

1 Thursday, 13 October 2016.

2 (9.30 am)

3 LORD PANNICK: My Lords, good morning. I appear with  
4 Rhodri Thompson, Anneli Howard and Tom Hickman for the  
5 lead claimant, Mrs Gina Miller. Your Lordship should  
6 have two pieces of paper on which I have set out who is  
7 speaking when. Dominic Chambers, Jessica Simor, and  
8 Benjamin John appear for the second claimant,  
9 Mr Dos Santos. Helen Mountfield, Tim Johnson, Jack R  
10 Williams and John Halford of Bindmans appear for the  
11 Grahame Pigney set of interested parties.  
12 Patrick Green, Henry Warwick, Paul Skinner, Matthieu  
13 Gregoire for the George Birnie group of interveners.  
14 Tony Muman for the AB set of interested parties. The  
15 Attorney General, and Christopher Knight appear for the  
16 defendant. We have also here, with watching briefs,  
17 Mr Martin Chamberlain for the Scottish Government, and  
18 Richard Gordon and Tom Pascoe for the Welsh Government.

19 As your Lordships well know, we are all here because  
20 this is an application for permission to bring judicial  
21 review proceedings, and it is an application for the  
22 remedy of a declaration in a case which raises an issue  
23 of fundamental constitutional importance concerning the  
24 limits of the power of the executive. Can the  
25 defendant, on behalf of the government, lawfully use

1 prerogative powers to give a notification under  
2 Article 50 of the treaty on European Union of this  
3 country's intention to withdraw from the EU.

4 THE LORD CHIEF JUSTICE: Before you begin the arguments,  
5 could we just, I wanted to ask you, it does seem to us  
6 fair to the shorthand writer, in particular, because  
7 a transcript is being made, if we had a five or  
8 ten minute break at 11 o'clock, or 11.15.

9 LORD PANNICK: Certainly.

10 THE LORD CHIEF JUSTICE: Would that fit in with your plans?

11 LORD PANNICK: Certainly, my Lord.

12 THE LORD CHIEF JUSTICE: And you tell us when it would be  
13 convenient. But I just don't think it is fair to them.  
14 I am not saying that it is fair to counsel to go for  
15 three and a half hours without a break.

16 LORD PANNICK: It may not be fair to your Lordship to have  
17 to listen for three and a half hours.

18 THE LORD CHIEF JUSTICE: No.

19 LORD PANNICK: Your Lordships know the case for Mrs Miller,  
20 is that prerogative powers may not lawfully be exercised  
21 by the minister because their use in this context would  
22 remove rights established by Act of Parliament, and  
23 would preempt the decision of Parliament, whether or not  
24 to maintain those statutory rights. That is our  
25 submission, which I will seek to develop. All the more

1           so, we say, when this question of the legal limits of  
2           executive power arises in the context of one of the most  
3           important of our statutes, the European Communities Act,  
4           which is the source of so much of the law of the land.

5           My Lords, some preliminary points if I may, just to  
6           clear away what we say this case is not about. First of  
7           all, this claim concerns, and only concerns, whether the  
8           law allows the executive to give notification under  
9           Article 50. The courts, we respectfully submit, I am  
10          sure there is no dispute about this, is not concerned  
11          with the political wisdom or otherwise of withdrawal by  
12          this country from the EU. The defendant, we  
13          respectfully submit, is wrong to suggest on page three  
14          of his skeleton argument, it is line 7, that for us to  
15          challenge the legality of the proposed notification,  
16          I quote "is merely camouflage." My Lords, of course my  
17          client, Mrs Miller, wishes this country to remain  
18          a member of the EU. Our skeleton argument so states at  
19          paragraph 53. But that is not the issue in these  
20          proceedings. Mrs Miller, I say, is entitled to complain  
21          in these proceedings that if we are to leave the EU,  
22          then the steps to be taken, which will deprive her of  
23          rights under the 1972 Act, and other legislation, must  
24          be taken in a lawful manner. Nor, my Lords, is this  
25          case concerned with the political desirability, or

1 otherwise, of parliamentary involvement in the decision  
2 to notify under Article 50. Our case is not that an Act  
3 of Parliament is politically desirable, we accept we can  
4 only succeed if we can satisfy the court that the  
5 defendant has no legal power to notify under prerogative  
6 powers.

7 Secondly, we are not inviting the court to address,  
8 nor would, I respectfully submit, the court wish to  
9 address, the substance of what Parliament may say if, as  
10 we contend, the defendant has no legal power to notify  
11 using prerogative powers, and if Parliament were  
12 hereafter to be asked to give statutory authorisation.  
13 If we are correct in our legal submissions, and if the  
14 government were then to place a bill before Parliament,  
15 it would be entirely a matter for Parliament whether to  
16 enact legislation and in what terms. Parliament may  
17 decide to approve such a bill, authorising notification.  
18 Parliament may reject such a bill, or it may approve it,  
19 with amendments which may impose limits on the powers of  
20 the defendant. For example, as to the date of  
21 notification; for example, in relation to parliamentary  
22 approval of negotiating terms; for example, as to the  
23 need for the minister to report back to Parliament at  
24 defined times. All of those would be matters for  
25 Parliament to consider and decide. Our legal claim is

1 in support of parliamentary sovereignty. What  
2 Parliament does with its sovereignty is, of course,  
3 entirely a matter for Parliament.

4 Third, we do not contend that the defendants' lack  
5 of legal power to notify is a consequence of EU law.  
6 Our case is that the principles of our domestic  
7 constitutional law deny the defendant lawful power to  
8 notify, using prerogative powers. Yes, EU law is highly  
9 relevant to the analysis in this case, because it  
10 explains the content and the importance of the legal  
11 rights under the 1972 Act, and other statutes, which we  
12 say notification will cause to be lost. But EU law is  
13 not the basis of the constitutional limits on the use of  
14 prerogative powers. Those limits are imposed by the  
15 common law.

16 My Lords, in developing my arguments on the limits  
17 of the prerogative powers of the defendant in the  
18 present context, I am going to adopt many of what we say  
19 are the valuable points made in the skeleton arguments  
20 from my friends, supporting this side of the argument.  
21 And your Lordships will then be asked to hear  
22 supplementary submissions from my friends. In  
23 particular, Mr Chambers is going to address the court on  
24 behalf of Mr Dos Santos on issues of parliamentary  
25 sovereignty and on whether a decision has been taken to

1           withdraw from the EU. Miss Mountfield for the  
2           Grahame Pigney set of interested parties, is going to  
3           deal with devolution points; those are the points  
4           arising from the special constitutional arrangements  
5           governing Scotland, Wales and Northern Ireland. She,  
6           Miss Mountfield, is going to deal with the acts of union  
7           with Scotland. She is going to address EU citizenship  
8           rights, and the Bill of Rights 1689. I am going to  
9           leave those topics to her. Mr Green is going to speak  
10          for the George Birnie --

11       THE LORD CHIEF JUSTICE: Can I just ask you one question, so  
12          it may help us in due course.

13       LORD PANNICK: Of course.

14       THE LORD CHIEF JUSTICE: We understand that there is some  
15          litigation in Northern Ireland --

16       LORD PANNICK: There is.

17       THE LORD CHIEF JUSTICE: -- and it would be helpful to know,  
18          or have put in a note for us, the status of that.

19       LORD PANNICK: Certainly, my Lord, we will deal with that at  
20          a convenient time, if that is acceptable.

21       THE LORD CHIEF JUSTICE: Thank you.

22       LORD PANNICK: Then Mr Green is going to make submissions  
23          for the George Birnie group of interveners. He is going  
24          to focus on the rights enjoyed by British citizens  
25          abroad and he too wants to address the absence of

1 an identifiable decision of the UK to leave the EU. And  
2 finally on our side, Mr Gill is going to address the  
3 court on the impact of the Article 50 notification on  
4 children and their carers.

5 My Lords, just to clear out the way, there is no  
6 dispute between the parties that the claimants have  
7 standing to raise the constitutional issues which I have  
8 identified. My client, Mrs Miller, is a British  
9 citizen. She lives in this country. She is concerned  
10 about the constitutional issues raised. She exercises,  
11 as her witness statement explains, many of the rights  
12 conferred by EU law.

13 The defendant has raised, it is at the end of his  
14 skeleton argument, an objection to the justiciability of  
15 the issues of law which we raise and he has objected to  
16 the constitutional impropriety, as he sees it, of the  
17 declaratory relief which we seek. We agree with the  
18 defendant that it is appropriate to deal with those  
19 issues at the end of the argument, rather than at the  
20 beginning, because the strength, we say the weakness of  
21 those points, can best be understood in context, after  
22 your Lordships have heard our side on the substance of  
23 the case. So I will deal with them at a later stage.  
24 Our case, of course, is that these proceedings raise  
25 an issue of law. An issue of law is for the court to

1           decide, and the declaratory relief we are seeking would  
2           not trespass on the powers of Parliament. On the  
3           contrary, we say it would uphold the powers of  
4           Parliament.

5           Now my Lords, I want to address, if I may, five main  
6           topics. Can I identify them and then deal with them in  
7           turn.

8           First of all, can I say something about Article 50.  
9           Secondly, I want to make some submissions about the EU  
10          Referendum Act 2015, on which, as the court has seen,  
11          the defendant has placed much reliance in his skeleton  
12          argument. Third, I want to remind your Lordships of the  
13          relevant features of the European Communities Act, and  
14          of its constitutional significance. Fourth, I need to  
15          make my submissions, I will make my submissions, on what  
16          we say are the legal limits, relevant limits, on the use  
17          of prerogative powers. And fifth, I want to respond to  
18          the points made in the defendant's skeleton argument,  
19          where he sets out his answers to the case that we have  
20          made. So that is the order, if I may. Of course, if  
21          there are other points, your Lordships will tell me as  
22          we go along.

23        THE LORD CHIEF JUSTICE: We may ask you questions in  
24          relation to those.

25        LORD PANNICK: Of course.



1 THE LORD CHIEF JUSTICE: And I think we will want to ask you  
2 two questions in relation to the scope of Article 50.  
3 Namely, once invoked, can it be stopped. And secondly,  
4 can you give a conditional notice under Article 50. But  
5 I thought -- we will try and indicate the questions if  
6 we can --

7 LORD PANNICK: Of course.

8 THE LORD CHIEF JUSTICE: -- so everyone has a chance to  
9 think about them. But as you are about to embark on  
10 Article 50, those are two of the questions we have.

11 LORD PANNICK: I will deal with those --

12 THE LORD CHIEF JUSTICE: They are not easy.

13 LORD PANNICK: I will do my best to answer them, my Lords.

14 Article 50 your Lordships have at bundle A, at tab  
15 number 6. Your Lordships are, by now, very familiar  
16 with it. Can I just read it out. Article 51:

17 "Any member state may decide to withdraw from the  
18 Union, in accordance with its own constitutional  
19 requirements.

20 "(2). A member state which decides to withdraw  
21 shall notify the European Council of its intention. In  
22 the light of the guidelines provided by the Council, the  
23 Union shall negotiate and conclude an agreement with the  
24 state, setting out the arrangements for its withdrawal,  
25 taking account of the framework for its future

1 relationship with the Union. That agreement shall be  
2 negotiated in accordance with Article 218(3) of the  
3 treaty on the functioning of the European Union. It  
4 shall be concluded on behalf of the Union by the  
5 Council, acting by a qualified majority, after obtaining  
6 the consent of the European Parliament.

7 "(3). The treatise shall cease to apply to the  
8 state in question from the date of entry in to force of  
9 the withdrawal agreement or failing that, two years  
10 after the notification referred to in paragraph 2,  
11 unless the European Council, in agreement with the  
12 member state concerned, unanimously decides to extend  
13 this period.

14 "(4). For the purposes of paragraph 2 and 3, the  
15 member of the European Council or of the Council  
16 representing the withdrawing member state, shall not  
17 participate in the discussions of the European Council  
18 or Council or in decisions concerning it. A qualified  
19 majority shall be defined in accordance with  
20 Article 238(3)(b) of the treaty, on the functioning of  
21 the European Union.

22 "(5). If a state which has withdrawn from the Union  
23 asks to rejoin, its request shall be subject to the  
24 procedure referred to in article 49."

25 LORD JUSTICE SALES: Lord Pannick, can I ask you,

1 Article 50, am I right in thinking it came in with the  
2 Lisbon Treaty?

3 LORD PANNICK: It did, my Lord.

4 LORD JUSTICE SALES: So what was the position on withdrawal  
5 before that, because some of the argument goes back to  
6 the 1972 Act.

7 LORD PANNICK: There was no express provision before the  
8 Lisbon Treaty was introduced, but there was discussion  
9 amongst international lawyers as to whether or not it  
10 would be open to a member state to withdraw, by reason  
11 of general international law provisions. And there are  
12 general international law provisions which may or may  
13 not have allowed a member state to withdraw.

14 LORD JUSTICE SALES: And are we going to be assisted from  
15 the counsels' row with argument about that?

16 LORD PANNICK: I wasn't proposing to do so. I can assist  
17 your Lordship or try to assist your Lordship in relation  
18 to the relevant provisions but I say they do not assist  
19 on the issues which are before the court. Not least  
20 because our argument is not that the defendant is acting  
21 in any way unlawfully, contrary to Article 50. Our  
22 case, and indeed the case of the defendant, is that the  
23 United Kingdom is perfectly entitled, in accordance with  
24 whatever its own constitutional requirements are, to  
25 withdraw from the EU.

1 LORD JUSTICE SALES: Right, but some of the arguments, as  
2 I understand them from this skeleton argument at the  
3 moment, seem to go back to the 1972 European Communities  
4 Act and what Parliament intended by that Act.

5 LORD PANNICK: Yes, well, some of the --

6 LORD JUSTICE SALES: Isn't it relevant to have some idea of  
7 what the international law position was in 1972, to  
8 inform our understanding of what Parliament intended by  
9 that Act?

10 LORD PANNICK: Well if it would assist your Lordship, I will  
11 seek to deal with that.

12 LORD JUSTICE SALES: I think I should register that I, for  
13 myself, am interested at least, to know that by way of  
14 background.

15 LORD PANNICK: Yes. Can I deal with that in due course,  
16 my Lord, and seek to assist your Lordship in relation to  
17 that aspect of the case.

18 LORD JUSTICE SALES: Thank you.

19 LORD PANNICK: For our part, we say that Article 50 does not  
20 envisage any conditional withdrawal, which is the second  
21 question put forward by my Lord, the Lord Chief Justice.  
22 What Article 50 envisages is that under Article 50  
23 sub-paragraph 2, that a member state which decides to  
24 withdraw shall give a notification. And the whole  
25 purpose of the Article 50 regime under article 53 is to

1 set out a very tight timetable which can only be  
2 extended with the unanimous agreement of the  
3 European Council, and the member state, the purpose of  
4 which is to provide some end point for the application  
5 of the treaties.

6 THE LORD CHIEF JUSTICE: The question really was directed  
7 that once notification is given, it can't be given in  
8 terms that we give notice but it is conditional, in that  
9 it is -- the terms again, are subject to parliamentary  
10 approval.

11 LORD PANNICK: No.

12 THE LORD CHIEF JUSTICE: Your answer is that the UK  
13 government cannot reserve parliamentary approval to  
14 anybody at the outset, it is an absolute notice.

15 LORD PANNICK: Yes. The United Kingdom has to make up its  
16 mind. And the United Kingdom has to decide, are we  
17 going to give notification of withdrawal? That is what  
18 Article 50(2) envisages. Article 50(2) then triggers  
19 the consequences that are set out with clarity in  
20 Article 50(3). And the consequence of giving  
21 notification is that the treatise cease to apply to the  
22 United Kingdom. When do they cease to apply? Well,  
23 they cease to apply as soon as the withdrawal agreement  
24 is entered into. But there is a time limit. This  
25 treaties, in any event, cease to apply within two years,

1 and that two year period can only be extended with the  
2 agreement of the European Council, in agreement with the  
3 member state, if the Council unanimously decides to  
4 extend the period. And the need for unanimity  
5 demonstrates how serious a matter this is.

6 THE LORD CHIEF JUSTICE: What you are saying is that in  
7 paragraph 1 of Article 50, is where it says "any member  
8 state may decide to withdraw from the Union, in  
9 accordance with its own constitutional arrangements",  
10 you can't say; well, the executive can give notice, but  
11 Parliament has to approve the terms. It can't give that  
12 sort of notice.

13 LORD PANNICK: That is my case. My case is --

14 THE LORD CHIEF JUSTICE: No, I thought it was your case.  
15 But it is a matter of some importance.

16 LORD PANNICK: It is of vital importance. It is of vital  
17 importance to our case that the agreement or otherwise  
18 of Parliament is irrelevant. It is simply irrelevant.  
19 Under Article 50(2) and (3), once notification is given,  
20 the United Kingdom will, will, leave the EU. It will  
21 leave the EU at one of three stages. First, when the  
22 withdrawal agreement is entered into, if that takes  
23 place within two years. Secondly, it will take place  
24 two years after notification, and thirdly, it will only  
25 take place more than two years after notification, if

1           there is unanimous agreement of the European Council,  
2           and of the United Kingdom, the state leaving, that the  
3           time period of two years is to be extended. It is as  
4           simple as that.

5   THE LORD CHIEF JUSTICE: And so within that period, if one  
6           goes back to paragraph 2 of the article, within that two  
7           year period, if there is to be an agreement, the Council  
8           has to agree and the European Parliament has to consent?

9   LORD PANNICK: Yes.

10   THE LORD CHIEF JUSTICE: And --

11   LORD PANNICK: A lot has to be done within the two year  
12           period, but the whole point, I say the whole point of  
13           this regime is to say to a member state, "If you decide  
14           to withdraw, there are consequences." And the  
15           consequences are that the treatise will cease to apply  
16           to you, irrespective of what, domestically, may happen  
17           thereafter, once a notification is given. That is the  
18           whole point behind our submission. And indeed, there is  
19           nothing in the skeleton argument for the defendant that  
20           takes issue with that. The defendant nowhere suggests,  
21           and I would be very surprised if the Attorney  
22           General contends, nothing to suggest that the  
23           United Kingdom envisages a conditional notification, or  
24           that it could give a conditional notification. The  
25           position of the defendant is very clear; we will be

1 giving notification in March or whenever it is, and we  
2 will be giving notification because we intend to leave  
3 the European Union. Where the dispute arises is as to  
4 the legal consequences for the domestic law application,  
5 and in relation to the prerogative power.

6 So I say no question of a conditional notification  
7 being given. Indeed, the whole basis of Article 50, in  
8 my submission, would be frustrated. Were it possible to  
9 give a conditional notification, it would frustrate the  
10 timetable that is very carefully laid down and it's laid  
11 down in order to ensure clarity and certainty as to when  
12 the United Kingdom, or any other country that wishes to  
13 use the notification process, ceases to be a member of  
14 the EU.

15 My Lord, your Lordship's other question was whether  
16 or not it would be possible to withdraw a notification  
17 once it has been given. And our submission, again, is  
18 that it is not possible for the United Kingdom, once  
19 having given a notification, to withdraw that  
20 notification. Article 50 is deliberately designed to  
21 avoid any such consequence. There is no mention of  
22 a power to withdraw. And the very possibility of  
23 a power to withdraw a notification would frustrate,  
24 again, Article 50(3), which sets out in the clearest  
25 possible terms, what the consequences are of giving the



1 notification under Article 50(2). Again, I do not  
2 understand there to be any dispute between us on our  
3 side and the defendant in relation to that issue,  
4 because there is no suggestion in the defendant's  
5 skeleton argument that there is any power to withdraw  
6 a notification and that that provides some sort of  
7 answer to the submissions that we are making.

8 THE LORD CHIEF JUSTICE: The only reason we ask is we wanted  
9 to be sure that there was absolute clarity on your case  
10 that once the notice is given, there is no withdrawal  
11 and you can't give it conditionally.

12 LORD PANNICK: Yes. Those are my submissions.

13 THE LORD CHIEF JUSTICE: That is all.

14 LORD PANNICK: And I rely on Article 50, the terms of  
15 Article 50. I rely also, Mr Thompson reminds me, on  
16 Article 50.5, which deals very clearly with what happens  
17 when, after withdrawal has taken place. If I am wrong  
18 in my understanding of the defendant's arguments, they  
19 will assist your Lordships, and I will have, I am sure,  
20 an opportunity to respond to any points they wish to  
21 make in my reply submissions. But our position, I hope,  
22 is very clear indeed; there is no possibility of  
23 a conditional withdrawal and there is no going back.  
24 And it is because of those features, and it is because  
25 Article 50(3) says that "the treatise shall cease to

1 apply to the state in question from the defined date",  
2 and does so whatever Parliament may later think, that  
3 the notification is so important, and that it has the  
4 effect of removing, we say, I will make this submission  
5 in a few moments, removing the rights which are enjoyed  
6 by Mrs Miller and other citizens.

7 Now my Lords, the defendant's skeleton argument, it  
8 is paragraph 6, seeks clarification on whether we are  
9 complaining about a decision to leave the EU,  
10 Article 50(1), or a decision to notify, Article 50(2),  
11 or indeed, both. And the position of the lead claimant  
12 is that a decision under Article 50(1) and notification  
13 under Article 50(2) are closely linked, for the purposes  
14 of Article 50. Because Article 50(2) says that  
15 "a member state which decides to withdraw", that is  
16 Article 50(1), "shall notify the European Council". So  
17 there is clearly a close link, for the purposes of  
18 Article 50. We are focusing our challenge, our legal  
19 challenge, on the decision to notify under  
20 Article 50(2). And the reason for that is that it is  
21 the notification which produces the legal effect in  
22 domestic law of which we complain. It is by reason of  
23 notification under Article 50(2) that the treatise cease  
24 to apply to the United Kingdom under Article 50(3), on  
25 the dates set out in Article 50(3).

1 THE LORD CHIEF JUSTICE: Just for clarification, as we  
2 understand it, you don't dispute the use of the royal  
3 prerogative to negotiate, what you say makes it  
4 different in this case is once notice is given, if it  
5 can't be given conditionally and it is irrevocable, then  
6 that then means it will have an effect in domestic law?

7 LORD PANNICK: Yes. I say my case is very simple. My case  
8 is that notification is the pulling of the trigger. And  
9 once you have pulled the trigger, the consequence  
10 follows. The bullet hits the target. It hits the  
11 target on the date specified in Article 50(3). The  
12 triggering leads to the consequence, inevitably leads to  
13 the consequence, as a matter of law, that the treatise  
14 cease to apply and that has a dramatic impact in  
15 domestic law. This is not simply action on the  
16 international plane. The notification has an impact in  
17 domestic law, because of the unique characteristics,  
18 which I am coming on to, of the European Communities  
19 Act. And it is the action on the international plane of  
20 giving notification which leads to the removal of  
21 a whole series of rights, important rights, which are  
22 conferred by Parliament in 1972, and thereafter, and  
23 those rights are removed, whatever Parliament may think  
24 about it at a later stage. They are removed. And we  
25 say that that is why the minister using prerogative

1 powers cannot trigger the notification, which produces  
2 an effect not just in international law, but in domestic  
3 law. That is our case. And that is why we focus on the  
4 notification. My friends, Mr Chambers and Mr Green in  
5 particular, are going to make further submissions on why  
6 there has not been a lawful decision for the purposes of  
7 Article 50(1). I, of course, associate myself with what  
8 they say, but for my purposes, Mrs Miller's case, we  
9 focus on notification because it is notification which  
10 produces the result which we say offends against  
11 domestic constitutional law. That is our case.

12 I should add, of course, Miss Mountfield makes this  
13 point in her skeleton argument for Mr Grahame Pigney and  
14 others at paragraph 4, that the actual process of  
15 notification, once Parliament has authorised, if it  
16 does, notification, the actual process of course, would  
17 be by the executive. So we are not concerned with that.  
18 We are concerned with the actual decision to give  
19 notification, not who carries it out.

20 I should also add that there is a mention in  
21 Article 50(2) of guidelines from the European Council.  
22 There are no guidelines, not yet anyway, no guidelines  
23 in relation to such matters.

24 That is what I wanted to say about Article 50. If  
25 I may, I will reflect on Lord Justice Sales' question,

1 if any assistance is provided by the pre Lisbon  
2 position, and I will come back to that. Can I reflect  
3 on that.

4 My Lords, my second topic is the EU Referendum Act  
5 2015. Your Lordships will have seen that the defendant,  
6 in his skeleton argument, places heavy reliance on the  
7 Referendum Act, and on the referendum itself. And can  
8 I take your Lordships to my friend's skeleton argument,  
9 the skeleton argument of the Secretary of State. And  
10 your Lordships will find where it is put, and it is  
11 powerfully put, it is put with some force, at the end  
12 of -- well, it is page 7 of my friend's skeleton  
13 argument. And at the top of page 7 is the end of  
14 paragraph 20(1). If your Lordships have page 7, the top  
15 section is the end of paragraph 20(1) and it is the last  
16 seven lines. This is what the defendant says. He says:

17  
18 "The lead claimant's case, and that of all of the  
19 parties seeking to rely on parliamentary sovereignty as  
20 a determinative principle, involves the proposition that  
21 it would be constitutionally appropriate for the British  
22 people to vote to leave and for the government and/or  
23 Parliament then to decline to give effect to that vote.  
24 That is a surprising submission in a modern democratic  
25 society."

1           Now, in answering reliance on the 2015 Act and the  
2 referendum results, I invite your Lordships to go to the  
3 Act itself, the European Union Referendum Act, which is  
4 in bundle A and it is at tab number 5, my Lords. And on  
5 the second page, section 1, "The referendum", all it  
6 says, of relevance, in my submission, is:

7           "A referendum is to be held on whether the  
8 United Kingdom should remain a member of the  
9 European Union."

10           And then there are some provisions about the dates,  
11 and then in sub-section 4 there is a provision about the  
12 question, and the question on the ballot paper, "Should  
13 the United Kingdom remain a member of the  
14 European Union, or leave the European Union?" And there  
15 is nothing else in the Act which assists, in my  
16 submission, in relation to any constitutional issue  
17 which arises in these proceedings.

18           What is absent from the 2015 Act is any provision  
19 specifying what consequences, if any, should follow from  
20 the referendum result. The Act says nothing on that  
21 subject. And it is of interest that the Act says  
22 nothing on that subject, because when Parliament does  
23 wish to specify the consequences that should follow from  
24 a referendum, it says so. If your Lordships go to  
25 bundle C at tab number 30, your Lordships will see

1 a recent example, and the recent example concerned the  
2 alternative vote referendum that was held in 2011.  
3 Tab 30 of bundle number C is the Parliamentary Voting  
4 System and Constituencies Act 2011. And your Lordships  
5 have section 8, which deals with the consequences of  
6 a referendum on alternative voting. Section 8.1:

7 "The minister must make an order, bringing into  
8 force section 9, schedule 10, part 1 of schedule 12, if  
9 more votes are cast in the referendum in favour of the  
10 answer yes than in favour of the answer no ... (2) If  
11 more votes are not cast in the referendum in favour of  
12 the answer yes, than in favour of the answer no, the  
13 minister must make an order repealing the alternative  
14 vote provisions."

15 So Parliament there specified what the consequence  
16 should be. By contrast, in the Referendum Act 2015,  
17 nothing was said.

18 Now, the defendant does not suggest, in his skeleton  
19 argument, that the 2015 Act gave him any statutory power  
20 to notify under Article 50(2). The defendant's case is  
21 that he has prerogative powers which entitle him to  
22 notify. Your Lordships have seen my friend's skeleton  
23 argument, but the assertion of prerogative powers can be  
24 found throughout; paragraph 2, paragraph 8(1), and in  
25 many, many other places. I won't take your Lordships to

1 it. But that is his case. He does not say that he has  
2 a statutory power conferred by the 2015 Act. What his  
3 skeleton argument suggests is that the 2015 Act, and the  
4 referendum which it authorised, is not a source of legal  
5 power to give notification, it is a justification for  
6 the use of prerogative powers to give notification. The  
7 defendant's argument, I summarise, and I hope I fairly  
8 summarise it, it amounts to this: at all material times  
9 the government's policy has been unequivocal. Their  
10 policy has been that they would respect the outcome of  
11 the referendum. Voting on the 2015 Bill in Parliament  
12 took place on that understanding, and the people voted  
13 in the referendum on that understanding. Therefore,  
14 says the defendant, he, and the government, are  
15 justified in using prerogative powers to give  
16 notification and in not seeking any further  
17 authorisation from Parliament. Our response to this  
18 argument is as follows: first, we say that the defendant  
19 is correct not to contend, and he does not contend, that  
20 the Referendum Act provides statutory authorisation for  
21 notification. His case, as I say, is based on  
22 prerogative powers.

23 Second, the issue in these proceedings is not  
24 whether it is justifiable for the defendant to use  
25 prerogative powers. The question for the court, in my



1 submission, is whether the defendant has lawful power to  
2 use the prerogative. And therefore the defendant's  
3 arguments as to whether he is justified in using such  
4 a power are wide of the mark. Our challenge is to  
5 whether he has legal powers in the first place, not  
6 whether he is justified in using them, if he does  
7 possess them.

8 Thirdly, we point out whatever the common law legal  
9 limits on the use of prerogative powers are, and our  
10 case is based on common law, there is nothing in the  
11 2015 Act to suggest that they are altered in any way by  
12 the 2015 Act. The common law limits on the use of  
13 prerogative powers cannot, in my submission, be altered  
14 by an Act of Parliament which says absolutely nothing on  
15 the subject.

16 THE MASTER OF THE ROLLS: One thing is we do have a slightly  
17 odd historical position here, because if we go back to  
18 the 17th century and we have this great debate between  
19 the Crown's powers and those of Parliament, there wasn't  
20 in existence anything like the referendum, so the  
21 democratic dynamic is a binding one. And what I wanted  
22 to ask you was whether the fact we now do have  
23 a different means of democratic response by the  
24 population, that adds a complicating factor which didn't  
25 exist before and that the common law hadn't had to deal

1 with before, in terms of the extent of the prerogative  
2 powers.

3 LORD PANNICK: My answer to your Lordship is that your  
4 Lordship is, of course, undoubtedly correct. But I say  
5 that the development of constitutional mechanisms to  
6 include a referendum, does not affect the issue in this  
7 case. And that is because the issue in this case, I say  
8 the only real issue in this case, is whether the  
9 defendant can use prerogative powers in a context where  
10 their use will defeat rights which have been conferred  
11 by Parliament itself. And none of the constitutional  
12 developments which have occurred come close to affecting  
13 the basic truth, which is that Parliament is sovereign  
14 and when it has conferred rights, they cannot be taken  
15 away by an act of the executive. That is the point. It  
16 is, of course, entirely open to Parliament to vary that  
17 constitutional principle in any context it sees fit.  
18 But the 2015 Act does not come close, in my submission,  
19 to effecting that basic truth of our constitution, which  
20 I say is supported by very high authority indeed, and to  
21 which I am going to come on. What the defendant says --  
22 again, if I take your Lordships back to my friend's  
23 skeleton argument, and could I invite your Lordships'  
24 attention to page 4 of my friend's skeleton argument,  
25 and it is paragraph 8(1), my Lords, page 4,

1 paragraph 8(1). And I am looking, my Lords, in the  
2 fifth line. There is a sentence which says, and this is  
3 the defendant's case:

4 "The 2015 Act [that is the Referendum Act] nearly  
5 expressly nor implicitly required that further  
6 parliamentary authority would be required before  
7 an Article 50(2) notification could be given, to  
8 commence the process of giving effect to the outcome of  
9 the referendum."

10 Now, I say, with great respect, that is to look at  
11 the matter through the wrong end of the telescope. The  
12 question is not whether the 2015 Act required  
13 parliamentary authority for notification, we say as  
14 a matter of common law, the defendant cannot use  
15 prerogative powers and parliamentary authority is  
16 required, if I can sustain my argument that notification  
17 deprives people of statutory rights, rights conferred by  
18 Parliament, or if it preempts Parliament's  
19 consideration.

20 LORD JUSTICE SALES: Lord Pannick, you say that your  
21 argument is that that happens as a matter of common law  
22 but isn't your case dependent upon showing that the  
23 prerogative power which did exist before, let's say, the  
24 1972 Act, has been abrogated by the 1972 Act.

25 LORD PANNICK: I do not put it in that way. Some of my

1 friends are going to make those submissions, but no,  
2 I say that I can sustain my argument simply on the basis  
3 that Parliament, in 1972, has conferred statutory rights  
4 and it has also done so in other legislation, which  
5 I will show your Lordships. And I say that the effect  
6 of notification is to defeat those statutory rights.  
7 And I say it is sufficient for my purposes that the  
8 defendant cannot use prerogative powers so as to defeat  
9 rights which have been conferred by Parliament. I do  
10 not have to persuade your Lordships. In my submission,  
11 I do not have to persuade your Lordships that the 1972  
12 Act has somehow occupied the field, the phrase that is  
13 used in this context. I mean I do make that submission,  
14 and my friends are going to develop it, but that is not  
15 my primary submission. I don't need to go that far.  
16 I say it is quite enough that Parliament has conferred  
17 statutory rights. That notification is going to take  
18 them away. That cannot be done by executive action.  
19 That is my case.

20 LORD JUSTICE SALES: Yes.

21 LORD PANNICK: Developing, and continuing on the Referendum  
22 Act, and I am going to deal with these points in more  
23 detail, my Lord, as I go through, but just ending the  
24 submissions on the Referendum Act, if I may. Insofar as  
25 the defendant relies upon government policy and

1 government policy is repeatedly asserted in the  
2 defendant's skeleton argument, I say, very simply,  
3 government policy is not law. And government policy is  
4 not law, not least because government policy may change  
5 from time to time. The assertion of government policy  
6 takes the defendant, with respect, nowhere, and in any  
7 event, none of the policy announcements which are  
8 referred to, and the understanding on which the  
9 referendum took place, addressed the issue in this case.  
10 And the issue in this case is not as I have, I hope,  
11 made clear, not whether this country should remain  
12 a member of the EU or leave the EU, the question is  
13 a much narrower question, a very important question but  
14 a different question. And the question is whether the  
15 government may act unilaterally to notify or whether it  
16 needs parliamentary approval to do so.

17 LORD JUSTICE SALES: When you say parliamentary approval to  
18 do so, do you mean primary legislation?

19 LORD PANNICK: Yes.

20 LORD JUSTICE SALES: Not votes in either house?

21 LORD PANNICK: No, a mere motion would not suffice. And the  
22 again, the reason for that, consistent with what I am  
23 submitting, is that a mere motion cannot abrogate rights  
24 that have been conferred by Parliament, only --

25 LORD JUSTICE SALES: It is not primary legislation.

1 LORD PANNICK: No, you need primary legislation.

2           There is a point made at the end of paragraph 20(1)  
3           of the -- well, I have read it out already, and can  
4           I just take your Lordships back to it?

5 THE LORD CHIEF JUSTICE: Yes.

6 LORD PANNICK: On page 7. Your Lordships will recall the  
7           passage I read at the end of paragraph 20(1):

8           "It would be constitutionally appropriate for the  
9           British people to vote to leave and for government and  
10          Parliament then to decline to give effect to that vote."

11          As I have said, that is not the issue in this case.  
12          No doubt the policy points made by the defendant in his  
13          skeleton argument, that is the government promised to  
14          implement and people voted, would carry very  
15          considerable political force in Parliament. But that is  
16          not the court's concern. The only issue is as to the  
17          legal validity of notification. And in any event, with  
18          great respect, the skeleton argument for the defendant  
19          is simply wrong to suggest that any question before  
20          Parliament would be the same question as was posed in  
21          the referendum. If one goes to paragraph 4 of the  
22          defendant's skeleton argument, your Lordships will see  
23          in paragraph 4, in the second sentence, this. The  
24          defendant says:

25          "It would be necessary [and this is attributing to

1 us], despite the referendum, to subject precisely the  
2 same issue to a further series of votes by members of  
3 Parliament."

4 No, it would not, if we are correct in our  
5 submission. The question for Parliament, Parliament can  
6 decide whatever it likes, but it would not be, on our  
7 submission, addressing the question should we stay or  
8 should we go, it would be addressing, it would have to  
9 address, on our submission, if the defendant wishes to  
10 notify, he would need authorisation from Parliament to  
11 notify. And Parliament may wish to consider, again  
12 I emphasise it is a matter for it, timing of  
13 notification, negotiating terms, reporting back to  
14 Parliament, matters of that sort, none of which, of  
15 course, were matters addressed in the referendum.

16 So our submission --

17 THE LORD CHIEF JUSTICE: I think what you are saying is,  
18 essentially, if legislation is needed, that then confers  
19 a mandate to use agency and then it is absolutely up to  
20 Parliament, not a matter for us, the terms of the  
21 mandate.

22 LORD PANNICK: Yes.

23 THE LORD CHIEF JUSTICE: And your argument, as I understand  
24 it, is that if Parliament is not consulted because of  
25 the inexorable nature of Article 50, Parliament -- and

1           we do want to examine what rights you say will be  
2           lost --

3   LORD PANNICK:   Yes.

4   THE LORD CHIEF JUSTICE:  -- if Parliament is not given a  
5           say.

6   LORD PANNICK:   That I am coming on to.

7   THE LORD CHIEF JUSTICE:  Yes.

8   LORD PANNICK:   That is our case.  Our case is that the  
9           defendant's contention in his skeleton, and it is  
10          a powerful contention, that these proceedings seek to  
11          undermine democracy, because they ignore the wishes of  
12          the people, that argument fails to recognise both the  
13          advisory nature of a referendum in a parliamentary  
14          democracy, particularly when the Act, the Referendum  
15          Act, says nothing to the contrary, and the fact that the  
16          referendum did not involve any expression of view of  
17          when and on what terms we leave, and what role  
18          Parliament should play.  These are matters for  
19          Parliament and a referendum is no answer to the  
20          fundamental point that notification will take away  
21          statutory rights.  And for those reasons, I respectfully  
22          submit that the defendant's reliance on the 2015 Act has  
23          no legal or constitutional substance whatsoever.  The  
24          Act was, as a matter of law, an advisory referendum, no  
25          more than that.



1           And indeed the fact that the 2015 Act does not  
2           affect, cannot affect, the legal limits on the use of  
3           prerogative powers, puts the defendant's case into  
4           a very stark context, because the logic of my friend's  
5           arguments for the defendant is that the defendant has to  
6           say that despite the existence of the 1972 Act and other  
7           legislation conferring statutory rights, it would be  
8           open to the defendant, as a matter of law it would be  
9           open to the defendant, to use prerogative powers to  
10          withdraw from the EU under Article 50, even if there had  
11          been no referendum. And that would, I say, be a quite  
12          remarkable state of affairs that under prerogative  
13          powers, that could be achieved. That has to be my  
14          friend's case. It has to be open legally. I say  
15          nothing about the politics of the matter, of course.  
16          But as a matter of law, the defendant's case has to be  
17          that prerogative powers extend that far. And I say  
18          that, with respect, is quite unsustainable.

19                 That is the Referendum Act.

20                 My Lords, the next topic is the European Communities  
21          Act 1972. Of course, very, very familiar to your  
22          Lordships but can I just emphasise some points. And  
23          your Lordships have the 1972 Act in volume A. Tab 1 is  
24          the Act as originally enacted. Tab 2 is the Act as  
25          currently in force. And can I take your Lordships to

1 the currently in force provision. And the fundamental  
2 point is that the Act implements in domestic law, the  
3 rights and duties under what was then the EEC treaty and  
4 is now the EU treatise, and they are unlike other  
5 treatise. And they are unlike other treatise, because  
6 they do not just create relations between states, or  
7 even, as with the European Convention on Human Rights,  
8 confer rights on individuals in international law,  
9 because international law does, sometimes, in modern  
10 law, do that, what the 1972 Act recognises and  
11 implements is the fact that EU law confers rights and  
12 imposes duties, but let's focus on rights, it confers  
13 rights at international level which take effect in  
14 national law. And more than that, those rights are not  
15 defined as at the date of any domestic implementation.  
16 They are rights which are altered from time to time by  
17 institutions not answerable to the Westminster  
18 Parliament. And that is not all. The rights take  
19 priority over inconsistent national law. And the rights  
20 are interpreted as to their scope, as to their meaning,  
21 at international level. They are determined by a court  
22 of justice in Luxembourg, whose rulings take priority  
23 over those of domestic courts, however senior. And my  
24 Lords, it is the irony of these proceedings that  
25 precisely these characteristics of EU law, which are not

1 in dispute, I apprehend, but it is precisely these  
2 characteristics of EU law which are both the reason why  
3 the defendant wishes to notify the UK's intention to  
4 withdraw from the EU, in order to restore, as the  
5 defendant would put it, national sovereignty. So they  
6 are both the reason why the defendant wishes to give  
7 notification to withdraw, and they are the very reason  
8 why he cannot use prerogative powers to do so, for the  
9 reason that I have identified; that the EU law, read  
10 with the 1972 Act, and other legislation, has created  
11 statutory rights at national level.

12 And my Lords, it may assist, just to emphasise.  
13 That these fundamental aspects of EU law were  
14 established long before 1972. There are two cases that  
15 set out these fundamental characteristics. The first is  
16 ^name# Van Geng v Loos, which is bundle A, tab 22.  
17 This is a judgment of the European Court of Justice in  
18 1963. ^naE Van Geng v Loos, 1963, European court  
19 reports, page 2, and if your Lordships have tab 22 of  
20 bundle A, there is a passage that may assist the court.  
21 It is page 12 in the bottom left-hand corner; it is  
22 page 643, bottom right-hand corner. And if your  
23 Lordships have that page, page 12, in the second  
24 paragraph, the Court of Justice sets out the  
25 fundamentals. It says:

1           "The objective of the EEC treaty to establish  
2           a common market, the functioning of which is of direct  
3           concern to interested parties in the community, implies  
4           this treaty is more than an agreement which merely  
5           creates mutual obligations between the contracting  
6           states. This view is confirmed by the preamble to the  
7           treaty, which refers not only to governments but to  
8           people. It is also conferred more specifically by the  
9           establishment of institutions endowed with sovereign  
10          rights, the exercise of which affects member states and  
11          also its citizens. Furthermore, it must be noted that  
12          the nationals of the states brought together in the  
13          community are called upon to cooperate. In addition,  
14          ^chk sent the task assigns to the Court of Justice,  
15          the object of which is to secure uniform interpretation  
16          of the treaty by national courts and tribunals, confirms  
17          that the states have acknowledged that community law has  
18          an authority which can be invoked by their nationals  
19          before those [that is the national] courts and  
20          tribunals. The conclusion to be drawn is that the  
21          community constitutes a new legal order of international  
22          law, for the benefit of which the states have limited  
23          their sovereign rights, albeit within limited fields and  
24          the subjects of which comprise not only member states,  
25          but also their nationals. Independently of the

1           legislation of member states, community law therefore  
2           not only imposes obligations on individuals but is  
3           intended to confer upon them rights which become part of  
4           their legal heritage. These rights arise not only where  
5           they are expressly granted by treaty, but by reason of  
6           obligations which the treaty imposes in this clearly  
7           defined way upon individuals, as well as upon the member  
8           states and upon the institutions of the community."

9           That is the end of the quote. And one other case  
10          more recently makes the point even clearer. Bundle B4,  
11          tab 56. Your Lordships will find the ^name Simintal  
12          case. 1978 European court reports, 629. B4, tab 56, my  
13          Lords, and in that judgment of the European court, can  
14          I invite the court's attention to page 643 of the  
15          report. It is 2303 of the bundle and paragraph 13 on  
16          page 643, if your Lordships have that:

17          "The main purpose of the first question is to  
18          ascertain what consequences flow from direct  
19          applicability of a provision of community law, in the  
20          event of incompatibility with the subsequent legislative  
21          provision of a member state. Direct applicability means  
22          that rules of community law must be fully uniformly  
23          applied in all the member states on the date of their  
24          entry into force, for as long as they continue in force.  
25          The provisions are therefore a direct source of rights

1 and duties for all of those affected thereby, whether  
2 member states or individuals, who are parties to legal  
3 relationships under community law. This consequence  
4 also concerns any national court whose task it is, as  
5 an organ of a member state, to protect, in a case within  
6 its jurisdiction, the rights conferred upon individuals  
7 by a community law. Furthermore, in accordance with the  
8 principles of the precedents of community law, the  
9 relationship between provisions of the treaty and  
10 directly applicable measures of the institutions on the  
11 one hand, and the national law of the member states on  
12 the other, is such that those provisions and measures,  
13 not only by their entry into force, render automatically  
14 inapplicable, any conflicting provision of current  
15 national law, but, insofar as they are an integral part  
16 of and take precedence in the legal order applicable in  
17 the territory of each of the member states, they also  
18 preclude the valid adoption of new legislative measures,  
19 to the extent to which they would be incompatible with  
20 community provisions."

21 And then at paragraph 19, there is a reference to  
22 the role of the Court of Justice.

23 20:

24 "The effectiveness of that provision would be  
25 impaired if the national court were prevented from

1       forthwith applying community law, in accordance with the  
2       decision or the case law of the European court. It  
3       follows that every national court must, in a case within  
4       its jurisdiction, apply community law in its entirety  
5       and protect rights which the latter confers on  
6       individuals and must, accordingly, set aside any  
7       provision of national law which may conflict with it,  
8       whether prior or subsequent to the community law.  
9       Accordingly, any provision of the national legal system,  
10      any legislative, administrative or judicial practice  
11      which might impair the effectiveness of community law,  
12      by withholding from the national courts having  
13      jurisdiction to apply such law, the power to do  
14      everything necessary at the moment of its application to  
15      set aside national legislative provisions, which might  
16      prevent community law rules from having full force and  
17      effect, are incompatible with those requirements which  
18      are the very essence of community law."

19               So a remarkable legal system. And going back to the  
20      1972 Act and going back, if I may, to bundle A at tab  
21      number 2. If one looks at the long title to the 1972  
22      Act, on the first page of tab 2 of bundle A, your  
23      Lordships see what this is. This is an Act to make  
24      provision in connection with the enlargement of the  
25      European communities, to include the UK, together for

1 certain purposes, the Channel Islands, the Isle of Man  
2 and Gibraltar and the provisions of the Act are well  
3 known. Section 2 appears on page 49, using the  
4 numbering at the bottom of the page, page 49, section 2,  
5 "General implementation of treatise". And the drafting  
6 of ^format section 2(1) is informed by what your  
7 Lordships have seen in Van Geng v Loos, and later of  
8 course, Simintal:

9 "All such rights, powers, liabilities, obligations  
10 and restrictions from time to time [and I will make  
11 a submission on the meaning of 'from time to time', its  
12 relevance, in a while], created or arising by or under  
13 the treatise and all such remedies and procedures from  
14 time to time provided for by or under the treatise, as  
15 in accordance with the treatise, are without further  
16 enactment, to be given legal effect."

17 In other words, you look at EU law to see what  
18 effect they have, and they are then to be given legal  
19 effect, or used in the United Kingdom:

20 "... shall be recognised and available in law and be  
21 enforced, allowed, and followed accordingly. And the  
22 expression 'enforceable EU right', this similar  
23 expression, shall be read as referring to one to which  
24 this sub-section applies."

25 Sub-section 2 confers a power on a relevant minister



1 to make subordinate legislation to implement, and that  
2 is in relation to those parts of EU law that are not  
3 directly applicable. Sub-section 4 makes clear just how  
4 broad the impact is:

5 "The provision that may be made under sub-section 2  
6 includes, subject to schedule 2, any such provision of  
7 any such extent as might be made by Act of Parliament  
8 ..."

9 And then this:

10 "... and any enactment [any enactment] passed or to  
11 be passed [so past or future], other than one contained  
12 in this part of this Act, shall be construed and have  
13 effect, subject to the foregoing provisions of this  
14 section ..."

15 Et cetera, et cetera. And then section 3, which  
16 appears on page 77 at the bottom, deals with the role of  
17 the court, domestic and in Luxembourg. Section 3 on  
18 page 77, ^format 3(1):

19 "For the purposes of all legal proceedings, any  
20 question as to the meaning or effect of any of the  
21 treatise or as to the validity, meaning or effect of any  
22 EU instrument, shall be treated as a question of law and  
23 if not referred to the European courts [that is under  
24 the reference procedure] be for determination as such,  
25 in accordance with the principles laid down by and any

1 relevant decision of, the European court."

2           So those are the provisions. Of course there is no  
3 question but that a treaty -- under our constitutional  
4 law, a treaty is not self executing. There is no  
5 dispute about that. Treaty obligations alter domestic  
6 law, only if and to the extent that an Act of Parliament  
7 so states. What Parliament has done in the 1972 Act is  
8 to make EU law a part of United Kingdom law. Even  
9 though it is otherwise an external set of laws with its  
10 own characteristics. They became, on 1 January 1973,  
11 rights enjoyed under domestic law. These rights are  
12 extensive. They cover, and your Lordships know this  
13 only too well, they cover free movement of persons,  
14 goods and services, they cover the right to  
15 establishment. There are also EU citizenship rights  
16 recognised in the TFEU. Can I take your Lordships  
17 briefly to volume C at tab 311. Miss Mountfield is  
18 going to deal in more detail with this, but can I just  
19 identify what we are talking about. if your Lordships  
20 have C31, your Lordships see in article 20 -- it is  
21 page 244.5, bottom of the page, three pages in,  
22 Article 20 of the TFEU:

23           "Citizenship of the Union is hereby established.  
24 Every person holding the nationality of a member state  
25 shall be a citizen of the Union. Citizenship of the

1 Union shall be additional to and not replace national  
2 citizenship. Citizens of the Union shall enjoy the  
3 rights and be subject to the duties provided for by the  
4 treatise. They shall have inter alia, the right to move  
5 and reside freely within the territory of the member  
6 states."

7 And then (b), which is of some importance because  
8 I am going to show your Lordships the domestic  
9 implication of this:

10 "The right to vote and to stand as candidates in  
11 elections to the European Parliament and in ministerial  
12 elections in their member states of residence, under the  
13 same conditions as nationals of that state."

14 And there are further rights over the page.  
15 Article 21, the right to move and reside freely within  
16 the territory of the member states. Article 18, if we  
17 go back to Article 18, there is also the fundamental  
18 right to non-discrimination on grounds of nationality.

19 LORD JUSTICE SALES: Lord Pannick, some of these rights,  
20 I mean this is the treaty on the functioning of the  
21 European Union, postdate the Act in 1972.

22 LORD PANNICK: Oh, certainly. But Parliament has --

23 LORD JUSTICE SALES: So how do we deal with the time line,  
24 if you like? Do we ask the relevant questions in, well,  
25 on the 1 January 1973?

1 LORD PANNICK: No. Your Lordships, in my submission, are  
2 concerned with today, with what are the rights which are  
3 enjoyed under the 1972 Act at the present time. And  
4 they include, under the 1972 Act, because Parliament has  
5 approved these rights, it is added to the 1972 Act, they  
6 include all of the rights now enjoyed under EU law. And  
7 the question is, in my submission, whether the minister,  
8 by prerogative powers, can take action which, as we put  
9 it, results in the removal of all of these rights. All  
10 rights now enjoyed. So I am not basing my argument on  
11 a historical position in 1972, I am basing my argument  
12 on what rights are currently enjoyed under EU law,  
13 although your Lordship is quite right, the rights have  
14 been added to from time to time.

15 THE LORD CHIEF JUSTICE: Lord Pannick, what would be useful  
16 for to us have in due course identified, is obviously,  
17 there are rights that are acquired, say the Working Time  
18 Directive or something of that kind, that Parliament  
19 could simply re-enact.

20 LORD PANNICK: Yes, I am going to deal with that as well,  
21 my Lord.

22 THE LORD CHIEF JUSTICE: But what are the rights, and it  
23 would be helpful to have them identified, which  
24 Parliament would have no power to re-enact and it would  
25 be helpful for to us have those identified for us.

1           Obviously, I assume that what you are saying is that the  
2           rights in Article 20, 21 and others, are rights that if  
3           there is a withdrawal, Parliament has no power to  
4           re-enact, but if someone could identify for us on  
5           a piece of paper, what those are, it would be helpful,  
6           I think --

7   LORD PANNICK:   I understand, my Lord.

8   THE LORD CHIEF JUSTICE:  -- for the attorney, actually to  
9           see what your case is on that.

10   LORD PANNICK:  Yes.  I will do that, my Lord.

11   THE LORD CHIEF JUSTICE:  Because it is different to, it  
12           seems to me, in principle anyway, you know, something  
13           like the Working Time Directive, you could simply  
14           re-enact it.

15   LORD PANNICK:  Yes, I have a number of answers to that point  
16           which I'm going to come to, but the stark answer --

17   THE LORD CHIEF JUSTICE:  In due course, as long as you are  
18           coming to it, I don't want to take you out of course.

19   LORD PANNICK:  I am definitely coming to it.  But can I just  
20           give your Lordship examples.  It's not possible for  
21           Parliament to re-enact a right to vote in the European  
22           Parliament.  It is simply inconceivable.  There is  
23           a statute which confers that right and Parliament simply  
24           cannot confer a right to vote for a member of the  
25           European Parliament.  Inconceivable.  That is one

1           example. A second example is once we leave, assume,  
2           this is your Lordship's question to me, assume that  
3           Working Time Directive, or other provisions are  
4           re-enacted, its quite impossible for Parliament to  
5           re-enact that my client or anybody else should have  
6           a process right, an absolutely crucial process right, to  
7           obtain a determination of the Court of Justice, in  
8           Luxembourg, as to the meaning, the scope and the meaning  
9           of that right. That will go forever. That is not  
10          possible. And it is also quite impossible for  
11          Parliament, of its own volition, to confer on my client,  
12          or anybody else, a right to free movement and all of the  
13          other fundamental rights throughout the community, free  
14          movement of services, goods, a person's right of  
15          establishment. Parliament cannot do that of itself.

16       LORD JUSTICE SALES: Just going back to your time line  
17          point, as I understand it, your argument at the moment,  
18          you say in fact, things changed fundamentally on  
19          1 January 1973.

20       LORD PANNICK: Yes.

21       LORD JUSTICE SALES: There were rights then introduced in to  
22          domestic law by the 1972 Act.

23       LORD PANNICK: Yes.

24       LORD JUSTICE SALES: And I follow that argument. What I am  
25          trying to understand at the moment is why that argument

1 changes in any relevant way by the ^word accretion of  
2 Acts in EU law. Are you maintaining some sort of  
3 alternative argument that if you are wrong about 1973,  
4 something has changed later?

5 LORD PANNICK: No. The only relevance of what came after  
6 1973 is that European law has added to the body of  
7 rights. So when I am asked the question, as I am by the  
8 Lord Chief Justice, to give examples, I am perfectly  
9 entitled, I say, to give examples of rights which may  
10 not have been enjoyed on 1 January 1973, but are the  
11 consequence of later developments in EU law. But my  
12 fundamental point is the same. My fundamental point is  
13 that rights were conferred by statute in 1973. If you  
14 are going to take them away, then you need parliamentary  
15 authority. You can't just do it as an act of the  
16 executive. But the range of rights clearly has  
17 developed over time, and some of the examples that  
18 I give, and some of the importance of these rights, is  
19 the consequence of the developments in EU law, such as  
20 EU citizenship rights, such as the ^cap? EU charter  
21 of rights, which is the other example. Because at  
22 tab 43 --

23 THE LORD CHIEF JUSTICE: But that can always be re-enacted  
24 as part of UK law.

25 LORD PANNICK: Yes, but when I come to --

1 THE LORD CHIEF JUSTICE: It obviously can be, because there  
2 would be no reason why it couldn't do that, why  
3 Parliament can't do that.

4 LORD PANNICK: But I have given your Lordship, and I will  
5 develop these arguments, examples, we say, where  
6 Parliament couldn't re-enact. But in any event, I say  
7 with great respect, that is not the right question and  
8 it is not the right question because if the defendant is  
9 going to start a process by notification, which will  
10 remove fundamental rights from domestic law, it is  
11 nothing to the point, in my submission, and I will  
12 develop this point, it is nothing to the point that  
13 Parliament might be able to put them back. I say that  
14 the defendant simply has no power to take them away.  
15 And the court cannot proceed on any assumption: well, it  
16 doesn't matter because Parliament might restore them.  
17 The point is he cannot have power to take action which  
18 will remove statutory rights, and remove them unless  
19 Parliament acts. I say that is the wrong way, in my  
20 submission, the wrong way of looking at the matter.

21 THE LORD CHIEF JUSTICE: But European institutions remove  
22 rights that were enjoyed which might have been enjoyed  
23 at common law elsewhere. You say that is the effect of  
24 section 2, and so that is why we have to look at the  
25 rights as they are today.



1 LORD PANNICK: Yes. Section 2 recognises that the rights  
2 which are enjoyed in domestic law are commensurate with  
3 the rights that are enjoyed as a matter of EU law. And  
4 I say it is one thing for the community legislature to  
5 amend these rights from time to time, of course they  
6 can, that is what European law is all about, and  
7 section 2 recognises it. But what cannot be done is for  
8 a minister of the Crown, using prerogative powers, not  
9 merely to amend the rights which are conferred by  
10 section 2, that would be bad enough, but to take them  
11 all away.

12 THE MASTER OF THE ROLLS: Can I just explore that a little.  
13 Your argument, so far, has been that Parliament has  
14 conferred these rights, Parliament ^can? can't take  
15 them away. Is there a wider point that you are making,  
16 and again, with the historical perspective, irrespective  
17 of the Act of Parliament, rights, common law rights,  
18 can't be taken away by executive acts. Because they are  
19 two different points, aren't they?

20 LORD PANNICK: They are. We say this is a stronger  
21 situation, because these are not merely rights which are  
22 recognised as a matter of common law, they are rights  
23 which Parliament itself has conferred in the 1972 Act as  
24 amended. So my position, I say, is much stronger.

25 THE MASTER OF THE ROLLS: I appreciate that. But are there

1           in fact, I understand you say they are stronger, but do  
2           you say that the executive act cannot remove, let's say,  
3           a common law right?

4   LORD PANNICK:   Certainly.  There are many cases, for  
5           example, the courts have said in celebrated  
6           administrative law cases that where there are  
7           fundamental rights recognised at common law, such as  
8           access to the court, it is not open to the executive to  
9           take action which will deprive people of those rights.  
10          You need parliamentary authority.  And if necessary,  
11          I can show your Lordship those cases.  This is  
12          a stronger situation, in that the rights are recognised  
13          by Parliament itself.  And, therefore, there is no need  
14          to argue about whether the common law does recognise  
15          such a right.  They are established rights.  But your  
16          Lordship is correct.  Of course, even if these were  
17          common law rights, provided the court was prepared to  
18          accept them, access to the court, the right to judicial  
19          review, freedom of expression, many cases where the  
20          courts have said "You, the minister, cannot take away  
21          such rights, impede them, without express statutory  
22          authority."  And we have set out in our skeleton  
23          argument, it is paragraph 20, if your Lordships would go  
24          to paragraph 20 of our skeleton argument, your Lordships  
25          will see, this is behind tab 1 of the skeleton argument

1 bundle, we have set out some well known authorities, and  
2 I am not going to take your Lordship through them, where  
3 the courts have recognised the constitutional  
4 significance of the 1972 Act and these cases are well  
5 known. I won't take time on them. ^name Factortame,  
6 ^nmae Fobolen in the Divisional Court,  
7 Buckinghamshire in the Supreme Court -- where the courts  
8 have described the 1972 Act as a constitutional statute,  
9 a statute that has a particularly high status. And  
10 ^name Fobon was concerned, as was ^name Factortam,  
11 with whether or not the 1972 Act could be impliedly  
12 repealed by a later statute, and the answer was no. No,  
13 because of its constitutional nature. We say the high  
14 constitutional status of the 1972 Act is also relevant  
15 to whether or not the prerogative may be used in order  
16 to cut down on rights which have been established by  
17 Parliament. There is also a principle, in answer to  
18 my Lord, the Master of the Rolls question, there is also  
19 a helpful principle of public law in the ^name Simms  
20 case. If your Lordships go to bundle B2, bundle B2 at  
21 tab number 24, ^name Simms. This was a case  
22 concerning whether the Secretary of State could restrict  
23 visits by journalists to prisons to talk to prisoners.  
24 And the answer given by the appellate committee was no.  
25 The Secretary of State had no power to do so. This is

1 an example of an interference with fundamental  
2 principles of human rights at common law. And if your  
3 Lordships have B2, tab 24, Simms, the relevant statement  
4 is by Lord Hoffmann at page 131 at letter E.

5 THE MASTER OF THE ROLLS: Give me that reference again?

6 LORD PANNICK: It is B2, my Lord, tab 24.

7 THE MASTER OF THE ROLLS: Yes.

8 LORD PANNICK: And if your Lordships, in that case, please,  
9 would look at page 131, letter E, this is Lord Hoffmann  
10 for the ^cap? appellate committee, in observations  
11 later approved by the appellate committee itself:

12 "Parliamentary sovereignty means that Parliament  
13 can, if it chooses, legislate contrary to fundamental  
14 principles of human rights. The Human Rights Act will  
15 not detract ^phraes from this power [this is pre the  
16 implementation of the Human Rights Act]. The  
17 constraints upon its exercise by Parliament are  
18 ultimately political, not legal, but the principle of  
19 legality means that Parliament will squarely confront  
20 what it is doing and accept the political cost.  
21 Fundamental rights [that is common law rights] cannot be  
22 ^or overridden? overwritten by general or ambiguous  
23 words. This is because there is too great a risk that  
24 the full implications of their unqualified meaning may  
25 have passed unnoticed in the process. In the absence of

1 express language or necessary implication to the  
2 contrary, the courts therefore presume that even the  
3 most general words were intended to be subject to the  
4 basic rights of the individual. In this way, the courts  
5 of the United Kingdom, although acknowledging the  
6 sovereignty of Parliament, apply principles of  
7 constitutionality little different from those which  
8 exist in countries where the powers of the legislature  
9 is expressly limited by constitutional document."

10 So even where you have a statute using general  
11 language, the court will assume that common law  
12 fundamental rights are not removed. A fortiori, in my  
13 submission, if the issue concerns whether the executive,  
14 through the use of prerogative powers, may interfere  
15 with fundamental rights at common law, which was your  
16 Lordship's question to me, all the more so where the  
17 question is whether the executive may interfere with  
18 rights that have been established by Parliament itself.

19 THE LORD CHIEF JUSTICE: Although we are obviously bound by  
20 what, or may be bound by what Lord Hoffmann said, your  
21 argument doesn't require us to go anywhere near the last  
22 two lines of that paragraph?

23 LORD PANNICK: No, it doesn't. But it is my answer to the  
24 question.

25 THE LORD CHIEF JUSTICE: I would be very reluctant to go

1           anywhere near that.

2   LORD PANNICK:  Oh, I respectfully agree.  I simply show your  
3           Lordship a passage.

4   THE LORD CHIEF JUSTICE:  These words assert something that,  
5           you know, that somehow the courts have developed some  
6           sort of constitutional doctrine.  We are not in that  
7           territory at all.

8   LORD PANNICK:  No, my Lord, we are not.

9   THE LORD CHIEF JUSTICE:  No.

10   LORD PANNICK:  I say this is a case about the limits of  
11           executive power --

12   THE LORD CHIEF JUSTICE:  Good.

13   LORD PANNICK:  -- where Parliament itself has conferred  
14           fundamental rights on the citizens of this country.  The  
15           question from my Lord, the Master of the Rolls, is  
16           whether or not I would be making a similar submission if  
17           the executive were purporting to act so as to remove  
18           fundamental rights established at common law, and I rely  
19           upon this authority as showing the scope of the court's  
20           approach to these matters.

21           My Lord, before 11 o'clock and what may be  
22           a convenient --

23   THE LORD CHIEF JUSTICE:  Any time around there, it is just  
24           really for the shorthand writers.

25   LORD PANNICK:  Can I just show your Lordship, before it may

1 be convenient to rise for however long your Lordships  
2 think appropriate, may I just show your Lordships the  
3 parliamentary implementation of the right to vote for  
4 European parliamentary elections. And that is volume C  
5 at tab 21.

6 LORD JUSTICE SALES: Lord Pannick, just before we go there,  
7 can I check that I understand your submission about what  
8 the effect, if the government's case is right on  
9 withdrawal under Article 50, would be, as far as the  
10 1972 Act is concerned. Am I right in thinking that you  
11 say that the effect of the argument for the government  
12 would be that there wouldn't need to be a repeal of the  
13 1972 Act or section 2 of it, it is just that the content  
14 of the obligation in section 2, EU rights, would fall  
15 away, because they would cease to be EU rights?

16 LORD PANNICK: Precisely. Your Lordship is very aware and  
17 I am not going to enter into any political debate, but  
18 your Lordship knows that the government have announced  
19 that there is going to be a great repeal bill which is  
20 to be produced some time in the next session. I say  
21 that the consequence of the defendant giving  
22 notification will be that at a point in the future, it  
23 is inevitably the case that the United Kingdom leaves  
24 the EU and the consequence of that, as a matter of law,  
25 is that all of the rights enjoyed under section 2(1) and

1 section 3(1), which is the process rights relating to  
2 the Court of Justice, fall away. There is simply  
3 nothing left. And therefore a great repeal bill,  
4 politically or otherwise, may be desirable. I say  
5 nothing about that. It will not affect those questions.  
6 Those rights will fall away as a consequence of the  
7 United Kingdom leaving the EU. Because when we leave,  
8 there are no treaty obligations. That is the whole  
9 point of leaving. And indeed that is the government's  
10 intention. This is not a happenstance, this is the  
11 whole point of notification. Notification is intended  
12 to remove the current substance of section 2(1) and  
13 3(1).

14 THE LORD CHIEF JUSTICE: Lord Pannick, I don't want to ask  
15 you to do it now, but you are going to come back to deal  
16 with very powerful arguments that the government puts  
17 which is section 13 and following on these points?

18 LORD PANNICK: Oh yes. I am going to, I hope, address all  
19 of these points when I come -- because I am working my  
20 way through and your Lordship will recall my fifth  
21 point, I think I am on the third of them, but my fifth  
22 point was to seek to answer the points that the  
23 government have made. They have made a number of  
24 points.

25 THE LORD CHIEF JUSTICE: Those all turn on, really, the



1 effect of the Communities Act and the point my Lord has  
2 just raised --

3 LORD PANNICK: I will have to deal with those.

4 THE LORD CHIEF JUSTICE: -- really, about what is  
5 effectively, withdrawing from the club.

6 LORD PANNICK: I want to put our case and then I will seek  
7 to answer what I think are the points my learned friend  
8 is making. That may be a convenient moment.

9 THE LORD CHIEF JUSTICE: Do you want to take us to  
10 ^fig C21?

11 LORD PANNICK: Shall we just look at this now, it is a very  
12 brief point? This is a statute, and your Lordships see  
13 it is enacted by Parliament. The reason it is enacted  
14 is because of the citizenship rights and on the second  
15 page, section 1, "there shall be 73 members of the  
16 European Parliament elected for the United Kingdom", and  
17 if your Lordships turn on to section 8, which is  
18 page 159 at the bottom, "a person is entitled to vote at  
19 an election to the European Parliament in the electoral  
20 region, if he is within one of the sub-sections." Now  
21 it is inconceivable that Parliament can restore those  
22 rights. My Lord, the Lord Chief Justice asked me to  
23 give an example of what Parliament could not do.  
24 Parliament could not, once we leave, restore those  
25 rights. Those rights would simply be frustrated. They

1 would be stripped away as a consequence, an inevitable  
2 consequence, of action by the executive, by the  
3 defendant. Now, that is what I wanted to say under my  
4 third point.

5 My fourth point is the legal limits on prerogative  
6 powers as we see them and my fifth point is my response  
7 to the arguments deployed by my friends. That is what  
8 I am coming to.

9 THE LORD CHIEF JUSTICE: And we are doing okay for time?

10 LORD PANNICK: Indeed, my Lord. Can I just ask the  
11 shorthand writers how long she would like and then  
12 counsel can have that sort of time.

13 THE LORD CHIEF JUSTICE: We will rise for 5 minutes and come  
14 back in 5 minutes precisely, namely at 11.10 am.

15 LORD PANNICK: Thank you, my Lord.

16 (11.05 am)

17 (A short break)

18 (11.10 am)

19 THE LORD CHIEF JUSTICE: I have (^ inaudible), that  
20 people wanted to Tweet. I was merely to say that is, of  
21 course, permissible.

22 LORD PANNICK: Thank you, my Lord. I mentioned at the  
23 outset, those who were here with a watching brief. They  
24 include, I didn't mention him, I apologise,  
25 ^name Conan Fagan of the Northern Ireland bar, and he

1 has very helpfully brought me up to date on the Northern  
2 Ireland position which my Lord asked about earlier this  
3 morning. He represents the lead claimant,  
4 ^nmae Mr Raymond McCord. The issues which your  
5 Lordship is hearing about today, certainly from me, have  
6 been stayed in Northern Ireland. The Northern Ireland  
7 proceedings have focused on the Good Friday Agreement  
8 and the Northern Ireland Act, and  
9 ^nmae Mr Justice Maguire heard argument last week.  
10 He has reserved his judgment.

11 THE LORD CHIEF JUSTICE: I think that Miss Mountfield,  
12 because she mentions the Good Friday Agreement in her  
13 skeleton, can reflect and discuss. Bearing in mind the  
14 respect we have for the courts in Northern Ireland, it  
15 would be very wrong for us -- may be very wrong for us  
16 to trespass into that, but Miss Mountfield can address  
17 us on that on Monday.

18 LORD PANNICK: She heard that, my Lord, and that is the  
19 position. Can I turn, please, to what we say are the  
20 legal limits on the use of prerogative powers and the  
21 first question that arises is what are prerogative  
22 powers? And there is a helpful description in the  
23 advice, the speech of Lord Bingham in the Appellate  
24 Committee in the ^name Banku case. It is B2, tab 36,  
25 one of many cases concerning the ^name Shagos

1 Islanders. This statement by Lord Bingham is in  
2 a dissenting speech, but not on the nature of the royal  
3 prerogative. Lord Bingham's observations, my Lord,  
4 appear in B2, 36, at page 490. And at 490, if your  
5 Lordships have, please, paragraph 69 of Lord Bingham's  
6 observations, he says at paragraph 69, on the second  
7 line:

8 "The royal prerogative, according to <sup>^sp</sup> Dicey's  
9 famous is 'the residue of discretionary or arbitrary  
10 authority which at any given time is legally left in the  
11 hands of the Crown'.

12 "It is for the courts to inquire into whether  
13 a particular prerogative power exists or not and if it  
14 does exist, into its extent. Over the centuries, the  
15 scope of the royal prerogative has been steadily eroded.  
16 It cannot today be enlarged."

17 And there is some further learning and at 491, just  
18 above letter B, there is a reference to the Burma Oil  
19 case, where <sup>^sp</sup> Lord Reed said:

20 "The prerogative is really a relic of a past age not  
21 lost by disuse, but only available for a case not  
22 covered by statute. I would think the proper approach  
23 is an historical one, how was it used in former times,  
24 how has it been used in modern times."

25 So that is the nature of the prerogative, and the

1 case law, we say, establishes a principle which was  
2 summarised by Lord Oliver for the Appellate Committee in  
3 the same volume at tab 19. If your Lordships turn back  
4 to tab 19, the ^name J H Raynor case, concerned with  
5 the International Tin Council and the relevant statement  
6 by Lord Oliver, speaking for the Appellate Committee, is  
7 at page 500 at letter B, tab 19. Page 500, letter B,  
8 where he says:

9 "The second [this is the second of the underlying  
10 principles] is that as a matter of the constitutional  
11 law of the United Kingdom, the royal prerogative, whilst  
12 it embraces the making of treatise, does not extend to  
13 altering the law or conferring rights upon individuals,  
14 or depriving individuals of rights which they enjoy in  
15 domestic law without the intervention of Parliament."

16 In other words, the intervention of Parliament is  
17 required if the royal prerogative is to be used to  
18 deprive people of rights which they enjoy in domestic  
19 law.

20 And that is the fundamental principle on which we  
21 rely. And may I develop our submission. Our submission  
22 comes to this, and I don't in any way seek to narrow the  
23 submissions that my friends are going to make, and I of  
24 course, adopt them. But my submission for Mrs Miller is  
25 this: first, in giving notification under Article 50(2),

1 the defendant is ensuring, by his notification, that the  
2 EU treatise will cease to apply to the UK. And that is  
3 the consequence of Article 50(3). There will be  
4 a point, and indeed, it is the intention of the  
5 defendant that there will be a point, at which the EU  
6 treatise cease to apply to the United Kingdom.

7 The second point is that once the treatise cease to  
8 apply under Article 50(3), those rights and duties which  
9 are under sections 2(1) and 3(1) of the 1972 Act,  
10 currently part of United Kingdom law, by reason of being  
11 "created or arising under the treatise", will no longer  
12 be part of United Kingdom law. The rights will no  
13 longer arise under the treatise and so they will be  
14 destroyed. It is, I say, and this is getting to the  
15 core of the argument, I say it is no answer for the  
16 defendant to submit, for example, paragraph 33 of his  
17 skeleton argument, that Parliament may decide to  
18 maintain in domestic law, some rights or obligations  
19 substantially equivalent to the rights currently  
20 enjoyed. No answer. And it is no answer for three main  
21 reasons. And the first answer is that the minister is  
22 using, proposing to use, prerogative powers to remove  
23 statutory rights. Not just any old statutory rights,  
24 but important constitutional statutory rights. And it  
25 is no answer, in my submission it is no answer to

1 a criticism of such use of prerogative powers to destroy  
2 those rights, that Parliament may, I emphasise may, step  
3 in and take action to restore some of those rights.

4 The court's only concern, in my submission, the  
5 court's only concern when it addresses the legality of  
6 the use of prerogative powers, is that statutory rights  
7 currently exist and the action taken by the defendant  
8 will remove them. That is my first answer. But there  
9 is a second reason why the notification cannot be made  
10 under prerogative powers and it is because some of the  
11 rights which will be removed are process rights,  
12 important process rights, which cannot be restored by  
13 Parliament, even should it wish to do so. Parliament  
14 cannot restore what section 2(1) describes as remedies  
15 and procedures "provided for by or under the treatise".  
16 Even if Parliament were to restore specific rights, for  
17 example, in the field of services or in the field of  
18 competition, Mrs Miller inevitably loses what is  
19 currently her statutory right under section 3(1) of the  
20 1972 Act, read with Article 267 of the TFEU, to seek  
21 a ruling from the Court of Justice as to the content of  
22 her rights. That is an important constitutional right.  
23 Under current law, the Court of Justice is the supreme  
24 judicial authority which determines the content of EU  
25 law rights. And the giving of notification commits the

1 United Kingdom to a fundamental change, whatever  
2 Parliament may think, that Mrs Miller and others loses  
3 her entitlement, her current statutory right, to have  
4 her rights adjudicated upon by the Court of Justice in  
5 appropriate cases. She loses the right of access to  
6 that court. An important constitutional right, whatever  
7 Parliament may think. So that is our second argument.  
8 Mrs Miller loses important constitutional process  
9 rights.

10 But there is a third answer to any suggestion that  
11 Parliament may decide to restore some of the rights  
12 which are currently enjoyed and which will be taken  
13 away, and the third answer is that they are also  
14 substantive statutory rights currently enjoyed by reason  
15 of the treatise which have been implemented in domestic  
16 law and which Parliament will be unable to restore,  
17 whatever view Parliament may take in the future. And  
18 I gave the example before the break of the European  
19 Parliamentary Elections Act 2002, volume C, tab 21, the  
20 right to stand for election to the European Parliament,  
21 the right to vote for members of the European  
22 Parliament. That right will be defeated, whatever  
23 Parliament may think. It is not a right under the 1972  
24 Act, well, it is by implication, but it is also  
25 an express statutory right that is confirmed by the 2002



1 Act. That right is simply frustrated in its entirety by  
2 the giving of notification. Parliament's consideration  
3 of that right is simply preempted by the notification  
4 and its consequences.

5 And there are other examples. Many of the rights  
6 which Mrs Miller and others currently enjoyed will be  
7 removed if the notification is given. For example,  
8 Mrs Miller's right to free movement, her right to free  
9 movement of goods, her right to freedom of services,  
10 across Europe. These are important rights and they are  
11 rights currently enjoyed as statutory rights under  
12 section 2(1). And Parliament, of itself, simply cannot  
13 restore those rights once we leave the EU, as we will if  
14 notification is given. Not least because the agreement  
15 of other states will be required to restore any of those  
16 rights. The decision of Parliament is simply preempted,  
17 and Miss Mountfield is going to have more to say on this  
18 topic.

19 So we say that the consequence of notification is  
20 that rights, statutory rights are removed, and it is no  
21 answer, for the reasons I give, that Parliament may, and  
22 I emphasise may, take action in the future to seek to  
23 restore them.

24 Our final point is that we say it therefore follows  
25 that the defendant cannot lawfully use the prerogative

1 to notify under Article 50. He cannot lawfully use the  
2 prerogative because notification has the consequence,  
3 the intended consequence, of depriving individuals of  
4 rights which they currently enjoy under the 1972 Act and  
5 under other legislation. It preempts the decision of  
6 Parliament, whether or not to maintain those rights, and  
7 it falls foul of the principle stated by Lord Oliver,  
8 which is supported by other case law to which I am  
9 coming. And we add that the court should be especially  
10 slow to recognise the legal validity of the defendant  
11 acting by means of the prerogative, so as to deprive  
12 people of statutory rights and preempt parliamentary  
13 consideration. That is our case and I have to deal, and  
14 I am going to deal, with the objections that my friends  
15 for the defendant have identified.

16 Now, there is case law, I say, which supports our  
17 argument. I have shown your Lordships the statement by  
18 Lord Oliver in J H Raynor, B2, tab 19, page 500. But  
19 there are three cases, in particular, which we draw  
20 attention to the court and which we say helpfully  
21 establish the relevant principles as to the limits on  
22 the use of prerogative powers. And the first case is  
23 the case of ^jname Proclamations from 1610 and it is  
24 at volume A and it is at tab 7. Can I take your  
25 Lordships to ^sp Lord Cook's own report of what

1           happened. Different times, as your Lordships will see.  
2           Because what happened in the case of Proclamations, as  
3           ^sp Lord Cook, Chief Justice, records at the  
4           beginning of the thankfully short report, he says that:  
5           "me listen to this para     On 20 September [this is  
6           1610] I was sent for to attend the Lord Chancellor, the  
7           Lord Treasurer, the Lord Privy Seal and the Chancellor  
8           of the Duchy. There was also present the attorney,  
9           the Solicitor General and a recorder and two questions  
10          were moved to me by the Lord Treasurer. The one, if the  
11          King, by his proclamation, may prohibit new buildings in  
12          and about London. The other, if the King may prohibit  
13          the making of starch of wheat. And the Lord Treasurer  
14          said that these were preferred to the King as grievances  
15          and against the law and justice and the King had  
16          answered that he will confer with his Privy Counsel and  
17          his judges and then he will do right to them. To which  
18          I, Lord Cook, answered that these questions were of  
19          great importance, that they concerned the answer of the  
20          King to the body, viz to the Commons, in the House of  
21          Parliament, that I, Lord Cook, did not hear of these  
22          questions until this morning at 9 o'clock, for the  
23          grievances were preferred and the answer made when I was  
24          in my circuit. And lastly, both the proclamations which  
25          now were showed, were promulgated after my time of

1 attorneyship and for these reasons, I did humbly desire  
2 them that I might have conference with my brethren, the  
3 judges, about the answer of the King and then to make  
4 an advised answer according to law and reason [very  
5 sensible]. To which the Lord Chancellor said that every  
6 precedent had first a commencement, and he would advise  
7 the judges to maintain the power and prerogative of the  
8 King and in cases in which there is no authority and  
9 ^punc precedent, to leave it to the King to order in  
10 it, according to his wisdom and for the good of his  
11 subjects or otherwise, the King would be no more than  
12 the Duke of Venikce and that the King was so much  
13 restrained in his prerogative, that it was to be feared  
14 the bonds would be broken."

15 And then the Lord Privy Seal added his advice too.  
16 And leaving the next paragraph, going into the middle of  
17 the page, "Note", and this is Lord Cook's conclusion:

18 "The King, by his proclamations or other ways,  
19 cannot change any part of the common law [the Master of  
20 the Rolls' question to me earlier] or statute law or the  
21 customs of the realm."

22 And some authority is given:

23 "Also, the King cannot create any offence by his  
24 prohibition or proclamation which was not an offence  
25 before, for that was to change the law and to make

1 an offence which was not."

2 And then there is a lot of detail and then over the  
3 page, just under the upper hole punch, there is a new  
4 short paragraph:

5 "Also, it was resolved that the King hath no  
6 prerogative but that which the law of the land allows  
7 him."

8 In other words, it is for the courts, for the  
9 judges, to determine the extent of the prerogative and  
10 it is not a matter for the discretion of the King. And  
11 we rely upon all of that. Nowadays, of course, the Lord  
12 Chief Justice and judges give answers in court, not in  
13 private summonses by the Lord Chancellor. But the  
14 principle is, we say, well established, that the royal  
15 prerogative, now exercised of course, by ministers not  
16 by her Majesty, although exercised by her Majesty on  
17 advice of ministers, does not extend to altering common  
18 law or statute. That is the point.

19 Now, the defendant's response to this case, if we go  
20 to the defendant's skeleton argument, in the skeleton  
21 argument bundle it is tab 6, the defendant deals with  
22 this authority at paragraph 34. In line 4 the defendant  
23 says:

24 "The commencement of the process of withdrawal from  
25 the EU does not itself change any common law or statute

1 or any customs of the realm. Any such changes are  
2 a matter for future negotiations, parliamentary scrutiny  
3 and implementation by legislation."

4 That is the answer. I respectfully submit that  
5 misses the point. It misses the fundamental point which  
6 is that to give the notification using prerogative  
7 powers causes the UK to leave the EU, which results in  
8 there being no treaty rights or duties for the purposes  
9 of sections 2 to 3 of the 1972 Act. All of those rights  
10 are stripped away and other legislation, for example,  
11 the European Parliamentary Elections Act, is frustrated.

12 Now, this principle has been applied in many later  
13 cases. Two of them I want to refer to. The first is  
14 the ^name Laker Airways case, which is volume A of  
15 the authorities at tab number 10. Laker  
16 Airways v Department of Trade. In this case,  
17 ^sp Mr Freddie Laker, your Lordships will recall,  
18 Mr Freddie Laker operated a budget airline which was  
19 called Sky Train and it flew across the Atlantic.  
20 Mr Laker required two things to operate his airline. He  
21 required a licence from the Civil Aviation Authority  
22 under the Civil Aviation Act of 1971. And he got that.  
23 He also needed the United Kingdom government to  
24 designate Sky Train as an air carrier under the  
25 international treaty between the UK and the US. That is

1 the Bermuda Agreement. And if the minister designated  
2 Sky Train, then under the treaty, the US government was  
3 obliged to grant an operating permit. And the  
4 government did designate Sky Train under the  
5 Bermuda Agreement. So Mr Laker was able to operate his  
6 airline. But unfortunately for him, the Secretary of  
7 State then changed his policy. And the Secretary of  
8 State, on behalf of the United Kingdom, withdrew its  
9 international designation of the plaintiff's airline as  
10 an approved Transatlantic airline under the  
11 international agreement, under the Bermuda Agreement.  
12 And Mr Laker brought his legal proceedings, challenging  
13 the withdrawal of the designation. And all of that is  
14 summarised by Lord Denning in his judgment, pages 697F  
15 to 698B. And the argument for the Attorney General --  
16 ^nmae Mr Sam Silkin presented the arguments, he was  
17 the Attorney General of course, he presented the  
18 argument and it is helpfully summarised, or at least  
19 part of his argument is helpfully summarised by  
20 Lord Justice Norton at page 727 at letter B. Can I take  
21 your Lordships, please, there. 727 B.  
22 Lord Justice Norton records that:

23 "The Attorney General based his submission on the  
24 well known and well founded proposition that the courts  
25 cannot take cognisance of her Majesty's government's

1           conduct of international relations. Laker Airways'  
2           designation as a British carrier, for the purposes of  
3           the Bermuda Agreement, was an act done in the course of  
4           conducting international relations. The Civil Aviation  
5           Act 1971 did not apply. The Act nowhere refers to  
6           designated carriers. An airline might be granted  
7           a licensed operator scheduled route but not become  
8           a designated carrier. It could not, by any legal  
9           process, compel the Secretary of State to designate it  
10          as a British carrier. It followed, submitted the  
11          attorney, that the withdrawal of designation must be  
12          within the prerogative powers exercisable by the  
13          Secretary of State on behalf of the Crown. And although  
14          the Bermuda Agreement does not provide in terms for the  
15          withdrawal of designation, both high contracting parties  
16          to it must, by necessary implication, have power to do  
17          so."

18                 And then just under E:

19                 "The act of withdrawing designation must come within  
20          the prerogative powers exercisable by the Secretary of  
21          State on behalf of the Crown."

22                 So that was the argument that ^nmae     Mr Silkin  
23          addressed to the Court of Appeal. And none of the  
24          judges accepted that argument. Lord Denning began at  
25          705, letter B, by explaining why the case was justicable



1 and what the limits were on the powers of the executive.

2 At B on 705, Lord Denning says:

3 "The prerogative is a discretionary power,  
4 exercisable by the executive government for the public  
5 good, in certain spheres of governmental activity for  
6 which the law has made no provision, such as the war  
7 prerogative, or the treaty prerogative. The law does  
8 not interfere with the proper exercise of the discretion  
9 by the executive in those situations but it can set  
10 limits by defining the bounds of the activity and it can  
11 intervene if the discretion is exercised improperly or  
12 mistakenly. That is a fundamental principle of our  
13 constitution."

14 And Lord Denning refers to <sup>^sp</sup> Lord Cook's  
15 statement in the Proclamations case, and he adds  
16 a reference to <sup>^nmae</sup> Blackstone as well, and there is  
17 much other authority.

18 Now, the reason why Mr Laker won his case then  
19 appears in the three judgments. At 706H, Lord Denning  
20 says:

21 "Seeing then, that those statutory means [and he has  
22 gone through the Civil Aviation Act] were available for  
23 stopping Sky Train if there was a proper case for it,  
24 the question is whether the Secretary of State can stop  
25 it by other means. Can you do it by withdrawing the

1 designation? Can he do indirectly, that which he cannot  
2 do directly? Can he displace the statute by invoking  
3 a prerogative? If he could do this, it would mean that  
4 by a side wind, Laker would be deprived of the  
5 protection which the statute affords them. There would  
6 be no inquiry, no hearing, no safeguard against  
7 injustice. The Secretary of State could do it in his  
8 own head by withdrawing the designation without a word  
9 to anyone. To my mind, [says Lord Denning] such  
10 a procedure was never contemplated by the statute."

11 To like effect is <sup>^sp</sup> Lord Justice Roskill at  
12 718, letter G. Lord Justice Roskill says:

13 "The sole question is whether the relevant  
14 prerogative power has been fettered, so as to prevent  
15 the Crown seeking, by use of the prerogative, to  
16 withdraw the designation under the Bermuda Agreement and  
17 thus, in effect, achieve what it is unable lawfully to  
18 achieve by securing the revocation by the authority of  
19 the plaintiff's air transport licence."

20 And Lord Roskill reached the same conclusion as  
21 Lord Denning; no, he couldn't. 722, just above  
22 letter G, Lord Justice Roskill, as he then was, says:

23 "Where a right to fly is granted by the authority  
24 under the statute by the grant of an air transport  
25 licence, which has not been lawfully revoked and cannot

1           be lawfully revoked in the manner thus far contemplated  
2           by the Secretary of State, I [Lord Justice Roskill] do  
3           not see why we should hold that Parliament, in 1971,  
4           must be taken to have intended that a prerogative power  
5           to achieve what is, in effect, the same result as lawful  
6           revocation would achieve, should have survived the  
7           passing of the statute unfettered, so as to enable  
8           the Crown to achieve, by what I have called the back  
9           door, that which cannot lawfully be achieved by entry  
10          through the front. I think Parliament must be taken to  
11          have intended to fetter the prerogative of the Crown in  
12          this relevant respect."

13   LORD JUSTICE SALES: Lord Pannick, both Lord Denning and  
14          Lord Justice Roskill are putting the answer to the  
15          question in Laker Airways in terms of what Parliament  
16          intended by the 1971 Act.

17   LORD PANNICK: I accept that and I have a submission to make  
18          on that.

19   LORD JUSTICE SALES: Can I just say that that seemed at  
20          variance from your primary submission that the common  
21          law supplies the answer for ours.

22   LORD PANNICK: No, but in our submission, that is an example  
23          of the use of the court's restrictions on the use of the  
24          prerogative. But it doesn't define the limits of the  
25          court's involvement in confining the use of the

1 prerogative. But I entirely accept, and I am going to  
2 make a submission, that that is what that case, at root,  
3 is about. Can I just complete, if I may, the three  
4 judgments, and then make a submission.

5 Lord Justice Norton, I have drawn attention to the  
6 summary of the argument by the Attorney General and the  
7 substance of the reasoning of Lord Justice Norton  
8 appears on the final page, page 728, and it is in the  
9 third line of 728:

10 "The Secretary of State cannot use the Crown's  
11 powers in this sphere, in such a way as to take away the  
12 rights of citizens."

13 And there is a reference to a Privy Counsel case:

14 "By withdrawing designation, that is what, in  
15 reality, if not in form, he is doing."

16 So he is taking away the rights of a citizen under  
17 a statute:

18 "A licence to operate a scheduled route is useless  
19 without designation. In my judgment, the Act of 1971  
20 was intended by Parliament to govern the rights and  
21 duties of British citizens in all aspects of civil  
22 aviation and to indicate what the Secretary of State  
23 could and should do."

24 And there is the detail and then at C:

25 "The Act made provision for revocation by the

1 authority under section 23 and by the Secretary of State  
2 under section 4. These provisions regulate all aspects  
3 of the revocation of licences. By necessary  
4 implication, the Act, in my judgment, should be  
5 construed so as to prevent the Secretary of State from  
6 rendering licences useless by the withdrawal of  
7 designation, when he could not procure the authority to  
8 revoke them, nor lawfully do so himself."

9         And I do recognise, this is the question from  
10 my Lord, Lord Justice Sales, I do recognise that the  
11 Laker case was concerned with a statutory scheme which  
12 itself implicitly restricted the power of the minister  
13 to use prerogative powers. And that is the point that  
14 is made by the defendant in his skeleton argument at  
15 paragraphs 38 through to 43. And I accept that that is  
16 an important part, of course, of the Court of Appeal's  
17 judgment. But I rely on the Laker case, because it also  
18 establishes more general principles relevant to the  
19 present case. And the first of them is whether the  
20 government has breached the legal limits, whatever they  
21 are, to the exercise of prerogative power, is  
22 a justicable matter. It is very plain indeed from the  
23 Laker judgment, Lord Denning expressly, but it is  
24 implicit in the judgments of the other members of the  
25 court.

1           The second point that is to be derived from Laker is  
2           that the legal limits to the exercise of the prerogative  
3           powers apply even when the minister is exercising  
4           functions relating to international treatise.  
5           Mr Laker's complaint was that the government had taken  
6           action on the international plane and the courts had no  
7           difficulty in saying that action on the international  
8           ^sp     plane does not, of itself, immunise the action  
9           from legal analysis, to determine whether the  
10          prerogative power has been lawfully used.

11          The third point we make is that the legal limits on  
12          the use of prerogative powers apply, even though the  
13          relevant legislation, there the Civil Aviation Act, did  
14          not expressly purport to confine the use of prerogative  
15          powers. The Civil Aviation Act said absolutely nothing  
16          about the royal prerogative. That, indeed, is  
17          identified by Lord Justice Roskill in a passage that  
18          I didn't show your Lordships, but can I go back to.  
19          Page 719 at B, where Lord Justice Roskill observes:

20                 "The strength of the Attorney General's argument  
21                 undoubtedly lies in the fact that nowhere in the Act  
22                 does one find any express fetter upon the relevant  
23                 prerogative power of the Crown."

24          And fourthly, we submit that the vice in that case  
25          is merely one example of a more general principle which

1 Lord Justice Norton expressly recognised in the passage  
2 I read at 728, letter A:

3 "The Secretary of State cannot use the Crown's  
4 powers in this sphere, in such a way as to take away the  
5 rights of citizens."

6 Laker is an example. Your Lordships may think it is  
7 an easier example, because the Civil Aviation Act itself  
8 implicitly restricted the power of the minister to  
9 remove designation. But I say it doesn't confine the  
10 restrictions on the use of prerogative powers, if I can  
11 sustain my contention that what the defendant is doing  
12 in this case will, deliberately will, defeat and  
13 frustrate powers which have been enacted by Parliament.  
14 That, of course, that wider principle, is the principle  
15 that I have shown your Lordships and which was expressly  
16 stated by Lord Oliver in the J H Raynor case, speaking  
17 for the Appellate Committee, B2, tab 19, page 500.

18 I won't go back to it, but your Lordships will recall  
19 what he said; the royal prerogative, while it embraces  
20 the making of treatise, does not extend to altering the  
21 law or conferring rights upon individuals or depriving  
22 individuals of rights which they enjoy in domestic law,  
23 without the intervention of Parliament.

24 So I rely on the Laker case, although of course,  
25 I recognise the point that my Lord, Lord Justice Sales,

1           has drawn attention to. We respectfully submit that  
2           there is a close analogy in the present case. By the  
3           use of prerogative powers, the Secretary of State is  
4           triggering a process which will remove the rights  
5           conferred by statute, whatever Parliament might think.

6   LORD JUSTICE SALES: Just on Lord Norton's judgment, if one  
7           reads on in the same paragraph, ultimately he seems to  
8           rest his decision not on the wider principle you say  
9           exists but on the necessary implication from the  
10          relevant act.

11   LORD PANNICK: No, I accept that, my Lord. I accept that  
12          the Court of Appeal in that case, found that there was  
13          an Act of Parliament which impliedly restricted the use  
14          of prerogative powers in that area. I entirely accept  
15          that that is the ratio of the decision. But there is  
16          a broader statement of principle by Lord Justice Norton,  
17          and I say it is not necessary for me to establish, in  
18          these proceedings, that the 1972 Act implicitly  
19          restricts prerogative powers. I say it is not necessary  
20          for me to go that far. It is quite sufficient for me to  
21          establish that Parliament has created a whole range of  
22          statutory rights, both in the 1972 Act and let's not  
23          forget, in other acts as well, and that the conduct of  
24          the defendant is going to remove those rights. That  
25          cannot be done, I say, under prerogative powers. And if



1           it is necessary to rely upon implicit restrictions,  
2           I say it is implicit in any Act of Parliament that the  
3           creation of statutory rights by that Act, prevents  
4           a minister from removing them by executive action.  If  
5           I need to put it in terms of implications, then I am  
6           happy to do so.  But I say that, with respect, that is  
7           not a necessary analysis.  It suffices for my purposes,  
8           that rights have been created by Parliament.  They can't  
9           be taken away by the minister.

10  LORD JUSTICE SALES:  And just to help me, are you going to  
11           take us to ^name     Walker and Baird, because that seems  
12           to be the --

13  LORD PANNICK:  I wasn't proposing to, but if necessary, we  
14           can look at that.

15  LORD JUSTICE SALES:  It is just that you now seem to be  
16           putting quite a lot of weight on what you say is a wider  
17           principle enunciated by Lord Justice Norton, but he  
18           seems to do it by reference to ^name     Walker and  
19           Baird.

20  LORD PANNICK:  Insofar as there is a wider principle,  
21           I relied upon Lord Oliver's statement in J H Raynor as  
22           the wider --

23  THE LORD CHIEF JUSTICE:  Lord Pannick, what does  
24           Laker Airways add for your purposes, to what was said by  
25           Lord Oliver?

1 LORD PANNICK: To what was said by who?

2 THE LORD CHIEF JUSTICE: By Lord Oliver in the --

3 LORD PANNICK: It only adds this. It is a practical  
4 example.

5 THE LORD CHIEF JUSTICE: Yes, but to the principle, it adds  
6 nothing.

7 LORD PANNICK: It adds nothing to the principle. It is  
8 an application of the principle and it is a particular  
9 application that may be of relevance because the  
10 Attorney General's argument, as I have shown your  
11 Lordship, is to the court, not for you, courts, because  
12 this is all on the international plane. But  
13 I respectfully agree. I respectfully agree.

14 THE LORD CHIEF JUSTICE: The <sup>^</sup>nmae Tin Council case was  
15 also on the international plane.

16 LORD PANNICK: Indeed it was, indeed it was.

17 The third case that I just want to mention is  
18 <sup>nzame</sup> Ex Parte Fire Brigade's Union, which is at  
19 <sup>tab</sup> 13.

20 THE LORD CHIEF JUSTICE: Yes.

21 LORD PANNICK: And your Lordships know that here, the  
22 Appellate Committee, by a majority, held that it was  
23 an abuse of prerogative powers for the Secretary of  
24 State to establish a new criminal injuries compensation  
25 scheme, when a different scheme had been approved by

1 Parliament in a statute, even though the statutory  
2 scheme had not been brought into force. And the two  
3 members of the Appellate Committee who dissented,  
4 Lord Keith and Lord Mustill, did so because the  
5 statutory scheme had not been brought in to force. They  
6 didn't question the more general statements as to the  
7 limits of prerogative powers. And there are certain  
8 passages your Lordships will wish to bear in mind.  
9 Lord Browne-Wilkinson at 552, letter D, says:

10 "My Lords, it would be most surprising if, at the  
11 present day, prerogative powers could be validly  
12 exercised by the executive, so as to frustrate the will  
13 of Parliament expressed in a statute and to an extent,  
14 to preempt the decision of Parliament whether or not to  
15 continue with the statutory scheme, even though the old  
16 scheme has been abandoned. We respectfully agree."

17 There is then a reference to a white paper. Just  
18 under E:

19 "It is for Parliament, not the executive, to repeal  
20 legislation. The constitutional history of this country  
21 is the history of the prerogative powers of the Crown  
22 being made subject to the overriding powers of the  
23 democratically elected legislature as the sovereign  
24 body. The prerogative powers of the Crown remain in  
25 existence to the extent that Parliament has not

1 expressly or, by implication, extinguished them."

2 And again, I say that that covers a case where  
3 Parliament has created statutory rights. It can't be  
4 open to the executive to remove them by executive  
5 action.

6 Lord Lloyd at 568, letter H. Lord Lloyd of Berwick,  
7 568, just above letter H. His Lordship said:

8 "It might cause surprise to the man on the Clapham  
9 omnibus that legislative provisions and an Act of  
10 Parliament which have passed both Houses of Parliament  
11 and received the royal assent, can be set aside in this  
12 way by a member of the executive. It is, after all, the  
13 normal function of the executive to carry out the laws  
14 which Parliament has passed, just as it is the normal  
15 function of the judiciary to say what those laws mean."

16 And <sup>^sp</sup> Lord Nichols' observations to which  
17 I draw attention, are at 576, just above letter B.  
18 Lord Nichols says:

19 "The executive cannot exercise the prerogative power  
20 in a way which would derogate from the due fulfilment of  
21 the statutory duty. To that extent, the exercise of the  
22 prerogative power is curtailed, as long as the statutory  
23 duty continues to exist. Any exercise of the  
24 prerogative power in an inconsistent manner or for  
25 an inconsistent purpose, would be an abuse of power and

1 subject to the remedies afforded by judicial review."

2 So a broad statement of principle. At 577,  
3 letter G, the line above letter G, Lord Nichols says:

4 "He [that is the Secretary of State] cannot lawfully  
5 do anything in this field which would be inconsistent  
6 with his thereafter being able to carry out his  
7 statutory duty of keeping the exercise of the  
8 commencement ^day? date power under review. If he  
9 wishes to act in a manner or for a purpose which would  
10 be inconsistent in this respect, he must first return to  
11 Parliament and ask Parliament to relieve him from the  
12 duty it has imposed on him. Parliament should be asked  
13 to repeal the sections and the relating commencement day  
14 provisions."

15 We rely upon that. Then at 578, letter B:

16 "It is true [said Lord Nichols] that the Secretary  
17 of State has done nothing which is irrevocable, the  
18 terms of the new scheme are not immutable. In that  
19 sense, despite the introduction now, of the tariff  
20 scheme, it would still be open to him at a future date  
21 to discontinue the new scheme and bring the statutory  
22 scheme into operation in its place. However, it seems  
23 to me [says Lord Nichols] that such an evaluation of the  
24 facts is detached from reality. The new tariff scheme  
25 is not intended as a temporary solution, while the

1 minister waits a more propitious moment at which to  
2 bring the sections into operation. The new ^word ex  
3 gratia scheme is intended to mark out the way ahead for  
4 the foreseeable future. It is intended to be the long  
5 term replacement of the existing ex gratia scheme and  
6 its statutory embodiment. It is an alternative, not  
7 a stop gap. It is being brought into operation on the  
8 footing that the sections will never come into  
9 operation. The Home Secretary will monitor the  
10 operation of the tariff scheme. He will consider  
11 recommending to Parliament that the tariff scheme itself  
12 should be put on a statutory basis, once it has had time  
13 to settle down and any teething problems have been  
14 resolved. But there is no expectation of ever bringing  
15 the statutory scheme into operation."

16 And then at F, just above F:

17 "By setting up the tariff scheme, the minister has  
18 set his face in a different direction. He has struck  
19 out down a different route and thereby disabled himself  
20 from properly discharging the statutory duty in the way  
21 Parliament intended."

22 And we say it is very closely analogous to the  
23 present case.

24 LORD JUSTICE SALES: That is page 578 D to E. There is also  
25 a reference to procedural rights which existed --

1 LORD PANNICK: Well, indeed.

2 LORD JUSTICE SALES: -- with a parliamentary scheme.

3 I wondered whether that --

4 LORD PANNICK: I am very grateful to your Lordship. There  
5 will also be other major procedural changes:

6 "The inescapable conclusion is the Home Secretary  
7 has effectively written off the statutory scheme and  
8 once the tariff scheme has been introduced, no realistic  
9 prospect of being able to keep the exercise of the  
10 commencement day power under review."

11 And it is, I say, a very similar case. It is  
12 obviously different, but it is similar in this sense:  
13 the Appellate Committee are saying that: you, the  
14 minister, cannot lawfully set out on a route which is  
15 going to frustrate that which Parliament has enacted.  
16 You need to go back to Parliament in order to obtain  
17 its, Parliament's authorisation, before you take these  
18 steps. And we say that the case of *Ex Parte*  
19 *Fire Brigade's Union* is helpful to this court, because  
20 it establishes, again, that whether the government has  
21 breached the legal limits on the exercise of prerogative  
22 powers is a justiciable matter, and indeed, the  
23 Appellate Committee applied those principles, even in  
24 a case where the substantive statutory provisions had  
25 not even been brought into force. It is a much harder

1 case, therefore, for arguing for restrictions on  
2 prerogative powers. We don't have that difficulty in  
3 the present case.

4 LORD JUSTICE SALES: Again, Lord Pannick, as I am reading at  
5 the moment, the speeches in this case, they all turn on  
6 implied abrogation of the prerogative power by the  
7 relevant statute. So if one reads Lord Nichols' speech,  
8 he focuses upon a statutory duty to keep the  
9 commencement of the statutory scheme under review, and  
10 says that the things that have been done are  
11 inconsistent with that and, therefore, the prerogative  
12 was abrogated, to the extent that it was inconsistent  
13 with that duty. So unless you can assist us further,  
14 I don't, at the moment, get from this case, support for  
15 what I understood to be your wider proposition.

16 LORD PANNICK: Well, I entirely accept what your Lordship  
17 puts to me; that is a strand. Your Lordship may think  
18 an important strand of the reasoning in the majority.  
19 But the case also is authority for the proposition that  
20 the minister, by the use of prerogative powers, cannot  
21 take action which will frustrate the substance of that  
22 which Parliament has already enacted. And if your  
23 Lordship thinks that it is necessary to put that  
24 proposition in terms of what Parliament implies, then as  
25 I have indicated, I am quite happy to put my submission



1 on the basis that the enactment of the 1972 Act, the  
2 enactment of the Parliamentary Elections Act, impliedly  
3 is a statement by Parliament itself, that the rights  
4 which those statutes create, cannot be set aside or  
5 frustrated by the executive. I am very happy to put the  
6 case that way. But I say that that is, with respect,  
7 artificial, because the more general principle on which  
8 I rely is a principle that where Parliament has  
9 established statutory rights, and it has, they cannot be  
10 set at nought. They cannot be taken away by executive  
11 action on the international plane. And this case is  
12 a most unusual case, because of the context that the  
13 international plane is inextricably linked to domestic  
14 rights, and obligations. This is not a normal case  
15 where action can be taken on the international level,  
16 which does not have a consequence on the domestic level.

17 LORD JUSTICE SALES: At all events, can I just check that  
18 there are no additional passages from the ones you have  
19 shown us?

20 LORD PANNICK: No, my learned friends may wish to take your  
21 Lordships to other ones, but those, as I identify them,  
22 are the main passages. And as I say, I hope fairly, I  
23 recognise what your Lordship puts to me, both on Laker  
24 and ^nmae Fire Brigade's Union, but my response is  
25 that these are examples of the more general principle

1           which was stated by Lord Oliver and, indeed, by  
2           ^sp     Lord Cook four centuries ago, of the general  
3           principle, which I say is not a surprising principle.  
4           There is nothing surprising about a constitutional  
5           principle that if Parliament has conferred statutory  
6           rights, a minister can't take them away.

7   THE LORD CHIEF JUSTICE:   I doubt that a principle said that  
8           simply would be in dispute by anyone.

9   LORD PANNICK:   No, I accept that.

10   THE LORD CHIEF JUSTICE:   But what is of more difficulty is  
11           the question of how it interrelates with the  
12           international.

13   LORD PANNICK:   Can I come to that?

14   THE LORD CHIEF JUSTICE:   Yes.

15   LORD PANNICK:   Can I then come to what I understand to be  
16           the main arguments that are advanced against my  
17           submissions.

18   THE LORD CHIEF JUSTICE:   Yes.

19   LORD PANNICK:   And there are a number of them.  Let me take  
20           them in turn.  The first argument I have already dealt  
21           with, or attempted to deal with.  That is the defendant  
22           places heavy reliance upon the European Union Referendum  
23           Act 2015.  I have made my submissions on that, your  
24           Lordships have them.

25   THE LORD CHIEF JUSTICE:   Yes.

1 LORD PANNICK: The defendant's second argument is that  
2 Parliament has expressly placed other limits on the use  
3 of prerogative power but has not done so in any respect  
4 relevant to these proceedings. And that is summarised  
5 at paragraph 24 of my friend's skeleton argument. And  
6 your Lordships may wish to have open what my friends,  
7 the defendant, say in paragraph 24 of his skeleton  
8 argument. And there are a number of statutes to which  
9 the defendant draws attention. He draws attention to  
10 section 12 of the European Parliamentary Elections Act  
11 2002. That is volume E, tab 8. I am not going to  
12 invite your Lordship to go to these, because I don't  
13 dispute the substance of them. That one requires  
14 primary legislation before any treaty increasing the  
15 powers of the European Parliament could be ratified.  
16 And there is a similar provision in section 6 of the  
17 European Parliamentary Elections Act 1978. Section 12  
18 of the European Parliamentary Elections Act 2002, to  
19 which my friends refer at paragraph 24(2), was in fact  
20 repealed by the European Union Act 2011, which imposed  
21 a broader set of restrictions.

22 The defendant also refers to The European Union  
23 Amendment Act 2008. That is paragraph 24(3) of my  
24 friends' submissions. That is E9. And what that did,  
25 was to incorporate, as they say, the Lisbon Treaty, and

1 as they say, did impose parliamentary controls over  
2 certain decisions made under the treatise; section 6.  
3 It did not impose any control over the use of  
4 Article 50. So they rely upon section 6 of the 2008  
5 Act. That provision was also repealed by the  
6 European Union Act 2011, which imposed a broader set of  
7 restrictions. And then we come to the 2011 Act at  
8 paragraph 24(4) of my friends' submissions. The  
9 European Union Act 2011 imposed a number of procedural  
10 requirements in relation to ratifying amendments to EU  
11 treatise or taking steps under them. And perhaps your  
12 Lordships would wish to look at the 2011 Act, which  
13 appears in volume A, behind tab 4. Volume A, tab 4,  
14 section 2, if I can pick it up with section 2, is headed  
15 "treatise amending or replacing the TEU or the TFEU":  
16 "Parliament enacted that a treaty which amends or  
17 replaces the TEU or the TFEU is not to be ratified  
18 unless a statement relating to the treaty was laid  
19 before Parliament, in accordance with section 5, the  
20 treaty is approved by an Act of Parliament and the  
21 referendum condition or the exemption condition is met."  
22 And there is a detailed series of provisions  
23 concerning when a referendum is required, section 4 in  
24 particular. I don't think the detail of that is -- that  
25 we need to go into that. But your Lordships see

1 a number of specific statutory restrictions on the power  
2 to enter into a treaty, which amends or replaces the TEU  
3 or the TFEU.

4 The defendant then refers to part 2 of the  
5 Constitutional Reform and Governance Act 2010, and we  
6 have that one at volume C, behind tab 29, if I can take  
7 your Lordships to that one. Tab 29. "treatise to be  
8 laid before Parliament before ratification." Section 20  
9 of the 2010 Act. And section 20 provides:

10 "Subject to what follows, a treaty is not to be  
11 ratified unless a minister of the Crown has laid before  
12 Parliament, a copy of the treaty, the treaty has been  
13 published, period A has expired without either house  
14 having resolved that the treaty should not be ratified  
15 ... "

16 And there is some detail relating to what happens if  
17 one house resolves but the other house does not. And  
18 then section 22 then sets out circumstances in which  
19 section 20 does not apply. It doesn't apply to  
20 exceptional cases.

21 THE LORD CHIEF JUSTICE: And I am assuming there was no  
22 parliamentary convention in relation to these matters  
23 before this statute?

24 LORD PANNICK: No.

25 Section 23, section 20 not to apply to certain

1 descriptions of treatise. That has been amended now, so  
2 that it is consistent with the 2011 Act, which your  
3 Lordships have seen. So the argument against me, as  
4 I understand it, is that Parliament has intervened in  
5 a number of respects and it has intervened in the  
6 specific context of EU treatise, so as to impose  
7 a number of restrictions on prerogative powers. And, it  
8 is said, and it is accurately said, none of those  
9 statutory restrictions assist the claimant in this case.  
10 And we have two linked answers to this line of argument  
11 from the defendant. The first answer is that as I have  
12 already explained, the common law authorities recognise  
13 that prerogative powers may not lawfully be used, where  
14 their exercise deprives individuals of statutory rights  
15 or where the exercise preempts parliamentary  
16 consideration. That is my common law submission. It is  
17 either good or it is bad. But that is the submission.  
18 And the second answer that I give is that if I am right  
19 in the submission that those are the common law limits  
20 on the lawful use of the prerogative, then it is nothing  
21 to the point that Parliament has imposed other  
22 restrictions on the use of prerogative powers.  
23 to here Parliament has not touched the common law  
24 restrictions on the use, the lawful use, of prerogative  
25 powers. A common law restriction on the use of

1 prerogative powers can only be removed or altered by  
2 an express statutory provision. Especially, we say, in  
3 the context of an interference with the rights conferred  
4 by the 1972 Act, given its constitutional status. The  
5 fact that Parliament has not addressed the common law  
6 use on the limits of prerogative powers simply means in  
7 my submission, and elementarily means, that is content  
8 for the common law limits to continue to be applied by  
9 the courts. And the statutory limitations address  
10 different subjects. They are not concerned with the use  
11 of the prerogative to remove or to frustrate rights  
12 which have been conferred by Parliament, either in the  
13 1972 Act or in other legislation.

14 LORD JUSTICE SALES: And if this court doesn't accept your  
15 wider submission about common law limits, what do you  
16 say about --

17 LORD PANNICK: Well then I lose the case. I lose the case.

18 LORD JUSTICE SALES: -- the legislation?

19 LORD PANNICK: If I am unable to persuade your Lordships of  
20 two things, first that the relevant legal principle is  
21 essentially that stated by Lord Oliver, and and that its  
22 application in the circumstances of this case is in my  
23 favour, because the notification does remove statutory  
24 rights, if I can't persuade your Lordships of both of  
25 those elements, we lose.

1 LORD JUSTICE SALES: I thought you were maintaining  
2 an alternative submission that even if it is not  
3 a common law limitation, there is implied abrogation of  
4 the prerogative power.

5 LORD PANNICK: Yes, your Lordship is absolutely right.

6 LORD JUSTICE SALES: So just focusing on that alternative  
7 argument, what do you say about (inaudible).

8 LORD PANNICK: If my alternative argument is accepted by the  
9 court, and that is once Parliament has created statutory  
10 rights, it is implicit in that creation that Parliament  
11 must have intended that the executive cannot remove them  
12 or frustrate them, then, again, I would submit that the  
13 intervention by Parliament on a different subject, which  
14 is whether or not there may be the cancellation of --  
15 whether or not to use, and let me go back to the  
16 European Union Act 2011. Whether or not the minister  
17 may ratify a treaty which amends or replaces the T EU or  
18 the TF EU, which isn't the context of this case, and no  
19 one is suggesting, far less the defendant, that this is  
20 a case where there would be a treaty which amends or  
21 replaces the T EU or the TF EU, and of course they don't  
22 so submit, because if they did then it would need to be  
23 approved by Act of Parliament and the referendum  
24 condition would apply, unless there was an exemption.

25 The fact that Parliament has introduced other



1 restrictions on the use of the prerogative does not such  
2 to upon our submission that there are the limitations  
3 for which we contend. And again I would rely upon the  
4 Simms principle to which I took your Lordships this  
5 morning; that fundamental rights cannot be impliedly  
6 removed by a statute. And on a matter as significant as  
7 this, that is the limits on prerogative power, I do  
8 respectfully submit that it cannot be the law that the  
9 limitations on the use of the prerogative, a matter of  
10 fundamental constitutional importance, can somehow be  
11 affected implicitly by an Act of Parliament which does  
12 not mention any such matter. I say that cannot be  
13 right, and therefore --

14 THE MASTER OF THE ROLLS: The thing is, if you fail on the  
15 wider points as my Lord has put it, it is quite  
16 difficult for you to succeed on the implication point,  
17 because really that is the other side of the coin of  
18 your general principle. Your general principle being  
19 that you can't use prerogative to abolish fundamental  
20 rights. That is why if you are right about that, that  
21 is the implication. If you are not right on that, you  
22 are in some difficulty, are you not?

23 LORD PANNICK: I hope I haven't suggested to the contrary,  
24 my Lord. Because the only basis upon which I am putting  
25 forward an implication is that Parliament has created

1 statutory rights. And the argument, I accept, doesn't  
2 add a great deal of substance. The only reason I put it  
3 forward is because my Lord Lord Justice Sales.

4 THE MASTER OF THE ROLLS: It was put to you as a third limb,  
5 I am putting to you that it was not a third limb, but  
6 just the other side of the coin.

7 LORD PANNICK: I don't put it forward as the heart of this  
8 case. The heart of this case, as I say, is that  
9 Parliament has undoubtedly created a series of  
10 absolutely fundamental rights, and they cannot be taken  
11 away by executive action. I only talk about the  
12 implication to be drawn if legislation, because my Lord,  
13 Lord Justice Sales puts to me, very properly puts to me,  
14 that if one analyses the two of the cases, Laker and  
15 fire brigade's union, it can be said that an implication  
16 was drawn from the legislation in those cases. They are  
17 merely, I say, and this is my preferred submission, they  
18 are examples of the limits of prerogative powers. But  
19 if my Lord is anxious that that is the true analysis,  
20 then I am quite happy to put my case forward on the  
21 basis of an implication from the creation of statutory  
22 rights. But it is really the same point, as your  
23 Lordship puts to me. I have to establish, and I say for  
24 the reasons I have given I can establish, that that is  
25 what is going on here. Rights have been created and

1           they are being taken away by the executive. So that is  
2           the second argument, the other statutory provisions.

3           The third argument, I just want to touch upon is  
4           that the defendant then says, it is paragraph 30 of his  
5           skeleton argument, and elsewhere, he says well, there is  
6           nothing in the 1972 Act or indeed any other statute  
7           which requires the United Kingdom to remain a member of  
8           the EU. And that, of course, is correct. But it  
9           doesn't address the legal complaint, which I have  
10          identified on too many occasions now; that notification  
11          will take away statutory rights and preempt Parliament's  
12          decision on the matter.

13          The fourth argument, the more substantial argument,  
14          paragraph 31 of the defendant's skeleton argument, is  
15          that section 2(1) of the 1972 Act, and let's go to  
16          paragraph 31 and see what is said by the defendant at  
17          paragraph 31 so that your Lordships have the point.  
18          Yes, it is paragraph 31 and it is the second sentence,  
19          that:

20                 "What section 2(1) of the 1972 Act does is give  
21                 effect to the UK's obligations under EU law whatever  
22                 they may happen to be at any particular point in time."

23          That is the submission, the fourth argument that  
24          I want to address. And the point relies on the use of  
25          the language in section 2(1) "from time to time".

1            "All such rights, powers, liabilities obligations  
2            and restrictions from time to time created or arising by  
3            or under the treatise, all such remedies and procedures  
4            from time to time provided for by or under the  
5            treatise."

6            Our submission is that those words do not assist the  
7            defendant. What section 2(1) undoubtedly recognises is  
8            that the rights and duties consequent on EU membership  
9            will change and evolve from time to time. Parliament  
10           has recognised that new rights will be created, in  
11           particular by the European legislature. New rights will  
12           be recognised, developed, by the Court of Justice. But  
13           what section 2(1) does not contemplate is a situation in  
14           which there are no rights and duties under the treatise  
15           for the purposes of that provision. And even less so  
16           because a minister has, by the use of prerogative  
17           powers, caused that to be so.

18           Our submission is that section 2(1) and the language  
19           which it contains is intended to give effect to the  
20           rights and duties arising from time to time by reason of  
21           membership of the EU. Section 2(1) is not intended to  
22           give effect to rights and duties arising from membership  
23           of the EU existing from time to time. The focus is on  
24           the rights and duties that exist from time to time.  
25           Section 2(1) is not intended to give effect to rights

1           and duties which arise from membership of the EU  
2           existing from time to time.

3   LORD JUSTICE SALES: Lord Pannick, just so you know when  
4           I asked my question at the start of the hearing about  
5           what was the position in international law about  
6           withdrawal from the EC treatise in 1973, one of the  
7           reasons I was interested in that is in the context of  
8           this submission. Now I understand you are making the  
9           submission generally what ever may have been the  
10          position at that time.

11   LORD PANNICK: Yes.

12   LORD JUSTICE SALES: If it was the position at that time  
13          that as a matter of international law there couldn't be  
14          withdrawal from the treatise, it might be said that that  
15          actually supports the submission you are making now.  
16          Conversely it might be said that if you could withdraw,  
17          that is, I suppose you would say you are left where you  
18          are generally and you make your wider point.

19   LORD PANNICK: I understand.

20   LORD JUSTICE SALES: I appreciate you are coming back to it.  
21          I thought I should mention the specific reason why I was  
22          interested in that submission.

23   LORD PANNICK: I thought that was why your Lordship was  
24          interested in the submission, and I am going to make the  
25          submission in due course relating to that specific

1 point. But I say whatever the position is in  
2 international law as at 1 January 1973, the clear  
3 meaning of section 2(1) is that Parliament was concerned  
4 with the rights and duties which arise from time to time  
5 under the treatise. Parliament recognised, it had to  
6 recognise, that the rights and duties that arise on the  
7 1 January 1973 would not necessarily be the same rights  
8 and duties the following year, or ten year later. And  
9 Parliament very wisely was emphasising that what it was  
10 committing itself to was the incorporation into  
11 United Kingdom law of all of the rights and duties,  
12 whatever they may be under EU law from time to time.  
13 But what Parliament was not contemplating, far less  
14 addressing in section 2(1), was that membership of the  
15 EU may exist from time to time. That was not the  
16 subject matter of section 2(1), nor could it sensibly be  
17 the subject matter of section 2(1), in the context of  
18 an Act of Parliament which I showed your Lordships, had,  
19 as its long title and had as its purpose, the  
20 enlargement of the European communities to include the  
21 United Kingdom. The whole purpose of the Act was to  
22 implement the United Kingdom joining the European  
23 community. Section 2(1) is not a provision which  
24 addresses or complaints the possibility of the  
25 United Kingdom ceasing to be a member of the EU. And

1           indeed, it is striking that it is no part, rightly, no  
2           part of the case for the defendant that he enjoyed any  
3           statutory power to give notification under Article 50 by  
4           reference to section 2(1). He doesn't suggest it is  
5           implicit in section 2(1) that he has a statutory power.  
6           He relies, and relies only, only on prerogative powers.

7   THE LORD CHIEF JUSTICE: But presumably under 2(1), if, for  
8           example the parties to the treatise agreed prior to the  
9           restrictions coming in in the latest act (?) to take  
10          away certain rights that had actually by the operation  
11          of section 2 become entrenched or become established  
12          under the law of the United Kingdom, that was perfectly  
13          acceptable.

14   LORD PANNICK: It was perfectly acceptable at a European  
15          level for them to do whatever they wished to do.

16   THE LORD CHIEF JUSTICE: But supposing you took away a right  
17          that existed under the 1972 treaty before these further  
18          restrictive acts came in. Did that take effect in  
19          domestic law?

20   LORD PANNICK: Your Lordship is putting to me if, for  
21          example, the states decided that they would remove the  
22          right to establishment?

23   THE LORD CHIEF JUSTICE: Yes.

24   LORD PANNICK: Or something of that sort. Yes it would be  
25          open to community law to take whatever steps they

1 thought was appropriate, consistent with community law,  
2 which would have the effect of altering rights and  
3 duties under domestic law. I can't dispute that that --  
4 THE LORD CHIEF JUSTICE: So this paragraph 2(1) operates, it  
5 permits the executive, provided you come within its  
6 wording, to derogate from the rights established by the  
7 treaty, by the use of the executive powers?  
8 LORD PANNICK: Yes, but there is a difference in my  
9 submission, a fundamental difference, in the terms of  
10 section 2(1) to an alteration of the rights enjoyed  
11 under the treatise which would take effect under EU law.  
12 THE LORD CHIEF JUSTICE: And withdraw?  
13 LORD PANNICK: And withdraw. Because what that does, for  
14 the reasons I have sought to explain, is that it removes  
15 the entirety of section 2(1) and section 3(1), and it  
16 frustrates that which Parliament has enacted. And it  
17 does so without any parliamentary authorisation. That,  
18 we say is a fundamental distinction. I accept, I have  
19 to accept, that EU law is not static.  
20 THE LORD CHIEF JUSTICE: No.  
21 LORD PANNICK: The whole point of 2(1) is that it can be  
22 expanded, it can be restricted.  
23 THE LORD CHIEF JUSTICE: Just suppose we go back to 1972 and  
24 prior to the enactment of Article 50, it would have been  
25 within the power of the executive to go to where ever,



1           and agree with all of the other member states all of the  
2           rights, such as rights of establishment, all of that  
3           could be whittled away and they would automatically fall  
4           under UK law.

5   LORD PANNICK: One has to be careful here, because what has  
6           happened, whenever there have been treaty amendments, is  
7           that the agreement at international level has not been  
8           implemented by the terms of the international agreement  
9           until the Act of Parliament has been enacted at domestic  
10          level. So for example when there were the changes at  
11          Maastricht, with the changes at Lisbon, the treaty  
12          changes are agreed and they do not come into effect, and  
13          indeed there is no ratification, until Parliament  
14          changes domestic law.

15   THE LORD CHIEF JUSTICE: That is why I asked the question in  
16          two parts. By section 3 of the 2011 Act, the executive  
17          power has been fettered, hasn't it? That is the change.

18   LORD PANNICK: Well, something as fundamental as what is  
19          covered --

20   THE LORD CHIEF JUSTICE: I will take you back to what I see  
21          as the most important practical point, the right of  
22          establishment, the right of freedom of movement. To  
23          take those away would require, under an amendment to the  
24          T EU or the TF EU, the treaty would have to be approved  
25          by Act of Parliament.

1 LORD PANNICK: Yes.

2 THE LORD CHIEF JUSTICE: And therefore the broader powers  
3 under section 2(1), are those restricted by section 2 of  
4 the Act so that whereas when this was originally enacted  
5 there was a power that the executive could, as a matter  
6 of allow, you know, agree with the other member states  
7 well, we are getting rid of this right and that right.  
8 But it can't do that now because of section 2 of the  
9 European Union Act.

10 LORD PANNICK: Well, the powers of the executive, prior to  
11 section 2 were restricted by the need to have a new  
12 treaty which would be agreed on something fundamental,  
13 and the consistent practice, I can take your Lordship  
14 through all of the provisions if your Lordships want to  
15 see them, but each time there has been a fundamental  
16 change prior to 2011 there has been an international  
17 treaty which has been agreed but not ratified and which  
18 states that it does not come into effect until domestic  
19 constitutional arrangements are secured.

20 THE LORD CHIEF JUSTICE: But does it therefore follow that  
21 on the alternative express or implicit argument, what  
22 you are really saying is that the power under section 2  
23 cannot, as a matter of convention or more recently as  
24 a matter of section 2 of the 2011 Act, be operated  
25 without the consent of Parliament, and therefore the

1 prerogative power power to amend the treatise has been  
2 restricted?

3 LORD PANNICK: Well, I am saying that. I am saying that  
4 that is a consequence of common law. I say this is  
5 a much starker case for the reasons I have given. That  
6 what the minister is doing is stripping away the  
7 entirety of section 2 and section 3. He is removing any  
8 content. That is why I say this is such a stark case.  
9 And were the minister to be purporting on the  
10 international plane to be doing something less dramatic  
11 and to be reaching an agreement, then different  
12 questions would certainly arise as to the scope of his  
13 prerogative powers.

14 THE LORD CHIEF JUSTICE: But then, of course, the action  
15 under Article 50 is not -- you then have to enter into  
16 the argument which I don't think is relied upon that  
17 Article 50, the operation of the power under Article 50  
18 is in fact the operation of a power that can be  
19 exercised by the prerogative, which doesn't require,  
20 doesn't need, an amendment of the treaty.

21 LORD PANNICK: Well, yes, the case for the defendant  
22 certainly is that section 2 has nothing to do with this  
23 case. Neither side is contending that section 2 is  
24 applicable.

25 THE LORD CHIEF JUSTICE: No.

1 LORD PANNICK: -- to this case. It is not our argument.

2 THE LORD CHIEF JUSTICE: And it is not their argument.

3 LORD PANNICK: And it is certainly not the argument of the  
4 defendant that there are those restrictions.

5 THE LORD CHIEF JUSTICE: But it is a curiosity that  
6 originally you accept that by the use of the royal  
7 prerogative to amend treatise, the rights and  
8 obligations could have been altered by treaty. You have  
9 now got an act which restricts that angle.

10 LORD PANNICK: Maybe I haven't been clear, let me try to  
11 make it clear. I don't accept that the royal  
12 prerogative would have extended to a fundamental change  
13 in that which had been created in 1972 under domestic  
14 law, because to take away, by executive action,  
15 something as fundamental as, for example, the right to  
16 establishment, implicitly, I say, Parliament has  
17 restricted the ability of the executive so to act. That  
18 is my -- if I need to go that far, I do go that far.

19 THE LORD CHIEF JUSTICE: Okay.

20 LORD JUSTICE SALES: Just so I follow, are you saying then,  
21 that if on 2 January 1973 the government had changed its  
22 mind about the desirability of the EC treaties and their  
23 full scope in that time and sought to go and negotiate  
24 with the other member states and said well, let's remove  
25 the right of establishment from the treaties, and they

1           might say yes, and that would modify what the EC  
2           obligations were; that the government would in fact by  
3           reason of section 2 of the European communities act have  
4           been disbarred from seeking to exercise the prerogative  
5           in that way, ie by approaching other states to see if  
6           this he would agree to a change in the treatise because  
7           it would be such a fundamental change within domestic  
8           law consequent upon --

9   LORD PANNICK:   They can certainly negotiate?

10   LORD JUSTICE SALES:   They could?

11   LORD PANNICK:   Yes, but what they couldn't do is take any  
12           action which determined that those rights could be taken  
13           away.   They would need parliamentary authority before  
14           any such rights could be taken away.

15   LORD JUSTICE SALES:   All right, they could negotiate but  
16           they would need primary legislation before ratifying the  
17           revised treaty, is that right.

18   LORD PANNICK:   Yes, the difference, the fundamental  
19           difference caused Article 50 is that the notification  
20           commits the United Kingdom to the removal of the rights  
21           which are enjoyed.

22   THE LORD CHIEF JUSTICE:   I am troubled by this,  
23           Lord Pannick, because of the broad terms of section 2(1)  
24           which on its face, as you will accept, envisage a moving  
25           content of both rights under the treaty and rights under

1 the European legislation, and if that is -- the extent  
2 to which the executive can vary the treaty and effect  
3 the rights is something maybe someone can come back to  
4 or you can come back to later.

5 LORD PANNICK: Yes. My submission is that it is open  
6 through the use of the prerogative power for the state  
7 to take action which will affect in some substantial way  
8 the rights which Parliament has created, has recognised,  
9 under the 1972 Act.

10 THE LORD CHIEF JUSTICE: Yes.

11 LORD PANNICK: The prerogative can't be used for that  
12 purpose. What is so different about the present case is  
13 two things: first, that the use of the Article 50  
14 notification procedure removes the whole substance of  
15 section 2 and 3, I have made that point. But also that  
16 this is not a case of negotiation at the international  
17 level, which may or may not lead to a particular result  
18 in domestic law. It is a case of starting the  
19 international notification and committing the state of  
20 English law to the removal of various rights, a whole  
21 panoply of various rights, which are currently enjoyed.  
22 And I also make the point that the constitutional  
23 practice, and I will show your Lordships this, that the  
24 constitutional practice is that when there are  
25 negotiations at the international level in relation to

1 EU treatise, treatise that will amend substantially  
2 Maastricht, Lisbon, what has happened, deliberately so,  
3 is that negotiations have taken place, but no  
4 ratification, unless and until Parliament has given its  
5 approval. That is what has happened. And the reason  
6 for that is because everyone recognises, as a matter of  
7 constitutional propriety, the enormity of the 1972 Act.  
8 And the close interplay between statutory rights and  
9 what happens at international level.

10 THE MASTER OF THE ROLLS: Do you go as far as to say that  
11 the effect of those two matters, that is the fact of any  
12 changes to treatise have always been ratified by  
13 Parliament and secondly the effect of the European Union  
14 Act is to create a convention? Effectively you seem to  
15 be saying that. I mean, are you saying that there is  
16 now implicitly, as a result of that course of action,  
17 and the statute, a convention to this effect?

18 LORD PANNICK: Well, I do say that but I say it is  
19 a convention that has a very solid foundation. It is  
20 a foundation that recognises the importance of the  
21 rights that are created under EU law. And the unique  
22 interplay between action on the international plane and  
23 action at domestic level. Quite unique. And it is the  
24 consequence of that, as well as the constitutional  
25 importance of the 1972 Act, that the practice has grown

1 up, advisedly so, that changes at the international  
2 level are not ratified unless and until Parliament has  
3 given its approval. It is of fundamental importance in  
4 this context.

5 LORD JUSTICE SALES: Doesn't it go rather further than  
6 convention, because section 2(1) of the 1972 Act refers  
7 to rights arising under the treatise.

8 LORD PANNICK: Yes.

9 LORD JUSTICE SALES: And each time the treatise are  
10 precisely defined. So if you have an extension of  
11 rights in the Maastricht treaty or something like that,  
12 you need as a matter of law to change the primary  
13 legislation.

14 LORD PANNICK: Your Lordship is precisely right. And that  
15 is what has happened. Parliament has amend section 1  
16 (3).

17 LORD JUSTICE SALES: Right, but if you stake the case may  
18 my Lord, the Lord Chief Justice Was putting to you,  
19 where you start off with, let's say the EEC treaty and  
20 a week later after we have ratified the act as being  
21 passed, all of the member states agree that that treaty  
22 will be treated as no longer including a right of  
23 establishment, and I can see you might have debates as  
24 a matter of international law whether that counts as  
25 a new treaty, but on the face of it, that would just be



1           excising part of one of the treatise which is referred  
2           to in the primary legislation.

3   LORD PANNICK:   Yes.

4   LORD JUSTICE SALES:   And certainly I understood your answer  
5           in relation to that question before to be if you get to  
6           that point of an excision of part of the rights in one  
7           of the treatise that would affect the the content of the  
8           rights that are given effect in section 2(1).

9   LORD PANNICK:   Yes.

10   LORD JUSTICE SALES:   But I understood you to be saying that  
11           if there had been such a negotiation, the United Kingdom  
12           government could not have ratified any such agreement to  
13           excise that part of the treaty, without an Act of  
14           Parliament.   Not by reason, well, essentially by reason  
15           of there having been an abrogation, you say, of the  
16           ability to do that.

17   LORD PANNICK:   Your Lordship is correct to point out, with  
18           respect, that the 1972 Act lists, in section 1 (3), what  
19           are the treatise for the purposes of section 2(1).   And  
20           the short, and I suggest correct answer, that I should  
21           have given to my Lord, the Lord Chief Justice, and I am  
22           grateful to my Lord, is that a new treaty --

23   THE LORD CHIEF JUSTICE:   I fully follow the answer, but it  
24           is part of the definitions section under section  
25           (inaudible).

1 LORD PANNICK: Yes and I say that is the correct answer and  
2 I apologise for being slow in getting there but it is  
3 the answer, because if the United Kingdom at  
4 international level reaches a new treaty which strips  
5 away, say, the right of establishment, it would have no  
6 effect in domestic law. Couldn't have any effect in  
7 domestic law, unless and until that new treaty is put in  
8 section 1(3), that is the reason why the consistent  
9 practice has been that what is agreed at international  
10 level is not ratified unless and until Parliament has  
11 given approval, because it would have no effect in  
12 domestic law and it must have effect in domestic law to  
13 ensure harmony between European law and domestic law so  
14 I am very grateful to my Lord.

15 THE LORD CHIEF JUSTICE: And the distinction, just to follow  
16 this through, as the treatise, for rights to arise under  
17 the treatise they have to be a treaty as defined.

18 LORD PANNICK: Yes.

19 THE LORD CHIEF JUSTICE: So that precludes the executive,  
20 you say, from taking away rights under a treaty.

21 LORD PANNICK: Yes.

22 THE LORD CHIEF JUSTICE: Insofar as the rights arise under  
23 European legislation, those are the rights conferred on  
24 Parliament and the Council, and if need be on the court,  
25 are all functions of the treatise and therefore take

1 effect that way.

2 LORD PANNICK: Precisely though. There is no lacuna here,  
3 it is a consistent system and the practice is  
4 consistent.

5 THE LORD CHIEF JUSTICE: I am grateful.

6 LORD PANNICK: I am particularly grateful for  
7 Lord Justice Sales for providing me with the correct  
8 answer. In my submission. That is my answer to  
9 section 2.

10 Then, the next argument that I wanted to address is  
11 yes, the defendant says he is proposing to use the  
12 standard constitutional practice for entering into and  
13 withdrawing from treatise. This is paragraphs 20(4) and  
14 27 to 29 of the skeleton argument. And the argument is  
15 well, it is customary on the international plane you use  
16 prerogative powers to negotiate treatise, and you follow  
17 it up with domestic implementation. And our response is  
18 that the argument from the defendant ignores the fact  
19 that the EU treatise as implemented from the 1972 act  
20 are very different from other kinds of international  
21 treaty which Parliament has implemented into domestic  
22 law. And that is for all of the reasons that I have  
23 sought to identify. And because of the exceptional  
24 characteristics of EU law, indeed unique characteristics  
25 of EU law, it is the consequence of notification under

1 Article 50 that action on the international plane does  
2 not -- action on the international plane of itself has  
3 a dramatic effect on rights and duties in national law.  
4 And we say that the defendant, with respect, was wrong  
5 in the detailed grounds of resistance on this point.  
6 Can I just take your Lordships to the main bundle, the  
7 agreed bundle in the case. I hope your Lordships have  
8 that. It is main bundle, tab 5, A5 of the main bundle,  
9 the agreed bundle for the hearing. The bundle that has  
10 all of the witness statements and the pleadings. And in  
11 the main bundle.

12 THE LORD CHIEF JUSTICE: Sorry, mine seems to have got lost  
13 but we will manage.

14 LORD PANNICK: I am sorry, my Lord, it is called agreed  
15 bundle for hearing on --

16 THE LORD CHIEF JUSTICE: I know what you are referring to,  
17 but it seems to have got mislaid. It doesn't matter.  
18 I will share with my Lord, it doesn't matter.

19 LORD PANNICK: Well, your Lordship doesn't need it. It is  
20 simply the assertion there that the giving of  
21 notification under Article 50(2), paragraph 15, sorry,  
22 not 5, paragraph 15.

23 THE LORD CHIEF JUSTICE: Which tab are you referring to?

24 LORD PANNICK: I am sorry, my Lord.

25 THE LORD CHIEF JUSTICE: Which tab are you referring to?

1 LORD PANNICK: It is tab number 5 and it is paragraph 15.

2 This is the defendant's detailed grounds of resistance.

3 Does your Lordship have that?

4 THE LORD CHIEF JUSTICE: Yes.

5 LORD PANNICK: 15. They say:

6 "Equally the giving ...(reading to the words)... is  
7 an act within the treaty prerogative of the Crown which  
8 takes place and has effect only on the international law  
9 plain."

10 And that is the point; no it doesn't. If it did,  
11 then of course one would understand the point that is  
12 being made by the defendant. But for all of the reasons  
13 I have sought to identify, that is simply not the case.  
14 The defendant then lists what he says are other examples  
15 of the Crown withdrawing from international treatise,  
16 but none of the examples raise the question in the  
17 present case. Because of the unique or at least  
18 exceptional characteristics of EU law. We are here  
19 concerned and only concerned with the withdrawal on the  
20 international plane by Article 50, which of itself  
21 removing rights enjoyed under domestic law. And none of  
22 the examples that are given take the matters any further  
23 forward.

24 As to the EU treatise, the point I was making a few  
25 moments ago, the position, says the defendant, if we go

1 back to the defendant's skeleton argument, we are  
2 looking at paragraph 29 of the defendant's skeleton  
3 argument, skeleton argument bundle-tab number 6, this is  
4 where they deal with new EU treatise. When new EU  
5 treatise have been adopted over the years, that is the  
6 single European act, Maastricht, Nice, Lisbon, the  
7 government has agreed to the new treatise using  
8 prerogative powers. The ECA has subsequently been  
9 amended so as to include the new treatise in the list of  
10 EU treatise in section 1 to which domestic effect is  
11 given. In fact, what has happened is that ratification  
12 has not occurred at international level unless and until  
13 the Act of Parliament, the 1972 Act, has been amended.  
14 And we have given all of the examples. In our skeleton  
15 argument, pages 29 to 31, paragraph 47(5)(b). But that  
16 is what has happened. And it has happened for a very  
17 good reason; and this is the point my Lord,  
18 Lord Justice Sales was making to me. Unless and until  
19 section 1 of the 1972 Act is amended, the treatise do  
20 not include, under the domestic legislation, do not  
21 include the new treaty.

22 Then the defendant relies upon the decision in the  
23 Divisional Court in the Reece Mogg case ^ . Could I come  
24 to the Reece Mogg case. It is volume A and it is at tab  
25 number 12. And in this case, the claimant, Reece Mogg,

1 was arguing that the Secretary of State could not ratify  
2 the protocol on social policy which was annexed to the  
3 Maastricht treaty, and you couldn't do it through  
4 prerogative powers. And the argument was that he  
5 couldn't do it through prerogative powers because  
6 section 2(1) of the 1972 Act would give the prerogative  
7 power effect in domestic law, and only Parliament --  
8 I am sorry, would give the protocol effect in domestic  
9 law and only Parliament could change the domestic law.  
10 And the court rejected Lord Reece Mogg's argument for  
11 two reasons. The first reason appears at 567 letters G  
12 to H.

13 "We find ourselves unable to accept this far  
14 reaching argument. When Parliament wishes to fetter  
15 the Crown's treaty making power in relation to community  
16 law it does so in express terms, such as one finds in  
17 section 6 of the Act of 1978. Indeed, as was pointed  
18 out, if the Crown's treaty making power were impliedly  
19 excluded by section 2(1) of the Act of 1972-section 6 of  
20 the Act of 1978 would not have been necessary. There is  
21 in any event insufficient ground to hold that Parliament  
22 has by implication curtailed or fettered the Crown's  
23 prerogative to alter or add to the EEC treaty."

24 So that was one argument. And the second strand of  
25 reasoning of the court --

1 LORD JUSTICE SALES: Sorry, the Act of 1978 was what --

2 LORD PANNICK: The Act of 1978 was the the European  
3 Parliament act, I believe. Parliamentary elections act  
4 1978.

5 LORD JUSTICE SALES: Thank you.

6 LORD PANNICK: Which is in bundle E. And the second strand  
7 of reasoning of the court rejecting the argument is at  
8 568, A to C, where the court says:

9 "Would the ratification of the protocol on social  
10 policy alter the content of domestic law? The protocol  
11 itself makes clear it was not intended to apply to UK.  
12 Nor is the UK party to the agreement which is annexed to  
13 the protocol. The protocol is not one of the treatise  
14 included within the definition of the treatise in  
15 section 1 (2) of the Act of 1972. For it is specific  
16 excluded by section 1 (1) of the Act of 19933. It  
17 follows that the protocol is not one of the treatise  
18 covered under section 2(1) by which alone community  
19 treatise have force in domestic law it does not become  
20 one of the treatise covered by section 2(1) merely  
21 because by the Union treaty it is annexed to EEC treaty;  
22 see section 1(3) of the Act of 1972."

23 So the court was making the point that the protocol  
24 which was the subject of the claimant's litigation, was  
25 not in any event part of domestic law. It didn't



1 address, it didn't alter, domestic law. Now, there are  
2 very important distinctions between the present case and  
3 ex parte Reece Mogg. First of all, the argument in  
4 Reece Mogg was that the effect of the 1972 Act was to  
5 curtail the prerogative power to amend or add to the EEC  
6 treaty. And we see that from 567 between E and F.  
7 By, en acting section 2(1), this is the argument,  
8 Parliament must therefore have intended to curtail the  
9 prerogative power to amend or add to the EEC treaty.  
10 Our case in the present case is much narrower. Our case  
11 is not that the 1972 Act generally curtails the  
12 prerogative power to enter into agreements in  
13 international law, our submission is that the  
14 prerogative power may not be used at the international  
15 level, where it would, as here, remove rights which are  
16 enjoyed under statute. And it cannot be used where that  
17 would preempt Parliament's decision on whether to retain  
18 those rights. The Divisional Court was simply not  
19 considering any such question. And the reason why  
20 Parliament was not considering any such question was  
21 because the protocol, as explained in the passage I read  
22 at 568 A to B, had no effect in domestic law at all.  
23 That is what the court found at 568. So the issue in  
24 Reece Mogg was a different issue to the issue with which  
25 this court is concerned. The argument in Reece Mogg

1 turned on the particular circumstances of the protocol.  
2 And in any event, there is a fundamental distinction  
3 between Reece Mogg and this case. Parliament had  
4 already given approval to the international agreement,  
5 and had incorporated it into the 1972 Act. As your  
6 Lordships appreciate, and as I have said, what happened  
7 in Reece Mogg, what happened in Maastricht was that the  
8 agreement was entered into but not ratified at  
9 international level unless and until Parliament gave its  
10 approval. And Parliament had given its approval long  
11 before the case came to court. One sees the 1993 Act  
12 set out at 562 letters C to F. It received royal assent  
13 in 1993, in July, ratification was later. Ratification  
14 was in August 1993. So the Divisional Court in Reece  
15 Mogg was simply not considering a complaint that  
16 an international agreement would preempt Parliament's  
17 consideration and would remove statutory rights without  
18 the approval of Parliament.

19 My Lords, that leaves, subject to any other  
20 questions that your Lordships want to put to me,  
21 justiciability, the constitution alter of the remedy and  
22 my Lord, Lord Justice Sales' point that I want to come  
23 back to, and any other questions your Lordships may wish  
24 to --

25 THE LORD CHIEF JUSTICE: We are doing quite well for time?

1 LORD PANNICK: I will finish at the designated time,  
2 my Lord.

3 THE LORD CHIEF JUSTICE: Good.

4 LORD PANNICK: If there are other questions, I am of course  
5 very happy to try to answer them, but those are the  
6 topics I need to still deal with.

7 THE LORD CHIEF JUSTICE: What I would personally find  
8 helpful is really, what is said in the skeleton argument  
9 of the defendants at paragraph 21 and paragraphs 31  
10 through 33.

11 LORD PANNICK: Sorry, paragraphs 21 and?

12 THE LORD CHIEF JUSTICE: 31 through 33.

13 LORD PANNICK: 31 to 33. Thank you my Lord. If we sit at  
14 2, would that be inconvenient?

15 LORD PANNICK: Certainly, my Lord.

16 THE LORD CHIEF JUSTICE: Thank you all very much.

17 (1.00pm)

18 (the luncheon adjournment)

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