Special Issue – Preliminary References to the CJEU
Part Three

The Supreme Court of the United Kingdom and Preliminary References to the European Court of Justice: An Opencast Constitutional Lab

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A. The Preliminary Reference as a "Litmus Test"

At the start of his paper *Keeping Their Heads Above Water? European Law in the House of Lords*,[1] Anthony Arnull reports a judgment delivered by Lord Denning in 1979, in the early days of the process of the United Kingdom's European integration. It stated as follows:

> [The] flowing tide of the Community law is coming in fast. It has not stopped at high-water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much that we have to learn to become amphibious if we wish to keep our heads above water.[2]

Lord Denning made a similar remark in his judgment in *Bulmer v. Bollinger*,[3] which was a pivotal case in the dialogue between the United Kingdom (UK) and European systems.

At that time, the UK was taking its first cautious steps in the European Community, following the entry into force of the European Communities Act in 1972. Since then, much has changed: the participation of the UK in the life of the European Union (EU) has developed, and a dialogue between the British and European courts has become a very powerful feature of the European constitutional landscape and also the British context. It is no longer a dialogue that suggests a two-way process; instead, from the perspective of the

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[1] Anthony Arnull, *Keeping Their Heads Above Water? European Law in the House of Lords*, *in* FROM HOUSE OF LORDS TO SUPREME COURT. JUDGES, JURISTS AND THE PROCESS OF JUDGING 129 (James Lee ed., 2011).

[2] Lord Denning MR in *Shields v. E Coomes (Holdings) Ltd.* [1979] 1 All ER 456, 462.

[3] *See* HP Bulmer Ltd & Anor v. J. Bollinger SA & Ors [1974] EWCA Civ 14 (22 May 1974), http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/1974/14.html&query=Bulmer+and+v+and+Bollinger+and+%281974%29&method=boolean.

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integration of the British national system into the EU system, it amounts to a relationship of cooperation.

In this light, a study of preliminary references under the UK system can be very informative. As it amounts to a link[4] between the domestic and European systems, it can act as the "litmus test" for dialogue between these two systems. For the UK in particular, it can tell us something about the frail relationship between the primacy of EU law and the principle of parliamentary sovereignty, which is "the very keystone of the law of the constitution," as Dicey taught.[5] Since *Costa v. ENEL*,[6] the principle of the supremacy of EU law has been asserted, that is, domestic courts are bound to apply EU law. National law must give way to EU law. There is thus no doubt that the constitution that Dicey described no longer operates as it did. The "classic view of parliamentary sovereignty,"[7] that is "a unique feature and a result of the unwritten constitution," belongs to the *tradition* of the British system. Nowadays, the constitutional arrangement of the UK is more problematic. Studying the preliminary reference procedure from the perspective of such a complex system offers a valid means of considering some crucial national debates.

The main purpose of this article is, accordingly, to verify whether the preliminary references sent by the Supreme Court of the United Kingdom (hereafter, UKSC) have provided a linkage between the European system and the national British system by securing the protection of rights. Studying this procedure can enable us to understand how the unwritten British constitution is developing.

The case law will be examined using two different approaches. First, a quantitative approach will be taken, with the intention of discerning any potential predominance of one particular issue regarding which the UKSC has considered it necessary to make a reference to the Court of Justice (CJEU). Second, a qualitative approach will be adopted, based on a study of the reasoning used by the two Courts in the records of preliminary references. The intersection between these two approaches will assist in understanding whether and how the dialogue between the two courts may assist in the integration of the UK into the EU. Nevertheless, it is important to note that this research cannot aim to provide definitive

[4] "Le rénvoi prejudiciel n'est pas un recours mais un mécanisme, une procedure. Il n'est pas demandé à la Cour de Justice de l'Union européenne de se pronunce sur un litige, ni *a fortiori* de le trancher, mais de "dire le droit." Le renvoi préjudiciel institue un lien entre le juge national et le juge communautaire, un pont assurant un dialogue qui s'établit sur les bases d'une coopération constructive entre deux ordres jurisdictionnel saux fins d'assurer l'application uniforme du droit de l'Union sur l'ensemble de son territoire." GEORGE VANDERSANDEN, RENVOI PREJUDICIEL EN DROIT EUROPEEN, REPERTOIRE PRATIQUE DU DROIT BELGE 9 (2013).

[5] ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 72 (1885).

[6] Case C–6/64, Costa v. ENEL, 1964 E.C.R. 585.

[7] *See* Pavlos Eleftheriadis, *Parliamentary Sovereignty and the Constitution*, 22/2 CANADIAN J. L. & JURISPRUDENCE, 267–90 (2009).

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answers to such difficult questions, particularly in the light of the fact that the data analyzed forms part of the case law of a very young Court, the role of which is still evolving.

B. A Peculiar Referring Court: The Supreme Court of the United Kingdom

Before starting our analysis, it is appropriate to consider the referring judge, the case law of which concerning preliminary references will be the object of this study. It is particularly important to explain *why* this focus was chosen.

In October 2009, the Appellate Committee of the House of Lords was replaced by the Supreme Court of the United Kingdom, as provided for under the Constitutional Reform Act of 2005. The UKSC inherited all of the powers previously vested in the House of Lords as the ultimate court of appeal. Along with its powers, it also inherited its limits, for example as to the power to conduct constitutional review of legislation. In its first judgment on a preliminary reference issued by the UKSC, in *Shirley McCarthy v. Secretary of State for the Home Department*, the CJEU took note of this transformation and referred to the national court as "the Supreme Court of the United Kingdom, formerly the House of Lords (United Kingdom)."[8]

As the UKSC is one of the many UK courts that can make references to the CJEU, it is important to explain the reasons underpinning the choice to focus on the use of the preliminary reference procedure within this Court only. Of the various reasons which could be proposed, one must be excluded from the outset. It is necessary to start by engaging in an *actio ad excludendum*: The UKSC is not a constitutional court, because it does not have powers of constitutional review.[9] In actual fact, the nature and role of this Court is said to be "evolving."[10] If we employ the traditional categories used in studies of constitutional courts in general, the only reason we can advance in support of the UKSC as a Constitutional Court does not concern the judicial review of legislation – as this power is not available in the UK – but jurisdiction over devolution issues (Government of Wales Act 1998, Scotland Act 1998, and Northern Ireland Act 1998). The UKSC acquired this jurisdiction from the Judicial Committee of the Privy Council. On the contrary, as regards the power of judicial review, many scholars consider that the UKSC does not have any such power. Paul Craig, for example, argues that:

> in UK law, the principles of judicial review can be used to invalidate secondary norms and to interpret primary legislation, but they cannot be used to invalidate the

[8] Case C–434/09, Shirley McCarthy v. Secretary of State for the Home Department, 2011 E.C.R. I–03375.

[9] PETER LEYLAND, THE CONSTITUTION OF UNITED KINGDOM: A CONTEXTUAL ANALYSIS 202 (2012).

[10] *See* Kate Malleson, *The Evolving Role of the UK Supreme Court*, PUBLIC LAW 754 (2011).

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> latter. This is true even in relation to rights-based review pursuant to the HRA 1998, since legislation that is incompatible with Convention rights is not invalidated, but is subject to a declaration of incompatibility that does not affect its legal status.[11]

He adds:

> The mere fact that we have an unwritten constitution does not *per se* preclude principles of judicial review from being above primary legislation. It would be perfectly possible to imagine an unwritten constitution in which this was so. The rationale for the position in the UK is not because we have an unwritten constitution, but because its dominant principle is the sovereignty of Parliament, the corollary being that UK principles of judicial review may serve as interpretive guides concerning primary legislation, but cannot lead to its invalidation.[12]

Nevertheless, this Court performs a peculiar and controversial institutional role. Indeed, its name itself is very telling: as Malleson writes, "the cultural connotation of the title, particular given the long shadow of the US Supreme Court, is likely to impact physiologically in a way which affects both internal and external expectations of the role of the court."[13] This is true with regard to the relationships with the CJEU.

First of all, the UKSC is a national Court of last resort: it is the final Court of appeal in the UK for civil cases and for criminal cases from England, Wales, and Northern Ireland. As a final court, it accepts the jurisdiction of the CJEU, under the duty imposed by Article 267 of the Treaty on the Functioning of the European Union (TFEU), to ask the CJEU to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the Union. Moreover, pursuant to Article 267(3) TFEU, it is a "[...] court or tribunal of a Member State against whose decisions there is no judicial remedy under national law" and, therefore, it "shall bring the matter before the Court."

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[11] Paul Craig, *Accountability and Judicial Review in the UK and EU: Central Precepts*, *in* ACCOUNTABILITY IN CONTEMPORARY CONSTITUTION 192 (Nicholas Bamforth and Peter Leyland eds., 2013).

[12] *Id.* at 193.

[13] MALLESON, *supra* note 10, at 771.

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Secondly, as mentioned above, the UKSC is the designated successor to the Appellate Committee of the House of Lords, before which the dialogue between the UK and EU started to develop during the 1980s and 1990s through the proposition of certain preliminary rulings. These included, in particular, the famous decision in *R v. Secretary of State for Transport, ex parte Factortame (No 2).*[14] This cannot be disregarded in any accurate account of the meaningful power of the preliminary reference procedure in the construction of the dialogue between the UK and EU, simply because, according to Drewry, it "has a special place in the political history of Britain's love-hate relationship with the Community and the Union."[15]

After the European Economic Community arranged for fishing quotas to be established for each Member State of the Community, the UK Parliament approved the Merchant Shipping Act in 1988. This Act sought to prevent foreign fishing companies from fishing in British waters, by prescribing certain rules governing the registration of the fishing boats as British boats. In fact, it only allowed fishing boats owned by British citizens or UK residents to trawl in national waters. The Spanish company Factortame had several fishing boats which could not be enrolled as British boats, even though they had been registered in the UK before the Act came into force. During the course of a complex legal procedure, three preliminary references were made to the CJEU, one of which was sent by the House of Lords. The House of Lords also made some important rulings, stating that the provisions of the Act had to be set aside as they were at odds with European Community law. This is the aspect which makes *R v. Secretary of State for Transport, ex parte Factortame (No. 2)* a pivotal case, and a point of no return for the UK in the European integration process. It marked a "sea-change in the attitude of the English courts to European law."[16] From then on, the sovereignty of Parliament would not be the same.[17]

The effects which the dialogue among the domestic and European systems have produced at the judicial level on the core rationale of parliamentary sovereignty cannot be ignored.

On the website of the UK Parliament, we read a definition of parliamentary sovereignty which recalls Dicey and his *Introduction to the Study of the Law of Constitution*. Here it is:

> Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal

[14] Case C–213/89, The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others, 1990 E.C.R. I–02433.

[15] Gavin Drewry, *The Jurisprudence of British Euroscepticism: A Strange Story of Fish and Vegetables,* 3/2 UTRECHT L. REV. 105 (2007).

[16] ARNULL, *supra* note 1, at 137.

[17] *See* Paul Craig, *Sovereignty of the United Kingdom Parliament after Factortame*, 11 Y.B. EUR. L. (YEL) 221 (1991).

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> authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is the most important part of the UK constitution.[18]

In the relationship with the EU legal system, this means that the British Parliament can repeal the European Communities Act and similar subsequent legislation whenever it wishes. There is no doubt that this is a feature of parliamentary sovereignty. At the same time, however, judgments such as *Factortame* have taken on a constitutional status, which cannot be underestimated. From this perspective, "UK membership of the EU represents a significant qualification to the principle of parliamentary sovereignty."[19] The preliminary reference procedure establishes both collaboration between the legal systems and a hierarchy.[20] It does not seem wrong to assert that this produces some important effects on the "classical view of parliamentary sovereignty."[21]

C. Preliminary References Sent by the UKSC: Some Aspects

We may now consider the general landscape of the preliminary references sent by the UKSC. Acting under Article 42 of the Supreme Court Rules 2009,[22] the UKSC has submitted

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[18] *See* www.parliament.uk/about/how/sovereignty.

[19] *See* LEYLAND, *supra* note 9, at 54.

[20] R. Romboli, *Corte di Giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, *in* NUOVE STRATEGIE PER LO SVILUPPO DEMOCRATICO E L'INTEGRAZIONE POLITICA IN EUROPA 431 (Adriana Ciancio ed., 2014) .

[21] ELEFTHERIADIS, *supra* note 7.

[22] Art. 42, Supreme Court Rules 2009: "(1) Where it is contended on an application for permission to appeal that it raises a question of Community law which should be the subject of a reference under Article 234 of the Treaty establishing the European Community and permission to appeal is refused, the panel of Justices will give brief reasons for its decision."

(2) Where on an application for permission to appeal a panel of Justices decides to make a reference under Article 234 before determining the application, it will give consequential directions as to the form of the reference and the staying of the application (but it may if it thinks fit dispose of other parts of the application at once).

(3) Where at the hearing of an appeal the Court decides to make a reference under Article 234 it will give consequential directions as to the form of the reference and the staying of the appeal (but it may if it thinks fit dispose of other parts of the appeal at once).

(4) An order of the Court shall be prepared and sealed by the Registrar to record any decision made under this rule."

a total of eleven preliminary references to the CJEU. One of these was struck from the register by the President of the Court.[23] All of the others cases were concluded.

If we attempt to distinguish these on the basis of the main subject-matter dealt with, some areas of law may be identified. The main subjects of the references are citizenship of the Union and right of entry and residence (*McCarthy* case[24]), approximation of laws (*Public Relations Consultants Association LTD.* and *David Edwards* cases[25]), social policy (*Williams and others, Alemo Herron* and *Saint Prix, O'Brien* cases[26]), freedom of establishment (*Test Claimants*[27]), and, lastly, the environment (*ClientEarth*[28]). In the cases of *Public Relations Consultant*s and *David Edwards*, along with *Office of Communications,*[29] the main subject-matter of the approximation of laws concerned the area of information.

The analysis here must consider the criteria used in making referrals to the CJEU, the reasons for making the references, the legal reasoning, and any discernible patterns. When reading each of the judgments, the "reasons of the judgment" become clear. Several reasons are advanced: in some cases, parts of the Directives do not enable the national courts to understand clearly whether they are able to provide dynamic interpretations, as in *Alemo-Herron* case. Other cases concern some difficult issues of European law, for which the guidance of the CJEU is required (*ClientEarth* case). In general, references are made when various members of the Supreme Court hold different views on a question of European law (for instance, in the *Williams and others, Edwards, O'Brien, Office of*

[23] Case C–54/11, JP Morgan Chase Bank and J.P. Morgan Securities (July 5, 2011), http://curia.europa.eu/. In this case, the UKSC was sent a copy of the judgment of 12 May 2011 in Case C-144/10 Berliner Verkehrsbetriebe, 2011 E.C.R. I–03961 by the Registry of the Court. This asked the UKSC whether, considering that judgment, it wished to maintain its reference for a preliminary ruling. One month later, the UKSC informed the Court that it did not wish to maintain the reference.

[24] Case C–434/09, Shirley McCarthy v. Secretary of State for the Home Department, 2011 E.C.R. I–03375.

[25] Case C–360/13, Public Relations Consultants Association LTD. v. The Newspaper Licensing Agency LTD, (June 5, 2014), http://curia.europa.eu/; Case C-260/11, Edwards and Pallikaropoulos v. Environment Agency, (Apr. 11, 2013), http://curia.europa.eu/.

[26] Case C–155/10, Williams v. British Airways, 2011 E.C.R. I–08409; Case C-426/11, Alemo Herron v. Parkwood Leisure LTD., (July 18, 2013), http://curia.europa.eu/; Case C–507/12, Saint Prix v. Secretary of State for Work and Pensions, (June 19, 2014), http://curia.europa.eu/; Case C–393/10, O'Brien v. Ministry of Justice, (Mar. 1, 2012), http://curia.europa.eu/.

[27] Case C–362/12, Test Claimants v. Commissioners, (Dec. 12, 2013), http://curia.europa.eu/.

[28] Case C–404/13, ClientEarth v. Secretary of State for the Environment, Food and Rural Affairs, (Nov. 28, 2013), http://curia.europa.eu/.

[29] Case C–71/10, Office of Communications v. The Information Commissioner, 2011 E.C.R. I–07205; Case C–360/13, Public Relations Consultants Association LTD. v. The Newspaper Licensing Agency LTD., (June 5, 2014), http://curia.europa.eu/; Case C–260/11, Edwards and Pallikaropoulos v. Environment Agency, (Apr. 11, 2013), http://curia.europa.eu/.

Communications, Public Relations and *Saint Prix* cases). In some cases (for example, *Test Claimants*) the Court expressly says that "the matter is not acte clair"[30] and, for this reason, considers a reference to the CJEU as necessary. As the UKSC is a national court of last resort, it is obliged by Article 267 TFEU to refer questions to the CJEU, as noted above. Hence, on this view, the preliminary references made by the UKSC were necessary.

Rather than dealing with all eleven cases, I will choose some of them, selecting certain themes and providing some observations. I shall focus on two groups of preliminary references made by the UKSC. The first group concerns the nodal point of social policy (*Williams, Alemo-Herron, Saint-Prix and O'Brien* cases); the second concerns citizenship (*McCarthy and Saint-Prix* cases). I have selected one case for each group, namely the *Williams* and *McCarthy* cases.

D. The UKSC References to the CJEU Concerning Social Policy: The *Williams* Case

British legal culture is characterized by the lack of a catalogue of social rights. For this reason, social policy is a field which is always developing. Out of the preliminary references sent by the UKSC, four concern the area of social policy. I refer to the cases of *Williams v. British Airways*, *Alemo Herron v. Parkwood Leisure LTD*, *Saint Prix v. Secretary of State for Work and Pensions*, and *O'Brien v. Ministry of Justice*. Moving from the assumption that "the legal culture of each Member State has always a marked effect upon the approach judges take towards preliminary references,"[31] a study of these rulings can suggest how the dialogue between UKSC and CJEU has secured the implementation of social rights at the domestic level. Employment is the prominent issue within these cases.

I consider it important to deal with the first case referred to the Court in this area: *Williams and Others v. British Airways plc.* In 2009, Williams and 2,750 other petitioners, who were pilots employed by British Airways, sued the British carrier before the Employment Tribunal with a claim for holiday pay ("paid annual leave"). The dispute arose because the pilots asserted that they had been underpaid by the company. According to the main domestic rules on pilots' employment, their remuneration was composed of three elements, namely a fixed annual sum and two supplementary payments which were dependent on the time spent flying and the time spent away from base. According to the pilots, these last two elements were not computed in their holiday pay. Both the Employment Tribunal and the Employment Appeal Tribunal found in favor of the workers. By contrast, the Court of Appeal held that the "paid annual leave" stands at a level of a "normal pay." Ms. Williams and other claimants challenged this decision before the UKSC.

[30] *See* Case C–77/83, CILFIT v. Ministry of Health, 1984 E.C.R. I–01257.

[31] Thomas de la Mare and Catherine Donnelly, *Preliminary rulings and EU Legal Integration: Evolution and Stasis*, *in* THE EVOLUTION OF EU LAW 363, 382 (Paul Craig & Grainne De Búrca eds., 2011).

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In order to establish the correct meaning of the concept of "paid annual leave," the Court needed to make five references to the CJEU.[32]

Ruling on the correct interpretation of the concept, the CJEU held that the EU provisions involved

> must be interpreted as meaning that an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot. It is for the national court to assess whether the various components comprising that worker's total remuneration meet those criteria.[33]

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[32] "(1) Under (a) articles 7 of Council Directives 93/104/EC and 2003/88/EC and (b) clause 3 of the European Agreement annexed to the Council Directive 2000/79/EC: (i) to what, if any, extent does European law define or lay down any requirements as to the nature and/or level of the payments required to be made in respect of periods of paid annual leave; and (ii) to what, if any, extent may member states determine how such payments are to be calculated?

(2) In particular, is it sufficient that, under national law and/or practice and/or under the collective agreements and/or contractual arrangements negotiated between employers and workers, the payment made enables and encourages the worker to take and to enjoy, in the fullest sense of these words, his or her annual leave; and does not involve any sensible risk that the worker will not do so?

(3) Or is it required that the pay should either (a) correspond precisely with or (b) be broadly comparable to the worker's "normal" pay?

Further, in the event of an affirmative answer to question (3)(a) or (b):

(4) Is the relevant measure or comparison: (a) pay that the worker would have earned during the particular leave period if he or she had been working, instead of on leave, or (b) pay which he or she was earning during some other, and if so what, period when he or she was working?

(5) How should "normal" or "comparable" pay be assessed in circumstances where: (a) a worker's remuneration while working is supplemented if and to the extent that he or she engages in a particular activity; (b) where there is an annual or other limit on the extent to which, or time during which, the worker may engage in that activity, and that limit has been already exceeded or almost exceeded at the time(s) when annual leave is taken, so that the worker would not in fact have been permitted to engage in that activity had he been working, instead of on leave?"

[33] Case C–155/10, Williams v. British Airways, 2011 E.C.R. I–08409, para. 31.

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Following the CJEU's judgment, the UKSC remitted the claims to the Employment Tribunal in order for the relevant amount to be quantified. The core principle within the European directive was the correlation between the amount of pay and the period of work.

It should be noted that at the domestic level, this case was a kind of "primum movens," specifically in the civil aviation sector in which various claims were raised concerning the level of holiday pay. Moreover, the CJEU's decision gave rise to a debate on the need to reform national legislation in this area.[34]

E. The Subject of Citizenship in the *McCarthy* Case

The *McCarthy* case focused on the interpretation of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States.

It is fitting to start by noting that the citizenship of the Union and the right of entry and residence are two crucial aspects of EU law. Indeed these themes lie at the heart of many of the references made by national courts to the CJEU, starting with the *Sala* case in 1996.[35] These rulings gave the CJEU the opportunity to act as a "constitutional adjudicator"[36] in drawing the "*ubi consistam*" of European citizenship.[37]

In the *McCarthy* case, EU law, if it was applied, would guarantee greater protection than domestic law. Shirley McCarthy was a woman with dual citizenship (British and Irish). The question was well-summarized in the opinion delivered by Advocate General Kokott:

> Can a person who is a national of two Member States of the European Union but has always lived in only one of those two States rely upon European Union law ('EU law') against that State in order to obtain there a right

[34] *See* Sophie Lalor-Harbord, Case-Comment: British Airways plc. v. Williams and Others [2012] UKSC 43, *available at* http://ukscblog.com/case-comment-british-airways-plc-v-williams-and-others-2012-uksfc-43/.

[35] Case C–85/96, María Martínez Sala, 1998 E.C.R. I–02691. This and the other main citizenship cases (*e.g.* Case C-34/09, Zambrano, 2011 E.C.R. I–01177; Case C–256/11, Dereci, 2011 E.C.R. I–11315) are commented also by Michael Dougan, *The Bubble that burst: Exploring the legitimacy of the Case Law on the Free Movement of Union Citizens*, *in* JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE COURT OF JUSTICE 127 (Maurice Adams, Henri de Waele, Johan Meeusen, & Gert Straetmans eds., 2013).

[36] I borrow this expression from Andrea Biondi and Silvia Bartolini, *Recent Developments in Luxembourg: The Activities of the Court's in 2012*, 20 EUR. PUB. L. 1–14 (2014).

[37] Citizenship is the main subject of other preliminary references such as the cases referred to, *supra* note 35.

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> of residence for him or herself and in particular for his or her spouse?[38]

Reliance on EU law would have enabled Mrs. McCarthy's husband, a Jamaican citizen, to have a derivative right of residence based on his wife's position; on the contrary, domestic law did not allow this.[39] Thus, what was the correct interpretation of Articles 3(1) and 16 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States? Was Mrs. McCarthy able to obtain a residence permit for her and her husband?

Although she had dual citizenship, the fact that she had always resided in a Member State of which she was a national and had never exercised the right of free movement led the Court to hold that Directive 2004/38/EC could not be applied to the case. However, the Court made an observation with regard to the application of Article 21 TFEU on the freedom of circulation of EU citizens, stating that whilst it could not be applied in a situation like this,

> the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.[40]

In the light of the UK system, this was a very meaningful assertion. The CJEU was expressly asserting that, if domestic law guaranteed a lower protection of the rights involved, EU law would have to be applied.

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[38] Opinion of Advocate General Kokott at para. 1, Case C–434/09, Shirley McCarthy v. Secretary of State for the Home Department (Nov. 25, 2010).

[39] UK Immigration rules provide that nationals of third countries who do not have leave to remain in the United Kingdom also do not meet the requirements to be granted leave to remain under those Rules as the spouse of a person settled in the United Kingdom.

[40] Case C–434/09, Shirley McCarthy v. Secretary of State for the Home Department, 2011 E.C.R. I–03375, para. 31.

F. Conclusions: The Preliminary Reference and the Changing British Constitutional Landscape

As was noted at the beginning of this article, the working question for this contribution was one of verifying whether the preliminary references issued by the UKSC have enhanced integration between the European and national British systems by securing the protection of rights and the development of the unwritten British constitution.

Some considerations may now be proposed. On the one hand, it might appear that the only path open to the UKSC is that of the preliminary reference to the CJEU. On the other hand, the number of such preliminary references may be indicative of the fact that judicial dialogue between the UKSC and the CJEU is increasing. From a quantitative standpoint, it is telling to observe the considerable increase in the number of preliminary references issued by the UKSC to the CJEU—an increase especially noticeable when compared to the experience of the UKSC's predecessor, the House of Lords. It is possible that other factors, which cannot be considered here, may have played a role in this. Until 2013, the statistics illustrate the increased incidence of references: eleven preliminary references were issued by UKSC during four years of activity, as against forty by the House of Lords between 1973 and 2008.[41] On this view, this is a revealing statistic.

The thematic aspect is interesting too. Whilst social policy undisputedly dominated in both the preliminary references sent by the UKSC and the House of Lords, the UKSC has also made references to the CJEU concerning other important subjects, such as citizenship (as shown in the *McCarthy* case). Moving from the assumptions that the preliminary reference is "the primary indication of judicial support for European integration,"[42] both a quantitative approach and a qualitative one prove that the integration of the UK into the EU may be improved strictly on the judicial level, although this is threatened by British euroskepticism. Within this perspective, judicial dialogue, which has grown through increasing judicial activism, can reveal its power in the process of integration, in order to create an "interconstitutional" order.[43]

I have left it to the end to consider an element which may be useful in support of the argument made here. The UKSC did not make any references to the CJEU in 2014. I do not think there is any reason to state that the UK is shrinking back from the process of

[41] ARNULL, *supra* note 1 (examining and taking stock of the preliminary references issued by the House of Lords).

[42] JONATHAN GOLUB, *Modelling Judicial Dialogue in the European Community: The Quantitative Basis of Preliminary References to the ECJ*, EUI Working Paper RSC No 96/58, 1.

[43] From this perspective, see Antonio Ruggeri, *Ragionando sui possibili sviluppi dei rapporti tra le Corti europee e i giudici nazionali (con specifico riguardo all'adesione dell'Unione alla CEDU e all'entrata in vigore del Prot. 16)*, *available at* http://www.rivistaaic.it/articolorivista/ragionando-sui-possibili-sviluppi-dei-rapporti-tra-le-corti-europee-e-i-giudici.

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European integration. Perhaps the adoption of a peremptory approach is not the right way to go about it. This statistic, if anything, allows us to consider how flexible the preliminary reference procedure is, as it is strongly dependent on the cases the Court has to judge on. The absence of rulings issued by the UKSC in 2014 is not a sufficient reason to conclude that "the United Kingdom will [not] continue to engage with Europe and European legal affairs."[44]

In actual fact, within this scenario, the constitutional role of the UKSC is perhaps a chapter yet to be written. As has been shown, an unwritten constitution leaves greater scope for action by this young court. This will enable the rights guaranteed at the domestic level to be implemented through dialogue with the CJEU. Indeed, it is likely that it is precisely "in policing the constitutional boundaries of the United Kingdom"[45] that the UKSC could display and enhance its constitutional role.

[44] *See* Lord Mance, *The Interface Between National and European Law*, 4 EUR. L. REV. 437, 456 (2013). He adds: "In whatever way the European Union may develop, I believe that the United Kingdom's contributions on both the legislative and the legal scenes have been and can in future continue to be pre-eminent."

[45] MALLESON, *supra* note 10, at 761.

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