself is also justiciable. So, to answer question posed by the Court of Appeal in this Reference, a textual analysis of the GFA must be undertaken. The GFA, under the heading 'Constitutional Issues', gives an unambiguous recognition of the right of self-determination to the people of Northern Ireland and the Republic of Ireland.[25] The full text is:

> CONSTITUTIONAL ISSUES
>
> 1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will:
>
> (i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
>
> (ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and <u>without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given</u>, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

[25] In relation to the GFA as an instrument of self-determination, see Maguire, A 'Self-Determination, Justice, and a 'Peace Process': Irish Nationalism, the Contemporary Colonial Experience and the Good Friday Agreement' (2014) 13 *Seattle Journal for Social Justice* 537 **[NI-69]**; and Maguire, A 'Contemporary Anti-Colonial Self-determination Claims and the Decolonisation of International Law' (2013) 22 *Griffith Law Review* 238.**[NI-70]**

(iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;

(iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;

(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

2. The participants also note that the two Governments have accordingly undertaken in the context of this comprehensive political agreement, to propose and support changes in, respectively, the Constitution of Ireland and in British legislation relating to the constitutional status of Northern Ireland. [emphasis supplied]

25. It will be recalled that s 1 NIA states that Northern Ireland 'shall not cease to be [part of the UK] without the consent of a majority of the people of Northern Ireland voting in a poll' and, should the majority so wish that 'Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland', the UK would give that wish effect. However, the express terms of s 1 NIA only reflects the issue contained at 1(i) of 'Constitutional Issues'. The terms of 1(i)-(vi) and 2 of 'Constitutional Issues' are not expressly reflected in s 1 NIA. Thus, a narrow construction of s 1 would leave the question referred by the Court of Appeal framed as one regarding the classic constitutional binary choice of Northern Ireland's status being either a part of a united Ireland or the UK. But, by reason of the requirement to read s 1 NIA down with the GFA and the justiciability of the GFA itself, this is far from the end of the

analysis. For the reasons given below, the GFA as a treaty enshrining rights of self-determination, it can, and indeed must, be looked at through the lens of international law.

(b) International Law

(i) Introduction

26. The text of 'Constitutional Issues' is peppered with the nomenclature of self-determination from the corpus of international law. It is patent that the use of such words and phrases from international law is intentional, particularly when the GFA expressly bestows to the people of Northern Ireland a standing *right* to self-determination. This raises the question: can the corpus of international law be applied or used to interpret the incorporated GFA? *R (on the application of SG and others) v Secretary of State for Work and Pensions*[26] **[NI-35]** is authority for the proposition that it can.

(ii) SG v Secretary of State for Work and Pensions

27. In *SG*, the issue for consideration was whether it was lawful for the Secretary of State to make subordinate legislation imposing a cap on the amount of welfare benefits which could be received by claimants in non-working households, equivalent to the net median earnings of working households. The appellants contented that art 3(1) of the United Nations Convention on the Rights of the Child (UNCRC) should be treated as forming part of the proportionality assessment under art 14 of the ECHR, read with the First Protocol and that the decision to make the Regulations was vitiated by an error of law as to the interpretation of art 3(1) of the UNCRC. In dismissing the appeal, Lord Reed writing the majority judgment said that '[i]t is firmly established that United Kingdom courts have no jurisdiction to interpret or apply unincorporated international treaties.'[27] Concurring, Lord Carnwrath said that: 'there has to be the necessary connection between the international law invoked and the Convention right under consideration'.[28] In his dissenting judgment, Lord Kerr went further and said that:

> If the rights enshrined in those treaties are not directly enforceable in domestic law it is, of course, open to domestic courts to refuse to allow such treaties to have any influence whatever on our conclusions as to the content of the right… But where the claimed right is directly relevant to the domestic issue to be decided, then recourse to the standards that the international instrument exemplifies is not only legitimate, it is required… This is not applying

[26] [2015] UKSC 16, [2015] 4 All ER 939
[27] Ibid at [90]
[28] Ibid at [142]

> an unincorporated international treaty directly to domestic law. It is merely allowing directly relevant standards to infuse our thinking about what the content of the domestic right should be.[29]

28. For the purposes of the Applicant's case, the argument can rest on the majority judgment in *SG*. In contrast to the UNCRC, as the GFA is a treaty incorporated in domestic law and has 'the necessary connection' with the domestic law it can, and *must*, be applied and interpreted with, in Lord Kerr's words, 'recourse to the standards that it exemplifies' as a treaty of self-determination.

(ii) The law on treaties

29. As seen above,[30] the GFA is an international treaty. The VCLT governs the formalities of the creation, entry into force and interpretation of international agreements and must be used to interpret the GFA. The customary doctrine of *pacta sunt servanda* has been codified by Article 26 of the VCLT **[NI-13]** which states: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. The International Court of Justice ('ICJ') has developed a rich jurisprudence on this doctrine across several cases in which it has had cause to determine the application of Article 26. In the case of *Gabcikovo v Nagymaros Project (Hungary v Slovakia)*[31] **[NI-48]** the Court explained the principle of good faith as it applies to international treaties:

> Article 26 combines two elements, which are of equal importance. It provides that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.

30. Not acting in good faith in international law includes the non-performance of a specific treaty term. It is submitted that a unilateral change in the arrangements contained within the GFA by the UK would constitute a breach its obligation to interpret the GFA in accordance with the doctrine of *pacta sunt servanda.*

[29] Ibid at [261]
[30] At paras 10 and 11 of this argument above.
[31] [1997] ICJ Rep 78

31. In addition to the obligation to interpret an international treaty in good faith, states are precluded from invoking the provisions of its internal law as a justification for its failure to comply with a treaty. Article 27 provides that: 'A Party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty. This rule is without prejudice to Article 46.' The ICJ and its predecessor, the Permanent Court of International Justice, have interpreted this provision in clear terms: 'A state cannot invoke the provisions of its internal law whether legislative, regulatory or administrative, to justify the non-performance of conventional obligations upon it'[32]. Article 31 VCLT **[NI-13]** provides:

> (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose….
> […] (3) There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

32. In respect of Art 31 it is submitted that the level of co-operation as between the UK and the Republic of Ireland through the EU from the date of the effective date of the GFA is such that it is now state practice which comes under the definition of Art 31(3) VCLT.

(iii) Conclusion on the UK's obligations on the law on treaties

33. As an incorporated treaty with constitutional status within the UK, the GFA can and must be interpreted and applied at a domestic law level using international law standards and instruments. Therefore, the UK could not unilaterally abrogate any of the express or implied terms of the GFA (including the implied term of the parties' mutual continuing membership of the EU) by invoking provisions passed by the prerogative or by parliament which the UK says was done so to reflect the outcome of an advisory referendum on EU membership. To do so would be a breach of doctrine of *pacta sunt servanda* as codified by Art 26 VCLT, a breach of Art 27 VCLT and a breach of Art 31.

[32] *Greco-Bulgarian Communities*, PCIJ, Ser B, No 17 [1930]

(c) The text of 'Constitutional Issues' viewed through international law

(i) Introduction

34. As it has been established that the GFA can and must be interpreted and applied using international law standards and instruments, it is now proposed to take each relevant word and phrase of the 'Constitutional Issues' and analysis them through the lens of international law standards.

(ii) 'Self-determination'

35. As an instrument for self-determination, it is perhaps most convenient to start with the phrase 'self-determination' which appears twice at 1(ii) and 1(iv). The concept of self-determination is grounded as a right both in customary international law and codified in international treaties which the United Kingdom has entered by way of signature and/or ratification. These include, *inter alia,* the International Covenant on Civil and Political Rights[33] ('ICCPR') **[NI-12]**, the International Covenant on Economic Social and Cultural Rights ('ICESCR') **[NI-11]** and the Charter of the United Nations. It is also widely accepted that the right to self-determination exists as an *erga omnes* right within international law.[34] In its first article, the ICCPR expressly recognises the right to self-determination: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[35] The law on self-determination has evolved since its important articulation in the League of Nations (one of the few rights recognised selectively in that post war settlement) through World War 2, post-colonialism, the UN Charter and resolutions[36], human rights treaties, international humanitarian law, soft law and national interpretation.

36. Art 1 ICCPR therefore gives a much wider definition to the concept of self-determination than just the relevant people's 'political status'. It also recognises the right of that people to 'freely pursue their economic, social and cultural development.' This is important in the context of the present case as it brings any reading of s1 NIA, and indeed the GFA, yet further away from

[33] Common Article 1 International Covenant on Civil and Political Rights (1966)
[34] See *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90 at 102 and *Advisory Opinion on the Construction of a Wall* [2004] ICJ Rep 136 at 87-88 **[NI-50]**
[35] Ibid, Common Article 1
[36] See for example Declaration on the Granting of Independence to Colonial Countries and Peoples General Assembly Resolution 1514 (XV); General Assembly Resolution defining the three options for self-determination; General Assembly Resolution 1541 (XV); General Assembly Resolution establishing the Special Committee on Decolonization; and General Assembly Resolution 1654 (XVI)

the narrow construction that the people of Northern Ireland have the right to self-determination only on the binary choice of the 'political status' or territorial control of Northern Ireland as either being part of a united Ireland or remaining part of the UK. Art 1 ICCPR thereby also protects the right of the people of Northern Ireland from any impediment on their 'economic, social and cultural development', whether that be development as part of the UK, or development towards a united Ireland as envisaged by the GFA. It is submitted that the removal of Northern Ireland from the EU would be an impediment to the right of development of its people's 'economic, social and cultural development', more particularly towards a united Ireland as guaranteed by the GFA. For example, a hard border or a customs tariff as between the Republic of Ireland and Northern Ireland would be such an impediment. Continued mutual membership of the EU makes any future united Ireland - or a re-United Kingdom thereafter - much easier than if Northern Ireland was outside the EU In line with the requirement for 'development' towards the people of Northern Ireland right to opt for a united Ireland. Taking Northern Ireland outside the EU against the will of its people would not only be an impediment to that 'development' towards a united Ireland, should that be the wish, it could put it permanently beyond their reach. It is not hard to imagine that such a situation would put the entire Peace Process at risk.

37. In the *Quebec Succession Reference*[37] **[NI-53]** (which is looked at in more detail below), the Canadian Supreme Court noted that the 'principle of self-determination 'has acquired a status beyond 'convention' and is considered a general principle of international law.'[38] As such, the court went on to hold that 'international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.'[39] It is submitted that the right to self-determination under the GFA is 'within the framework of the existing sovereign states' given the direct incorporation of the GFA by the UK and the Republic of Ireland. The unique acknowledgement within the GFA to the right of self-determination of the people of Northern Ireland is given with the express consent of the UK and the Republic of Ireland and thus displaces the requirement that self-determination must take place within 'the territorial integrity' of the state to which Northern Ireland is part of at any given point in time. In fact, Professor Bogdanor sees that arising from the UK's devolution settlements there is a stand-

[37] [1998] 2 SCR 217
[38] Ibid at [434] –[435]
[39] Ibid at [122]

alone right of self-determination within the UK constitution for each of the nations to secede at any time, "a right denied in many federal constitutions".[40] **[NI-59]**

(iii) 'The people'

38. The word 'people' appears 11 times in the text of 'Constitutional Issues'. It appears either in the context of 'the people of Northern Ireland' or 'the people of the island of Ireland'. As the 'people of Northern/island of Ireland' are expressly referred to in the GFA and s 1 NIA, and with the definition 'people of Northern/island of Ireland' perhaps being understood by reference to the constituency who voted in the referendums to accept the GFA, it is perhaps unnecessary to seek further definition for purposes of the GFA and/or s 1 NIA. However, the word 'people' has specific definition in international law and is worthy of examination.

39. For the purposes of international law, the definition of a 'people' has been consistently approached in the context of the right to self-determination and identity. The most authoritative definition is offered by Ian Brownlie who states that:

> …[T]here has been continuing doubt over the definition of what is a 'people' for the purpose of applying the principle of self-determination. Nonetheless, the principle appears to have a core of reasonable certainty. This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives. The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate. The physical indicia of race and nationality may evidence the cultural distinctiveness of a group but they certainly do not inevitably condition it. Indeed, if the purely ethnic criteria are applied exclusively many long existing national identities would be negated on academic grounds as, for example, the United States.[41] **[NI-60]**

40. Further to the definition advanced by Brownlie, it is clear that the definition of 'people' in international law denotes a social entity that is in possession of a clear identity and characteristic, implies a relationship with a territory and a commonality of interests usually

[40] Bogdanor, V, *The New British Constitution*, Chapter 4 'Devolution', (Hart Publishing 2009) 116. This stand-alone right is examined further below under the federal nature of the UK constitution.
[41] Brownlie, *The Rights of Peoples in Modern International Law,* 9 BULL. AUSTL. Soc'y LEGAL PHIL. (1985) pp 107-108

manifested in a shared socio-political aspiration. It must also be noted that the definition of a people is not to be constructed so narrowly so as to be confused with ethnic, linguistic, religious or other minorities whose rights are protected separately in Article 27 of the ICCPR.

41. The definition of a people for the purposes of self-determination was explored by the International Court of Justice *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[42] **[NI-50]**. In concluding that the construction of a wall which would sever territorial rights acquired by the Palestinian people, the Court held that despite the lack of international consensus on Palestinian statehood, the construction of a wall would interfere with the Palestinian people's right to self-determination. The Court re-emphasised the position of self-determination in international law and the attendant obligation on every state to adhere to the *erga omnes* character of the right as expressed under the terms of UN General Assembly Resolution 2625 **[NI-97]**:

> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle.[43]

42. Due to the land border between Northern Ireland and the Republic of Ireland and the huge trade, family and social activity across,[44] **[APP 207-796]** it is submitted that the fettering of the right to change the 'political status' of Northern Ireland and its 'economic, social and cultural development' which will come about if Northern Ireland were to be outside the EU would be an impediment and an impermissible situation in the same way that the building of a wall was an interference with the right of self-determination recognised by the ICJ in *The Construction of a Wall.*

(iv) 'Impediment'

43. At 1(ii) of 'Constitutional Issues', the parties agree that the people of the island of Ireland can exercise their right of self-determination 'without external impediment'. The word 'impediment' or 'interference' has meaning in international law. In *The Construction of a Wall* case, the ICJ further stated that all states respecting the principles of the UN Charter and

[42] [2004] ICJ Rep 136
[43] http://www.un-documents.net/a25r2625.htm
[44] See De Mars and ors, *Policy Paper: Brexit, Northern Ireland and Ireland*, A Constitutional Conundrums Paper (Durham University & Newcastle University, June 2016) **[NI-94]**

international law ought to see to it that the construction of the wall be brought to an end as it 'severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.'[45]

44. The U.N. General Assembly's *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*[46] **[NI-97]** states:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter. [emphasis supplied]

45. The right to self-determination without external impediment is also recognised in other international legal documents, for example, the *Final Act of the Conference on Security and Co-operation in Europe.*[47] The UK has itself emphasised the importance of the concept of self-determination in relation to its own overseas protectorates in a Ministry of Defence policy document on the Falkland Islands[48]. The document deplores the Argentinian state for trying 'to coerce the Falkland Islanders into becoming part of Argentina'. The UK thereby accepts the right of self-determination without external 'coercion' or impediment as it applies to its own overseas territories in accordance with principles of international law.

46. It is clear from the foregoing that any impediment or interference to the right of a people to self-determination would be a breach of international law. Where the GFA expressly defines a people as the 'people of Northern Ireland/island of Ireland' and gives them a standing right to self-determination free from 'external impediment', and where the GFA is binding and

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[45] [2004] ICJ Rep 136 at [122], 184 **[NI-50]**

[46] GA Res. 2625 (XXV), 24 October 1970 (*Declaration on Friendly Relations*)

[47] 14 I.L.M. 1292 (1975) (Helsinki Final Act), states (in Part VIII):

> 'The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States. By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. [Emphasis added.]'

[48] https://www.gov.uk/government/publications/2010-to-2015-government-policy-falkland-islanders-right-to-self-determination/2010-to-2015-government-policy-falkland-islanders-right-to-self-determination#actions

justiciable in domestic law, then there can be no doubt as to this proposition being applicable in the Applicant's case.

(v) 'Civil, political, social and cultural rights'

47. 1(v) of 'Constitutional Issues' provides that the state to which Northern Ireland is part of – the UK presently, or the Republic of Ireland in the future – shall accept the choice of the people of Northern Ireland and 'be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights'. This wording reflects that of Art 1 ICCPR which is within a category of international instruments through which the GFA can be applied and interpreted. Like Art 1, 1(v) of 'Constitutional Issues' gives a much wider definition to the concept of self-determination than just that people's 'political status'; it also allows that people to 'freely pursue their economic, social and cultural development.' It is submitted that if such rights are not being pursued 'freely' as would be the case upon the withdrawal of Northern Ireland from the EU, then they are being impeded in breach of Art 1 ICCPR. A paper entitled 'Brexit, Northern Ireland and Ireland'[49] sets out in great detail the likely negative impact on travel, nationality and the economy of the withdrawal of Northern Ireland from the EU. The Court's attention is drawn to this document and its contents are adopted for the purposes of this argument. It concludes that "Whereas the European Project drew Ireland and the UK closer together, Brexit would impose new strains on the relationship."[50]

(vi) 'Consent'

48. The word 'consent appears three times at 1(ii) and 1(iii) of 'Constitutional Issues'. A paper by Prof Diarmaid Ferriter on the importance of 'consent' within modern Irish history has been specially commissioned by the Applicant to address this issue in a fuller way **[NI-95]**. It carefully sets out the importance of the concept of consent in Ireland from 1914 to the present day. Its contents are adopted for the purposes of this part of the argument. It was not possible to have it produced for the High Court in Belfast but has been shared with the Respondents and an application is hereby made to have it placed before the Supreme Court for consideration. Prof Ferriter notes that when recently asked if Brexit was a breach of the Good Friday Agreement, Senator George Mitchell, who managed the Good Friday Agreement negotiations, said that: 'the agreement plainly provides that the political status of Northern Ireland can be determined or changed only through a vote - and it's the informed consent

[49] De Mars and ors*, Policy Paper: Brexit, Northern Ireland and Ireland*, A Constitutional Conundrums Paper (Durham University & Newcastle University, June 2016) **[NI-94]**
[50] Ibid, 25

through a vote - of the people of Northern Ireland.'[51] Prof concludes that: 'Abandonment of recognition of partnership mixed with self-determination about status and citizenship in Northern Ireland –so tortuously achieved over decades- has very serious implications.'[52] **[NI-95]**

(d) Conclusions on 'Constitutional Issues'

49. Taken together, s 1 NIA and the GFA are powerful statements which provide for the constitutional right of self-determination requiring interpretation by international law standards. A number of points can be made about the application of this position to the present case.

50. *Firstly*, the GFA settlement on the constitutional status of Northern Ireland means that the Respondents must recognise 'the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status'.[53] It may be argued that this 'choice' is a binary one between being part of the UK or Ireland given the contents of s 1 NIA. However, the necessary 'generous and purposive' reading down of this constitutional provision with the GFA means that it should be given a wide interpretation. When viewed this way, other areas not expressly provided for in the GFA come into focus. For example, neither the GFA nor s 1 NIA provides for the parties to have full joint sovereignty over Northern Ireland. But this would be a change in the status of Northern Ireland and would surely be a breach of the GFA and would impede s 1 NIA. Other than joint sovereignty, withdrawal from the EU is the only other event that could be reasonably categorised as being so fundamental as to amount to a change in the constitutional status of Northern Ireland.

51. *Secondly*, the Respondents must 'recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment.'[54] Withdrawal of Northern Ireland from the EU would represent an 'external impediment' would mean that if the majority of the people of Northern Ireland wished to have a united Ireland at some point in the future, Northern Ireland would be required to accede to the EU as a new member and go through the accession process as such before being able to be re-united with

[51] In an interview on *The World This Weekend*, BBC Radio 4, 30 October 2016. The full transcript of this interview is within the authorities bundle at #96. **[NI-96]**
[52] Paper commissioned by the Applicant from Professor Diarmaid Ferriter, Professor of Modern Irish History, University College, Dublin dated November 2016, 22.
[53] GFA 'Constitutional Issues' at 1(i) **[NI-14]**
[54] Ibid at 1(ii)

the rest of Ireland. This would take many years and requires the unanimous consent of existing EU members. As the recent Canadian free-trade agreement demonstrates, their consent could not be guaranteed and there would be huge, potential violent instability in the interregnum. The most relevant analogous example emerges from discussions surrounding the potential loss of EU membership upon the withdrawal of Scotland from the UK. At the time, the then president of the European Commission, Jose Manuel Barroso, told a number of media outlets that withdrawal from the United Kingdom, would require Scotland to re-apply for membership to the EU. He is reported as having stated that it would be 'extremely difficult, if not impossible' for an independent Scotland to obtain the necessary approval to re-join the EU.[55] On 25 November 2016, the Taoiseach, Enda Kenny, is reported by *The Irish Times* to have said that Northern Ireland should not have to wait 20 years to re-enter the EU as Scotland would likely have to,[56] clearly contemplating a 20 year wait for unification should the people of the Island of Ireland so choose unification. Therefore, there is a real risk that by the Respondents taking Northern Ireland out of the EU would be setting to naught the agreement on Northern Ireland 'Constitutional Issues' under the GFA, or at the very least be a serious impediment. This would put the Respondents in breach of its 'binding obligation' to give effect to a united Ireland should there be such consent and that of 'parity of esteem and…equal treatment for the identity, ethos, and aspirations of both communities.'[57]

52. *Thirdly*, and most importantly, the UK agreed 'that it would be wrong to make <u>any change</u> in the status of Northern Ireland save with the consent of a majority of its people' [emphasis supplied]. The use of the word 'wrong' suggests that such a change without the consent of the people of Northern Ireland must be assessed against a higher source of law rather than a positivist construction of s 1 NIA. It is submitted that this source is Lord Hoffman's 'constitutional environment' or international laws and norms brought about by the binding nature of the GFA. The status of Northern Ireland, in domestic constitutional and international terms, would be profoundly and permanently changed if Northern Ireland was to withdraw from the EU. There is no consent of the majority of the people of Northern Ireland to so change. Therefore, it would be a breach of the GFA and/or s 1 NIA in this regard within the context of the domestic constitution or international law and norms.

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[55] http://www.independent.co.uk/news/uk/politics/scottish-independence-eu-bid-extremely-difficult-says-jose-manuel-barroso-9131925.html and http://www.bbc.com/news/uk-scotland-scotland-politics-26215963 and http://www.scotsman.com/news/politics/impossible-for-scotland-to-join-eu-says-barroso-1-3308359

[56] http://www.irishtimes.com/news/politics/kenny-says-brexit-could-bring-about-united-ireland-1.2881284 <accessed on 25 November 2016>

[57] GFA 'Constitutional Issues' at 1(iv) and (v) **[NI-14]**

53. *Fourthly*, the GFA 'recognises the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British.'[58] The Applicant has set out in his affidavit that he identifies as a British and European citizen and wishes to retain both citizenships. If Northern Ireland left the EU, in order to remain as an EU citizen, the Applicant would be required to claim Irish citizenship first. He genuinely feels that this would undermine his identity as a British citizen. Therefore, the 'future change in the status of Northern Ireland' brought about by the withdrawal from the EU would put the Respondents in breach of their commitment to the Applicant's right to hold British citizenship, and breach of his right to have 'parity of esteem and just and equal treatment of his identity, ethos, and aspirations'. However, another problem arises. Even if he did claim Irish citizenship for the sole purpose of retaining his EU citizenship, as an Irish/EU citizen resident in Northern Ireland he would not be able to exercise his rights to the same extent as his fellow Irish citizens could. For example, he could not exercise his mandate in EU elections, he would lose EU consumer rights if purchasing something from the Republic of Ireland or another EU state and would be unable to rely upon the EU Charter of Fundamental Rights. In this context, there would be a breach 'parity of esteem and just and equal treatment of his identity, ethos, and aspirations' as guaranteed by the GFA.

54. *Fifthly*, the statutory provision of s 1 NIA provides to the people of Northern Ireland a unique standing-provision of great constitutional significance. The statutory provision of s 1 NIA replaced s 1(2) of the Ireland Act 1949 s 1(2). This older provision made the departure from the UK conditional upon the consent of the Parliament of Northern Ireland. It is submitted that s 1 NIA is but a facilitative statutory provision that is required to reflect the constitutional status of Northern Ireland for as long it remains part of the UK. Should the people of Northern Ireland choose to become part of a united Ireland, it would have to be repealed and amended to reflect the new constitutional status. In other words, the NIA is a conduit for the GFA. This is further support for the view that the NIA and its provisions are subservient to the GFA.

55. *Sixthly*, as noted in Prof Ferriter's paper, mutual membership of the EU has allowed an opportunity to allow for invaluable, informal meetings at times of crisis in the Peace Process.[59] He also sets out how the internationalisation of the Peace Process is regarded as very

[58] Ibid at 1(vi)
[59] N 52 , 17-20 **[NI-95]**

important by many observers and the role that peace-monies have played in stabilisation.[60] All point to a fragile peace that cannot be taken for granted. Those parts of Prof Ferriter's paper are adopted by the Applicant for the purposes of this argument.

56. *Finally*, the GFA provides 'the people of Northern Ireland', not the Northern Ireland Assembly, with the perpetual right through a binding poll to determine the constitutional status of Northern Ireland at any point since the GFA was made effective in 1999. As Campbell, Ní Aoláin and Harvey observe: 'No longer is territorial cession about the transfer of sovereignty by means of an agreement between ceding and acquiring state, but rather the ceding of the decisive power to citizenry itself, with the prior consent of the implicated states.'[61] **[NI-62]** Morrison views the issue of sovereignty in Northern Ireland thus:

> An analysis of Northern Ireland's on-going transition provides an excellent illustration of how sovereignty is in fact displaced, as the constitution there is better explained in terms of the creation of a whole series of governable spaces where the project of governance is less dependent on the formal State and the engine of sovereign law-making than a much wider, bottom-up exercise of power.'[62] **[NI-73]**

Mitchell says of the 1973 Northern Ireland border poll: "The border poll suggested that sovereignty rested with the people of Northern Ireland and not Parliament at Westminster."[63] **[NI-72]** These observations have deep constitutional implications for where sovereignty lies on issues of 'any change' to the constitutional status of Northern Ireland, citizenship and national identity. On these narrow, yet fundamental issues at least, it is 'the people of Northern Ireland' who are sovereign, not the UK executive, nor Parliament.

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[60] See for example: See e.g. http://www.politicalsettlements.org/about/how/themes/peace-processes/ This is a joint Ulster / Edinburgh DfiD supported research program addressing the fragility of peace agreements and the challenges to prevent the recurrent of violence; http://peacemaker.un.org ; and http://www.pcr.uu.se/research/ucdp/program_overview/current_projects/ucdp_peace_agreements_project/

[61] Campbell, C *and ors*, '*The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland*' (2003) 66 Modern Law Review 317, 329-30

[62] Morison, J '*A sort of farewell': Sovereignty, Transition, and Devolution in the UK*' in Leyland P, Rawlings R, Young AL (eds) Sovereignty and the Law Domestic, European and International Perspectives, (Oxford University Press 2013) pp 120-144, 133

[63] Mitchell, J *Devolution in the UK*, extracts from Chapter 8 'Northern Ireland since 1972', (Manchester University Press 2010) 181

VI.

NORTHERN IRELAND AS A CONSTITUENT PART OF THE UK

(a) Introduction

57. The GFA and NIA are not just the out-workings of a peace-process. They provide for and regulate the position of Northern Ireland within the wider UK constitutional order for as long as the people of Northern Ireland consent to remain part of the UK. It is now necessary to analyse Northern Ireland as a constituent part of the UK.

(b) Parliamentary sovereignty limited

(i) Introduction

58. It has long been assumed that parliamentary sovereignty was simply that the UK Parliament had 'the right to make or unmake any law whatever' and that 'no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[64] This century-old Diceyan view of parliamentary sovereignty is, however, now very questionable in light of the UK devolution settlements, the ECHR, *Factortame* and the constitutional status of the GFA and NIA. Indeed, over a decade ago, Lord Steyn observed in *R (Jackson) and Ors v HM Attorney General* **[Miller-59]**:

> The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom…In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.[65]

And later in that decision, Lord Hope said that:

> The rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based. The fact that your Lordships have been willing to hear this appeal and give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliamentary sovereignty.[66]

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[64] A.V. Dicey, *The Law of the Constitution*, ed ECS Wade (10th ed, 1959), 40-41 as cited in Mark Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective' in Jowell, Oliver and O'Cinneide (eds), *The Changing Constitution* (OUP 2015) 39 **[NI-65]**

[65] [2005] EWCA Civ 126, [2005] QB 579, at [102]

[66] Ibid at [107]

59. In the more recent case of *AXA General Insurance Ltd and others v HM Advocate and others*[67] **[Miller-31]**, Lord Hope revisited the issue and left open the question of whether the supremacy of the UK Parliament is absolute or may be subject to limitation in exceptional circumstances:

> [50] The question whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances is still under discussion […]
>
> [51] We do not need, in this case, to resolve the question how these conflicting views about the relationship between the rule of law and the sovereignty of the United Kingdom Parliament may be reconciled. The fact that we are dealing here with a legislature that is not sovereign relieves us of that responsibility. It also makes our task that much easier. In our case the rule of law does not have to compete with the principle of sovereignty. As I said in Jackson, para 107, the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. I would take that to be, for the purposes of this case, the guiding principle. Can it be said, then, that Lord Steyn's endorsement of Lord Hailsham's warning about the dominance over Parliament of a government elected with a large majority has no bearing because such a thing could never happen in the devolved legislatures? I am not prepared to make that assumption. We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.[68]

(ii) A federal state and a constitutional court?

60. Prof Bogdanor firstly describes the UK as a 'quasi-federal state' with a constitution that is 'quasi-federal in nature'.[69] He then goes on to state that:

> There is a sense, however, in which the 'devolution points even beyond a quasi-federal system of government. The legislation providing for devolution to Scotland, Wales and

[67] [2011] UKSC 46
[68] Ibid [50]-[51]
[69] Bogdanor, V, *The New British Constitution*, Chapter 4 'Devolution', (Hart Publishing 2009) 116 **[NI-59]**

> Northern Ireland, establishes a new constitutional settlement amongst the nations comprising the United Kingdom. The United Kingdom is, as a result of devolution, in the process of becoming a new union of nations, each with its own identity and institutions—a multi-national state rather than, as the English have traditionally seen it, a homogeneous British nation containing a variety of people. It seems to have become implicitly accepted, in consequence, that the various nations comprising the United Kingdom enjoy the right of self-determination, and that this includes the right of secession, a right denied in many federal constitutions. The United States in the nineteenth century fought a civil war to confirm the proposition that the states comprising it were part of an indissoluble union.[70] **[NI-59]**

61. Indeed, the *con*federal nature of the UK constitution arising from the GFA's creation of the British-Irish Council is noted by O'Leary[71] and Prof Bogdanor.[72] In 2012, Lady Hale in an extra-judicial speech said: 'The United Kingdom has indeed become a federal state with a Constitution regulating the relationships between the federal centre and the component parts.'**[NI-88]**[73] It is respectfully submitted that Lady Hale is correct in this analysis. This very case demonstrates that the Supreme Court has now become an arbitrator between competing regions and layers of government within the UK. The Supreme Court has become a constitutional court. That being so, it is submitted that this is supportive of the proposition that the UK Parliament is no longer sovereign in the Dicyean orthodoxy sense.

(iii) Legality vs constitutionality

62. The legislature set up by the NIA in Northern Ireland could, in a strict legal sense, be abolished by the UK Parliament passing legislation to so do. However, in constitutional terms, it is submitted that it cannot. As is noted by Professor Mark Elliott:

> …it becomes clear that the devolution schemes both acknowledge and conjure into life a constitutional principle – that of devolved autonomy – whose fundamentality is increasingly difficult to dispute. This demands, among other things, that the authority of devolved institutions be respected, and implies the general impropriety of UK legislation impinging upon self-government within the devolved nations.[74] **[NI-65]**

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[70] Ibid

[71] O'Leary, B '*The Nature of the Agreement*' (1998) 22 Fordham International Law Journal 1628; O'Leary, B '*The Character of the 1998 Agreement: Results and Prospects*' in Rick Wilford (ed), *Aspects of the Belfast Agreement* (Oxford University Press 2001) 49 **[NI-74]**

[72] N69, 118. **[NI-59]**

[73] Lady Hale at the Legal Wales 2012 conference on 12 October 2012 available at https://www.supremecourt.uk/docs/speech-121012.pdf

[74] Mark Elliott, ' The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective' in Jowell, Oliver and O'Cinneide (eds), *The Changing Constitution* (OUP 2015) 42-43. **[NI-65]**

63. This respect for the legitimacy of the devolved institutions in Northern Ireland was expressly recognised by the House of Lords in *Robinson*[75] and in *McComb.*[76] A purposive approach to the devolution acts with their 'generous settlement of legislative authority' was also recognised in *Imperial Tobacco Ltd v Lord Advocate.*[77]**[Miller-41]** It is submitted that while the legal authority of the devolved institutions set up under the NIA may not have authority over UK Parliamentary authority in a strict legal sense, they do have a constitutional status that allows for the constitutionality of acts of Parliament to be justiciable in rare circumstances. Prof Elliott puts it thus: 'The devolved competences set out in the devolution legislation can thus properly be regarded as benchmarks by reference to which the constitutionality – as distinct from the legal validity – of UK legislation may be assessed.'[78]

(iv) Justiciable and unconstitutional Acts of Parliament

64. So while an act of Parliament may be lawful, it may not be constitutional. *Blackburn v Attorney General*[79]**[Miller-11]** concerned a challenge by the applicant against the Attorney General seeking declarations to the effect that on entry into the Common Market, signature of the Treaty of Rome by Her Majesty's government would be in breach of the law because the government would thereby be surrendering in part the sovereignty of the Crown in Parliament for ever. Lord Denning MR said:

> Freedom once given cannot be taken away. Legal theory must give way to practical politics. It is as well to remember the remark of Lord Sankey LC in British Coal Corpn v Regem ([1935] AC 500 at 520, [1935] All ER Rep 139 at 146):
>
> > '… the Imperial Parliament could, as a matter of abstract law, repeal or disregard s 4 of the Statute [of Westminster]. But that is theory and has no relation to realities.'
>
> What are the realities here? If Her Majesty's Ministers sign this treaty and Parliament enacts provisions to implement it, I do not envisage that Parliament would afterwards go back on it and try to withdraw from it. But, if Parliament should do so, then I say we will consider that event when it happens. We will then say whether Parliament can lawfully do it or not.

[75] N9 above
[76] N12 above at 44.
[77] [2012] UKSC 61, [2013] SLT 2, [12]-[15], per Lord Hope.
[78] N74 above **[NI-65]**
[79] [1971] 2 All ER 1380 at 1382-83

65. *Blackburn* concerned the role of Parliament entering of the UK into the Common Market. The instant case concerns the role of Parliament upon potential exit. Even 45 years ago Lord Denning envisaged that the curtailing of freedoms (read fundamental rights in a modern sense) brought about by the withdrawal from the EU's predecessor (the Common Market) by way of an act of Parliament would be justiciable by the courts.

66. It is submitted that an act of Parliament may be legal in a strict sense, it could be illegitimate or unlawful by reason of it being incompatible with the constitution. This idea was dealt with by the Canadian Supreme Court case of *Re Resolution to amend the Constitution (sub nom Patriation Reference).*[80]**[NI-55]** That case involved a policy that the Canadian federal government sought to press ahead with in the face of opposition from the majority of the Canadian provinces. The Court held that although there was nothing illegal about the government's intended policy, its conduct conflicted with the constitutional principle of federalism and another constitutional practise/convention and would thereby be 'unconstitutional'.[81]

(v) Conclusion on the state of parliamentary sovereignty

67. On the issue of the limit that devolution places on the orthodox theory of parliamentary sovereignty, Prof Elliott concludes that:

> Accepted on its own terms, the doctrine [of devolution] concedes unfettered legal authority to the UK Parliament: but that concession does not imply an absence of constitutional standards that may operate both as benchmarks of constitutionality and as powerful interpretative constructs.[82]**[NI-65]**

68. In his speech in *Jackson*[83], Lord Steyn spoke of a 'divided sovereignty' arising from the Scotland Act 1998 as an example of how the orthodox 'pure and absolute' notion of parliamentary sovereignty was now outmoded. As seen above, he went on to say that the House of Lords could consider refusing to apply legislation that was at odds with a 'constitutional fundamental'[84] and that 'it is not unthinkable that circumstances could arise where the courts

[80] [1981] 1 SCR 753
[81] Ibid at 909 and 910.
[82] N74 at 60
[83] N65 above at 102 **[Miller-59]**
[84] Ibid

may have to qualify a principle established on a different hypothesis of constitutionalism.'[85] Professor Bogdanor suggests that in fact:

> Westminster is no longer a Parliament for the domestic and no domestic affairs of the whole of the United Kingdom. It has been transformed in a parliament for England, a federal parliament for Scotland and Northern lreland and a parliament for primary legislation for Wales. Westminster has become, might be suggested, a quasi-federal parliament.[86] **[NI-59]**

69. In the final analysis, Elliott answers the question 'is Parliament sovereign' in this way:

> The reality of the contemporary UK constitution is that Parliament's legislative authority falls to be exercised against the backdrop of a normatively rich constitutional order and in the light of the restraining influences of multi-layered and common law constitutionalism.[87] **[NI-65]**

(c) The constitutional compact

(i) Northern Ireland's unique place

70. The Applicant argues that the invocation of Art 50 at all, either by Prerogative or by an act of the UK Parliament, would be unconstitutional as to do so would breach the historic constitutional compact between Northern Ireland and the other constituent countries of the United Kingdom and undermine the unique position of Northern Ireland within it as guaranteed by s 1 NIA and the GFA.

(ii) The Canadian cases

71. Again, in support of this position, instruction can be taken from Canadian cases decided by the Supreme Court of Canada. Although it is accepted that Canada does have a written constitution, a vein of cases run where the Canadian Supreme Court was required to fill lacunae in the Canadian written constitution and the Court was therefore called upon to discern those parts of the Canadian Constitution that are unwritten or uncodified. So, from

[85] Ibid
[86] N69 above at 114
[87] N74 above at 65.

this view, they are of assistance. Four cases are of relevance: *Patriation Reference*[88]*; Quebec Succession Reference*[89]*; Senate Reform Reference*[90]*; Supreme Court Act Reference*[91].

72. *Patriation Reference* **[NI-51]** - As noted above, this case concerned a constitutional convention. The Court found that while there was no legal impediment to federal unilateral action, this would have been unconstitutional without the consent of a substantial majority of provinces.

73. *Quebec Succession Reference* **[NI-53]** - In 1998 the Court had to grapple with Quebec's intended secession from Canada. It concluded that for Quebec to secede would require a formal amendment of the Canadian Constitution. As there was no constitutional convention for the situation that arose, the Court employed a principle-based approach to interpreting the unwritten elements of the constitution:

> The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession.
>
> The Court in this Reference is required to consider whether Quebec has a right to unilateral secession. Arguments in support of the existence of such a right were primarily based on the principle of democracy. Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values. Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province 'under the Constitution' could not be achieved unilaterally, that is,

[88] N80 above
[89] [1998] 2 SCR 217
[90] [2014] 1 SCR 704
[91] [2014] 1 SCR 433

> without principled negotiation with other participants in Confederation within the existing constitutional framework.[92]

74. The Court went on to hold that secession could not happen unilaterally and that any secession would require a constitutional amendment because it would 'alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements'.[93] Constitutional change of such a profound nature to the constitution requires the use of the 'unanimous formula' under art 41 of the Canadian Constitution. This requires the unanimous agreement of all provincial governments and federal government before change could be made.[94] The Court was having to deal with the outcome of a referendum, the result of which put the constituent parts of Canada at odds. The Court's analysis in this regard is therefore of great assistance in the instant case:

> The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities 'trumps' the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.[95]

75. *Senate Reform Reference* **[NI-56]** - Here the Court focused on the Canadian constitution's 'architecture' or 'basic structure.' Finding that the Canadian Senate was an integral part of that architecture, the Senate could not be abolished by an act of Parliament, even if to do so was legal in a strict sense. Rather, it could only be done by a constitutional amendment. The Court further rejected the argument that because the constitution was silent on the role of the provinces when it came to amending the constitution, that the constitution could be

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[92] N89 at 220

[93] Ibid at 263, [84]

[94] 'Amendment by unanimous consent

> 41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:
> (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
> (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
> (c) subject to section 43, the use of the English or the French language;
> (d) the composition of the Supreme Court of Canada; and
> (e) an amendment to this Part.'
> Available at: http://www.canlii.org/en/ca/const/const1982.html#sec41

[95] N89 above at 268, [93]

amended without their consent under the general amending procedure. Rather, in a process analogous to reading down legislation under the Human Rights Act, or the purposive approach adopted by the House of Lords in *Robinson*, it read into the constitution that the Senate could only be abolished with the consent of all provinces.[96]

76. *Supreme Court Reference* **[NI-57]** – In this case, the Court noted that the 'historic bargain' between the provinces and the federal government in the creation of the Canadian Supreme Court itself.[97] The Court expressly stated that the relevant statutory provision reflected 'the historical compromise that led to the creation of the Supreme Court' and that for this reason, '[a] purposive interpretation of [the relevant statutory provision] must be informed by and not undermine that compromise.'[98]

77. In each of these cases, the Canadian Supreme Court looked beyond the actual written text of the constitution and instead gave purposive effect to conventions or statutory provisions in light of underlying principles, basic architecture, historic bargains and political relations of and surrounding the creation of the constitution. It was also clear, particularly in the *Quebec Secession Reference*, that unanimous support among the provinces would be required before profound constitutional changes could take place. As was importantly recognised by the Court in the *Quebec Secession Reference* 'equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion'[99] and that:

> [t]he consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the 'sovereign will' is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in

[96] N90 above at 752, [96] and [97]
[97] N91 at 447, [20] and 456, [48].
[98] Ibid at 456, [48]
[99] N89 at 255, [66]

> our constitutional structure. It would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values.[100] **[NI-53]**

(d) Conclusions on Northern Ireland's constitutional position within the UK

78. Taking into account the purposive reasoning, constitutional principles and acknowledgment of historic compacts between the constituent parts of Canada, it is submitted that the fundamental characteristics of the UK cannot be altered without the consent of the constituent units[101] and must be done in a way that is consistent with and gives purpose to the constitutional documents of the GFA and NIA. Withdrawal from the EU would abrogate many provisions of the NIA, undermine the right to self-determination as guaranteed by the GFA and cause significant, negative alteration in relations with the Republic of Ireland. This situation would cause a profound change to the basic elements of the 'bargain' between not only Northern Ireland and the rest of the constituent parts of the United Kingdom, but also the relationship with the Republic of Ireland. While the majority of the United Kingdom as a whole voted to leave the European Union, the majority of the people of Northern Ireland voted in favour of both the GFA (which gave rise to the NIA) and also voted to remain in the European Union. It is submitted that the UK constitution requires that these legitimate majorities be reconciled by negotiation, not by one majority trumping the other. As argued above, mutual membership of the EU was an express and/or implied basic term of the GFA and of the consequential devolution settlement between Northern Ireland and the other countries of the UK. The constitution must be interpreted in a way that gives effect to the historic constitutional compact between Northern Ireland and the other constituent countries of the United Kingdom, the unique position of Northern Ireland within it and the GFA and the NIA, rather than one that would breach it. It is submitted therefore that neither the Respondents, by the Prerogative, nor the UK Parliament through an act can bring about such profound constitutional changes to the UK constitution without the consent of the people of Northern Ireland. This 'constitutional compact' analysis and argument is made in addition to the argument above that the people of Northern Ireland have a right to self-determination enshrined in a binding treaty which places them in a unique position within the UK constitution as being sovereign on any issue involving a change in the constitutional status of Northern Ireland.

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[100] Ibid at 256, [67]

[101] See S. Grammond, 'Canadian Constitutional Jurisprudence and the Brexit Process', U.K. Const. L. Blog (12th Jul 2016) (available at https://ukconstitutionallaw.org/)) **[NI-89]**

VII.

CONCLUSIONS

(a) GFA is not merely a political peace settlement

79. The GFA is more than the terms of a peace settlement. It sets out the constitutional basis upon which the people of Northern Ireland consent to be governed. It is a written constitutional document of the highest order which recognises and declares the principle of consent and the right to self-determination and that the rule of law in Northern Ireland is based upon the consent of the governed. It guarantees rights to be protected by either the UK or the Republic of Ireland independent of which state the people choose to be part of. As Morison puts it:

> This means that the Northern Ireland constitutional transition is not best seen - or certainly not only to be seen - as a political deal or one-off constitutional moment where a deal was brokered among elites to in some way 'solve' the Northern Ireland problem. Rather what we have is a complex and expensive structure addressing the three strands of the big Political Problem', namely the internal governance of Northern Ireland, the relationship between the Republic of Ireland and Northern Ireland, and the wider relationships among the islands in the British Isles, and one which enables politicians to put on hold the constitutional problem relating to the place of Northern Ireland within the United Kingdom.[102] **[NI-73]**

(b) GFA expressly premised upon continuing EU membership

80. The GFA expressly references and is necessarily impliedly premised upon the continuing membership of both states of the EU - "as partners in the European Union" - as is the Northern Ireland Act. As O'Leary observed in the year the GFA was passed by the people of Northern Ireland:

> Meanwhile we all know that the con/federal dimensions of the Agreement are not merely pan-Irish or pan-British. They will evolve within a European Union, which has its own strong confederal relationships, as well as many ambitious federalists. There will be no obvious organizational contradictions that will arise from this extra layer of con/federalizing, and they might help to transfer some of the heat from binary considerations of whether a given issue is controlled by London or Dublin.[103] **[NI-74]**

[102] N62 above at 133-134

[103] O'Leary, B '*The Nature of the Agreement*' (1999) 22 Fordham International Law Journal 1628, 1649

(c) Both states bound by GFA

81. Both states are joint-custodians of the GFA. Whichever state the people of Northern Ireland choose to be part of from time to time, that state is bound by the terms of the GFA. It would be unconstitutional for either state within its own constitution to legislate contrary to the terms of the GFA. S 1 NIA, for example, could not be repealed or amended without the consent of the people of Northern Ireland. Were the UK Parliament to attempt to do so, the Courts would be obliged to intervene. What has been given away cannot be taken back. Withdrawal from the EU would undermine the GFA upon which the entire multiple-decade Peace Process rests. Such warnings have been repeatedly made by the actors at the heart of the peace process, the majority of the political establishment and many commentators. **[APP 207-796]** In this context, withdrawal from the EU is a matter of significant and historical public importance for the Peace Process not only in Northern Ireland, but also the rest of the UK and Ireland.

(d) Status of Northern Ireland

82. The GFA expressly provides that 'it would be wrong to change the status of Northern Ireland without the consent of its people'. The people of Northern Ireland have expressly voted to be governed by a combination of law emanating from Westminster, the Northern Ireland Assembly, law arising from meetings of the North-South and East-West bodies, the ECHR and, most significantly for the purposes of the Applicant's case, EU law. The people of Northern Ireland do not consent to the removal of any one column of this legal structure. The supranational elements of scrutiny, harmonisation and control of the excesses of national self-interest arising from membership of the EU are of particular importance to the people of Northern Ireland because of recent conflict experience. The transfer of law-making power from EU institutions to Westminster is unacceptable to them. The removal of EU citizenship rights which serve to dilute the significance of Irish or British citizenship is unacceptable. A delicate balance has been struck. It cannot be defeated by short-sighted and short-term political disputes not of the people of Northern Ireland's making.

(e) Could the Republic of Ireland withdraw from the EU?

83. Upon a transfer of Northern Ireland to the Republic of Ireland, the rights and interests of unionists would be safeguarded by the terms of the GFA. If Ireland post-transfer were to withdraw from the EU, it would be a clear breach of the GFA. It would furthermore distance Northern Ireland from Great Britain and create impediments to free trade and movement. It

would impede the operation of an equivalent to s 1 NIA-type transfer back to the UK that would be required to be enacted by the Republic of Ireland upon transfer. If s 1 NIA is to ever be practicably operative, it must be on the basis of continuing EU membership of both states and on the basis that the terms of the GFA will be upheld by either state. If the UK chooses to ignore the constitutional terms and guarantees of the GFA, the GFA could not be relied upon by the people of Northern Ireland as affording any protection or rights from either state.

(f) Withdrawal would be unconstitutional

84. The devolution question posed by the Court of Appeal necessarily refers only to a devolution issue as defined by the NIA. *Robinson* expressly states that reference must be made to the GFA in interpreting the NIA. S 1 NIA operates firstly as a declaration in UK domestic law of the right to self-determination and the principle of consent on the issue of membership of the UK or the Republic of Ireland. The NIA does not incorporate into domestic law every provision of the GFA. It does not expressly reference any other change in constitutional status such as withdrawal from EU membership because such continuing membership was expressly and/or impliedly presumed to continue. Such a fundamental change in premise requires the consent of the people of Northern Ireland for governance to continue on a changed constitutional basis. Insofar as s 1 NIA is reads consistently with it, the GFA is a declaration in domestic law of the principle of consent and a mechanism for effecting major constitutional change. Its operation would be impeded by use of the Royal Prerogative to effect constitutional change or indeed by the use of a Westminster parliamentary vote or Act. At the very minimum, the terms of Northern Ireland's proposed new constitutional arrangement require to be set out and voted upon by its people. But as it presently stands, it is submitted that Art 50 cannot be invoked because the people of Northern Ireland have not consented as required by the constitution and thereby Art 50. In line with the Attorney General for Northern Ireland's submission that the constitution of Wales should be interpreted as broadly and purposively as any other country's constitution, if parliament chooses to invoke Art 50 against the will of the people of Northern Ireland it should be made clear by this Court that, in doing so, it would be acting unconstitutionally as would happen in many other jurisdictions (for example Canada).

(g) Legitimate expectation

85. Independently of or arising from the other bases for establishing that the GFA is binding, it is arguable that the terms of the document are a clear and unambiguous representation by the

United Kingdom to a distinct class of people namely the people of Northern Ireland. By voting for the GFA in a referendum, and thereby making constitutional and other concessions, they acted to their detriment. While *Wheeler* rejects that an election manifesto or other political promise prior to electing a government can give rise to a legitimate expectation, it does not limit the category of persons by number that can benefit from a representation. Furthermore, it does not deal with the unique circumstances in which the GFA was created. The GFA was always intended to be binding and to outlast any period or type of government.

(h) Answering the question posed

86. It is clear that the irrevocable invocation of Art 50, either by Prerogative or Parliament, is a fundamental change in the constitutional status of Northern Ireland. The GFA, read with s 1 NIA, means that the consent of the sovereign people of Northern Ireland (on this issue at least) is therefore required by the constitution. Such consent is not forthcoming. Therefore, to invoke Art 50 at all cannot be done at this time 'in accordance with the constitutional requirements' of the UK.

87. For these reasons, it is respectfully submitted that the answer to the question posed is: the triggering of Article 50 Treaty of European Union ('TEU') by the exercise of the prerogative power (or by an Act of Parliament) without the consent of the people of Northern Ireland is an impediment to the operation of section 1 of the Northern Ireland Act 1998.

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