The UK Supreme Court and the Preliminary Rulings Procedure

Arnull, Anthony

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THE UK SUPREME COURT AND REFERENCES TO THE CJEU

*Anthony Arnull**

I. Introduction

The outcome of the referendum of 23 June 2016 on the United Kingdom's continued membership of the European Union administered a profound shock to the political establishment throughout Europe and beyond. In voting to leave the EU, the British electorate overturned what had been a major plank of British foreign policy for over 50 years, rejecting the advice of the then Prime Minister and most expert opinion.

The reverberations of that pivotal moment in Europe's post-war history will be felt for many years. The search for its causes will inevitably be wide-ranging. At the national level, the records of British institutions which have been most closely involved with the EU since UK accession on 1 January 1973 are likely to come under scrutiny. Those institutions include the national courts, which have played a central role in the application of EU law in the UK. In undertaking that task, they have on occasion engaged directly with one of the EU's most influential institutions, the Court of Justice of the European Union (hereafter 'CJEU'). The tone of their engagement has been set by the UK's ultimate court of appeal, initially the Appellate Committee of the House of Lords (hereafter 'House of Lords') and, since 1 October 2009, the Supreme Court of the UK created under the Constitutional Reform Act 2005.

The engagement of the national courts of Member States with the CJEU takes place mainly through the preliminary rulings procedure established by Article 267 TFEU.[1] While most national courts enjoy a discretion in deciding whether to refer a case to the CJEU for a preliminary ruling, national apex courts (courts 'against whose decisions there is no judicial remedy under national law')[2] are in principle bound to do so by the third paragraph of Article 267. The purpose of this article is to examine the

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*Barber Professor of Jurisprudence, University of Birmingham, UK. I am grateful for the help provided with the writing of this article by Rachel Jarvis under the Undergraduate Research Scholarship Scheme organised by the College of Arts and Law at Birmingham. Many thanks also for their invaluable assistance to Graham Gee of the University of Sheffield; Michael Gration, barrister; and my Birmingham colleagues Fiona de Londras and Karen McAuliffe.

[1] See generally M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (Oxford, OUP, 2nd ed, 2014); D Anderson and M Demetriou, *References to the European Court* (London, Sweet & Maxwell, 2nd ed, 2002); C Naômé, *Le Renvoi Préjudiciel en Droit Européen* (Brussels, Larcier, 2nd ed, 2010); K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (Oxford, OUP, 2014) chs 3, 6, 10 and 24.

[2] For discussion of the meaning of this phrase, see Broberg and Fenger, ibid 223-230.

way in which the UK Supreme Court has negotiated that obligation in dealing with questions of EU law.

Like what is now the EU itself, the reference practice of the UK's apex court has changed beyond recognition since the House of Lords first sought the guidance of the CJEU in *Henn and Darby* in 1979.[3] Although European integration has been politically contentious in the UK since the 1950s, in the early years of British membership the law applicable was technical and limited in scope. It had not been systematically studied by most judges and practitioners. The attitude of the House of Lords was generally accommodating,[4] perhaps most dramatically so in *Factortame*,[5] where the European Communities Act 1972 giving effect to the requirements of membership was held to be immune to implied repeal. Although there were the occasional flash points,[6] the House of Lords did not align itself with the apex courts of other Member States by developing a constitutional theory

[3] Case 34/79 [1979] ECR 3795, EU:C:1979:295.

[4] See A Arnull, 'The Law Lords and the European Union: swimming with the incoming tide' (2010) 35 European Law Review 57. For discussion of lower courts, see Broberg and Fenger, above n 1, ch 7; Anderson and Demetriou, above n 1, ch 5; 55; A Dashwood and A Arnull, 'English courts and Article 177 of the EEC Treaty' (1984) 4 Yearbook of European Law 255.

[5] *R v Secretary of State, ex p Factortame* [1990] 2 AC 85.

[6] Eg *Duke v GEC Reliance* [1988] AC 618; *Freight Transport Association v London Boroughs Transport Committee* [1991] 3 All ER 915.

that might allow it to curtail the intrusion of EU law in general and the CJEU in particular into national law.

This article has five main sections. Section II offers a brief introduction to the preliminary rulings procedure, with a focus on the obligation to refer. Section III considers the approach of the Supreme Court to the interpretation of EU law. Section IV looks at cases where the Supreme Court made references to the CJEU, while section V consider cases where it declined to do so. Section VI examines the quality of the guidance supplied to the Supreme Court by the CJEU. There is then a short conclusion.

The article will show that the Supreme Court makes enough references to avoid being accused of insufficient engagement with the reference procedure. However, it employs a range of devices to avoid making references where it considers that it would be inconvenient or unhelpful to involve the CJEU. The result is that the Supreme Court has effectively liberated itself from the obligation to refer imposed on it by Article 267 and now behaves as if it has the same margin of discretion in deciding whether or not to do so as lower courts. Following the example of other apex courts, it has also become increasingly assertive in setting limits to the extent to which it will give effect to EU law in domestic proceedings. The limited deference now accorded to the CJEU by the Supreme Court is at least partly the result of preliminary rulings which have not seemed to the Court to be based on a sufficiently thorough analysis of the issues at stake.

II. The Preliminary Rulings Procedure and the Obligation to Refer

A. Role and Function

The preliminary rulings procedure establishes a formal framework for dialogue between the CJEU and the national courts of the Member States. Described by the CJEU as the 'keystone' of the EU's judicial system,[7] its primary purpose is to ensure the uniform application of EU law throughout the Member States. The particular function of the obligation imposed on apex courts by the third paragraph of Article 267 is 'to prevent a body of national case-law that is not in accordance with the rules of [EU] law from being established in a Member State…'[8]

Although the third paragraph of Article 267 seems to express the obligation of apex courts to refer in absolute terms, its precise scope has long been the subject of debate.[9] In *CILFIT* v *Ministry of Health*,[10] the CJEU appeared to introduce certain qualifications to the obligation.[11] In

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[7] Opinion 2/13 EU:C:2014:2454, para 176.

[8] Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, EU:C:2005:552, para 29.

[9] See Broberg and Fenger, above n 1, 230-273.

[10] Case 283/81 [1982] ECR 3415, EU:C:1982:335.

[11] The *CILFIT* qualifications apply only to questions of interpretation. They do not apply where the validity of an EU act is in issue, where the obligation to refer is unqualified: Case C-461/03 *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR I-10513, EU:C:2005:742. This seems to have been misunderstood by Lord Reed and

particular, it stated that there was no obligation to refer where the question concerned had already been dealt with in a previous decision of the CJEU (sometimes called *acte éclairé*). Even where this was not the case, the obligation to refer did not apply where the correct application of EU law was 'so obvious as to leave no scope for any reasonable doubt' (sometimes called *acte clair*).[12] Before coming to that conclusion, the national court had to consider a number of factors. These included whether the answer to the question would be equally obvious to the courts of the other Member States and to the CJEU[13] and the need to compare the different language versions when interpreting a provision of EU law.

The *CILFIT* criteria were deliberately demanding and attracted criticism for being virtually impossible to meet.[14] It is not clear how a national court might go about satisfying itself that an answer it considers obvious would be seen in the same light by courts in the other Member

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Lord Toulson in *R (Lumsdon) v Legal Services Board* [2015 UKSC 41, para 28.

[12] Para 21.

[13] A supreme national court is not required 'to ensure that, in addition, the matter is equally obvious to bodies of a non-judicial nature such as administrative authorities': Case C–495/03 *Intermodal Transports* v *Staatssecretaris van Financiën* [2005] ECR I-8151, EU:C:2005:552, para 39.

[14] See *The Role and Future of the European Court of Justice* (A Report of the EC Advisory Board of the British Institute of International and Comparative Law chaired by Lord Slynn, 1996) 75–7.

States. The injunction to compare the different language versions of a provision is particularly onerous, especially today when the EU has many more official languages than it did when *CILFIT* was decided.[15] Advocate General Jacobs said in *Wiener v Hauptzollamt Emmerich*[16] that the *CILFIT* injunction on comparing different language versions should be regarded simply 'as an essential caution against taking too literal an approach' and as 'reinforcing the point' that provisions of EU law 'must be interpreted in the light of their context and of their purposes…rather than on the basis of the text alone.'

In 2000, a report by a European Commission working party chaired by Ole Due, a former President of the CJEU,[17] suggested that the text of Article 267 should be amended to relax further the obligation to refer. The Member States chose not to follow that suggestion. Be that as it may, Broberg and Fenger observe[18] that 'there is a certain variance between the strict *acte clair* conditions established in *CILFIT* and the more relaxed interpretation that appears to be widely applied among national courts of

[15] See Broberg and Fenger, above n 1, 249-252.

[16] Case C–338/95 *Wiener v Hauptzollamt Emmerich* [1997] ECR I–6495, EU:C:1997:352, I-6517.

[17] See A Dashwood and A Johnston (eds), *The Future of the Judicial System of the European Union* (Oxford, Hart, 2001) 203.

[18] Above n 1, 254-255.

last instance.' This was undoubtedly true of the House of Lords[19] and is also true of the UK Supreme Court.

B. The Development of the CJEU's Case Law

Two cases decided on 9 September 2015 by the second chamber of the CJEU led to speculation that it had given its blessing to a less stringent approach to the obligation to refer.[20] In *X v Inspecteur van Rijksbelastingdienst and T.A. van Dijk v Staatssecretaris van Financiën,*[21] the CJEU was asked whether an apex national court was obliged to refer when a lower national court had already made a reference in a similar case raising exactly the same legal issue or whether it was obliged to wait until the lower court had received an answer from the CJEU. In *João Filipe Ferreira da Silva*

[19] See A Arnull, 'The use and abuse of Article 177 EEC' (1989) 52 Modern Law Review 622.

[20] A Kornezov, 'The new format of the *acte clair* doctrine and its consequences' (2016) 53 Common Market Law Review 1317; F-V Guiot, 'La responsabilité des juridictions suprêmes dans le renvoi préjudiciel: with great(er) power, (at last) comes great responsibility?' (2016) 52 Cahiers de Droit Européen 575.

[21] Joined Cases C-72/14 and C-197/14 EU:C:2015:564. Cf Case C-3/16 *Aquino v Belgische Staat* EU:C:2017:209.

e Brito and Others v Estado português,[22] the CJEU was asked whether an apex national court was obliged to make a reference where a directive it needed to apply had been the subject of divergent interpretations by lower courts in the Member State concerned.

In *X and van Dijk*, the CJEU ruled that an apex national court was not required to refer 'on the sole ground' that a lower national court had made a reference in a similar case involving the same issue, nor to wait until the latter court had received an answer from the CJEU. In *Ferreira da Silva e Brito*, the CJEU ruled that, where a concept of EU law had been the subject of conflicting decisions by lower courts in the state concerned and frequently gave rise to difficulties of interpretation across the Member States, an apex national court called upon to apply the concept was obliged to make a reference to the CJEU.

At first sight, these cases may appear to represent nothing more than routine applications of the *CILFIT* line of authority in straightforward circumstances. Indeed, it is perhaps surprising that any reference was made in *van Dijk* (the second of two joined cases in which the CJEU delivered a single judgment), for the referring court could simply have deferred giving judgment until the CJEU had ruled on the first case (*X*). Advocate General Wahl tactfully observed that 'even though it would be a rare event for a sensible application of the *acte clair* doctrine to be viewed differently from

[22] Case C-160/14 C:2015:565. Cf Case 379/15 *Association France Nature Environnement v Premier ministre* EU:C:2016:603.

Luxembourg, that risk cannot be ruled out entirely'[23] and that 'it might, on occasion be wiser to await the Court's judgment.'[24]

However, there were some subtle variations in the way in which the duty to refer was expressed. In *Ferreira da Silva e Brito*, Kornezov (a Judge at the General Court of the EU) pointed out that the CJEU's 'summary and rather general reminder of its *CILFIT* case law'[25] did not reiterate the criteria referred to in that case. In *X and van Dijk*, although the CJEU referred to those criteria,[26] he noted that 'it did so fleetingly and not specifically…it did not recall their content, nor did it dwell on them.'[27] Kornezov claimed that this was a 'clear sign' that the *CILFIT* criteria were 'no longer considered mandatory, if they ever were' and that supreme national courts 'can now rely on the *acte clair* exception without having to show that each one of the rigorous *CILFIT* conditions are satisfied.'[28]

Guiot argued that it was on the question whether the answer would be equally obvious to the courts of other Member States and the CJEU that the cases were particularly significant. He highlighted paragraph 59 of the judgment in *X and Van Dijk*, where the CJEU declared: 'it is for the national courts alone against whose decisions there is no judicial remedy under

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[23] EU:C:2015:319, para 72.

[24] Para 73 of his Opinion.

[25] Above n 20, 1323.

[26] See paras 60 and 61 of the judgment.

[27] Above n 20, 1323.

[28] Above n 20, 1324.

national law, to take upon themselves independently the responsibility for determining whether the case before them involves an "acte clair".' This, he argued, constituted formal endorsement of a margin of appreciation in practice already applied by several apex national courts. Subjectivising the criterion relating to the absence of reasonable doubt in this way, he said, involved a change of policy by the CJEU on how the *CILFIT* criteria were to be policed.[29] The CJEU had effectively acknowledged that the way in which the *acte clair* doctrine was originally framed in practice rendered it unworkable.[30] In conceding in *X and Van Dijk* that a divergence of opinion among the courts of the same Member State as to the answer to a question of EU law did not rule out the application of the *acte clair* doctrine, the CJEU seemed to have abandoned the condition requiring the absence of doubt to be shared by courts in other Member States.

Kornezov and Guiot placed much weight on the Opinion of Advocate General Wahl in *X and Van Dijk*. He took a liberal approach to the *acte clair* doctrine, observing that it would be 'unwise for the Court to police the narrowest of interpretations of the scope of the conditions attaching to that doctrine.'[31] He described the *CILFIT* criteria as 'a "tool kit" for determining whether or not there might be any reasonable doubt. They are to be seen as warning signs rather than strict criteria and, read fairly, amount to no more

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[29] Above n 20, 586.

[30] H Rasmussen claimed that this was a deliberate ploy by the CJEU: see 'The European Court's acte clair strategy in CILFIT' (1984) 9 ELRev 242.

[31] Para 64 of his Opinion.

than common sense.'[32] The approach of Advocate General Bot in *Ferreira da Silva e Brito*[33] was markedly stricter. He pointed out that, where an apex national court needed to resolve a disputed question of EU law, complying with its obligation to make a reference 'constitutes the rule, while a decision not to make a reference is the exception.'[34] He emphasised that apex national courts 'must exercise particular caution before ruling out the existence of any reasonable doubt' and said they had to set out the reasons why they were certain that EU law was 'being applied correctly.'[35] This meant that they had to 'make a precise check of whether their application of EU law takes due account of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union.'[36] He added that it was 'important that the Court adopt a strict position when it comes to reiterating the obligation to make a reference that is incumbent on national courts and tribunals against whose decision there is no judicial remedy under national law.'[37]

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[32] Para 67 of his Opinion, citing D Edward, 'CILFIT and Foto-Frost in their historical and procedural context' in M Maduro and L Azoulai (eds), *The Past and Future of EU Law* (Oxford, Hart, 2010) 173, 179.

[33] EU:C:2015:390.

[34] Para 89 of his Opinion.

[35] Para 94 of his Opinion.

[36] Para 95 of his Opinion.

[37] Para 101 of his Opinion.

The second chamber of the CJEU followed both Opinions without commenting directly on these competing visions of the scope of the obligation to refer. A degree of caution is therefore necessary in considering whether the two cases have broader significance beyond the confines of their own particular circumstances. In any event, one would not expect a major reappraisal of an important and widely known judgment like *CILFIT* to be effected by a five-Judge chamber of the CJEU. Moreover, if such a reappraisal, with significant implications for the role of apex courts in all Member States, were to be made, it would be important for it to be communicated clearly to the CJEU's national interlocutors in a judgment that addressed fully its implications for previous case law. Indeed, if in *X and Van Dijk* the CJEU intended to relieve supreme national courts of the need to consider the likely attitude of courts in other Member States, it reimposed a new version of that requirement in *Ferreira da Silva e Brito* by emphasising the obligation of a supreme court to refer where an EU provision frequently gave rise 'to difficulties of interpretation in the various Member States…'[38] Once again, the CJEU did not explain how a national court might establish whether this was so.

Perhaps the most that may be said for the time being is that these cases may prompt the CJEU, sitting as a Grand Chamber, to review the *CILFIT* line of authority when a suitable opportunity arises. If the Opinions of Advocates General Wahl and Bot are anything to go by, it would be

[38] Para 44 of the judgment.

unwise to place bets on the outcome. In *Lyckeskog*,[39] Advocate General Tizzano cautioned against

> abandoning a line of interpretation based on assessment criteria that are as objective as possible for a line that leaves room for subjective, not to say arbitrary, assessments by the national courts…any other course would lead to a gradual erosion of the unity and uniformity of [EU] law and ultimately undermine its primacy.

In practice, there will often be room for argument over whether the *CILFIT* criteria are met. This may make it difficult to establish when the obligation to refer has been breached. If that hurdle can be overcome, a breach may in principle lead to a claim for damages or infringement proceedings against the state to which the defaulting court belongs.[40] Moreover, the European Court of Human Rights has held[41] that Article 6(1) ECHR (right to a fair trial) means that

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[39] Case C-99/00 *Lyckeskog* [2002] ECR I-4839, EU:C:2002:108, para 65 of his Opinion.

[40] Opinion 1/09 on the creation of a unified patent litigation system [2011] ECR I-1137, EU:C:2011:123, paras 86 and 87.

[41] *Dhahbi v Italy*, no. 17120/09, judgment of 8 April 2014, para 31. See also *Vergauwen and Others v Belgium*, no. 4832/04, 10 April 2012, paras 89-90; *Ullens de Schooten and Rezabek v Belgium*, nos. 3989/07 and 38353/07, judgment of 20 September 2011, paras 54-63. See Guiot, above n 20, 621-

> national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU.

In reality, however, the obligation is very difficult to enforce and relies in large part on the good will of national judges.[42]

III. Interpreting EU Law

The Supreme Court is frequently asked to decide on the correct interpretation of provisions of EU law. This section considers how it approaches that task. To what extent does it compare different language versions of EU provisions? How does it apply the principle of consistent

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630; J Krommendijk, ' "Open Sesame!" Improving Access to the ECJ by Requiring National Courts to Reason their Refusals to Refer' (2017) 42 European Law Review 46.

[42] See Krommendijk, ibid, 57-58; Lenaerts, Maselis and Gutman, above n 1, 102-104; AG Tizzano in *Lyckeskog*, above n 39, EU:C:2002:108, para 65; Z Varga, 'National Remedies in the Case of Violation of EU Law by Member State Courts' (2017) 54 Common Market Law Review 51, 56-59.

interpretation, requiring national courts wherever possible to interpret domestic provisions consistently with overlapping EU provisions?

A. Comparing Language Versions

A notable feature of the approach taken by the Supreme Court in seeking to establish the meaning and effect of provisions of EU law is its willingness to compare different language versions. Although some Justices are known to be conversant in languages other than English, this places a potentially heavy burden on the parties and their lawyers.

A striking example is *R (Edwards) v Environment Agency*,[43] a case which reached the House of Lords before its jurisdiction was transferred to the Supreme Court. The President of the Supreme Court appointed two costs officers to carry out a detailed assessment of the appellant's liability in costs. Among the issues they were asked to decide was the proper application of provisions contained in two directives based on the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Reflecting Article 9 of that Convention, each directive required members of the public to have access to a review procedure that was 'not prohibitively expensive.'

An appeal against the decision of the costs officers was referred to a panel of five Justices. On the meaning of the word 'prohibitively' in the Aarhus Convention and the question whether a costs order made at the

[43] [2010] UKSC 57.

outset of the proceedings precluded further consideration of the matter once they had come to an end, Lord Hope (with whom the other Justices agreed) observed:[44]

> The Aarhus Convention has been authenticated in three languages: English, French and Russian. The English word "prohibitively" in the English version of article 9 suggests that the question is for consideration at the outset, as the act of prohibiting must always anticipate what is prohibited. The French language version uses the word prohibitif. The Russian text uses the word недоступно, indicating that the costs must not be inaccessibly high. The words "prohibitively" and "prohibitif" are carried forward into the English and French language versions of the EU directives and the adjective απαγορευτικό in the Greek version carries the same meaning. But the words used in the translations of the directives into German (übermässig teuer), Italian (eccessivamente onerosa) and Spanish (excesivamente onerosos) indicate that, so far as the directives are concerned, the question of expense is not exclusively for consideration at the outset.

The Court concluded that the correct test was unclear. Citing *CILFIT*, it therefore referred the question to the CJEU.[45]

[44] Para 24 of the judgment.

For present purposes, the *Edwards* case is notable for the exceptionally wide range of language versions of the crucial term considered by the Supreme Court. Versions of important provisions in languages other than English have, however, been considered in many cases, including *Assange v Swedish Prosecution Authority* (French and German);[46] *Goluchowski v District Court in Elblag, Poland* (French, German and Spanish);[47] *X v Mid Sussex CAB* (French, Spanish, Dutch and German);[48] and *R (HS2 Action Alliance Limited) v The Secretary of State for Transport* (French, Spanish, German, Dutch, Italian, with an extensive quotation in German from a judgment of the German Bundesverfassungsgericht).[49] The practice of the Supreme Court therefore shows complete acceptance of the need to compare different language versions when interpreting provisions of

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[45] For the ruling of the CJEU, see Case C-260/11 *Edwards and Pallikaropoulos v Environment Agency and Others* EU:C:2013:221; G De Baere and J Nowak, 'The right to "not prohibitively expensive" judicial proceedings under the Aarhus Convention and the ECJ as an international (environmental) law court: *Edwards and Pallikaropoulos*' (2016) 53 Common Market Law Review 1727. For the application of the CJEU's ruling by the Supreme Court, see *R (Edwards and another) v Environment Agency and others* (No 2) [2013] UKSC 78.

[46] [2012] UKSC 22. This case is considered in more detail below.

[47] [2016] UKSC 36.

[48] [2012] UKSC 59.

[49] [2014] UKSC 3. This case is considered in more detail below.

EU law and an impressive capacity to do so. It should be regarded as complying fully with the *CILFIT* injunction on the matter, sensibly construed.

B. The Principle of Consistent Interpretation

A significant constraint on the Supreme Court's right to interpret domestic provisions occupying the same field as provisions of EU law is imposed by the principle of consistent interpretation. A helpful elaboration of that principle may be found in *Angelidaki*,[50] where the CJEU declared:[51]

> …when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive… This obligation to interpret national law in conformity with [EU] law concerns all provisions of national law, whether adopted before or after the directive in question…

[50] Joined Cases C-378/07 to C-380/07 [2009] ECR I-3071, EU:C:2009:250.

[51] Para 197.

Although most of the CJEU's case law concerning the principle is concerned with directives, it applies in the same way to all provisions of EU law. It is not confined to domestic provisions adopted to implement directives.[52]

After a shaky start,[53] the principle of consistent interpretation came to be applied by the House of Lords in a highly conscientious manner, which might involve reading additional words into national measures adopted to give effect to the requirements of EU law.[54] The principle is routinely applied by the Supreme Court when the correct meaning of national provisions designed to implement EU law is in issue. The CJEU has accepted that it will not always be possible to achieve a result which satisfies the requirements of EU law through consistent interpretation of national law.[55] However, where it is possible for an apex national court to establish the meaning of the applicable EU provision to its own satisfaction and then to interpret the overlapping provision of national law accordingly, it will be unlikely to consider itself bound to make a reference to the CJEU.

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[52] See eg Case 157/86 *Murphy v An Bord Telecom Eireann* [1988] ECR I-673; Joined Cases C-397/01 and C-403/01 *Pfeiffer v Deutsches Rotes Kreuz* [2004] ECR I-8835, EU:C:2004:584.

[53] See *Duke v GEC Reliance* [1988] AC 618; *Finnegan v Clowney Youth Training Programme* [1990] 2 AC 407.

[54] *Pickstone v Freemans* [1989] AC 66; *Litster v Forth Dry Dock* [1990] 1 AC 546; *Webb v EMO Air Cargo* [1993] 1 WLR 49; Arnull, above n 4, 69-73.

[55] Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325, EU:C:1994:292; para 27

A nice example of the principle of consistent interpretation in action is *Robertson v Swift*,[56] which involved Directive 85/777 to protect the consumer in respect of contracts negotiated away from business premises[57] (sometimes called the door-step selling directive). The directive gave consumers a right of cancellation and required traders to give them written notice of that right. Neither the directive nor the UK implementing regulations specified the consequences where a trader failed to do so, as occurred in *Robertson v Swift*. The CJEU had held that Member States were required to ensure that the trader rather than the consumer bore the consequences in these circumstances.[58] Could the national regulations be interpreted in a way that enabled that result to be achieved? Lord Kerr, giving the judgment of the Court, concluded without undue difficulty that they could.[59]

Lord Kerr drew attention to the judgment of Sir Andrew Morritt, C in *Vodafone 2 v HMRC*.[60] There, Lord Kerr said, the 'breadth and importance' of the principle of consistent interpretation had been 'authoritatively set out'. The desire to paraphrase for a domestic audience the sometimes stilted

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[56] [2014] UKSC 50.

[57] OJ 1985 L 372/31. See now Directive 2011/83 on consumer rights, OJ 2011 L 304/64.

[58] Case C-350/03 *Schulte* [2005] ECR I-9215, EU:C:2005:637.

[59] See paras 31-33 of his judgment.

[60] [2010] Ch 77, paras 37 and 38. See also *USA v Nolan* [2015] UKSC 63, para 14 (Lord Mance).

language of the CJEU may be readily understood. None the less, the enterprise risks obscuring or distorting the CJEU's case law. The summary given by the Chancellor was not his own, but had been produced by counsel for one of the parties, though without dissent from counsel for the other party. It purported to give an exhaustive list of the 'constraints on the broad and far-reaching nature of the interpretative obligation'. Unfortunately the list failed to mention that, as the CJEU pointed out in *Angelidaki*,[61] the obligation is 'limited by general principles of law, particularly those of legal certainty and non-retroactivity' and that it 'cannot serve as the basis for an interpretation of national law *contra legem*.' Moreover, it takes effect only once the period allowed for transposing the directive into national law has expired.[62] Perhaps some of these factors were not considered relevant in the circumstances of *Vodafone 2*. Perhaps some of them may be regarded as covered by the rather vague terms in which parts of the Chancellor's guidance were expressed. However, these niceties can be lost when such guidance is repeated in the different context of other cases.[63] On the whole, it is therefore better for national courts to work directly with the language used by the CJEU rather than translating it into language of the sort they

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[61] Above n 50, para 199.

[62] Ibid, para 201.

[63] The criteria identified by Sir Andrew Morritt in *Vodafone 2* and quoted by Lord Kerr in *Robertson v Swift* were reiterated by Lord Dyson in *In the matter of Lehman Brothers International (Europe) (In Administration)* [2012] UKSC 6, para 131.

would themselves have used, with the risk that something important will be lost in the process.[64]

The Supreme Court considered the applicability of the principle of consistent interpretation, as well as the legislative antecedents of a legal act of the EU, in *Assange v Swedish Prosecution Authority*.[65] That case concerned a challenge to the validity of a European Arrest Warrant issued by a Swedish prosecutor pursuant to an EU framework decision of 2002,[66] which had been implemented in the United Kingdom by the Extradition Act 2003. The central question was whether the prosecutor constituted a 'judicial authority' within the meaning of Article 6(1) of the framework decision. Exceptionally, that question could not be referred to the CJEU because the United Kingdom had not accepted its jurisdiction over framework decisions at the material time.[67]

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[64] The same issue arises when national courts attempt to summarise in their own words the effect of general principles of EU law, such as proportionality. See eg Lord Reed and Lord Toulson in *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, paras 23-74.

[65] [2012] UKSC 22. See also *Public Relations Consultants v Newspaper Licensing Society* [2013] UKSC 18.

[66] Framework Decision 2002/584 on the European Arrest Warrant and the surrender procedures between Member States, OJ 2002 L 190/20.

[67] See Article 35(2) of the pre-Lisbon version of the TEU; Lady Hale, para 179; Lord Mance, para 198.

In seeking to establish the meaning of the term 'judicial authority', Lord Phillips referred to a range of materials in both English and French on the antecedents to and genesis of the framework decision, including the European Convention on Extradition of 1957 and an accompanying explanatory report.[68] He concluded that the Swedish prosecutor constituted a judicial authority within the meaning of both Article 6(1) of the framework decision and the corresponding provision of the 2003 Act. Lord Mance also referred to the 1957 Convention and a variety of additional materials including the drafting history of the framework decision in French and German as well as English.[69] He reached the same conclusion as Lord Phillips on Article 6(1), though for slightly different reasons. However, after an even more exhaustive examination of the background to the 2003 Act, Lord Mance concluded that,

> whatever may be the meaning of the Framework Decision as a matter of European law, the intention of Parliament and the effect of the Extradition Act 2003 was to restrict the recognition by British courts of incoming European arrest warrants to those issued by a judicial authority in the strict sense of a court, judge or magistrate.[70]

[68] See paras 16-59 of his judgment.

[69] See paras 226-233 and 239.

[70] Para 266.

This placed him in a dissenting minority of two with Lady Hale, whose short judgment betrayed a sense of relief that this was 'not a case where Parliament has told us that we must disregard or interpret away the intention of the legislation.'[71]

Lord Mance's conclusion on the effect of the Extradition Act was facilitated by a point he uncovered concerning the very applicability of the principle of consistent interpretation in *Assange*. Article 34(2)(b) of Title VI of the pre-Lisbon TEU provided that framework decisions (a type of act which is now defunct) 'shall not entail direct effect.' This created doubt about whether they were covered by the principle of consistent interpretation. That doubt was removed in *Pupino*,[72] where the CJEU ruled that national courts were indeed required to interpret their national law in the light of the wording and purpose of relevant framework decisions. The House of Lords had applied *Pupino*,[73] believing it to be binding in the UK in the ordinary way under the European Communities Act 1972. However, in *Assange* Lord Mance demonstrated that this was not the case because framework decisions adopted under Title VI of the TEU were not covered by the 'Treaties' as defined by section 1 of the 1972 Act. This meant that they fell outside the scope of section 2 of that Act, which would otherwise have given

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[71] Para 194 of Lady Hale's judgment.

[72] Case C-105/03 [2005] ECR I-5285.

[73] See *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6; *Caldarelli v Judge for Preliminary Investigations of the Court of Naples, Italy* [2008] UKHL 51.

them legal effect. Lord Mance observed: 'This is now, rightly, common ground between all parties to the present appeal. It is a constitutional point…and it has been overlooked in the previous case law.'[74] The consequences of that extraordinary finding were limited only by the presumption that English law should comply with the UK's international obligations and the demise of Title VI of the TEU in its pre-Lisbon form following the entry into force of the Treaty signed in that city on 1 December 2009.[75]

In some cases, the principle of consistent interpretation has led the Supreme Court to focus almost exclusively on the relevant EU provisions on the assumption that the overlapping domestic provisions were intended to mean, or may be interpreted as meaning, the same thing. In *Public Relations Consultants v Newspaper Licensing Agency*, for example, Lord Sumption said: 'It is not disputed that the effect of the Directive and the English statutory instrument is the same, and it is convenient to refer to the terms of the Directive.'[76] However, practice is not consistent. *Airtours Holidays*

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[74] Para 210. Lord Mance acknowledged that he had sat in *Dabas* and agreed with the other speeches: *Assange*, above n 46, para 207.

[75] The pre-Lisbon scheme was preserved until 31 November 2014: Protocol (No 36) on transitional provisions, Article 10(3), annexed to the TEU and the TFEU

[76] [2013] UKSC 18, para 5. See also *BT v Telefónica O2* [2014] UKSC 42, para 14 (Lord Sumption); *Russell v Transocean International Resources*, above n 43, para 22 (Lord Hope). For some older cases where a similar

Transport v HMRC[77] involved the construction of the Value Added Tax Act 1994, which gave effect to various EU directives on VAT. Giving the judgment of the majority, Lord Neuberger observed:[78]

> So far as the provisions of the 1994 Act are concerned, they must, of course, be interpreted as far as possible so as to comply with the current Directive, and it is accepted that, at least for present purposes, they do so. Whether it is right to decide this appeal by reference to the Principal VAT Directive or the 1994 Act is therefore a wholly academic point. However, the strictly correct approach must be to decide it by reference to the 1994 Act, but only on the basis that that Act cannot be interpreted without reference to the Principal VAT Directive, and must, if at all possible, be interpreted so as to be consistent with that Directive.

This must be right, for deciding a case by reference to a directive rather than the national implementing measures is to treat the directive as if it were directly applicable, a quality possessed only by regulations. By-passing the implementing measures might perhaps be more likely to produce a result

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approach was adopted by lower courts, see A Arnull, *The European Union and its Court of Justice* (Oxford, OUP, 2nd ed, 2006) 215-217.

[77] [2016] UKSC 21. See also *Edenred v HM Treasury* [2015] UKSC 45, para 30 (Lord Hodge).

[78] Para 17.

consistent with EU law, but it is incompatible with the particular nature of directives under the Treaty.

C. Summary

There is complete acceptance by the Supreme Court of the need when interpreting provisions of EU law to compare different language versions. The principle of consistent interpretation is generally applied conscientiously by the Court, although there is a risk that the proper scope of that principle will be obscured by misleading paraphrases by domestic judges. On the other hand, the Supreme Court sometimes goes further than strictly required by treating domestic provisions as if they comply with overlapping EU provisions without actually enquiring whether that outcome is compatible with the language used by the domestic draftsperson.

IV. References by the Supreme Court

A. Quantity

When on 1 October 2009 the UK Supreme Court opened its doors for the first time, it sprang upon the legal world fully formed. It was to exercise essentially the same jurisdiction as its predecessor, the House of Lords,[79] to which nearly all its first Justices had immediately beforehand belonged.

[79] Constitutional Reform Act 2005, s 40.

Between UK accession to the European Communities in January 1973 and the demise of the House of Lords on 30 September 2009, it made 40 references to the CJEU.[80] Eleven of these were made over the last seven years of its existence. By contrast, the Supreme Court had made 16 references by the end of 2016.[81]

The number of references made by a court is affected by a range of factors, some of which will lie outside its control.[82] It is therefore only a partial guide to a court's willingness to engage with the preliminary rulings procedure. Be that as it may, this is a context in which volume matters. The more references a national court makes, the more it is able to educate the CJEU about the national context in which it operates and the greater its potential influence on the development of EU law.

Nor should it be thought that making a reference deprives the national court of any control over the subsequent course of the proceedings. Bobek maintains that the voice of the national court is 'determinative': the CJEU 'will always be bound by the facts and the way in which these are interpreted by the national court, as well as the picture it receives from the national court about the interpretation of national law.' Although the CJEU sometimes reformulates questions submitted to it, it is influenced by the

[80] See Arnull above n 4.

[81] Figures supplied by the CJEU.

[82] See Broberg and Fenger, above n 1, ch 2.

terms in which they are framed initially by the national court.[83] Moreover, guidance published by the CJEU encourages national courts to suggest answers to their own questions.[84] It is, of course, the national court that applies the ruling of the CJEU to the facts of the case.

The slight increase in the reference rate since the establishment of the Supreme Court is therefore welcome, even if the UK's days as a full member of the EU are numbered.

B. Quality

(i) Positive Engagement

Cases which reach the Supreme Court will already have involved the expenditure of much time and effort. No-one will wish to incur the further delay and expense entailed by a reference to the CJEU[85] if a satisfactory

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[83] M Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' in M Adams, H de Waele, J Meeusen and G Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford, Hart, 2013) 197, 223.

[84] Para 17, Recommendations to National Courts and Tribunals, in Relation to the Initiation of Preliminary Ruling Proceedings, OJ 2016 C 439/1.

[85] 15 months on average in 2016, the latest year for which figures were available at the time of writing.

result can be achieved without taking that step. Be that as it may, the Supreme Court has often engaged positively with the CJEU though the reference procedure. A good example of healthy dialogue is *Test Claimants in the Franked Investment Group Litigation v HMRC*,[86] a complicated and long-running dispute involving very large sums of money. It concerned the compatibility with the Treaty free movement rules of the tax treatment of dividends received by UK resident companies from non-resident subsidiaries. Two remedies were potentially available to the claimants: a claim for restitution of tax demanded unlawfully and a claim for tax paid under a mistake of law. Parliament had reduced without notice and with retroactive effect an extended limitation period applicable to the second of those remedies. In the Supreme Court, there was a division of opinion on two questions: was this compatible with EU law and did it made any difference that, when the taxpayer brought its claim under the mistake cause of action, it had been recognized only recently and had yet to be confirmed by the highest domestic court. Those questions were therefore referred to the CJEU for a preliminary ruling.

The case is notable for the depth of the analysis of EU law conducted by the Justices who took part in it and their willingness to make a reference in proceedings which had already been the subject of two references by the

[86] [2012] UKSC 19. Other good examples are *Jessy Saint Prix v Secretary of State* [2012] UKSC 49 and *British Airways v Williams* [2010] UKSC 16.

High Court.[87] While those references were each dealt with by the Grand Chamber, the third was assigned to a five-Judge chamber, which answered yes to the first question and no to the second.[88] The case is an example of strict compliance by the Court with its obligations under the third paragraph of Article 267.

(ii) Sub-Optimal Engagement

The success of the preliminary rulings procedure depends not only on the national court but also on the CJEU, which must deliver clear and persuasive rulings which identify and respond to the issues of concern to the national court. A helpful ruling helps to build confidence in the CJEU as a reliable interlocutor, while obscure or unhelpful rulings may have the opposite effect.

An example of litigation in which the role played by the CJEU was less than ideal is the saga of Declan O'Byrne (OB), a child who suffered brain

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[87] Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11753, EU:C:2006:774; Case C-35/11 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue and The Commissioners for Her Majesty's Revenue & Customs* EU:C:2012:707.

[88] Case C-362/12 *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue and Commissioners for Her Majesty's Revenue and Customs* EU:C:2013:834. For the subsequent course of the proceedings, see [2017] 1 Common Market Law Reports 57.

damage following a vaccine he received at a doctor's surgery. The ensuing proceedings raised questions about the effect of the product liability directive[89] and generated two references, one from the High Court and one from the House of Lords. The final judgment was given by the Supreme Court.

Article 1 of the product liability directive makes producers liable for damage caused by defects in their products. Article 3(1) states that the term 'producer' includes 'the manufacturer of a finished product…' Article 3(3) adds: 'Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product…' According to Article 11, liability ceases 10 years after 'the producer put into circulation the actual product which caused the damage…'

OB brought two actions for damages in the High Court. In the first, the defendant was the company believed to be the producer of the vaccine. It subsequently transpired that it was in fact a wholly-owned subsidiary of the producer, so OB brought a second action in the High Court against the true producer, the parent company. In addition, he sought an order substituting the parent company for the subsidiary as defendant in the first action. The High Court made a reference to the CJEU on the interpretation of Article 11.

[89] Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 L210/29.

It sought clarification of when a product was 'put into circulation' and the circumstances, if any, in which Member States were permitted to allow a party to be substituted in proceedings governed by the directive.

The approach of the five Judges of the first chamber of the CJEU was nuanced. A product was to be regarded as having been put into circulation 'when it leaves the production process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed.'[90] The CJEU accepted that close links between the producer in the strict sense and another entity might mean that the concept of producer within the meaning of the directive encompassed both. On the question of substitution, the CJEU said that this was 'as a rule for national law to determine'[91] but added that a national court considering such a substitution must 'ensure that due regard is had to the personal scope of the Directive, as determined by Articles 1 and 3 thereof.'

Following that ruling, the High Court substituted the parent for the subsidiary in the first action. The parent appealed unsuccessfully to the Court of Appeal and thereafter to the House of Lords.[92] Four of the Law Lords were minded to dismiss the appeal, but one of them, Lord Rodger, persuaded them that there was room for doubt about the precise effect of the CJEU's ruling. It was therefore decided that a further reference should

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[90] Case C-127/04 *Declan O'Byrne v Sanofi Pasteur MSD* [2006] ECR I-1313, EU:C:2006:93, para 27 of the judgment.

[91] Para 39.

[92] *OB v Aventis Pasteur SA* [2008] UKHL 34.

be made. The CJEU assigned the second reference to the Grand Chamber,[93] which held that it was incompatible with Article 11 of the directive for national law on the substitution of parties to allow a producer 'to be sued, after the expiry of the period prescribed by that article, as defendant in proceedings brought within that period against another person.'[94] However, it qualified that basic rule in two ways. First, it said that that, in proceedings brought within the ten-year deadline against a wholly-owned subsidiary of the producer, the national court was at liberty to substitute that producer for the subsidiary if it found that the producer had determined when the product was to be put into circulation. Secondly, where the person injured by an allegedly defective product was not reasonably able to identify its producer before commencing proceedings against its supplier, that supplier could be treated as a producer if it did not promptly inform the injured person of the identity of the producer or its own supplier. The CJEU's judgment therefore left much to the discretion of the referring court.

The ruling of the CJEU fell to be applied by the Supreme Court,[95] which had in the meantime replaced the House of Lords. The judgment of

[93] Case C-358/08 *Aventis Pasteur* SA v OB [2009] ECR I-11305, EU:C:2009:744.

[94] Para 62.

[95] *OB v Aventis Pasteur* [2010] UKSC 23.

the Court was given by none other than Lord Rodger.[96] He allowed the appeal and set aside the order of the High Court substituting the parent for the subsidiary.[97] While his judgment contained an exhaustive examination of the two judgments of the CJEU, it did not address directly the question whether the qualifications to the basic rule identified by the CJEU in its second judgment could be applied in the circumstances of this case.

It is always unsatisfactory when two references have to be made in the same national proceedings in order to establish the position in EU law. This is particularly so when the second reference is needed to resolve obscurity or ambiguity in the CJEU's first judgment.[98] The central problem with the first judgment in this case was that it failed to elaborate on the personal scope of the directive under Article 3 or make clear what weight the referring court was to give to the matter. Although it examined the possible links between the parent and the subsidiary, it did so only in the course of

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[96] The panel of five Justices included three others who had been members of the House of Lords which made the second reference to the CJEU.

[97] See Lord Brown of Eaton-under-Heywood, 'Dissenting Judgments' in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, OUP, 2013) 33.

[98] See further T Tridimas, 'Constitutional Review of Member State Action: the Virtues and Vices of an Incomplete Jurisdiction' (2011) 9 I·CON 737; V Heyvaert, J Thornton and R Drabble, 'With Reference to the Environment: the Preliminary Reference Procedure, Environmental Decisions and the Domestic Judiciary' (2014) Law Quarterly Review 413, 428-430.

answering the referring court's first question, concerning when a product was to be regarded as having been put into circulation. It did not explore the implications of those links for Article 3. If the case reflects poorly on the CJEU, it reveals considerable conscientiousness on the part of the House of Lords, which resolved to seek clarification of the CJEU's first judgment despite the added delay this would cause.[99]

C. Summary

The Supreme Court has so far maintained a slightly higher reference rate than the House of Lords. It has shown itself to be willing to engage constructively with the CJEU, even in cases where references have already been made. The guidance it has received from the CJEU, however, has sometimes been found wanting. This issue is pursued in section VI.

V. Avoiding References

A feature of the Supreme Court's case law on the question whether to make a reference to the CJEU is the absence of routine and systematic analysis of the extent to which the *CILFIT* criteria are met. In cases where the Court decides to make a reference, it is perhaps natural for it not to feel a need to

[99] Another case where a reference was made (this time by the Supreme Court itself) because a minority regarded the position as unclear was *Secretary of State v Vomero* [2016] UKSC 49; [2017] 1 CMLR 3.

articulate detailed reasons for its decision to take that step.[100] However, some account of its reasons is desirable in the interests of transparency and the proper development of the case law. Of greater importance, however, are cases where a reference might have been made but the Supreme Court chose not do so. In these circumstances, a full analysis of why it thought it was not bound to refer might be expected. It is in cases of this type that reasons are required by Article 6(1) ECHR[101] and were considered necessary by Advocate General Bot in *Ferreira da Silva e Brito.*[102]

A. Failure to Consider a Reference

In a significant number of cases where difficult questions of EU law have had to be addressed, little or no consideration seems to have been given to whether a reference was required.[103] An example is *R (EM (Eritrea)) v*

[100] In *MB v Secretary of State* [2016] UKSC 53, the reasoning consisted of a single sentence: see para 17.

[101] See above, n 41.

[102] See Krommendijk, above n 41, 59-61.

[103] Eg *HMRC v Secret Hotels2* [2014] UKSC 16; *Stott v Thomas Cook* [2014] UKSC 15; *Deutsche Bahn v Morgan Advanced Materials* [2014] UKSC 24*; Amoena v HMRC* [2016] UKSC 41; *Airtours Holidays Transport v HMRC* [2016 UKSC 21.

Secretary of State,[104] which raised questions about the effect of the so-called Dublin II regulation.[105] This laid down a general rule that, where asylum was sought by a person present within the EU, the application should be dealt with by the Member State in which the asylum seeker had first arrived. If the person concerned later moved to another Member State, that state was entitled to return him or her to the first state. The question that arose in *EM* was whether return to the state of arrival could be resisted if it could be shown that it would expose the asylum seeker to a risk that his or her fundamental rights would be infringed.

That question was addressed by the CJEU in *NS*,[106] where it declared:

> if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum

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[104] [2014] UKSC 12. See also *HMRC v Pendragon* [2015] UKSC 37; *TN and MA (Afghanistan) v Secretary of State* [2015] UKSC 40; *R v McGeough* [2015] UKSC 62. Cf *Cavendish Square Holding v Talal El Makdessi* [2015] UKSC 67, where the question of a reference was considered only in the dissenting judgment of Lord Toulson (para 315).

[105] Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L 50/1.

[106] Joined Cases C-411/10 and C-493/10 [2011] ECR I-13905, EU:C:2011:865, para 86.

> applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter [of Fundamental Rights of the EU], of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.

In *EM*, Lord Kerr (giving the judgment of the Court) observed:[107]

> an exclusionary rule based only on systemic failures would be arbitrary both in conception and in practice. There is nothing intrinsically significant about a systemic failure which marks it out as one where the violation of fundamental rights is more grievous or more deserving of protection…gross violations of article 3 [ECHR] rights can occur without there being any systemic failure whatsoever.

Lord Kerr concluded that, where it could be shown 'that the conditions in which an asylum seeker will be required to live if returned under Dublin II are such that there is a real risk that he will be subjected to inhuman or degrading treatment, his removal to that state is forbidden.'[108] No consideration appears to have been given to whether a preliminary ruling should be sought, even though *NS* was a decision of the Grand Chamber,

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[107] Para 48.

[108] Para 63. Cf the test laid down by the European Court of Human Rights in *Soering v United Kingdom*, no. 14038/88, judgment of 7 July 1989, para 91.

the effectiveness of a central plank of the EU's asylum policy was at stake and the Court of Appeal had taken a different view. The failure of the Supreme Court to refer deprived the CJEU of an opportunity to review its previous ruling and put at risk the uniform application of the regulation.[109]

The possibility of a reference was not discussed in *R (Miller) v Secretary of State*,[110] even though the meaning of a Treaty provision, Article 50 TEU, was fundamental to the outcome.[111] The central question in *Miller* was whether notice of the UK's intention to withdraw from the EU pursuant to Article 50 could be given by ministers in the exercise of their prerogative powers without legislative authorisation by Parliament. The case was heard by the Supreme Court sitting for the first time in a plenary formation of 11

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[109] Regulation 343/2003 was recast as Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ 2013 L 180/31 (the Dublin III regulation). Article 3(2) of the Dublin III regulation reproduces the test laid down in *NS*, but the CJEU held in Case C-578/16 PPU *CK v Republika Slovenija* EU:C:2017:127 that the test applicable under the new regulation was less stringent.

[110] [2017] UKSC 5.

[111] See P Allott, 'Taking Stock of the Legal Fallout from the EU (Notification of Withdrawal) Act 2017', UK Constitutional Law Blog (2nd Feb 2017) (available at https://ukconstitutionallaw.org/).

Justices.[112] By a majority of eight to three, the Court held that the answer to that central question was 'no': an Act of Parliament was needed to give the government authority to notify the European Council of the UK's decision to withdraw from the EU. The majority[113] took the view that the European Communities Act 1972 'effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning.' It was 'a conduit pipe' by which EU law was brought into domestic law. On withdrawal, EU law would 'cease to be a source of domestic law for the future…'[114] They declared:[115]

> It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source in question was brought into existence by Parliament through primary legislation, which gave that

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[112] In principle, the full Court comprises 12 Justices, but at the time there was a vacancy.

[113] Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge. Lord Reed, Lord Carnwath and Lord Hughes dissented.

[114] Para 80.

[115] Para 81. The Court was unanimous in holding that the devolved legislatures did not need to be consulted: paras 126-151.

source an overriding supremacy in the hierarchy of domestic law sources.

The Court did not subject Article 50 to detailed analysis. Three issues were not in dispute between the parties: (a) that the result of the 2016 referendum did not itself constitute a decision by the UK to withdraw from the EU; (b) that the European Union Referendum Act 2015 under which the referendum had been held did not itself authorise notification of intention to withdraw under Article 50(2);[116] and (c) that notice under Article 50(2) 'cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn.'[117] While the first two issues seem uncontroversial, the same cannot be said of the third. Both the majority[118] and Lord Carnwath (dissenting)[119] recognised that this might not be the effect of Article 50(2). The majority stated: 'we are content to proceed on the basis that that is correct, without expressing any view of our own on either point. It follows from this that once the United Kingdom gives Notice, it will inevitably cease at a later date to be a member of the European Union and a party to the EU Treaties.' The inevitability of that outcome was crucial to the applicants' argument that the giving of notice would necessarily mean that legal rights they enjoyed under EU law would come to an end. Without

[116] Para 171 (Lord Reed).

[117] Majority judgment, para 26.

[118] Para 26.

[119] Para 261.

parliamentary enabling legislation, this would mean that the law had been altered by executive action, which was unlawful.

It might have been thought that this issue needed to be resolved before judgment could be given and should therefore have been referred to the CJEU. This possibility was not in the interests of any of the principal actors. If it turned out that notice under Article 50(2) was revocable or might be qualified, the government could have faced constant harrying from its political opponents for information about the progress of the negotiations that might lead to calls for them to be halted or suspended. It would not have wished to conduct a potentially difficult additional debate about whether, and if so how, notice might be qualified. For the applicants, their argument about the constitutional significance of invoking Article 50 would have been undermined. So the Supreme Court dealt with the case on the basis of an assumption about the legal position which it knew might be incorrect but without deciding one way or the other what the correct legal position was. As a matter of judicial politics, the idea of involving in a primarily domestic dispute an institution of the very organisation the UK wished to leave would have seemed very unattractive.[120] As a matter of law,

[120] On the revocability of notice given under Art 50, see House of Lords EU Committee, 'The process of withdrawing from the European Union' (11th Report of Session 2015–16, HL Paper 138) paras 6-17, referring to evidence given by D Edward and D Wyatt. Crowd-funded proceedings have been brought in the Irish High Court by UK barrister Jolyon Maugham QC with a view to seeking clarification from the CJEU on this point.

however, neither the convenience of the parties nor the fact that they are in agreement absolves an apex court of the obligation to refer.[121] For the purposes of the case, the Supreme Court decided a question of EU law the answer to which it knew to be unclear. It should therefore have made a reference to the CJEU.

B. Reference Considered but Rejected

There is a large number of cases where the question whether a preliminary ruling should be sought was considered but no reference made.[122] The Supreme Court has given a variety of reasons to explain this outcome. They include: that the Court considers the question to be *acte clair* or *éclairé*; to avoid further delay; that neither party has requested a reference; that the case involves not the meaning of the law but its application to the facts, a matter within the jurisdiction of the national court; and that it appears on analysis that the point in issue does not need to be resolved in the circumstances of the case. In one case, it was even doubted whether the

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[121] See Broberg and Fenger, above n 1, 252-3.

[122] Eg *Office of Fair Trading v Abbey National* [2009] UKSC 6; *Morge v Hampshire County Council* [2011] UKSC 2; *Walton v Scottish Ministers* [2012] UKSC 44; *PMS International Group v Magmatic* [2016] UKSC 12; *Re N (Children)* [2016] UKSC 15; *R (Nouazli) v Secretary of State* [2016] UKSC 16; *Moreno v Motor Insurer's Bureau* [2016] UKSC 52 (which contains what may be the Supreme Court's first reference to Brexit: see para 2).

CJEU 'would feel able to provide any greater or different assistance than we have here sought to give.'[123] Individual Justices may give different reasons or a range of reasons for reaching the conclusion that a reference is not necessary.

(i) Application of Law to Facts/Acte Eclairé

The possibility of a reference was considered but rejected in *HS2*.[124] That case involved a challenge to a government decision to proceed with the construction of a high-speed train link known as HS2 from London to the north of England. The case raised two main issues: should the decision have been preceded by a strategic environmental assessment under Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment;[125] and the compatibility with Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment[126] of the proposed use of the hybrid bill procedure.[127] This, the

[123] *Morge*, ibid, para 25 (Lord Brown).

[124] Above n 49.

[125] OJ 2001 L 197/30.

[126] OJ 2012 L 26/1.

[127] A hybrid bill is one which affects the general public but also has a significant impact on specific individuals or groups: http://www.parliament.uk/about/how/laws/bills/hybrid/ (accessed 25

appellant said, would prevent effective public participation due to the imposition of the government whip and collective ministerial responsibility at an important stage of the parliamentary process. The appeal was unanimously dismissed.

Lord Carnwath (with whom Lord Neuberger, Lord Mance, Lord Kerr, Lord Sumption and Lord Reed agreed) focused on the first issue and concluded that a reference to the CJEU was unnecessary. The case was in his view concerned principally with the application of the law to the facts, and in particular to the workings of the parliamentary process. The existing case law of the CJEU provided sufficient guidance.

Lord Reed (with whom Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Sumption and Lord Carnwath agreed) focused on the second issue. He observed:[128]

> The argument presented on behalf of the appellants as to the implications of the EIA Directive [2011/92], if well founded, impinges upon long established constitutional principles governing the relationship between Parliament and the courts, as reflected for example in article 9 of the Bill of Rights 1689, in authorities concerned with judicial scrutiny of Parliamentary procedure…and in other cases concerned with judicial scrutiny of decisions whether to

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May 2017). For more detail, see the judgment of Lord Reed at paras 57 and 58.

[128] Para 78.

> introduce a bill in Parliament… [I]t follows that the appellants' contentions potentially raise a question as to the extent, if any, to which these principles may have been implicitly qualified or abrogated by the European Communities Act 1972.

Lord Reed added that the issue could not be resolved 'simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the 1972 Act.'[129] However, he concluded that the proposed parliamentary process was a substantive one in which Parliament's role would be more than merely formal. Like Lord Carnwath, Lord Reed thought the case involved the application of principles that had been clearly established in the case law of the CJEU. No reference was therefore required.

(ii) Varied Reasoning

An example of a case where a variety of reasons for not referring was given is *Office of Fair Trading v Abbey National.*[130] The issue was the extent to which the Office of Fair Trading (OFT) could challenge the fairness of

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[129] Para 79.

[130] [2009] UKSC 6. See A Arnull, 'Keeping their heads above water? European Law in the House of Lords' in J Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Oxford, Hart, 2011)129, 143-147.

certain charges imposed by the respondent banks on their customers pursuant to standard terms agreed between them. The case turned on the effect of regulations introduced to give effect to Directive 93/13 on unfair terms in consumer contracts.[131] Article 4(2) of that directive provided that, when assessing the fairness of a contractual term, no account should be taken of 'the adequacy of the price and remuneration…as against the services or goods supplie[d] in exchange…' Article 6(2) of the implementing regulations was in similar terms and the two provisions were treated as having the same effect. As Lord Phillips explained,[132] the question was whether the contested charges constituted the price or remuneration for the services supplied by the banks.

Both the High Court and the Court of Appeal had concluded that regulation 6(2) did not have the effect of limiting the assessment of fairness that the OFT was entitled to carry out. The Supreme Court disagreed. However, even though the CJEU had yet to rule on the scope of Article 4(2) of Directive 93/13, it declined to make a reference for a preliminary ruling.

The question whether the Court was obliged to make a reference was discussed by Lord Walker, Lord Phillips, Lord Mance and Lord Neuberger. Lord Walker noted[133] that neither side had shown any enthusiasm for a reference because of the further delay that would be

[131] OJ 1993 L 95/29.

[132] See para 57 of his judgment.

[133] Paras 48-50.

entailed. He took the view that, if the Court was unanimous that the appeal should be allowed, the point should be treated as *acte clair* without a reference. This was a case where in his opinion the lower courts were clearly wrong. In any event, the application of Article 4(2) to the facts was a matter for national law. Lord Mance agreed that the decisive issue could properly be regarded as *acte clair*. Lord Phillips did not, but accepted that a reference 'would not be appropriate'.[134] Lord Neuberger considered it possible that the CJEU would agree with the Court of Appeal. Had the issue needed to be resolved, he would therefore 'very reluctantly, have concluded that a reference was required.'[135] However, he did not think the issue did need to be resolved for the purpose of the appeal.[136]

It is axiomatic that neither the wishes of the parties nor the delay a reference would cause are relevant to the scope of the obligation imposed by Article 267 on national courts of last resort. An apex court mindful of its Treaty obligations might have seen the fact that it disagreed with a lower court as evidence that 'there is involved a question of interpretation on which judicial minds can differ', as Lord Diplock put it in *Henn and Darby*,[137] and as militating in favour of a reference. [138] The outcome of

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[134] Para 91 of the judgment.

[135] Para 120.

[136] The fifth Justice, Lady Hale, did not express a view of her own on whether or not a reference should be made.

[137] [1980] 2 All ER 166, 197.

[138] Cf *Ferreira da Silva e Brito*, above n 22, paras 41-45.

Abbey National was determined essentially by the term 'price and remuneration' in Article 4(2) of Directive 93/13. In order to apply that term to the facts, its proper meaning self-evidently needed to be established first.[139]

(iii) Alternative Basis for Resolution

Abbey National illustrates a general enthusiasm on the part of the Supreme Court for declaring references unnecessary because a question of EU law is *acte clair*.[140] Even where cases are not considered *acte clair* (or *éclairé*), however, references may still be avoided. In *Re A (A Child)*,[141] the Supreme Court concluded that a question of EU law did not need to be resolved because the case could be dealt with on an alternative basis. As Lady Hale

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[139] The difficulty of drawing a clear dividing line between the interpretation of the law and its application was acknowledged by Lord Reed and Lord Toulson in *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, para 30.

[140] See also *Russell v Transocean International Resources*, above n 43; *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59; *Goluchowski v District Court in Elblag, Poland* [2016] UKSC 36; [2016] 3 CMLR 39.

[141] [2013] UKSC 60. See A Verdan, J Renton and M Gration, 'In the Matter of A (Children) [2013] UKSC 60 – An Analysis' http://www.familylawweek.co.uk/site.aspx?i=ed117049 (accessed 25 May 2017). Cf *I (A Child)* [2009] UKSC 10. See also *BT v Telefónica O2* [2014] UKSC 42.

(with whom the majority of the Court agreed) explained, at issue was whether the High Court could order the return to the UK of a child who had never been there on the basis that he had British nationality or was habitually resident in the UK. Of relevance to the question of habitual residence was Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.[142] If the case could have been resolved only on the basis of the habitual residence of the child, a reference to the CJEU on the meaning of the regulation would have been necessary. However, it was possible that the High Court would be able to resolve the case on the basis of the child's nationality under its inherent jurisdiction at common law. Only if the High Court decided not to do this would it be necessary to address the question of the child's habitual residence. The case was therefore remitted to the High Court for urgent consideration as to whether its inherent jurisdiction should be exercised.

This case displays distinct reluctance to involve the CJEU. A supreme national court remains subject to the obligation to refer even where a ruling it proposes to give will not bring an end to the proceedings.[143] The High Court had already decided to exercise jurisdiction on the basis that the child was habitually resident in the UK. Its inherent jurisdiction had not been considered. Lady Hale acknowledged that 'extreme circumspection' was

[142] OJ 2003 L 338/1.

[143] Case C-337/95 *Parfums Christian Dior v Evora* [1997] ECR I-6013, EU:C:1997:517; Guiot, above n 20, 598.

needed before exercising that jurisdiction[144] and set out 'a number of important general considerations which may militate against its exercise'[145] before offering several countervailing factors. The case was urgent, however, and the Supreme Court doubtless calculated that the High Court would take advantage of the steer it had been given promptly. If so, its calculation proved correct, for just under a month later the High Court exercised its jurisdiction on the basis of the child's nationality and ordered his return to the UK.[146] Even though the urgent preliminary ruling procedure (PPU)[147] would have been available to the CJEU had a reference been made on the meaning of Regulation 2201/2003, cases heard under that procedure were at that time being decided on average in 2.2 months. Moreover, a national court requesting the use of the procedure cannot be certain that its request will be granted.[148]

(iv) Proceedings Pending in Another Forum

It is not uncommon for issues of EU law in play before the Supreme Court to have been raised in another forum, such as the CJEU in infringement

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[144] Para 65.

[145] Para 64.

[146] *A v A* [2013] EWHC 3298.

[147] 'Procédure préjudicielle d'urgence'. See Article 107, Rules of Procedure of the CJEU.

[148] Rules of Procedure of the CJEU, Article 108.

proceedings against a Member State under Article 258 TFEU or the national courts of another Member State. Where such proceedings are brought to the attention of the Supreme Court, it may be asked to await their outcome before giving judgment or deciding whether to make a reference itself.

As a matter of EU law, the CJEU made it clear in *Gomes Valente v Fazenda Pública*[149] that 'the fact that the Commission discontinues infringement proceedings against a Member State concerning a piece of legislation has no effect on the obligation upon a court of last instance of that Member State to refer to the Court of Justice…a question of [Union] law in relation to the legislation concerned.'[150] Where a reference has previously been made by a court of a Member State, the ruling of the CJEU may resolve the matter and remove the need for it to be the subject of a further reference, as the CJEU acknowledged in *CILFIT*. Where two references 'concerning the same subject-matter' are made in quick succession, the CJEU may give a single judgment dealing with both.[151] However, this will

[149] Case C-393/98 [2001] ECR I-1327, EU:C:2001:109, para 15.

[150] Para 19. See further Broberg and Fenger, above n 1, 246-8.

[151] Rules of Procedure of the CJEU, Art 54. See eg Joined Cases C–46/93 and C–48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I–1029; EU:C:1996:79 (where one case came from Germany and the other from the UK); Joined Cases C-53/09 and C-55/09 *HMRC v Loyalty Management UK Ltd and Baxi Group Ltd* [2010] ECR I-9187, EU:C:2010:590 (where both references came from the UK).

not be possible where 'the connection between them'[152] is not sufficiently close. As we have seen, there is nothing to stop national courts from making two (or more) references in the same case.[153]

Following the ruling of the CJEU in *R (Edwards) v Environment Agency*[154] and oral submissions from the parties, the Supreme Court agreed to defer judgment until it had received the Opinion of the Advocate General in related infringement proceedings against the UK (which had been assigned to the same Advocate General).[155] When the Supreme Court came to give judgment,[156] Lord Carnwath (giving the judgment of the Court) said that the replies given by the CJEU to the questions referred to it 'failed to offer a simple or straightforward answer' to 'one of the main issues raised by

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[152] Rules of Procedure of the CJEU, Art 54.

[153.] Case 69/85 *Wünsche v Germany* [1986] ECR 947, EU:C:1986:104, para 15. For examples, see *Pierik*, Case 117/77 [1978] ECR 825 and Case 182/78 [1979] ECR 1977; *Foglia v Novello*, Case 104/79 [1980] ECR 745 and Case 244/80 [1981] ECR 3045; *CILFIT*, Case 283/81 [1982] ECR 3415 and Case 77/83 [1984] ECR 1257; *Francovich*, Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357 and Case C-479/93 [1995] ECR I-3843; *Factortame*, Case C-213/89 [1990] ECR I-2433, Case C-221/89 [1991] ECR I-3905 and Joined Cases C-46/93 and C-48/93 [1996] ECR I-1029.

[154] Above n 43.

[155] For the Opinion, see EU:C:2013:554 (AG Kokott).

[156] *R (Edwards) v Environment Agency* (No 2) [2013] UKSC 78.

the reference.'[157] The appellant suggested that if the Court had any doubt about the implications of the CJEU's ruling and the Advocate General's Opinions, it should wait until the infringement proceedings had been resolved.[158] Lord Carnwath did not consider this 'necessary or desirable.' Noting that the case had already been long delayed, he observed: 'there is nothing in the Advocate General's later opinion, in my view, which suggests that more definitive guidance for the purposes of the present case is to be expected from the forthcoming judgment.'[159] He proceeded to make the long awaited order for costs.

In *Patmalniece v Secretary of State,*[160] the issue was whether the conditions of entitlement to state pension credit were compatible with the rule against discrimination on grounds of nationality laid down in Article 3(1) of Regulation 1408/71 on social security.[161] A few months before the case was heard by the Supreme Court, the Commission launched

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[157] Para 31. At para 23 of his judgment, Lord Carnwath referred to the German text of the CJEU's judgment in attempting to elucidate the English text.

[158] Case C-530/11 *Commission v United Kingdom* EU:C:2014:67.

[159] Para 38.

[160] [2011] UKSC 11.

[161] Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ 1971 L 149/2, has now been replaced by Regulation 883/2004 on the coordination of social security systems, OJ 2004 L 200/1.

infringement proceedings against the UK which covered the disputed conditions of entitlement. It was argued by an intervener that this showed that the issue in dispute was not *acte clair*. However, Lord Hope observed that the Commission had not yet issued an opinion on the alleged infringement. He went on: 'In these circumstances I would not draw any conclusions either one way or the other from these developments.' No reference was made.

It has been persuasively argued that national courts of last resort should not invoke the *acte clair* doctrine in cases where the issue at stake is the subject of infringement proceedings brought by the Commission.[162] It is true that such proceedings are often settled without a judgment of the Court and that occasionally this may be because the Member State has persuaded the Commission to withdraw its complaint. However, this merely serves to confirm that the disputed issue is not *acte clair*. In *Edwards* the Supreme Court should therefore have waited for the infringement proceedings to be resolved before giving judgment, while *Patmalniece* should have been referred to the CJEU. If the related infringement proceedings had also been brought before the CJEU, it might have been able to deal with the two cases at the same time.

A reference should also have been made in *Re N (Children)*,[163] another case concerning Regulation 2201/2003 on matrimonial matters and

[162] Broberg and Fenger, above n 1, 247-248; Guiot, above n 20, 604.

[163] [2016] UKSC 15.

parental responsibility.[164] The general rule laid down by Article 8 of that Regulation in matters of parental responsibility is that jurisdiction belongs to the courts of the Member State where the child is habitually resident. However, Article 15 makes provision for the matter to be transferred to a court of another Member State by way of exception where certain conditions are met. *Re N* concerned two little girls born in England to Hungarian parents. Although both girls had Hungarian nationality, they had lived all their lives in England. They were both now living with foster carers. One of the issues the Supreme Court had to decide was whether Article 15 applied to public law care proceedings. That question and others relevant to *Re N* had been referred to the CJEU by the Irish Supreme Court in *Child and Family Agency v JD*,[165] which was pending when the UK Supreme Court gave judgment. Lady Hale (giving the judgment of the Court) said[166] the question whether Article 15 applied to public law proceedings 'cannot be regarded as acte clair. This court has to decide whether to make its own reference of essentially the same question that the Supreme Court of Ireland has already referred; whether to delay its decision until the outcome of that reference is known; or whether to proceed on the assumption that article 15 is capable of applying to public law proceedings and review the decisions of the courts below on their merits.' She found the third option 'infinitely preferable to the other two' as '[t]hese proceedings have already taken far too

[164] Above, n 142.

[165] Case C-428/15 EU:C:2016:819.

[166] Para 54.

long.' The best interests of the girls 'demand that their future should be decided as soon as possible.'[167] She therefore said that she would 'proceed on the basis that the meaning of article 15.1 is *acte clair*, albeit not yet *éclairé*, and we are merely applying it to the facts of the case, which is the task of the national courts.'

The option favoured by Lady Hale should have been avoided, for it involved a clear breach of the obligation to refer. However, each of the other options suffered from disadvantages. An immediate reference would have involved a further delay of something of the order of 15 months. That period could have been shortened by recourse to the PPU, but the CJEU might not have acceded to a request that this should be done. Waiting for the ruling of the CJEU in the *JD* case involved a risk that it might not be framed sufficiently broadly to cover the circumstances of *Re N*. In that event, a reference would have been required at that point. The best solution compatible with the Treaty would have been for the Supreme Court to make an immediate reference with a view to withdrawing it if its questions were answered in *JD*. Its reference should have been accompanied by a request that the PPU should be used.[168]

In the event, the judgment of the CJEU in *JD* was given over six months later. It substantially endorsed the conclusion reached by Lady Hale on the correct interpretation of the Regulation. An application by the

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[167] Para 55.

[168] This would admittedly not have been without drawbacks in terms of additional work and expense.

referring court for the PPU to be used was rejected by the CJEU, although it did agree to give the case priority over others.[169]

(v) Legacy Issues

The Supreme Court declined to make a reference in extraordinary circumstances in *HMRC v Aimia Coalition Loyalty UK Ltd*,[170] a VAT case involving a well-known loyalty card scheme. A reference to the CJEU had been made by the House of Lords. It fell to the Supreme Court to apply the CJEU's ruling.[171] The CJEU had joined the case with a separate one referred by the House of Lords at the same time about another loyalty scheme, though one of what Lord Reed called 'an entirely different character…'[172] The CJEU decided the cases without an Advocate General's Opinion. As Lord Reed noted, this meant that it did not consider them to raise any new point of law.[173] Lord Reed also noted a comment by the CJEU about the limited scope of the

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[169] See Rules of Procedure of the CJEU, Article 53(3).

[170] [2013] UKSC 15. For an acerbic comment, see E Saulnier-Cassia, 'Saisir ou ne pas saisir…telle est la question pour la Cour suprême britannique (2014) Revue Trimestrielle de Droit Européen 225.

[171] Joined Cases C-53/09 and C-55/09 *HMRC v Loyalty Management UK Ltd and Baxi Group Ltd*, above, n 151.

[172] Para 34.

[173] Statute, Article 20, fifth para.

reference,[174] which meant that the CJEU was unable to consider the full range of factors that had been regarded as important in the national proceedings. He criticised the House of Lords for not making 'sufficiently clear…what the central issues were' and failing to direct the CJEU's attention 'to the facts…which bore most directly upon those issues.'[175] He observed:[176]

> As a consequence of these aspects of the reference, a situation was created in which, instead of the dialogue between the Court of Justice and national courts which is the essence of the preliminary reference procedure, there was a danger that the ruling of the Court of Justice would fail to address the issues which lay at the heart of the appeal before the referring court.

The Supreme Court was not therefore in a position to

> treat the ruling of the Court of Justice as dispositive of its decision, in so far as it was based upon an incomplete evaluation of the facts found by the [Value Added Tax and Duties] tribunal or addressed questions which failed fully to reflect [the arguments presented]. This court must

[174] Para 37.

[175] Para 30.

[176] Para 33.

> nevertheless reach its decision in the light of such guidance as to the law as can be derived from the judgment of the Court of Justice.[177]

This Lord Reed proceeded to do.

These remarks, directly criticising the House of Lords for the way it had formulated the questions referred to the CJEU, must surely be unprecedented, yet more was to come. Lord Hope said candidly: 'I think that it was a pity that a preliminary ruling was sought in this case.'[178] The real issue was 'how principles that are not themselves in doubt should be applied to particular facts…' The absence of an Opinion meant that the CJEU's 'judgment lacks the depth of reasoning which a judgment informed by an opinion would have provided.'[179] The questions referred, he said, 'tended to obscure what became the real issue when the case was argued in Luxembourg. For this reason the CJEU can hardly be blamed for not addressing that issue directly when it was conducting its analysis.'[180] The situation had been further complicated by the simultaneous reference in another case. Lord Walker confessed: 'I was one of the Law Lords who, five years ago, directed a reference to the Court of Justice, but with hindsight I

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[177] Para 56.

[178] Para 87.

[179] Ibid. Saulnier-Cassia remarks on the inconsistency involved in lamenting the absence of an Advocate General's Opinion in a case which it is said ought never to have been referred: above n 170, 226.

[180] Para 88.

recognise that it was unnecessary, and that it would have been better not to have made a reference.'[181]

Only Lord Carnwath declined to take part in this collective assault on the House of Lords:[182]

> I do not see how we can, properly or responsibly, go behind either the decision of the House to make the reference, or the questions which were then approved with [the respondent's] consent. Nor, still less (with respect to Lord Reed), do I believe that it is appropriate or fair for us now to decide that there were other relevant facts, necessary for the determination, but which, through oversight of ourselves and the parties, were not drawn to the attention of the court; and, further, that the true issues were not questions of law at all, so that we are free to redetermine them for ourselves as questions of fact, without regard to the CJEU's conclusions on them. Those are to me entirely novel and controversial propositions…

Lord Carnwath agreed with Lord Hope that the absence of an Advocate General's Opinion was unfortunate, but did not 'find any serious uncertainty about what the court has decided and why.'[183]

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[181] Para 118.

[182] Para 123.

[183] Para 34.

The result was that Lord Reed, Lord Hope and Lord Walker were in favour of dismissing the appeal, while Lord Carnwath and Lord Wilson would have allowed it. It is evident that the issues raised were not *acte clair* and that they had not been fully *éclairés* by the reference to the CJEU. This meant that the Supreme Court should have made a further reference. The appellants asked the Supreme Court to do precisely that when the parties were invited to make written submissions as to the form of order to be issued. It declined to do so. Lord Reed, giving the judgment of the Court, pointed out that the majority had taken the view 'that, with the benefit of hindsight, there had in reality been no need for a reference in the first place…'[184] The CJEU 'had itself considered that the case raised no new point of law.'[185] The Court had applied the principles laid down in the case law of the CJEU to an account of the facts which was more comprehensive than that which had been supplied to the CJEU. There was therefore 'no question of EU law which now requires to be elucidated, and therefore no need for a further reference.'[186] Lord Reed added that it would be 'unfortunate if the position were otherwise, bearing in mind that this litigation has already lasted since 2003.'[187]

Whilst one can understand the frustration of the Supreme Court in this case, its refusal to make a further reference amounted to a deliberate disregard of the obligation laid down in the third paragraph of Article 267. By

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[184] [2013] UKSC 42, para 5.

[185] Ibid.

[186] Ibid.

[187] Para 7.

the Court's own admission, the CJEU treated the case as not raising any new point of law because the questions referred by the House of Lords and the account of the facts it had been given were defective. The period which had elapsed since the start of the litigation could have been shortened had a reference been made by a lower court and the reference eventually made by the House of Lords not been flawed. These circumstances are far removed from those identified in *CILFIT* as negating the obligation of supreme national courts to refer. It is hard to imagine that they would be included in any modified version of the *CILFIT* criteria that the CJEU might choose to elaborate. Since the appellant was an organ of the state, proceedings for damages were out of the question.

C. Summary

In some cases where questions of EU law have been raised, the Supreme Court seems to have given very little consideration, if any, to the question whether a reference to the CJEU should be made. It is possible that the need for a reference may have been discussed with counsel, but when this occurs an outline of the discussion should be included in the judgment so that the Court's reasoning is transparent. Where the Court has considered the possibility of a reference but decides not to make one, it has given a variety of reasons to explain its position. Some reasons, such as that the case is *acte clair* or *éclairé* or that it merely involves the application of the law to the facts and that this is a matter for the national court, are used regularly. Other reasons may be tailored to the circumstances of the

particular case. The fact that proceedings raising the same point may be pending in another forum is unlikely to dissuade the Court from making up its own mind.

VI. The Quality of the Guidance Provided by the CJEU

Where the Supreme Court decides not to make a reference, it is likely to be motivated not just by considerations specific to the case in hand, but also by a general view of the helpfulness of the procedure based on previous experience. The Supreme Court has been overtly critical of the approach of the CJEU on several occasions and it is to the nature of its criticisms that the discussion now turns.

A. The Opinion of the Advocate General

One source of dissatisfaction is the treatment by the CJEU of the Opinions of its Advocates General,[188] to which the Supreme Court pays close attention in attempting to establish the requirements of EU law.[189] This may

[188] For detailed and authoritative analysis of the role of the Advocate General, see L Clément-Wilz, *La Fonction de l'Avocat Général près la Cour de justice* (Brussles, Bruylant, 2011), especially chs 5 and 6.

[189] It also draws regularly on the views of academic writers: see eg *Assange*, (above n 46); *British American Tobacco Denmark v Kazemier Transport*

be exemplified by *Patmalniece.*[190] The applicant was born in Latvia. In 2005 she claimed state pension credit but her claim was refused on the basis that she had no right to reside in the UK. Did that refusal constitute direct or indirect discrimination on the ground of nationality and, if the latter, could it be justified? Lord Hope (with whom Lady Hale and Lord Brown agreed) referred to the analysis of the CJEU's case law on discrimination carried out by Advocate General Sharpston in her 'powerful'[191] Opinion in *Bressol v Gouvernement de la Communauté Française.*[192]

The *Bressol* case raised the question whether legislation adopted by the French Community of Belgium on limiting access to certain higher education programmes contravened the EU prohibition against discrimination on grounds of nationality. The legislation required students to show that their principal residence was in Belgium and that they satisfied one of a list of further conditions. The first was that the student had the right to remain permanently in Belgium. Advocate General Sharpston declared:

> I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a

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[2015] UKSC 65; *Cavendish Square Holding v Talal El Makdessi* [2015] UKSC 67; *Miller*, above n 110.

[190] Above n 160.

[191] Para 32.

[192] Case C-73/08 [2010] ECR I-2735, EU:C:2010:181.

> correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification.[193]

Discrimination was indirect where some other criterion was applied but it affected a substantially higher proportion of one group than another. On that basis, the Advocate General maintained that the condition relating to a student's principal residence was indirectly discriminatory (and therefore capable of justification) because 'Belgians and non-Belgians alike may establish their principal residence in Belgium.' However, she thought the condition concerning the right to remain permanently in Belgium was directly discriminatory, because only Belgian nationals automatically had that right. The CJEU, however, dealt specifically only with the residence condition,[194] which it agreed was indirectly discriminatory, before moving on to the question of justification.[195]

Lord Hope concluded that the right to reside test at issue in *Patmalniece* had to be treated as indirectly discriminatory but objectively justified. Lord Walker (dissenting only on the issue of justification) was highly critical of the CJEU's judgment:[196]

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[193] Para 56 of her Opinion.

[194] Paras 45 and 46.

[195] Para 47.

[196] Para 63

> the difference between the Advocate General's opinion and the Grand Chamber's judgment is profound. The opinion…sets out a lengthy, scholarly and closely-reasoned discussion of the difference between direct and indirect discrimination. The Grand Chamber made no reference to this discussion. It treated the case as one of indirect (and therefore potentially justifiable) discrimination without explaining why the Advocate General was wrong to treat the case as direct discrimination.

He added: 'I regret that the Grand Chamber did not explain why they disagreed with the Advocate General. She has…grappled with the real difficulties of this issue…'[197] He declared: 'I recognise that this Court must follow the judgment of the Court of Justice of the EU in *Bressol*, even if some of us do not fully understand its reasoning.'

The issue of how to distinguish direct from indirect discrimination also arose in *Bull v Hall*.[198] One of the parties sought to rely on *Maruko*,[199] where the CJEU found that there had been direct discrimination. Lord Neuberger did not find that decision persuasive.[200] His reasons included the facts that 'the finding was an unreasoned assertion' and 'the Advocate General, in a fully reasoned analysis, had held that the discrimination was

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[197] Para 64. Cf *HS2*, below n 224.

[198] [2013] UKSC 73.

[199] Case C-267/06

[200] Para 81.

indirect…' He added that 'the decision of the Grand Chamber on this point is very hard to reconcile with the well established CJEU and domestic jurisprudence…'[201]

The Supreme Court has also on occasion drawn attention to the absence of an Advocate General's Opinion in cases where this has been dispensed with under Article 20, fifth paragraph, of the Statute of the CJEU. In *Aimia Coalition Loyalty*,[202] the judgment of Lord Carnwath contained a section headed 'Absence of an Advocate-General's Opinion'. He said it was 'unfortunate'[203] that there was no Opinion. He pointed out[204] that the case

> was a reference by the highest court in this country. It should have been clear from the judgments below, and the submissions, that it had raised serious differences as to the correct application of [the underlying] principles, including questions as to the authority of the leading House of Lords decision in the light of subsequent European authority.

[201] This did not involve any breach of EU law as the case concerned purely domestic legislation rather than legislation adopted to give effect to an EU obligation.

[202] [2013] UKSC 15.

[203] Para 128.

[204] Para 129.

He went on:[205]

> Experience shows that the Advocate-General's Opinion can often provide a fuller discussion of the principles and their practical application, against which the sometimes sparse reasoning of the judgment can be easier to understand and apply. In this case, at least in retrospect, as the present controversy demonstrates, it was an unfortunate omission.

There are two simple but important lessons here for the CJEU. The first is that Opinions by Advocates General are highly valued by the Supreme Court in helping it to resolve questions of EU law. There is at the very least a possibility that they are equally valued by courts in other Member States. The CJEU should therefore review the frequency with which it decides to dispense with an Opinion, for this sometimes leaves judgments built on sand which may be misapplied or even ignored by national courts. The second is that the CJEU's practice of not engaging to any significant extent with the Opinions of its Advocates General can undermine the authority of its own judgments. Where the CJEU disagrees with an Advocate General, it should make this clear and set out its reasons. Otherwise its judgments risk looking like a series of unsubstantiated assertions. If the Opinion seems more persuasive to a national court, it may look for ways to avoid applying the judgment of the CJEU.

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[205] Para 130.

B. Reformulated Questions

In *R (ClientEarth) v Secretary of State*[206] the applicants were seeking various declarations aimed at ensuring that the UK complied with the nitrogen dioxide limits laid down by EU law. The Supreme Court granted a declaration in relation to a breach of Article 13 of Directive 2008/50 on ambient air quality and cleaner air for Europe,[207] which Lord Carnwath (delivering the judgment of the Court) said had been 'clearly established'.[208] However, he added,[209] taking account of the CJEU's guidelines on references,[210] that the dispute raised additional 'difficult issues of European law'[211] requiring the guidance of the CJEU and on which the Supreme Court was obliged to make a reference.

However, when the time came to consider the CJEU's response,[212] the Supreme Court found that the first two questions referred had been

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[206] [2013] UKSC 25.

[207] OJ 2008 L 152/1.

[208] Para 37.

[209] Para 1 of the judgment.

[210] See now Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings, OJ 2016 C 439/1.

[211] Para 38.

[212] Case C-404/13 *ClientEarth v Secretary of State* EU:C:2014:2382.

reformulated by the CJEU.[213] This, according to Lord Carnwath (again delivering the judgment of the Court), had 'introduced a degree of ambiguity which it had been hoped to avoid in the original formulation. This has had the unfortunate consequence of enabling each party to claim success on the issue.'[214] Lord Carnwath also made the recurring complaint that there was no Advocate General's Opinion 'to provide background to the court's characteristically sparse reasoning.'[215] However, neither party wanted a new reference to be made, so he concluded that a mandatory order should be made requiring the Secretary of State to prepare new air quality plans in accordance with a fixed timetable.

C. Lack of Jurisdiction

Slightly different concerns were raised in *USA v Nolan*,[216] which involved the closure by the appellant, the USA, of a watercraft repair centre it maintained in Hampshire, England. The respondent had been employed at the centre and its closure made her redundant. She complained that the appellant had failed to consult with staff representatives contrary to the Trade Union and

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[213] For the CJEU's practice of reformulating questions referred to it, see Broberg and Fenger, above n 1, 412-428; Lenaerts, Maselis and Gutman, above n 1, 235-237.

[214] [2015] UKSC 28, para 6.

[215] Para 10.

[216] [2015] UKSC 63.

Labour Relations (Consolidation) Act 1992, as amended by regulations adopted in 1995 to give effect to a ruling against the UK in infringement proceedings brought by the Commission.[217] The 1992 Act gave effect to Directive 77/187[218] and its successor, Directive 98/59.[219] The Employment Tribunal and the Employment Appeal Tribunal found in the respondent's favour. The appellant appealed to the Court of Appeal, which referred to the CJEU a question concerning the point at which the obligation to consult about collective redundancies arose.

Article 1(2)(b) of Directive 98/59 provided that it did not apply to workers employed by public administrative bodies or by establishments governed by public law. The CJEU therefore ruled that the civilian staff of a military base were not covered by the directive. This the CJEU said was consistent with the objective and general system of the directive, which was concerned with the functioning of the internal market, not the size and functioning of the armed forces. There was therefore no Union interest in

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[217] Case C-383/92 *Commission v United Kingdom* [1994] ECR I-2479, EU:C:1994:234

[218] On the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ 1977 L 61/26.

[219] On the approximation of the laws of the Member States relating to collective redundancies, OJ 1998 L 225/16. The appellant did not rely on state immunity, though it was accepted that it could have done so: see para 3 of the judgment.

ensuring the uniform interpretation of the directive in the excluded area. Consequently the CJEU declined jurisdiction. This meant that the issues raised by the case would have to be resolved without the CJEU's assistance. The Court of Appeal responded by dismissing the appeal.

Doubts about the applicability of the directive in circumstances such as these had been raised by the Commission, but were not shared by Advocate General Mengozzi.[220] He pointed out that Article 5 of the directive allowed Member States to introduce provisions that were more favourable to workers, a possibility of which the UK had taken advantage. He also noted that the CJEU had consistently held that, in order to ensure uniformity, it had jurisdiction to give preliminary rulings on national provisions adopted voluntarily to mirror EU provisions.[221] He therefore proposed that the CJEU should reply to the question referred and suggested how it should do so.

The CJEU's ruling could not therefore reasonably have been anticipated. On further appeal to the Supreme Court, it encountered a metaphorical raised eyebrow from Lord Mance (with whom Lord Neuberger, Lady Hale and Lord Reed agreed). The appellant argued that UK law should be read in the same sense as the directive, as interpreted by the CJEU. Lord Mance rejected that argument, noting that Directive 98/59 laid down only

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[220] EU:C:2012:160.

[221] Para 24 of his Opinion. The leading case is Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763. AG Mengozzi added that this approach had even been taken in a case concerning Directive 98/59: Case C-323/08 *Rodríguez Mayor and Others* [2009] ECR I-11621.

minimum standards. It was also argued that the amendments made to the 1992 Act by the 1995 regulations, on which the respondent was relying, were *ultra vires*, as they were based on section 2(2) of the European Communities Act 1972 but went further than required by EU law. Lord Mance also rejected that argument. The 1992 Act

> in its unamended form represented a unified domestic regime. The Court of Justice in 1994 identified a flaw in the protection provided…It is entirely unsurprising that the 1995 Regulations did not distinguish between parts of [the 1992 Act] which were and were not within the internal market competence or within article 1(2)(b) of the Directive.

Parliament having created that link, 'the executive was entitled to take it into account and to continue it by and in the 1995 Regulations.'[222] The appeal was therefore dismissed.[223]

The line taken by the CJEU here was curious. The reference had been made by the UK's second highest court, with the possibility of a subsequent appeal to the Supreme Court. The judgment of the CJEU involved a departure from established case law and ignoring the advice of its Advocate General. It failed to offer the referring court any useful guidance. The case

[222] Para 72.

[223] Lord Carnwath (dissenting) would have allowed the appeal on the basis that the 1995 regulations fell outside the power conferred by the 1972 Act.

will have done little to enhance the reputation of the CJEU among British judges as a reliable partner.

D. Constitutional Identity and Approach to Interpretation

By far the most thunderous shot across the bows of the CJEU to date was unleashed in *HS2*[224] by Lord Neuberger and Lord Mance in a joint judgment with which all the other Justices agreed. The first issue addressed by Lord Neuberger and Lord Mance was the CJEU's approach to interpretation. Article 2(a) of Directive 2001/42 concerning the protection of the environment referred to plans and programmes 'which are required by legislative, regulatory or administrative provisions…' The CJEU had held that 'required' meant 'regulated'.[225] Article 1(5) of Directive 85/337 (as amended), which also concerned environmental protection, provided that this directive did not apply to 'projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.' The CJEU had held that 'since' in effect meant 'provided that'. The result was that the directive might after all apply to projects adopted by a

[224] [2014] UKSC 3.

[225] Case C-567/10 *Inter-Environnement Bruxelles ASBL and others v Région de Bruxelles-Capitale* EU:C:2011:755.

specific act of national legislation if it were found that the objectives of the directive had not been achieved through the legislative process.[226]

Lord Neuberger and Lord Mance made a number of comments. In a legislative process, compromises or concessions had to be made and objectives were not always achieved. When reading or interpreting legislation, it should not be assumed that objectives have been fully achieved. Qualifications might have been necessary to reach agreement. 'Where the legislature has agreed a clearly expressed measure, reflecting the legislators' choices and compromises in order to achieve agreement, it is not for courts to rewrite the legislation, to extend or "improve" it in respects which the legislator clearly did not intend.'[227] If people could not be certain that EU legislation meant what it said, they might lose confidence in EU law and the relationship between national courts and the CJEU might be undermined. It would be more difficult to decide whether a point of EU law was *acte clair* and to reach agreement on new legislation.

Lord Neuberger and Lord Mance then turned to the Opinion of Advocate General Kokott in *Inter-Environnement Bruxelles*, where she said that 'required' meant based on a legal obligation. Had the question come before the Supreme Court, they would 'unhesitatingly have reached the same conclusion…'[228] They continued:[229]

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[226] See the cases cited in para 162 of the judgment of the Supreme Court.

[227] Para 171.

[228] Para 187.

[229] Para 188.

> We would also have regarded this as clear to the point where no reference under the *CILFIT* principles was required. The reasons given by the Fourth Chamber of the Court of Justice would not have persuaded us to the contrary. While they allude, in the briefest of terms, to the fact that the Governments made submissions based on the clear language of article 2(a) and on the legislative history, they do not actually address or answer them or any other aspect of Advocate General Kokott's reasoning.

Lord Neuberger and Lord Mance conducted a similar analysis of the CJEU's finding that the word 'since' in Article 1(5) of Directive 85/337 meant 'provided that', observing: 'it is difficult to see why it should be supposed that the Council of Ministers as the European legislator intended a condition, or intended the word "since" to have anything other than its ordinary meaning.'[230] Moreover, this particular issue gave rise to a deeper concern about 'the fundamental institutions of national democracy in Europe.'[231] Echoing Lord Reed, they pointed out that 'Article 9 of the Bill of Rights, one of the pillars of [the] constitutional settlement which established the rule of law in England in the 17th century, precludes the impeaching or questioning in any court of debates or proceedings in Parliament.'[232]

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[230] Para 196.

[231] Para 202.

[232] Para 203.

Examination of the workings of Parliament and enquiring whether they met requirements imposed from the outside would clearly involve 'questioning and potentially impeaching (i.e. condemning) Parliament's internal proceedings, and would go a considerable step further than any United Kingdom court has ever gone.'[233] It was,

> putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.[234]

Lord Mance (with whom Lord Neuberger, Lady Hale and Lord Wilson agreed) returned to some of these issues in *Pham v Secretary of State*,[235] which concerned the question whether under the British Nationality Act 1981 the Secretary of State could deprive the appellant, who was suspected of involvement in terrorism, of British citizenship if doing do would render him stateless.[236] Because depriving the appellant of British citizenship would

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[233] Para 206.

[234] Para 207.

[235] [2015] UKSC 19.

[236] Cf Case C-135/08 *Rottman v Freistaat Bayern* [2010] ECR I-1449, EU:C:2010:104.

mean that he lost EU citizenship too, the Supreme Court considered the position in EU law. The case was ultimately remitted to the Special Immigration Appeals Commission (SIAC) for further consideration. No reference was made, although the possibility of a reference at a later stage was not ruled out.

Laws LJ had observed in *R (G1) v Secretary of State*:[237] 'The conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation State. They touch the constitution; for they identify the constitution's participants.' If the CJEU sought to interfere in such matters, UK courts might have to consider whether the European Communities Act had conferred on it authority to do so. Lord Mance agreed:[238]

> European law is certainly special and represents a remarkable development in the world's legal history. But, unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed. The question how far Parliament has so willed is thus determined by construing the 1972 Act.

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[237] [2013] QB 1008, para 43. See also *Thoburn and Others v Sunderland City Council and Others* ('Metric Martyrs') [2003] QB 151.

[238] Para 80.

Having referred in paragraphs 86-89 of his judgment to Declaration No 2 annexed to the Maastricht Final Act, the Council Decision of 1992 concerning Denmark[239] and Declaration No 3 annexed to the Lisbon Final Act, he went on:

> A domestic court faces a particular dilemma if, in the face of the clear language of a Treaty and of associated declarations and decisions, such as those mentioned in paras 86-89, the Court of Justice reaches a decision which oversteps jurisdictional limits which Member States have clearly set at the European Treaty level and which are reflected domestically in their constitutional arrangements. But, unless the Court of Justice has had conferred upon it under domestic law unlimited as well as unappealable power to determine and expand the scope of European law, irrespective of what the Member States clearly agreed, a domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements, including in the case of the 1972 Act what jurisdictional limits exist under the European Treaties and upon the competence conferred on European institutions including the Court of Justice.

To avoid problems, it was necessary 'that all concerned should act with mutual respect and with caution in areas where Member States' constitutional identity is or may be engaged…' That reflected 'the spirit of

[239] OJ 1992 C 348/1.

co-operation of which both the Bundesverfassungsgericht and this court have previously spoken.'[240]

E. Summary

There have been several instances of overt criticism of the CJEU by the Supreme Court. Particular topics of dissatisfaction have been the lack of engagement by the CJEU with the Opinions of its Advocates General and the reformulation by the CJEU of the questions referred in ways which were not considered helpful to the resolution of the dispute. In one case, the CJEU declined jurisdiction, leaving the case to be resolved ultimately by the Supreme Court.

More importantly, in *HS2* the Supreme Court embraced the idea that the primacy accorded to EU law by the European Communities Act 1972 might not be absolute. It thereby aligned itself, 50 years after *Costa v ENEL*, with some of the highest courts in Europe, most notably the Bundesverfassungsgericht, in rejecting the notion that EU law enjoys unqualified primacy over national law. The Court was driven to articulate this stance by the approach of the CJEU, particularly its all too frequent inability to give persuasive reasons for the conclusions it reaches and its tendency to meddle with what it sees as the failings of the legislature or the Member States. It is an indictment of the CJEU that the Supreme Court

[240] Para 91.

should have considered it necessary to spell out so bluntly basic principles about the role of courts.

The timing of the judgment in *HS2* was interesting. It was delivered on 22 January 2014, almost exactly 12 months after the Bloomberg speech of the then Prime Minister, David Cameron, in which he announced his intention if re-elected to hold a referendum on the UK's continued membership of the EU. When the Treaty of Lisbon was ratified, Cameron had also promised to enact a United Kingdom Sovereignty Bill to make clear that ultimate authority rested with the UK Parliament. Although that promise was kept with the enactment of section 18 of the European Union Act 2011,[241] the idea resurfaced during the campaign preceding the June 2016 referendum. Is it possible that the Supreme Court thought that the moment might be a propitious one for a reassertion of the sovereignty of Parliament and its own prerogatives in the face of the competing claims of the CJEU? Perhaps not. The media and many politicians seemed unaware of the Court's bold pronouncements in *HS2*, even though they undermined any case for a more expansive Sovereignty Bill and were less likely than an Act of Parliament to attract infringement proceedings under Article 258 TFEU. Ironically, in an article published in the *Daily Mail* on 3 December 2016 shortly before the hearing in *Miller*,[242] Lord Neuberger and Lord Mance were both given the maximum 'five-star' rating for Europhilia.

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[241] See G Gee and A Young, 'Regaining Sovereignty? Brexit, the UK Parliament and the Common Law' (2016) 22 European Public Law 131.

[242] Above n 110.

VII. Conclusion

There has been a subtle yet marked change since 2009 in the approach of the UK's apex court to the preliminary rulings procedure. It is possible that the change would have occurred even if the Supreme Court had not been created, for some of the contributory factors would surely have affected the House of Lords in a similar way: the expanding scope and complexity of EU law, causing an increase in the number of cases turning on difficult questions of the effect of the Treaties and the legislation adopted thereunder; the arrival in the upper echelons of the legal profession of practitioners with experience and expert knowledge of EU law. But it is also possible that the departure from the second chamber of Parliament and move to premises of their own encouraged the Justices to compare themselves more directly with the apex courts of other Member States.[243] The CJEU has not succeeded in persuading all such courts that the EU is an autonomous legal order that takes effect in the Member States on its own terms. Many of them adhere to the competing view, now seemingly more in keeping with the times, that EU law is applicable within their jurisdiction by virtue of national law, of which they are ultimately the guardians. The CJEU may have been heartened when the Bundesverfassungsgericht made its first

[243] See P Craig and G de Búrca, *EU Law* (Oxford, OUP, 6th ed, 2015) 278-309; A-M Slaughter, A Sone Sweet and J Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Oxford, Hart, 1997).

ever reference in the *Gauweiler* case[244] and then complied with the guidance it was given.[245] However, in December 2016 it was dealt a further blow by another old adversary, the Supreme Court of Denmark,[246] which refused to comply with a sternly worded judgment[247] requiring it to apply the general principle prohibiting discrimination on grounds of age in accordance with the poorly reasoned *Mangold* decision.[248] If apex courts of other Member

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[244] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* EU:C:2015:400. The Spanish Tribunal Constitucional and the French Conseil Constitutionnel are among other apex courts which waited some time before making their first references. See respectively Case C-399/11 *Melloni v Ministerio Fiscal* EU:C:2013:107; Case C-168/13 PPU *Jeremy F v Premier Ministre* EU:C:2013:358.

[245] Judgment of 21 June 2016.

[246] Decision of the Supreme Court of Denmark, Case no. 15/2014, 6 December 2016.

[247] Case C-441/14 *Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, judgment of 19 April 2016, EU:C:2016:278.

[248] Case C-144/04 [2005] ECR I-9981, EU:C:2005:709. See further A Dashwood, "From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?" (2006-07) 9 *Cambridge Yearbook of European Legal Studies* 81; M Dougan, "In Defence of *Mangold*?" in A Arnull, C Barnard, M Dougan and E Spaventa, *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart, 2011) 219.

States behave in this way, the Supreme Court may have thought, should it not follow suit so that the UK is not placed at a disadvantage?

The Supreme Court has largely insulated itself from the inter-court competition fostered by the preliminary rulings procedure, which can loosen the control apex national courts are able to exert over lower courts.[249] In building this position it has been assisted by the expertise of its members, for whom EU law is now part of their stock in trade. Collectively they have shown considerable facility with languages other than English, which enables them to compare different language versions of provisions under scrutiny and to engage with the case law of other European apex courts. The common law style in which their judgments are written enables them to analyse thoroughly the issues at stake. In Luxembourg, only the Advocates General can compete with this level of rigour. As Burrows and Greaves point out: 'The key point about the [Advocate General's] Opinion is that it is

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[249] See J Weiler, *The Constitution of Europe* (Cambridge, CUP, 1999) 197; K Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in A-M Slaughter, A Stone Sweet and J Weiler, (eds), *The European Courts and National Courts—Doctrine and Jurisprudence* (Oxford, Hart, 1997) 227; K Alter, *Establishing the Supremacy of European Law* (Oxford, OUP, 2001) 47–52. A leading example is Case C-416/10 *Jozef Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2013:8. Heyvaert, Thornton and Drabble argue that there is little evidence of such competition in environmental law cases (above n 98, 432).

written to convince the audience, the Court.'[250] It is not therefore surprising that Opinions are consulted frequently by the Supreme Court. By comparison, the meagre reasoning often given by the CJEU can appear unconvincing, especially where it does not follow the Advocate General or decides to dispense with an Opinion.

The approach of the Supreme Court to matters of EU law is far from unblemished. *Abbey National* and *Aimia Coalition Loyalty* are major blots on its copybook. The Justices do not apply a consistent method in analysing whether a reference should be made.[251] When they decide not to refer, their reasoning does not always seem adequate to satisfy the requirements of Article 6(1) ECHR. Sometimes there are too many individual judgments. Sometimes they are too long. But a concerted effort seems to have been made to bear down on some of these failings. In the complex *Franked Investment Income* case, Lord Hope gave a short introductory judgment 'to assist the reader in understanding at the outset what the issues are…'[252] In *HS2,* Lord Carnwath

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[250] N Burrows and R Greaves, *The Advocate General and EC Law* (Oxford, OUP, 2007) 30.

[251] Heyvaert, Thornton and Drabble observe that the domestic judiciary generally 'are at risk of adopting an ad hoc and unpredictable approach to references, thereby creating legal uncertainty' (above n 98, 433).

[252] Para 1. It might be helpful if longer judgments followed the example of the CJEU and incorporated tables of contents to assist the reader to navigate them.

and Lord Reed shared some of the judicial heavy lifting. In many cases, a judgment by one Justice is endorsed by all the other members of the panel.

The UK notified the European Council of its intention to leave the EU on 29 March 2017. In principle, the EU Treaties will therefore cease to apply to the UK at midnight on 29 March 2019 pursuant to Article 50(3) TEU unless that deadline is extended. It is likely (though not certain) that, ahead of the point of departure, an agreement will have been negotiated between the EU27 and the UK 'setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.'[253] It is possible that the withdrawal agreement will provide for transitional arrangements before the UK becomes a third state and negotiations begin on its future relations with the remaining Member States.

The British Prime Minister, Theresa May, has repeatedly emphasised her wish, as part of the process of withdrawal, to extract the UK from the jurisdiction of the CJEU.[254] However, the guidelines adopted by the European Council on 29 April 2017 under Article 50(2) TEU and the negotiating

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[253] Article 50(2) TEU. It is theoretically conceivable that the withdrawal agreement could enter into force before 29 March 2019, but this seems highly unlikely.

[254] See eg her speeches to the Conservative Party Conference on 2 October 2016 and at Lancaster House on 17 January 2017 setting out the UK's negotiating objectives for exiting the EU. See also HM Government, *The United Kingdom's Exit From and New Partnership With the European Union* (Cm 9417) 13.

directives published by the Council 22 May 2017[255] indicate that the EU27 see a continuing role for the CJEU in respect of the UK. This could encompass proceedings pending before the CJEU on the withdrawal date, including preliminary references and ongoing infringement proceedings, as well as judicial proceedings concerning the UK brought after the withdrawal date in respect of facts which occurred before that date. It could also embrace disputes relating to the enforcement of the withdrawal agreement.

If these proposals made their way into that agreement, the CJEU would remain a significant influence on the UK legal system beyond the withdrawal date. At the same time, it would continue to be subject to the scrutiny of the UK Supreme Court. That court has exposed with sometimes brutal clarity the need for the CJEU to make greater use of its Advocates General; to improve the quality of its reasoning; and above all to respect the limits of the judicial role in a modern democratic polity.

[255] XT 21016/17 ADD 1 REV 2.