IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Claim No. CO/3220/2017

IN THE MATER OF AN APPLICATION FOR PERMISSION
TO APPLY FOR JUDICIAL REVIEW

B E T W E E N :-

R on the application of

CIARAN McCLEAN

Claimant

- and -

(1) THE FIRST SECRETARY OF STATE
(2) HER MAJESTY'S ATTORNEY-GENERAL

Defendants

AMENDED DETAILED STATEMENT OF GROUNDS FOR JUDICIAL REVIEW

Introduction

1. On 26 June 2017, the Defendants, and the Prime Minister, on behalf of Her Majesty's Government ("HMG") decided ("the Decision") to enter into, and thereafter to continue to hold office and to govern under the terms of, a confidence and supply agreement with the Democratic Unionist Party of Northern Ireland ("the DUP") dated 26 June 2017 ("the DUP Agreement")[1]. The Defendants also decided, in the DUP Agreement and/or for the purposes of implementing the DUP Agreement, that ministers' public expenditure powers are to be used for purposes which are legally impermissible and so are improper purposes.

[1] Available at
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621794/Confidence_and_Supply_Agreement_between_the_Conservative_Party_and_the_DUP.pdf
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621797/UK_Govt_financial_support_for_Northern_Ireland.pdf

2. The Government Legal Department ("the GLD"), in its response dated 6 July 2017 to the Claimant's *Judicial Review Pre-Action Protocol* letters dated 22 June and 29 June 2017 ("the GLD Response"), identified the Defendants as being the appropriate defendants to this claim. The Claimant is content to proceed on this basis on the understanding that the Defendants represent the interests of the Government, including the Prime Minister in her capacity as Prime Minister and as Leader of the Conservative Party.

3. The Claimant seeks (1) a declaration that no minister of the Crown may authorise the expenditure of or expend any public funds in pursuance of the DUP Agreement or any variant thereof, (2) a prohibiting order to the foregoing effect, and (3) a declaration that the DUP Agreement is contrary to the terms of the *Bribery Act 2010* ("the 2010 Act").

4. The Claimant also seeks a declaration that the Decision is unlawful, and an order quashing the Decision, on the basis that the Decision is illegal as being contrary to the Belfast Agreement[2] which, in material part, provides that HMG shall exercise its power in Northern Ireland with "*rigorous impartiality*" on behalf of all the people of Northern Ireland[3] ("the impartiality obligation"). The impartiality obligation is enhanced by the requirement that it should be rigorous. This emphasises the qualitative nature of impartiality to be fulfilled.

5. As set out below, the impartiality obligation is a legal duty which HMG is required to fulfil, and/or the Claimant had, and has, a legitimate expectation that HMG will comply with the impartiality obligation. By reason of the Decision, HMG has failed to fulfil the requirements of the impartiality obligation and is therefore in breach of

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[2] *The Belfast Agreement: an agreement reached at the multi-party talks on Northern Ireland,* command paper Cm 3883, presented to parliament by the Secretary of State for Northern Ireland on 20 April 1998, *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland,* command paper Cm 4292, presented to parliament by the Secretary of State for Foreign and Commonwealth Affairs in March 1999, and *Treaty Series No. 50 (2000),* presented to parliament by the Secretary of State for Foreign and Commonwealth Affairs in May 2000 as Cm 4705.

[3] Para. 1(v) of the *Agreement reached in the multi-party negotiations* under the heading "Constitutional Issues", and Article 1(v) of the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland.*

the impartiality obligation. Further, when making the Decision, the Defendants/HMG had a conflict of interest and duty. For these reasons, the Decision is illegal and should be quashed.

~~5. The Claimant also contends that the DUP Agreement is contrary to the terms of the *Bribery Act 2010* ("the 2010 Act"), and so is illegal and unlawful on that ground too.~~

The Parties

6. The Claimant is a citizen of Northern Ireland. The Claimant has standing to bring this claim because, as a citizen of Northern Ireland, the Claimant is a direct beneficiary of the impartiality obligation; and he is prejudiced by HMG's non-compliance with, and breach of, the impartiality obligation. The Claimant is also entitled to expect that ministers' public expenditure powers will be used lawfully and that the DUP Agreement does not contravene the terms of the 2010 Act.

7. The Defendants represent HMG and the Prime Minister. HMG is led by the Prime Minister. The Prime Minister is also the leader of the Conservative Party and a member of the Conservative Party Board, which is the ultimate decision-making body of the Conservative Party. It is believed (subject to confirmation from the Defendants) that the DUP Agreement was authorised by the Conservative Party Board, and also that the Prime Minister, in her capacity as a member of the Conservative Party Board and Prime Minister, approved and/or authorised the DUP Agreement.

Relevant factual and legal background

8. A government holds office by virtue of its ability to command the confidence of the House of Commons, chosen by the electorate in a general election.[4] The ability of a government to command the confidence of the elected House of Commons is central

[4] Title of Chapter 2 of the *Cabinet Manual* at https://www.gov.uk/government/publications/cabinet-manual

to its authority to govern.[5] Where a general election does not result in an overall majority for a single party, the incumbent government remains in office unless and until the Prime Minister tenders his or her resignation and the Government's resignation to the Sovereign.[6] Where there is no overall majority, a single-party, minority government may be formed where the party may be supported by a series of ad hoc agreements based on common interests, or a government may be formed by formal inter-party agreement.[7] The Prime Minister is the head of the Government and holds that position by virtue of his or her ability to command the confidence of the House of Commons, which in turn commands the confidence of the electorate, as expressed through a general election.[8] The Prime Minister's unique position of authority also comes from the support of the House of Commons.[9]

9. Prior to the general election of 8 June 2017, the Rt. Hon Theresa May MP, Prime Minister and the leader of the Conservative Party, headed HMG with a Conservative Party majority in the House of Commons, thereby commanding the confidence of the House of Commons. As a result of the general election on 8 June 2017, the Conservative Party won the most seats of any single party in the House of Commons, but did not have a majority. The Prime Minister and HMG did not resign, and so the incumbent Conservative Government accordingly remained in office with the Prime Minister at its head.[10]

10. On 9 June 2017, the Prime Minister made a public statement in which she said that she had just been to see Her Majesty the Queen and that she would now form a government. In order to form a government which commanded the confidence of the House of Commons, the Defendants/HMG, acting by the Prime Minister, made the Decision, caused the DUP Agreement to be entered into, and now govern pursuant to the terms of the DUP Agreement.

11. The DUP Agreement provides, amongst other things, as follows:-

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[5] Para. 2.7 of the *Cabinet Manual*.
[6] Para. 2.12 of the *Cabinet Manual*.
[7] Para. 2.17 of the *Cabinet Manual*.
[8] Para. 3.1 of the *Cabinet Manual*.
[9] *Ibid*.
[10] As per para. 2.12 of the *Cabinet Manual*.

"*Both parties will adhere fully to their respective commitments set out in the Belfast Agreement and its successors.* ***The Conservative Party*** *reiterates its steadfast support for the Belfast Agreement and its successors and,* ***as the UK Government,*** *will continue to govern in the interests of all parts of the community in Northern Ireland.* ***The UK Government will*** *continue to support close co-operation with the Irish Government, and* ***work with them in accordance with the Belfast Agreement*** *and subsequent agreements, while recognising that ultimate responsibility for political stability in Northern Ireland rests with the UK Government.* (emphasis added).

...

Both parties agree the need for additional support for Northern Ireland as set out in the annex to this agreement."

The annex to the DUP Agreement sets out "*additional financial support*" for Northern Ireland in the sum of £1 billion.

12. The Claimant relies on the above provision as demonstrating that (i) although ostensibly the DUP Agreement is between the Conservative Party and the DUP, in reality it is between HMG and the DUP, and/or HMG caused the DUP Agreement to be entered into for its own purposes, and (ii) HMG has agreed to implement the additional public expenditure commitments set out in the annex to the DUP Agreement, and (iii) HMG has made a binding and justiciable commitment to abide by the terms of the Belfast Agreement, including the impartiality obligation. For these purposes, there is no material distinction between the Conservative Party and HMG: the two are indivisible so far as the DUP Agreement is concerned, a fact also implicitly acknowledged at pages 2 and 3 the GLD Response where the Conservative Party and HMG are treated as one with reference to the DUP Agreement. There is no material distinction between the Conservative Party as a party, and the Conservative Party as the party of Government.

Ministers' public expenditure powers being used for improper purposes

12A. Any disbursement of public funds except for purposes authorised by law is illegal.

12B. All expenditure of public funds by ministers requires parliamentary authority.

12C. An agreement between two political parties cannot by itself constitute the necessary authority for the expenditure of public funds.

12D. It is immaterial that parliamentary authority might have been found for the specific disbursements if (as here) the true reason for making them is a political bargain.

12E. An agreement between two political parties that the government which one of them has formed will use public funds for the benefit of and/or at the direction of the other is contrary to public policy and of no legal effect.

12F. It is a general principle of public law that powers conferred on a public authority may be exercised for the public purpose for which those powers were conferred and not otherwise - per Lord Bingham in *Porter v Magill* [2002] 2 AC 357 at para. 19(1), approving the statement that statutory power conferred for public purposes can be validly used only in the right and proper way which Parliament, when conferring it, is presumed to have intended.

12G. It follows that powers conferred on a public authority may not be lawfully exercised to promote the electoral advantage, or party political advantage, of a political party - per Lord Bingham in *Porter v Magill* at para. 19(5), and Lord Scott at para. 132.

12H. As Lord Scott said in *Porter v Magill* (at para. 144), there is all the difference in the world between, on the one hand, a policy adopted for naked political advantage but spuriously justified by reference to a purpose which, had it been the true purpose, would have been legitimate, and on the other hand a policy adopted for a legitimate purpose and seen to carry with it significant political advantage. Policies (or agreements) in the former category are unlawful as being for an improper purpose, whilst policies (or agreements) in the latter category are lawful - per Lord Bingham at para. 21, and Lord Scott at paras. 143 - 144.

12I. Accordingly, in the "homes for votes" case of *Porter v Magill*, the House of Lords held that Westminster Council's policy of using section 32 of the *Housing Act 1985* to

sell council homes in eight marginal wards to likely Conservative voters was unlawful because it was directed to the pursuit of electoral or political advantage and not to the achievement of proper housing objectives - per Lord Bingham at para. 25, and Lord Scott at para. 143. Lord Scott (at para. 143) described the policy thus "*The city-wide policy was no more than a cloak to give apparent legality to the sales in the eight key wards which leading counsel had rightly warned would be unlawful unless part of a city-wide policy adopted for a proper reason. The sales of the 618 properties involved the exercise of local government powers to sell council properties (see section 32, Housing Act 1985) not for the purpose for which those powers were granted, but in order to increase the number of Conservative voters in marginal wards.*"

12J. The DUP Agreement is legally indistinguishable from Westminster Council's policy in *Porter v Magill*.

12K. The vice of the DUP Agreement is that, whilst on its face it is made between two political parties, it in fact purports to commit HMG to specified expenditures regardless of legality or parliamentary authority.

12L. In return for the DUP supporting HMG on certain identified key issues, HMG has, under the DUP Agreement, agreed to provide an economic package for Northern Ireland in the sum of £1 billion and/or HMG has agreed to implement the spending commitments set out in the economic package contained in the annex to the DUP Agreement. This economic package purports to commit public funds to causes and purposes favoured by the DUP.

12M. The economic package represents additional funding for Northern Ireland over and above the Government funding allocated to Northern Ireland under the Chancellor's 2016 Autumn Statement, the Spring Budget 2017 and the Block Grant for Northern Ireland.

12N. HMG cannot spend public funds without Parliament's consent. The principles governing the use of public funds are set out in *Managing Public Money* (July 2013, revised as at August 2015) published by HM Treasury. Under those principles,

specific primary legislation is normally required to spend public funds, public funds may be drawn only with parliamentary authority, and only ministers may use public funds to pursue their policy objectives[11]. The expenditure of public funds is always limited to identifiable purposes, authorised by Parliament. Further, public funds must be managed, amongst other things, with fairness, impartiality and objectivity carried out in the spirit, as well as to the letter, of the law in the public interest to high ethical standards achieving value for money.[12] The principles set out above in *Managing Public Money* accurately reflect the law.

12O. An agreement that ministers will use their powers of public expenditure in specified ways in return for votes in Parliament is a corrupt bargain. It is different in kind from ordinary governmental decisions designed to attract parliamentary support.

12P. Just like the policy of Westminster Council in *Porter v* Magill, the DUP Agreement is no more than a cloak to give apparent legality to that which is in fact unlawful. By spending public money to finance the economic package provided for in the DUP Agreement, HMG will be using its powers of public expenditure not for a purpose for which the power was conferred, but for an improper purpose, namely to promote the political advantage of a political party. That is unlawful under *Porter v Magill* principles. As Lord Scott said in *Porter v Magill* (at para. 132), it is a form of political corruption which "*engenders cynicism about elections, about politicians and their motives and damages the reputation of domestic government.*"

Breach of the 2010 Act

13. Under sections 1(1) and (2) of the 2010 Act, it is an offence for a person P to offer, promise or give a financial or other advantage to another person, and P intends the advantage to induce a person to perform improperly a relevant function or activity. By section 1(4), it does not matter whether the person to whom the advantage is offered, promised or given is the same person who is to perform the function or

[11] *Managing Public Money*, para. 1.2.5
[12] *Managing Public Money*, para. 1.1.1

activity concerned. By section 1(5), it does not matter whether the advantage is offered, promised or given by P directly or through a third party. By section 16, the 2010 Act applies to individuals in the public service of the Crown.

14. For the purposes of section 1 of the 2010 Act, the Prime Minister is the person P. For the purposes of section 5 of the 2010 Act, the Prime Minister has used a third party, namely the Conservative Party, to enter into the DUP Agreement which contains the advantages for the purposes of section 1(2).

15. The financial advantage referred to in section 1(2) of the 2010 Act is the financial package to the people of Northern Ireland identified in the DUP Agreement. Individual DUP MPs, by reason of their residence in Northern Ireland, will also be direct beneficiaries of this financial advantage (although by the terms of section 1(4) it is not necessary for the DUP MPs to be direct beneficiaries of the financial advantage). In addition to the financial advantage just referred to, the DUP Agreement also contains a further "advantage" within the meaning of section 1(2), namely the agreement to bring the DUP onto the co-ordination committee referred to under the heading "Working Arrangements" in the DUP Agreement ("the co-ordination committee advantage"). The co-ordination committee advantage is an advantage for the DUP and its MPs.

16. By section 3 of the 2010 Act, a relevant function or activity for the purposes of section 1(2) is one which (a) is any function of a public nature, or any activity performed by or on behalf of a body of persons whether corporate or unincorporate, and (b) the person performing the function or activity is expected to perform it impartially. In the present circumstances, the relevant function or activity is the function/activity of DUP MPs voting in Parliament with the Government, pursuant to the terms of the DUP Agreement, on those issues identified in the DUP Agreement. This function/activity of voting is a public function/activity and/or it is an activity which DUP MPs perform on behalf of the DUP and/or their constituents, and it is a function/activity which they are expected to perform, in the relevant respect, impartially. In the present circumstances, impartially means voting without the influence of a bribe.

17. This expectation of impartiality is reinforced and informed by paragraph 11 of the Code of Conduct for MPs, approved by the House of Commons on 13 July 2005, HC 735 ("the Code"). Paragraph 11 of the Code provides:-

> *"The acceptance by a Member of a bribe to influence his or her conduct as a Member, including any fee, compensation or reward in connection with the promotion of, or opposition to, any Bill, Motion, or other matter submitted, or intended to be submitted to the House, or to any Committee of the House, is contrary to the law of Parliament."*

18. Paragraph 11 of the Code accordingly identifies and delineates the circumstances in which an MP is expected and required to vote impartially, namely without the influence of a bribe, for the purposes of section 3 of the 2010 Act.

19. By section 4 of the 2010 Act, a relevant function or activity is performed improperly for the purposes of section 1(2) if it is performed in breach of a relevant expectation, and for these purposes the relevant expectation is the expectation that the persons (in this case, the DUP MPs) performing their function/activity (in this case, voting) will perform the function/activity without the influence of a bribe, and so impartially.

20. By section 5(1) of the 2010 Act, the test of what is to be expected is the test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.

21. In the present case, the execution and implementation of the DUP Agreement constitutes the offence of bribery contrary to the 2010 Act. Given the terms of the DUP Agreement, the DUP MPs cannot perform their voting functions/activities impartially because they have tied themselves in advance to vote with the Government on those issues identified in the DUP Agreement in return for the financial and co-ordination committee advantages referred to above. These financial and co-ordination committee advantages constitute a bribe within the meaning of paragraph 11 of the Code, and this constitutes a breach of the expectation test in section 5(1) of the 2010 Act.

22. For the purposes of section 1(2) of the 2010 Act, by causing the DUP Agreement to be entered into, the Prime Minister intended the advantages set out in the DUP

Agreement to induce the DUP MPs to perform their voting functions improperly within the meaning of the 2010 Act knowing, as she did, that the DUP MPs could not vote impartially given the terms of the DUP Agreement and the advantages conferred thereby.

23. The GLD Response states that MPs do not have a duty to act impartially when voting in Parliament. This is incorrect insofar as it relates to the issue of bribery and paragraph 11 of the Code. The GLD Response fails to address paragraph 11 of the Code at all, including how paragraph 11 of the Code informs the expectation of impartiality in the 2010 Act.

24. The GLD Response also says that the allegation of improper behaviour in parliament highlights that the claim would amount to a 'gross intrusion' upon Parliamentary privileges and could not be ruled on by the courts. This is incorrect for the reasons set out in paragraph 30 above. If the GLD is right, the courts would never have jurisdiction to intervene if an MP is bribed. The GLD is not correct in this respect because the bribe of an MP is not covered by parliamentary privilege – see generally *R v Chaytor* [2011] 1 AC 684 at paras. 33 - 44 per Lord Phillips PSC.

25. For the reasons set out above, the DUP Agreement is contrary to the provisions of the 2010 Act, and it is therefore illegal and unlawful.

The Belfast Agreement

26. The Belfast Agreement of 10 April 1998 comprises two agreements, namely the *Agreement reached in multi-party negotiations* between various Northern Irish political parties and the United Kingdom and Irish governments, known as the Multi-Party Agreement ("the MPA"), and the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland* between the United Kingdom and Irish governments, known as the British-Irish Agreement ("the BIA"). By Article 2 of the BIA, the UK and Irish governments "*affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement.*"

27. The BIA is an international treaty within the meaning of Article 2, paragraph 1(a) of the 1969 *Vienna Convention on the Law of Treaties* ("the Vienna Convention") and it is registered with the secretariat of the United Nations[13]. The BIA is made between two contracting states, signed by the UK and Irish governments on 10 April 1998, and it is enforceable under international law.[14]

28. The MPA forms Annex 1 to the BIA and, under international law, the MPA is part of the text of the BIA.[15]

29. By Article 26 of the Vienna Convention "*Every treaty in force is binding on the parties and must be performed by them in good faith.*" This includes the impartiality obligation in the Belfast Agreement.

30. In March 1999, the BIA was presented to parliament by the Secretary of State for Foreign and Commonwealth Affairs, with the MPA annexed, as command paper Cm 4292. The explanatory memorandum accompanying the BIA, referring to the MPA annexed, stated "*the two Governments undertake in this Agreement [the BIA] to implement their commitments under the Multi-Party Agreement.*" The explanatory memorandum also described the BIA's purpose as being "*to underpin the commitments made by the British and Irish Governments as participants in the multi-party negotiations concluded in Belfast on 10 April 1998.*"

31. The impartiality obligation is set out in identical terms in Article 1(v) of the BIA, and in paragraph 1(v) of the MPA (under the heading 'Constitutional Issues'). Article 1(v) of the BIA provides:-

> "*The two Governments:*
>
> ...
>
> *(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***

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[13] Under Article 102, paragraph 1 of the Charter of the United Nations.

[14] There was no provision for ratification of the BIA because Article 4(1) contained conditions precedent which needed to be, and were, satisfied. Under Article 4(2), the BIA entered into force on 2 December 1999.

[15] See article 31(2) of the 1969 *Vienna Convention on the Law of Treaties*.

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.*" (emphasis added).

32. Many (but not all) parts of the Belfast Agreement were given the force of domestic law under the *Northern Ireland Act 1998* ("the NIA 1998"). The impartiality obligation is not expressly incorporated into the NIA 1998. Nevertheless, the impartiality obligation is enforceable under domestic law for the reasons set out below.

33. The impartiality obligation requires HMG, as the sovereign government with jurisdiction in Northern Ireland, to exercise 'rigorous impartiality' on behalf of all the people of Northern Ireland in the diversity of their identities and traditions. In law, this amounts to an obligation on HMG to exercise its powers over the people of Northern Ireland without any partiality, actual or apparent, and free of any conflicts of interest. The applicable legal test is similar to that for apparent bias or lack of independence, as set out in well-known cases such as *Porter v Magill* [2002] 2 AC 357 (HL) and *Helow v Home Secretary* [2008] 1 WLR 2416 (HL).

34. The test is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that HMG may act without 'rigorous impartiality', or (put the other way around) partially, when exercising its powers on behalf of the people of Northern Ireland. The concept of independence is a central feature of 'rigorous impartiality'. If HMG's independence is compromised, for example by a connection to one of Northern Ireland's political parties not enjoyed by any of the other Northern Irish political parties, HMG's impartiality is negated, irrespective of whether or not HMG in fact acts or acted partially.[16]

35. In the GLD Response, the GLD says that the Claimant's reliance on *Porter v Magill* is misplaced on the basis that it is not appropriate to characterise international treaty commitments as identical to domestic law duties imposed in some circumstances on

[16] See by analogy cases concerning the independence of valuation experts, e.g. *Hopkinson v Hickton* [2016] EWCA Civ. 1057 (Court of Appeal) at paras. 28 – 29.

public bodies to act without actual or apparent bias. This is not correct. The test for exercising 'rigorous impartiality' under the Belfast Agreement is identical in all material respects to the test of actual or apparent bias as set out in *Porter v Magill* and similar cases. There is no basis in law or logic to distinguish between the two.

Justiciability and parliamentary privilege

36. The impartiality obligation is binding on HMG and is justiciable under domestic law. In this regard, the Claimant relies on the following facts and matters:-

(1) The impartiality obligation is binding on HMG as a signatory to both the BIA and the MPA, both of which contain the impartiality obligation.

(2) The MPA, which contains the impartiality obligation, and the NIA 1998 both form the basis of the constitutional structure in Northern Ireland.[17]

(3) The Belfast Agreement enjoys the status of a central constitutional document within the United Kingdom. It is an agreement which regulates the operation of governance and rights within Northern Ireland; it provides for the position of Northern Ireland as a constituent part of the United Kingdom and the relationship between those parts; it provides for a unique pooling of aspects of sovereignty with the people of Northern Ireland and the Irish Republic, and it imposes the impartiality obligation on HMG both through the BIA and the MPA. From this perspective, the Belfast Agreement forms a part of the UK constitution that is written or codified. Any breach of the Belfast Agreement, including the impartiality obligation, would therefore be unconstitutional and/or unlawful and justiciable domestically.

(4) The NIA 1998[18], which expressly incorporates many aspects of the Belfast Agreement into domestic law, has also been recognised by the House of Lords in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, to be a

[17] Para. 8.13 of the *Cabinet Manual*.

[18] The long title of which is to *"make provision for the government of Northern Ireland for the purpose of implementing the Agreement reached at multi-party talks on Northern Ireland"*.

constitutional statute. Lord Bingham stated at para. 11 that "*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 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.*" In *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583 (SC), the Government's Printed Case[19] cited *Robinson* and stated that "*the interpretation arrived at was informed by the fact that the UK constitution allows a flexible response to events as they develop and took account of the need to prevent the collapse of the Northern Ireland Government.*" This underscores the importance of the constitutional status of the Belfast Agreement, acknowledges the purposive approach to interpretation, and gives a good indication of how the standard of 'rigorous impartiality should be interpreted.

(5) As *Robinson*[20] and other cases[21] make clear, the NIA 1998 and the Belfast Agreement are symbiotic, they must be construed and read down together, and should be given a generous, purposive and wide interpretation as constitutional documents. Accordingly, when interpreting the 'constitutional provisions' embodied in the NIA 1998, that must be done in a way which is not only consistent with the Belfast Agreement, but also done in a way that is generous and purposive to the Belfast Agreement. The Belfast Agreement has as much, if not more[22], constitutional status as the NIA 1998. The high position which the Belfast Agreement enjoys within the UK constitution means that the impartiality obligation in the Belfast Agreement is justiciable at the domestic level through the NIA 1998, as construed with the Belfast Agreement.

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[19] Appendix, paragraph 3.

[20] See e.g. para. 11 per Lord Bingham, and paras. 29 - 30 per Lord Hoffmann.

[21] Such as *McComb's Application* [2003] NIQB 47 at para. 29 - 31 per Kerr J (as he then was), *Coláiste Feirste's Application* [2011] NIQB 98 at paras. 22, 43 and 44 per Treacy J

[22] It was the Belfast Agreement as a document upon which the people of Northern Ireland voted and approved in the 1998 referendum, not the NIA 1998.

(6) In the GLD Response, the GLD says that the BIA, as an unincorporated international treaty, is not justiciable, and the GLD relies on *R (JS) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 at para. 90 per Lord Reed (Supreme Court). Although it is correct that an international treaty *per se* is not justiciable, in the present case the BIA and Belfast Agreement is considerably more than a mere international treaty for the reasons set out in sub-paragraphs (1) -(5) above. For those reasons, the principles in the *JS* case do not apply, and the BIA/Belfast Treaty is justiciable. Similar arguments were made to the Supreme Court by Mr Raymond McCord[23] in *R (Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583 (SC), although in the event it was unnecessary for the Supreme Court to decide those arguments.

37. In any event, it has been consistent government policy, as exemplified by many express HMG statements to that effect,[24] that HMG would support, implement and abide by the terms of the Belfast Agreement. As a consequence, the United Kingdom government is legally obliged to implement and abide by those terms, and that obligation is justiciable in the domestic courts. The most recent policy statement by HMG to this effect is contained in the DUP Agreement itself[25], as set out above.

38. Further or in the alternative, by reason of the aforesaid government policy and express statements, the people of Northern Ireland, including the Claimant, had, and have, a legitimate expectation[26] that HMG would abide by and comply with the terms of the Belfast Agreement, including the impartiality obligation, and that any breach by the UK government of the Belfast Agreement would be enforceable by the Claimant in the domestic courts through the grant of appropriate remedies to ensure HMG's

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[23] McCord's Printed Case in the Supreme Court, paras. 9 - 25.

[24] In Article 2 of the BIA; in addition, when the Belfast Agreement was presented to parliament on 20 April 1998, March 1999 and May 2000 under Cm 3883, 4292 and 4705 respectively, when the NIA 1998 was enacted, and in the numerous public statements over the years in which the government has expressed its support for and commitment to the Belfast Agreement.

[25] As well as the Prime Minister's statement made on 26 June 2017 welcoming the DUP Agreement, available at https://www.gov.uk/government/news/pm-statement-on-confidence-and-supply-agreement-with-the-dup

[26] See generally paras. 12-016 – 12.019 of *De Smith's Judicial Review* (7th edition, 2013). So far as the Claimant's legitimate expectation is based on the BIA as an unincorporated international treaty, the Claimant relies amongst other things on the principles set out in paragraphs 12-026 – 12-029 of *De Smith*.

compliance with the Belfast Agreement and its various policy statements that it would so comply.

39. The GLD Response says, relying on *R v Director of Public Prosecutions Ex p Kebilene* [2000] 2 AC 326 at 337-338 (HL), that there is no legitimate expectation that an international treaty will be complied with. But that reasoning does not apply to a case such as the present, in particular where there have been express representations from Government ministers, acting on behalf of the Government, that the provisions of the Belfast Agreement will be complied with (see above). This distinguishes the present case from *Kebilene*[27], and gives rise to a justiciable legitimate expectation. The correct position is set out in *De Smith's Judicial Review* (7th edition, 2013) at para. 12-028 as follows:-

> *"Things said and done by government in relation to the nation's treaty obligations should not – by reason only of the action being on the international plane – be excluded from the wide range of governmental assurances and practices that may from time to time give rise to a legitimate expectation. A court will need to assess the whole context; it is a matter of evidence (Musaj v Secretary of State for the Home Department [2004] S.L.T. 623 at [21]-[22]). In seeking to identify what if any express or implied representations the government may have made in relation to an unincorporated treaty, account may be had of (among other factors) the fact of ratification, things said or done by the government in relation to ratification, the nature of the treaty rights in issue – particularly whether they are of such a nature as to define individual rights – and any steps that the government may have made in giving practical effect to the treaty. ... Each case must be judged in the round."*

40. In the GLD Response, the GLD also says that the claim is not justiciable because the claim seeks to impugn what is essentially a political act which intends to regulate the behaviour of politicians in parliament, and that the rights and privileges of parliament will be interfered with if the Court embarks on a process of determining whether the DUP's commitment to vote with the Government on certain key issues has been unlawfully secured. This is incorrect for three reasons.

41. First, the DUP Agreement is an agreement between two protagonists and so is plainly justiciable. The political nature of the DUP Agreement is nothing to the point. If, as the Claimant contends, the DUP Agreement is contrary to the Belfast Agreement

[27] Where the government representations were held not to be relevant as not binding on the DPP.

and/or the 2010 Act, the Court is not ousted from its function of review simply because the DUP Agreement was made in a political context.

42. Secondly, the DUP Agreement makes provision in respect of matters outside of parliament, most notably the economic package for Northern Ireland and the establishment of the co-ordination committee comprising members of HMG and the DUP. The co-ordination committee gives the DUP a direct say at government level in relation to all matters the subject of the DUP Agreement, a power not enjoyed by any other person or body. These factors are extra-parliamentary and justiciable.

43. Thirdly, parliamentary privilege relates to matters within parliament; it does not cover situations where there is a prior agreement, outside parliament, which regulates the manner in which a Member of Parliament will vote, in the future, in parliament. By way of example, if in return for payment from a third party a Member of Parliament agrees to vote in a particular way in parliament, the Court plainly has jurisdiction to determine whether the payment was a bribe or not; the fact that the ultimate objective of the agreement was to get the MP to vote in a particular way in parliament does not deprive the court of jurisdiction on the grounds of parliamentary privilege. For these purposes, it is not the actual voting or the way in which the MP votes which matter; it is the lawfulness of the prior extra-parliamentary agreement to vote in a particular way which matters, and that is not caught by the doctrine of parliamentary privilege.

Breach of the impartiality obligation and conflict of interest

44. The facts are clear and not in dispute. The purpose of the DUP Agreement is to ensure that HMG is able to hold office through its ability to command the confidence of the House of Commons. Without the DUP Agreement, HMG would be unable to command the confidence of the House of Commons and so would be unable to govern.

45. The DUP holds the highest number of seats in the Northern Ireland Assembly, and it holds the most Northern Irish seats in the Westminster parliament. The DUP represents a particular section of the people of Northern Ireland, with discrete views

on a variety of social, economic and political issues. The DUP represents people in Northern Ireland who have identities and traditions which are diverse from those represented by other political parties or who are not represented by any political party.

46. Against that background, the DUP Agreement clearly breaches the impartiality obligation because, under the DUP Agreement, the Defendant/HMG has allied itself to the DUP, which represents just one section of the people of Northern Ireland, in a manner not enjoyed by other political parties in Northern Ireland. The consequence of this is that HMG has compromised the independence and 'rigorous impartiality' required of it under the Belfast Agreement, such that HMG can no longer be regarded as impartial. The qualitative requirement that the impartiality must be rigorous demonstrates the high standard required of HMG in meeting the impartiality obligation.

47. The actual terms of the DUP Agreement do not matter for these purposes. What matters for these purposes is the very fact of the DUP Agreement itself, and the resulting loss of independence on the part of HMG. The fair-minded and informed observer would conclude, after HMG had caused the DUP Agreement to be entered into, that there was and is a real possibility that HMG, when exercising its powers in relation to the people of Northern Ireland, may act without 'rigorous impartiality' or, put the other way, may act partially. That a fair minded and informed observer may reach that conclusion is sufficient in and of itself to amount to a breach of HMG's obligations under the Belfast Agreement.

48. How HMG actually acts, or says[28] it will act, is not relevant to the analysis. The GLD Response says that there is nothing whatsoever in the terms of the DUP Agreement to indicate that the Government has failed to act with impartiality. But this misses the point. It is the very fact of the DUP Agreement which results in HMG failing the *Porter v Magill* apparent bias test.

49. Similarly, the reliance in the GLD Response on those provisions of the DUP Agreement which confirm HMG's commitment to the Belfast Agreement and the

[28] In the DUP Agreement or otherwise.

need for sovereign power to be exercised impartially is misplaced. It does not matter if, or how many times, the decision-maker says he will exercise impartiality. If (as here) the decision-maker fails the apparent bias test then, under *Porter v Magill* principles, decision-maker will be removed and cannot act. The GLD Response goes on to say that whether or not future decisions of HMG are in conformity with any applicable duty of impartiality is a matter to be determined by reference to particular decisions in the circumstances in which they are taken, and is not something which can be determined in abstract in advance. But this is also contrary to *Porter v Magill* principles, for the same reasons as just set out. Failure of the apparent bias test is determinative of the legality of the position.

50. By making and implementing the Decision, HMG was therefore in breach of the impartiality obligation to the obvious detriment of the Claimant who is a beneficiary of the impartiality obligation.

51. Further, when making the Decision, the Prime Minister had a conflict of interest and duty. The Prime Minister was conflicted because, as head of HMG, leader of the Conservative Party and a member of the Conservative Party Board (the ultimate decision-making body of the Conservative Party), it was in her interests and those of HMG and the Conservative Party for the DUP Agreement to be entered into[29], thereby enabling HMG to command the confidence of the House of Commons in circumstances where, absent the DUP Agreement, HMG would not be able to do so. However, as explained above, HMG had a duty to comply with the impartiality obligation, something which HMG could not do as a consequence of the Decision. This conflict of interest also renders the Decision unlawful. The GLD Response does not address this conflict of interest and duty point at all.

52. It follows that, by making the Decision, by causing the DUP Agreement to be entered into, and thereafter by governing in accordance with and under the terms of the DUP Agreement, the Defendant/HMG has (i) breached the impartiality obligation, and (ii) made the Decision in circumstances where the Defendant had a conflict of interest and duty, as set out above. The Decision is accordingly unlawful and illegal.

[29] A decision which it is understood was sanctioned by the Conservative Party Board and the Prime Minister. This is being clarified with the GLD.

Conclusion

53. Consequently, by acting as set out above, the Defendants and HMG have acted unlawfully and illegally.

54. The GLD Response does not address at all the fact that HMG is currently governing under the terms of the DUP Agreement. If, as the Claimant alleges, the DUP Agreement was secured unlawfully, then HMG is acting unlawfully and illegally by governing under it.

55. The Court has jurisdiction to remedy this illegality by granting the appropriate relief by way of judicial review, as set out in section 7 of the Amended Claim Form.

DOMINIC CHAMBERS Q.C.
JOHN COOPER Q.C.

10 July 2017
21 July 2017