CO/3220/2017

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

BETWEEN:

THE QUEEN
(on the application of
CIARAN McCLEAN)

Claimant

-and-

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

Defendants

DEFENDANTS' SUMMARY GROUNDS

The claim

1. The Claimant challenges a purported "*decision of Her Majesty's Government to enter into, and continue to hold office and govern, pursuant to the terms of a confidence and supply agreement with the Democratic Unionist Party of Northern Ireland dated 26 June 2017*" on the grounds that it (a) contravenes an obligation of "rigorous impartiality" in Article 1(v) of the British Irish Agreement ("**BIA**") and (b) contravenes the Bribery Act 2010 ("**the 2010 Act**"). In amended grounds provided on 21 July 2017, the Claimant argues, in addition, that the relevant decision entails the unlawful use of ministers' public expenditure powers.

2. The agreement in question - the *Agreement between the Conservative and Unionist Party and the Democratic Unionist Party on Support for the Government in Parliament* ("**the Agreement**") – was negotiated and entered into with the DUP not by the Government but by the Conservative Party, and there has been no decision "*that the Government should continue to hold office and govern under the*

terms of the DUP Agreement". However, the Defendants will assume, for the purposes of these Summary Grounds only, that the conclusion and/or continuing operation of the Agreement involves a decision of a public body which could be susceptible to challenge by judicial review.

3. The Defendants submit, nevertheless, that the Claim is unarguable, and permission should be refused, since:

   (1) Whether the Government has, by the Agreement, breached, or may in the future breach, its international obligations under Article 1(v) BIA is not a matter which is justiciable in the domestic courts. The Agreement in any event discloses no such breach of those obligations.

   (2) The criminal law of bribery plainly does not apply to a confidence and supply agreement between political parties.

   (3) The additional ground, alleging public expenditure which is unlawful at common law and/or without parliamentary authority, is misconceived in particular because the expenditure contemplated by the Agreement will have appropriate Parliamentary authorisation.

Alleged breach of Article 1(v) BIA

Claim not justiciable

4. The Claim is non-justiciable because it places direct reliance on, and seeks to enforce, an unincorporated treaty provision in the domestic courts.

5. As the Claimant notes (§14 of the Detailed Statement of Grounds for Judicial Review ("**DSG**")), the BIA is an international treaty concluded between the UK and Ireland and registered with the United Nations. It is primarily concerned with guaranteeing respect for the right of the people of Northern Ireland to self-determination. Pursuant to Article 1(v), the two Governments:

> "*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 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.*"

6. Many, but not all, of the provisions of the BIA (including the Multi-Party Agreement ("**MPA**") annexed to it) were incorporated into domestic law through the Northern Ireland Act 1998 ("**NIA 1998**"), the long title of which is "*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*". However, it is common ground that Parliament decided not to incorporate Article 1(v) in the NIA 1998 (see DSG §19). Thus, Article 1(v) BIA is an unincorporated treaty provision.[1]

7. Unincorporated treaty provisions "*do not form part of English law and…the domestic courts have no jurisdiction to interpret or apply them*": *R v Lyons* [2003] 1 AC 976, at §27 per Lord Hoffmann. In *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, at 499F-G, Lord Oliver stated that it is "*axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law.*" This principle has been applied by the Courts on numerous occasions to find unincorporated treaty provisions non-justiciable. For recent examples in relation to Article 3.1 of the UN Convention on the Rights of the Child, see *R (JS and anor) v. Secretary of State for Work and Pensions* [2015] 1 WLR 1449, at §90 per Lord Reed and at §115 per Lord Carnwath; *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250, at §38 per Lord Wilson.

[1] The MPA, a "comprehensive political agreement" amongst Northern Ireland political parties and the two Governments – re-states Article 1(v) BIA. It states that the parties "*endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will ..*" and then sets out the provisions of Article 1 BIA, including Article 1(v).

8. There are two key constitutional rationales for the non-justiciability of unincorporated treaty provisions.

a. The first rationale is rooted in the doctrine of the separation of powers and the limit of prerogative powers. The UK's treaties are made by the Crown in the exercise of prerogative power but only Parliament can create domestic law rights and duties. In *JH Rayner*, at 500, Lord Oliver concluded that an unincorporated treaty provision "*as a source of rights and obligations…is irrelevant*". Lord Templeman, at 476-477, explained:

> "*A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.*"

b. The second rationale was expressed by Lord Neuberger in *Belhaj v Straw and Ors* [2017] 2 WLR 456, at §123, in the following terms:

> "*international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts. This…rule is justified on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels*".

9. In DSG §23, the Claimant advances five reasons why Article 1(v) BIA is justiciable, which are said to lead to the conclusion – stated in §23(6) – that the BIA is "*considerably more than an international treaty*", to which "*the principles in the JS case do not apply*".

10. First, it is argued that "*[t]he impartiality obligation is binding on HMG as a signatory to both the BIA and the MPA*" (§23(1)). This simply does not address the status of Article 1(v), the key obligation relied on by the Claimant, as an unincorporated treaty provision. While all unincorporated treaties are binding

on the UK as a matter of international law, whether or not they are justiciable before domestic courts is a separate question.

11. The second and third reasons given are that the MPA and the NIA 1998 "*both form the basis of the constitutional structure in Northern Ireland*" (§23(2)); and that "*[t]he Belfast Agreement enjoys the status of a central constitutional document within the United Kingdom*" (§23(3)). The obvious difficulty with these arguments is that the NIA 1998 does not incorporate Article 1(v) of the BIA (or the provisions of the MPA which re-state Article 1(v)). Since Article 1(v) of the BIA has not been incorporated into domestic law, it cannot be said to represent "*part of the UK constitution that is written or codified*".

12. The fourth reason given is that "*[t]he NIA 1998…expressly incorporates many aspects of the Belfast Agreement into domestic law*" and has been recognised by the domestic courts, in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, to be a "*constitutional statute*" (§23(4)). The same insuperable difficulty applies. The NIA 1998 does not incorporate Article 1(v) BIA, and that this unincorporated treaty provision does not form part of any "*constitutional statute*".

13. The fifth reason given is that "*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*" (§23(5)). The Claimant's submission appears to be that Article 1(v) should somehow be read into the NIA 1998 and so treated as if it had been incorporated into domestic law. This submission would be contrary to well-established principles of statutory interpretation to the effect that the courts may have regard to unincorporated treaty provisions only where a statute is ambiguous on its face: see e.g. *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 760 per Lord Ackner. In the present case since there is no relevant ambiguity or obscurity in the NIA (and none is suggested by the Claimant). It is clear on the face of the NIA 1998 that Parliament decided to incorporate into domestic law many provisions of the BIA, but not Article 1(v). The Claimant's submission thus invites the Court to do precisely that which

the House of Lords in *Brind* (in the context of the ECHR pre-Human Rights Act 1998) concluded was impermissible – to introduce international provisions through the back door in circumstances in which Parliament had decided they should not be introduced through the front door.

14. The Claimant also submits (DSG §24) that Article 1(v) BIA is justiciable because "*it has been consistent government policy, as exemplified by many express statements to that effect, that HMG would support, implement and abide by the terms of the Belfast Agreement*". Lord Carnwath in the *JS* case, at §115, provides the answer to this submission: "*Ministerial statements of the Government's "commitment"...to [unincorporated treaty obligations]…may have political consequences but are no substitute for statutory incorporation*".

15. In a similar vein, the Claimant submits that "*by reason of the aforesaid government policy and express statements, the people of Northern Ireland, including the Claimant had, and have, a legitimate expectation that HMG would abide by and comply with the terms of the Belfast Agreement*" (DSG §25). There can be such no legitimate expectation enforceable in the domestic courts:

    (1) It is well established that the ratification of an unincorporated treaty is incapable of giving rise to a legitimate expectation: *R v DPP, ex parte Kebilene* [2000] 2 AC 326. As a matter of principle, the ratification of a treaty is an act of the UK, as a sovereign State, on the international plane. The international legal obligation undertaken is owed only to the other state parties to the relevant treaty. The act of ratifying a treaty does not amount to a representation by the Crown as a whole to the public at large. If the position were otherwise, it would drive a coach and horses through the principle that compliance with unincorporated international treaty obligations is not justiciable.

    (2) In any event, any such expectation would be contradicted by the terms of the NIA 1998. As explained above, Parliament has entered the field and enacted legislation intended to implement certain provisions of the BIA,

but not Article 1(v). In *R (Pepushi) v CPS* [2004] EWHC 798 (Admin), at §§37-38, Thomas LJ held:

> *"Where Parliament has enacted in words specifically chosen the scope of an international obligation…there is no room for a legitimate expectation to protection other than that which Parliament has provided. To acknowledge that an international treaty gives rise to legitimate expectations under our domestic law would in effect be indirectly circumventing the scope of our domestic law as set out in statute in a way that was bound to give rise to very considerable confusion and uncertainty."*

This principle was upheld and applied by the House of Lords in *R v Asfaw* [2008] 1 AC 1061, at §30 per Lord Bingham and at §69 per Lord Hope.[2]

16. In short, the Claim seeks to subvert long-established principles regarding the enforcement of unincorporated international treaty provisions. It is unarguable for that reason alone.

No breach of Article 1(v) BIA

17. If, contrary to the above submissions, the Court takes the view that the claim of breach of Article 1(v) BIA is justiciable, the Defendants submit that it is plain in any event that there has been no breach of the duty to act with impartiality which is contained in that provision.

18. In pre-action correspondence, the Defendants pointed out to the Claimant that there is nothing whatsoever in the terms of the Agreement to indicate that the

[2] Lord Hope stated: "*The giving effect in domestic law to international obligations is primarily a matter for the legislature. It is for Parliament to determine the extent to which those obligations are to be incorporated domestically. That determination having been made, it is the duty of the courts to give effect to it. There can be no free-standing defence, nor can there be any legitimate expectation that one will be provided, where Parliament has chosen in its own words to set out the scope of the defence that is to be available*." This principle is consistent with the passage from *De Smith's Judicial Review*, §12-028, on which the Claimant relies in DSG §26. The authors state that the Court will need to assess the "*whole context*". The quotation reproduced by the Claimant omits the important sentence: "*If a statutory provision is part of the background to the claim, that must be taken into account as well*."

Government has failed to act with impartiality, in line with its international commitments. The Agreement records the agreement of the DUP to support the Government in Parliament on certain matters (motions of confidence, the Queen's Speech, the Budget, finance bills, money bills, supply and appropriation legislation, Estimates and legislation pertaining the UK's exit from the European Union and to national security). Support on other matters is to be agreed on a case by case basis. The Agreement records certain matters of policy agreement between the Conservative Party and the DUP and an agreement on the need for additional support for Northern Ireland, as set out in the Annex to the Agreement. Each of the matters of policy agreement reflects present Government policy and will be to the benefit of all communities in Northern Ireland. Similarly, the additional funding set out in the Annex to the Agreement will be provided by the Government to support growth and prosperity for the benefit of all communities in Northern Ireland.

19. The Claimant has responded by abandoning any complaint about lack of impartiality in the terms of the DUP Agreement. It argues now that "*[t]he 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 and resulting loss of independence on the part of HMG*" (DSG §34). The Claimant maintains – citing *Porter v Magill* [2002] 2 AC 357 – that (DSG §21) "*the test is whether the fair-minded and informed observer 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 .. If HMG's independence is compromised, for example by a connection to one of the Northern Ireland political parties not enjoyed by any of the other political parties, HMG's impartiality is negated, irrespective of whether or not HMG in fact acts or acted partially*".

20. This argument is plainly wrong:

    (1) Article 1(v) requires sovereign power in Northern Ireland to be "*exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions*". Compliance with that obligation requires consideration of particular decisions in the circumstances in which they

are taken and is not something which could be determined in the abstract in advance. Nor can that obligation sensibly prohibit all future decisions taken in relation to Northern Ireland, including those which – the Claimant now appears to accept – are for the benefit of all of people of Northern Ireland (such as committing additional funding to Northern Ireland, as per the Annex to the Agreement).

(2) There is no basis for the suggestion that the parties to the BIA intended their international treaty commitment to act with impartiality in the exercise of sovereign governmental powers to be identical to the English domestic public law duties imposed in some circumstances on public bodies to act without actual or apparent bias. Article 1(v) of the BIA imposes an autonomous international law treaty standard, which cannot be analogised to principles of English law.

(3) In any event, the fact that the UK Government has reached agreement with the DUP on certain policy matters and committed certain additional funding to Northern Ireland, and that the DUP has agreed to support the Government in Parliament on certain matters, does not establish that there could plausibly be any perception of bias on the part of the UK Government when exercising the power of sovereign government over Northern Ireland in the future, whether on matters covered or not covered by the Agreement.

(4) If the Claimant's interpretation were correct, it would have the absurd result of preventing any party participating in the UK (or Irish) Government from having any kind of affiliation, no matter how loose, with a political party holding seats in Northern Ireland; and indeed from holding seats in Northern Ireland itself.

(5) For the avoidance of doubt, the Claimant's submission that when making the purported decision under challenge, the Prime Minister had "*a conflict of interest and duty*" which was itself a breach of the obligation of rigorous impartiality (DSG §38) is yet further from a realistic view of the

scope of that obligation, and adds nothing to the Claimant's other submissions under this head.

21. It should be noted that the question for the Court is not whether the Claimant's interpretation and application of the "*rigorous impartiality*" obligation is correct but whether the Government has adopted a "*reasonably tenable view*" of the meaning of that obligation. In *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756, the Director of Public Prosecutions argued that his decision not to prosecute was in accordance with (the unincorporated) Article 5 of the *OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*. Lord Bingham, at §43, described as "*problematical*" the claimant's submission that it was open to the domestic courts to interpret the unincorporated treaty provision and, if the Director's interpretation were found to have been incorrect, to quash the decision based upon it. He then observed, at §44:

> "*Whether, in the event that there had been a live dispute on the meaning of an unincorporated provision on which there was no judicial authority, the courts would or should have undertaken the task of interpretation from scratch must be at least questionable. It would moreover be unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the UK by fear that their decision might be held to be vitiated by an incorrect understanding.*"

22. Lord Brown expressed similar concerns (§65, 67-68):

> "*Although, as I have acknowledged, there are occasions when the court will decide questions as to the state's obligations under unincorporated international law, this, for obvious reasons, is generally undesirable. …For a national court itself to assume the role of determining such a question (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons. …*
>
> *It simply cannot be the law that, provided only a public officer asserts that his decision accords with the state's international obligations, the courts will entertain a challenge to the decision based upon his arguable misunderstanding of that obligation and then itself decide the point of international law at issue. …in this particular context the "tenable view" approach is the furthest a court should go in examining the point of international law in question…*"

23. The 'tenable view' approach was reaffirmed and applied by Lloyd Jones J (as he then was) in *R (ICO Satellite) v The Office of Communications* [2010] EWHC 2010 (Admin) at §§88-96. A further good reason for this approach is that, as a matter of international law, domestic court judgments are attributable to the Government of the UK and there is thus a real danger that, by ruling on the interpretation of unincorporated treaty provisions, the domestic courts may confuse the position of the UK in its treaty relations.

24. The Government's interpretation of Article 1(v) BIA, as set out in §19 above, is, at the least and plainly, reasonably tenable.

Parliamentary privilege

25. The proposed claim is non-justiciable for the further reason that it seeks to impugn what is essentially a political act which intends to regulate the behaviour of politicians in Parliament. The Agreement is one between the DUP and the Conservative Party, whereby the former gives political support to the latter, in relation to certain matters and does so in the forum of the House of Commons. It would interfere with the rights and privileges of Parliament, contrary to Article 9 of the Bill of Rights 1689, were the Courts to embark upon a process of determining whether the DUP's commitment to vote with the Government on certain matters has been unlawfully secured.

26. The position is analogous to that in *R (Wheeler) v Prime Minister* [2008] EWHC 1409 (Admin), where the Divisional Court refused to order the defendants "*to do an act within Parliament in their capacity as Members of Parliament*" as this "*would plainly be to trespass impermissibly on the province of Parliament*" (§49). Similarly, the Court in the present case should not enquire as to whether DUP MPs should or should not offer their support to the Government in Parliamentary votes on account of the unincorporated provision of an international treaty.

The 2010 Act

27. The Claimant persists – albeit briefly - in the surprising allegation that the Agreement gives rise to breaches of the criminal law created by the 2010 Act. If that were correct, the parties to the Agreement would have committed offences contrary to s. 1 of the 2010 Act (bribing another person) and s. 2 (being bribed).

28. These serious allegations are plainly misconceived. In pre-action correspondence, the Defendants pointed out that "*[t]he most obvious, but far from the only, reason why the Bribery Act does not apply in current circumstances is that the Agreement does not entail DUP MPs acting other than entirely properly when voting in Parliament. MPs do not have a duty to act "impartially" when voting in Parliament. Indeed, political parties could not enter into coalition agreements and MPs could not take the whip of any party if there were such a duty*".

29. That point was made with reference to s. 1(2) of the 2010 Act, whereby the offence of bribery will be committed where a financial or other advantage is offered "*to induce a person to perform improperly a relevant function or activity*". Under s. 3(1), a "*relevant function or activity*" is a function or activity which meets one or more of the conditions set out in s. 3(3)-(5). These state:

> "*(3) Condition A is that a person performing the function or activity is expected to perform it in good faith.*
>
> *(4) Condition B is that a person performing the function or activity is expected to perform it impartially.*
>
> *(5) Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.*"

30. A relevant function or activity is performed improperly "*if it is performed in breach of a relevant expectation*" (s. 4(1)(a)) and, by s. 4(2), a relevant expectation "*in relation to a function or activity which meets condition A or B, means the expectation mentioned in the condition concerned*". The Claimant's submission – referring to Condition B - is that the function of voting in Parliament is one which DUP MPs are expected to perform impartially, and that the Agreement commits them to voting other than impartially.

31. There is no basis for the submission that MPs have a duty to vote "*impartially*" in the sense contended for by the Claimant, namely without previously committing themselves to vote one way or the other on particular matters (see DSG §48). The Code of Conduct of MPs to which the Claimant refers, which would contain such a duty if one existed, does not do so. Entirely standard features of political life, such as taking the party whip and agreements by one political party to support another, would be contrary to such a duty if it did exist.

32. The Claimant's only response to the point made in pre-action correspondence and repeated above is that §11 of the Code of Conduct (cited in DSG §44), which prohibits MPs from accepting bribes, "*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 s. 3 of the 2010 Act*" (DSG §45). This reasoning is entirely circular. The Claimant's submission is that MPs have a duty to vote impartially for the purposes of offence of bribery, because they have a duty not to accept bribes. But there can only be a "bribe" within the 2010 Act where there is a pre-existing duty to vote impartially (a pre-existing duty which the Claimant cannot establish).

Expenditure without Parliamentary authority

33. In amended grounds, the Claimant now contends that the Agreement is unlawful because it commits Ministers to exercising public expenditure powers without the requisite Parliamentary authority.

34. It is uncontroversial that "*all expenditure of public funds by ministers requires parliamentary authority*" (DSG §12B) and that "*an agreement between two political parties cannot by itself constitute the necessary authority for the expenditure of public funds*" (DSG §12C).

35. But the Claimant has misunderstood the effect of the Agreement. His core complaint is that the Agreement "*purports to commit HMG to specified expenditures regardless of legality or parliamentary authority*" (DSG §12K). That is incorrect:

(1) The Annex to the Agreement provides that the Government is prepared to make available additional financial support to Northern Ireland and then sets out certain specific heads of additional expenditure under "*Economy and Infrastructure*" and "*Health and Education*".

(2) The mechanism by which money is made available by central Government to Northern Ireland is in s. 58 of the NIA 1998:

> "*The Secretary of State shall from time to time make payments into the Consolidated Fund of Northern Ireland out of money provided by Parliament of such amounts as he may determine.*"

In practice, these payments are made by the Secretary of State for Northern Ireland.

(3) Any such payments, including any additional payments which may be made pursuant to the Agreement, are normally included in the Main or Supplementary Estimates of the Northern Ireland Office for the financial year in which they are made. This is in accordance with long-established procedures, under which central Government requests the grant of money by the House of Commons (grant which is assented to by the House of Lords). Proposals for central Government funding are put before the House of Commons in the form of Main and Supplementary Estimates. Estimates are subject to a vote in the House of Commons and are typically subject to debate in that House, as determined by the Liaison Committee. Estimates which are granted by the House of Commons are termed "Supply" and become embodied in primary legislation: a Supply and Appropriation (Main Estimates) Act and a Supply and Appropriation (Anticipation and Adjustments) Act for Supplementary Estimates presented during a financial year.

(4) The Government is committed to ensuring that any money provided has appropriate Parliamentary authorisation. The Agreement could not, and does not, involve the Government committing itself to any provision of

additional funds to Northern Ireland which would not be authorised under standard procedures, including the consent of Parliament.

36. The Claimant relies upon passages from the HM Treasury document *Managing Public Money*, which explain the necessity for Parliamentary consent to expenditure by central Government departments (DSG §12N). But it is nowhere explained why he believes that the expenditure referred to in the Annex to the Agreement will be treated other than in accordance with the standard procedures.[3]

37. The Claimant also argues, in the alternative, that Ministers have no power to incur the additional expenditure referred to in the Annex to the Agreement because it is unlawful at common law, by analogy with the conduct of a local authority, Westminster City Council, in making policy for the sale of social housing, which was considered in *Porter v Magill* [2002] 2 AC 357 (DSG §12P). The very significant factual and legal differences between that case and the present undermine any such analogy. However, this submission fails in any event for the same reason as the submission regarding lack of Parliamentary authorisation. Any money provided under the Agreement will have appropriate Parliamentary authorisation and its subsequent provision to Northern Ireland is not, therefore, capable of being challenged on the basis of common law principles relied upon by the Claimant.

Conclusion

38. For these reasons, permission to apply for judicial review should be refused.

[3] No suggestion is, or could be, made that it would be unlawful for Ministers to request, in Estimates, additional funds from Parliament to meet the commitments set out in the Annex to the Agreement. That is not a matter which could properly be the subject of judicial review, on account of Parliamentary privilege: see *Wheeler*, §§45-51 where the Divisional Court held that the courts may not review decisions to put draft legislation before Parliament in a particular form. See also *R (Unison) v Secretary of State for Health* [2010] EWHC 2655 (Admin), §10 "*The courts cannot forbid a Member of Parliament from introducing a Bill. To do so would be just as much an interference with Parliamentary proceedings as to require the introduction of a Bill*".

39. If the Court refuses permission, the Defendants apply for their costs of preparing the acknowledgment of service in accordance with the guidelines in *R (on the application of Mount Cook Ltd) v Westminster City Council* [2004] P & CR 22. They seek an order for costs in a sum to be assessed, if not agreed.

JAMES EADIE QC
JASON COPPEL QC
SEAN AUGHEY

9 August 2017