

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

CO/3281/2016; CO/3809/2016

Court No 4

Royal Courts of Justice
The Strand
London WC2A 2LL

Before:

THE LORD CHIEF JUSTICE

THE MASTER OF THE ROLLS

LORD JUSTICE SALES

THE QUEEN ON THE APPLICATION OF:

SANTOS & MILLER

Applicants

-v-

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondent

LORD PANNICK QC , MR R THOMPSON QC, MS A HOWARD & MR T HICKMAN (instructed by Mishcon De Reya) appeared on behalf of the Applicant Miller
MR D CHAMBERS QC, MS J SIMOR QC & MR B JOHN (instructed by Edwin Coe) appeared on behalf of the applicant Santos
MS H MOUNTFIELD QC, MR G FACENNA QC, MR T JOHNSON & MR J WILLIAMS (instructed by Bindmans) appeared on behalf of the Graham Pigney & others
MR P GREEN QC, MR H WARWICK, MR P SKINNER & MR M GREGOIRE (instructed by Croft Solicitors) appeared on behalf of the interveners
MR M GILL QC, MR R DE MELLO & MR T MUMAN (instructed by Bhatia Best) appeared on behalf of AB, KK, PR & Children
MR J EADIE QC, MR J WRIGHT QC, MR J COPPEL QC, MR T CROSS & MR C KNIGHT (instructed by Her Majesty's Government) appeared on behalf of the Respondent.

2 (9.45 am)

3 THE LORD CHIEF JUSTICE: Before we start, there is just one
4 observation I would like to make. The court was
5 informed that the principal claimant in this case has
6 been, again, subject to various emails and other
7 communications. We have in this country a civilised way
8 of dealing with things, and it is simply wholly wrong
9 for people to be abusive of those who seek to come to
10 the Queen's courts. If this conduct continues, those
11 who do it must appreciate that the full vigour of the
12 law will be used to ensure that access to Her Majesty's
13 courts are freely available to everyone.

14 Submissions by MS MOUNTFIELD (continued)

15 THE LORD CHIEF JUSTICE: Yes.

16 MS MOUNTFIELD: My Lords, I calculate I have 30 minutes left
17 and some ground to cover, so Mr Green has kindly offered
18 me five of his minutes if I need them, although I will
19 try not to. To save time, we have prepared a note on
20 matters which I was asked to address on Friday. I will
21 introduce the various parts of that at a convenient
22 point in my submissions.

23 I left you on Friday with a list of my seven core
24 propositions, and three of those, the first three, were
25 largely covered on Thursday. Just so you can identify

1 my submissions on these, our position on the first
2 proposition, that notification to the Council of
3 a binding decision will remove directly applicable or
4 effective EU citizenship rights, is summarised in our
5 skeleton at paragraphs 15 to 20, and in our note at
6 paragraphs 16 to 18, which addressed the questions that
7 were asked to me at the close of business on Thursday.

8 In short we don't dissent from what Lord Pannick
9 says on that. We note that the House of Lords
10 constitution committee, having seen a range of views on
11 it, says that that is the prudent approach to take, and
12 we add that even if there were any doubt about it, where
13 there is so great a risk that rights would be
14 extinguished and rights are so serious, then there is
15 an alternative argument that it would be an abuse of the
16 prerogative to exercise it in that way.

17 As to the second proposition, that the binding
18 decision would extinguish EU citizenship rights in a way
19 that could not be preserved or retained by Parliament,
20 we have summarised some examples of those rights which
21 could not be replicated in our skeleton argument at
22 paragraph 72 and in the note at paragraphs 13 to 15, but
23 those are matters which I understand that Mr Green and
24 Mr Gill will be developing, so I am not going to say
25 more about that.

1 As to the third proposition, the fundamental
2 constitutional character of the EU citizenship rights,
3 I took you on Thursday to Thorburn, and made the
4 submission that citizenship rights are part of the
5 over-arching framework of our legal system. They
6 provide for stability and predictability in it, in
7 particular because of the now well established rules
8 about the relationship between EU law, statute and
9 common law. That was a development of points in our
10 skeleton at paragraphs 22 to 28 and 47 to 49.

11 So I turn now to the fourth proposition, which is
12 that the EU legal order and the rights contained within
13 it are recognised in domestic law because, and only
14 because, Parliament has legislated to require national
15 courts to give EU law such recognition. In our skeleton
16 argument, I have cited the way Lord Mance put it in
17 Pham, in fact it was paragraph 80 and not 82 as I wrote
18 in the skeleton argument. We don't need to turn it up,
19 but it is bundle B4, tab 53, paragraph 80:

20 "European law is part of domestic law because
21 Parliament has so willed."

22 That proposition is linked to the argument that
23 my Lord the Master of the Rolls and Lord Justice Sales
24 was putting to Lord Pannick last week, relating to the
25 implied abrogation or limitation of the treaty making

1 and breaking powers of the Crown in relation to EU
2 treaties.

3 We say that a prerogative power to withdraw from the
4 EU is implicitly ousted by the European Communities Act,
5 and that is because Parliament has willed, by section 2
6 and 3 of that Act, that the rights, powers, liabilities,
7 obligations and restrictions, which from time to time
8 are created by, or arising under the treaties which
9 Parliament has agreed to being ratified, and the
10 remedies and procedures provided for by or under those
11 treaties, are, without further enactment, to be given
12 legal effect.

13 That is, in answer to my Lord Lord Justice Sales'
14 inquiries, whether or not those rights or obligations
15 arising under those treaties arose before or after the
16 Act itself was enforced, because of section 2(4) of the
17 European Communities Act. That is reinforced by
18 section 18 of the 2011 European Union Act, which is in
19 the core bundle, tab 4, at page 122.

20 In view of the time, I don't ask you to turn that up
21 now, but I do ask you to note that in the -- there is
22 an explanatory note in the Halsbury section, version of
23 that section, which you have in the bundle which quotes
24 Lord Howell in a written answer on this in the House of
25 Lords, saying that the section was intended to put

1 beyond speculation that Parliament was sovereign over
2 matters of recognition of EU law. That was already the
3 law; this was to put it beyond speculation.

4 But the structure of the European Communities Act
5 and the nature of the European treaties bring into
6 tension two fundamental constitutional principles. The
7 first one is that in general, and subject to the limits
8 which have now been imposed by the Constitutional Reform
9 and Governance Act, the Crown has retained power to
10 enter treaties on behalf of the United Kingdom, and to
11 ratify them.

12 The second is this: the Crown does not have power to
13 confer rights or impose liabilities recognised in
14 domestic law, and nor does it have power to remove
15 rights or liabilities as a matter of domestic law. But
16 the validity of the first principle, that the Crown can
17 do foreign policy, is in my submission wholly dependent
18 upon and conditioned by the second.

19 The only reason that the Crown can retain authority
20 over foreign relations consistently with the principle
21 of Parliamentary sovereignty, is because in a dualist
22 system, the making or breaking of treaties does not
23 generally confer rights or impose obligations which can
24 be recognised or enforced on the national plane.

25 Indeed in the Tin Council case, which Lord Pannick

1 cited to you, bundle B2, tab 19, page 500 of the
2 internal pagination, Lord Pannick took you to the
3 celebrated passage in Lord Oliver's speech as to the
4 extent of the Crown's prerogative power to make the
5 treaties. But that passage goes on, in a sentence which
6 I believe he didn't read aloud, to say that the reason
7 why the Crown has retained the prerogative power to make
8 treaties is because individuals cannot deprive rights or
9 be deprived of rights by them without intervention from
10 Parliament. Lord Oliver said that they are simply
11 irrelevant as a source of rights and obligations in
12 national law.

13 But when, as a result of the combination of the
14 nature of the treaties which create a legal order with
15 individuals as subjects and Parliament's will that shall
16 be part of our national law, treaties are relevant as
17 a source of rights and obligations, it draws into
18 question the Crown's right, consistently with the
19 principle of Parliamentary sovereignty, either to ratify
20 such treaties or to withdraw from them.

21 The consequence, therefore, is that while the
22 European Communities Act is in force, EU treaties are
23 a source of rights and obligations in national law,
24 because Parliament wills that it should be so. And that
25 is Parliament's intention, unless and until it,

1 Parliament, says that they should no longer be a source
2 of rights and obligations in national law.

3 THE MASTER OF THE ROLLS: If that is the correct analysis,
4 what was the reason for the narrow approach taken in the
5 Laker case, where they sought to explain why
6 Parliamentary sovereignty applied in that case, because
7 on the wording of the statute, the prerogative had been
8 excluded? You are introducing a much wider principle
9 here.

10 MS MOUNTFIELD: Well, I am saying that on the intention of
11 the statute, the purpose I have set out in the long
12 title, the EU shall be enlarged, and the shape of
13 sections 2 and 3 of the European Communities Act, it is
14 necessarily implied that the Crown cannot ratify
15 a treaty unless there has first been Parliamentary
16 authority.

17 I note, and it is a footnote in Lord Pannick's
18 written submissions, that that was in fact a submission
19 that the Crown appeared to make in Laker, contrasting
20 the legislation in that case with the European
21 Communities Act, and saying where the Crown intends to
22 have an effect on the prerogative, it says so; see the
23 European Communities Act, the passage is in
24 Lord Pannick's skeleton argument in a footnote.

25 But what I say is that the European Communities Act

1 says in effect that the European treaties are a source
2 of rights and obligations in national law.
3 Consequently, for so long as Parliament says that, those
4 treaties are directly applicable and effective domestic
5 law, then the power to add or take away from those
6 sources of domestic rights and obligations must also
7 belong to Parliament and not the Crown.

8 It is notable, and it is in tab 22 of bundle E --
9 somebody has prepared a table -- every time a treaty has
10 been ratified since the European Communities Act has
11 been in force, every time there has been a further
12 treaty, it has been ratified by the Crown only after the
13 legislation has been passed or after the order in
14 Council has been made; that, I submit, is a new
15 constitutional convention which is necessary --

16 THE MASTER OF THE ROLLS: You say it is a constitutional
17 convention -- you say it is a new constitutional
18 convention.

19 MS MOUNTFIELD: Well, if one looks at what does the
20 constitution require in a particular context, as
21 Lord Bingham said in Bancoult, you have to look at the
22 history. Since the passage of the European Communities
23 Act, no EU treaty has ever been ratified without prior
24 Parliamentary authority, and I submit that that is
25 necessary because of the two otherwise inconsistent

1 constitutional principles.

2 The Crown can make treaties, but not if, or to the
3 extent, that they confer rights or impose liabilities in
4 domestic law, or withdraw rights and liabilities in
5 domestic law. I say that the consequence of that is
6 that while the European Communities Act is in force, the
7 prerogative power, either to make further treaties or to
8 amend treaties, or to withdraw from treaties is
9 impliedly abrogated, because otherwise it would be
10 the Crown and not Parliament which would be conferring
11 or withdrawing rights.

12 If there is any doubt about that, section 2 of the
13 European Union Act expressly provides that the Crown may
14 not ratify a treaty which amends or replaces the
15 existing treaties without Parliamentary authority,
16 through various procedures.

17 I submit that since the purpose of that provision is
18 to prevent the Crown from altering the foundations of EU
19 law as it applies within the UK without Parliamentary
20 sanction, and we have quoted William Hague introducing
21 the 2011 Act saying that, by necessary implication, that
22 restriction extends to any act of the Crown which would
23 withdraw from or revoke those treaties without
24 Parliamentary sanction, and thereby remove directly
25 enforceable rights.

1 I don't have more time to develop that argument in
2 detail, but I would invite the court to consider
3 carefully the submissions on this in our skeleton
4 argument at paragraphs 29 to 41 and 47 to 50.

5 I then turn to my fifth proposition, which is that
6 notification of withdrawal from the EU, using the
7 prerogative, would be unlawful because it would be
8 ultra vires the Bill of Rights. I don't need to turn
9 the text up again. Mr Chambers took you to it. The
10 relevant provision is very well known, the late
11 dispensing power. The pretended power of dispensing
12 with laws or the execution of laws by regal authority as
13 it had been assumed and exercised of late is illegal.

14 Dispensing with law has a number of meanings, and
15 I have put into tab 30 of bundle E the full Oxford
16 dictionary definitions of the words "dispense" and
17 "execute". I won't turn those up now either, but
18 I invite you to find that the relevant definitions of
19 "dispense" in this context are to forego or to
20 disregard; and to execute a law or purpose is to put it
21 into effect. So to forego or to disregard the putting
22 into effect of a law or the purpose behind the law.

23 So for this limb of my submissions, I have to submit
24 that in practical terms, the putting into effect of the
25 purpose of the European Communities Act, that purpose

1 being to enlarge the EU by having the UK as a member of
2 it, would be foregone or disregarded if a minister of
3 the Crown were to act so as to require the UK to leave
4 the EU. So too would the purpose and putting into
5 effect of many other laws, like the European
6 Parliamentary Elections Act 2002.

7 I want to take your Lordships, I am conscious of the
8 time, to three authorities which support this
9 submission. The first is the case of Proclamations at
10 tab 7 of bundle A. Of course, Lord Pannick took you to
11 this, and of course it pre-dates the Bill of Rights.
12 But I want to show you it, because it is an example of
13 the pretended power, or gives an example of the
14 pretended power of regal authority, which Lord Cook gave
15 as an example of a legal action, to which in my
16 submission the Bill of Rights was referring when it said
17 this these dispensing powers had been used, assumed and
18 exercised, illegally before it was brought in to force.
19 So the case of Proclamations is at tab 7. Lord Pannick
20 took you to the operative part. But page 193 at the
21 bottom, last four lines, Lord Cook said:

22 "We do find diverse precedents of proclamations
23 which are utterly against law and reason and for that
24 void."

25 "for", and I will now translate in these post Lord

1 Woolf days, those things which have been introduced
2 contrary to the law, ought not to be drawn into
3 precedent.

4 "An Act was made by which foreigners were licensed
5 to merchandise within London. Henry IV, by
6 proclamation, prohibited the execution of it, and that
7 it should be in suspense until the next Parliament,
8 which was against the law."

9 So this is an example, which is right on point,
10 an Act which provides for freedom of movement and
11 establishment of foreign merchants. The Crown doesn't
12 purport to repeal this act; it simply frustrates its
13 purpose by a decree which makes the intended purpose of
14 the Act unenforceable for a particular period of time.
15 The law itself which is referred to there has been,
16 I think, tracked down by the industries of my friend Ms
17 Simor QC, the law of 1297 at bundle E1, and it is
18 perhaps unsurprising that it was Henry IV who wanted to
19 kill all of the lawyers.

20 If I move forward in time, then, to the New Zealand
21 Supreme Court in 1976, in the case of
22 Fitzgerald v Muldoon, that is in bundle E at tab 10. In
23 that case, the Prime Minister of New Zealand made
24 a press statement, announcing that a statutory
25 superannuation scheme would no longer be applied,

1 pending what he intended would be passage of
2 retrospective legislation to confirm this policy, and
3 the declaration was sought and was granted. But this
4 was contrary to section 1 of the Bill of Rights.

5 I would invite you to turn to page 622, and see at
6 lines 15 through to 40, that it had been conceded that
7 there was no instruction by the Prime Minister to the
8 members of the superannuation board that they should
9 cease to pay pensions on the relevant basis. But that
10 leaves a consideration, at line 20, the Prime Minister's
11 public announcement as evidenced by his press statement.

12 No criticism was made of the opening two paragraphs
13 of that statement, which were no more than an indication
14 of the new government's legislative intentions. The
15 first sentence of the third paragraph, however, and the
16 fourth paragraph, amounted together to an unequivocal
17 pronouncement that the compulsory requirement for
18 employee deductions and employee contributions were to
19 cease as stated. That was reiterated in unmistakable
20 terms in the second paragraph of the statement -- the
21 second statement.

22 "The Act of Parliament yet in force required that
23 those deductions and contributions must be made, yet
24 here was the Prime Minister announcing that they need
25 not be made. I am bound to hold that in doing so, he

1 was purporting to suspend the law without consent of
2 Parliament. Parliament had made the law, therefore the
3 law could be amended or suspended only by Parliament, or
4 with the authority of Parliament."

5 Then there is a quotation from Dicey and at line 41,
6 it said:

7 "The question of whether the pretended power of
8 suspending was by regal authority within the meaning of
9 the Bill of Rights is, I think, to be determined by
10 reference to the powers of the Prime Minister and the
11 position occupied by him which are of fundamental
12 importance in our system of government. He is the Prime
13 Minister, the leader of the government, elected to
14 office, the chief of the executive government. He has
15 latterly received his commission by royal authority,
16 taken oath of office ... In my opinion, his public
17 announcement, made as it is in the course of his
18 official duties as Prime Minister, must therefore be
19 regarded as made by regal authority within the meaning
20 of section 1 of the Bill of Rights."

21 On page 623, between lines 26 and 36, we see that
22 a declaration was granted even though the government in
23 that case intended to introduce legislation to
24 Parliament to implement what the Prime Minister had said
25 in his public announcement.

1 Then the third and final authority on this point is
2 the recent observations of Lord Sumption in our own
3 Supreme Court in the case of Nicklinson which has found
4 its way into the back of bundle E, at, I believe,
5 tab 27. And that was a case in which the claimant
6 sought a declaration that the Director of Public
7 Prosecutions should give an assurance that it would be
8 lawful for a person to assist with his -- I am sorry, it
9 is tab E29.

10 THE LORD CHIEF JUSTICE: 29?

11 MS MOUNTFIELD: So that was a case, one of a series of cases
12 where the claimant sought a declaration that the DPP
13 should publish an assurance, or a policy that said it
14 would be lawful for a person to assist with his suicide
15 in order to give effect to his rights of self
16 determination under Article 8 of the European Convention
17 on Human Rights. We provided the headnote and the
18 relevant extracts, one from the Court of Appeal and one
19 from the Supreme Court.

20 In short it was held that no such undertaking could
21 be given because to do so would be an act of executive
22 discretion which would in effect frustrate the will of
23 Parliament as set out in the statute and that would cede
24 the balance of constitutional propriety. If I invite
25 you to just look at the extract from the speech of

1 Lord Sumption; we didn't give you the whole judgment to
2 try and save a bit of rainforest, but at paragraph 241
3 he said:

4 "The limitation on what could be done ... a point of
5 principle. The pursuit of clarity and precision cannot
6 be allowed to exceed the bounds of constitutional
7 propriety and the rule of law itself."

8 Then a little further down that paragraph:

9 "As Lord Bingham observed in *Pretty*, the director
10 has no power to give a collective grant of immunity from
11 prosecution. This is not just a limitation on the
12 statutory powers of a particular public official; it is
13 a constitutional limitation arising from the nature of
14 the function which he performs."

15 Then he cites the Bill of Rights. We say that what
16 is being done here by the Prime Minister's announcement
17 or the notification that it was opposed be given by the
18 defendant, is a proleptic announcement that the law will
19 be -- effectively frustrated and made unusable. In
20 summary, in considering whether the defendant could
21 lawfully make a binding notification of a decision to
22 leave the EU, this court must ask itself what the
23 consequences of the proposed exercise of residual regal
24 power would be.

25 We say it is plain it would be to forego the need --

1 that is to dispense -- to comply with Parliament's
2 intention in passing the 1972 Act. Parliament acted to
3 enlarge the EU, to include the United Kingdom as
4 a member state, and Gibraltar for some purposes.
5 Parliament acted to make rights and duties arising from
6 the law of the EU available, and binding in national
7 law. We say only a future Parliament can lawfully act
8 so as to remove the UK from the EU and to remove the
9 availability of EU law from the law of the
10 United Kingdom, consistently with, in effect, our
11 foundation or constitutional statute, the Bill of
12 Rights.

13 I then come to my sixth proposition, which is that
14 it would be contrary to the Union with Scotland Act, for
15 ministers to alter private and public law rights in
16 Scots law, which arise from EU law, without
17 Parliamentary authority. It follows that for ministers
18 to bind the UK's withdrawal from the EU by executive act
19 is ultra vires the Union with Scotland Act, which is
20 also a constitutional statute in the list established in
21 cases like the HS2 case.

22 This point is addressed in our skeleton argument at
23 paragraphs 51 to 56. It is quite a short point. As
24 your Lordships are aware, after the union between
25 Scotland and England and the creation of a UK-wide

1 Parliament, Scotland kept its independence with respect
2 to its legal and religious systems. That was part of
3 the deal. The Act therefore made special provision to
4 protect the Scottish legal system, and to protect Scots
5 law from alteration without proper Parliamentary
6 consideration.

7 This is constitutional legislation, because it is in
8 substance the founding document of the kingdom of Great
9 Britain. It is the basis on which the Scots have been
10 able for more than 300 years to enjoy the advantage of
11 their own distinct legal system within the union of
12 nations which now forms the United Kingdom. The text of
13 Article 18 of the Acts of Union provides that the law
14 concerning regulation of trade customs -- sorry, this is
15 in my skeleton at paragraph 51 -- and such exercise
16 which Scotland is by virtue of this treaty to be liable,
17 to be the same in Scotland from after the Act of Union
18 as in England. And all other laws in use in the kingdom
19 of Scotland, do after the Union notwithstanding
20 therefore remain in the same force as before, except
21 such as are contrary to or inconsistent with this
22 treaty, but alterable by the Parliament of Great
23 Britain.

24 Then there is a difference between the laws
25 concerning public right policy and civil government, and

1 those which concern private right, which is that the
2 laws which concern public right policy and civil
3 government may be made the same throughout the whole
4 United Kingdom, but no alteration be made in laws which
5 concern private right, except for the evident utility of
6 the subject of Scotland. My short point is this:
7 Scottish law as interpreted by the Scottish courts
8 continues to apply in Scotland after the union, but it
9 can be altered by the Parliament of Great Britain.

10 LORD JUSTICE SALES: But does Scottish law not allow for
11 exercise of prerogative powers just as English law does?

12 MS MOUNTFIELD: Not to change the public and private
13 rights---

14 LORD JUSTICE SALES: Right, so then the argument is just the
15 same. It doesn't seem that the Act of Union is adding
16 anything to that argument?

17 MS MOUNTFIELD: My Lord, it is adding a vires point to it,
18 that if the act of notifying withdrawal from the EU
19 triggers the inevitable removal of public law rights
20 from Scottish citizens and the inevitable alteration to
21 private law rights in Scotland, then these rights cannot
22 be preserved by Parliamentary legislation. It won't be
23 possible for our Parliament to preserve the right of
24 Scottish farmers and so on.

25 LORD JUSTICE SALES: But on your argument, that would only

1 be the effect of the government exercising the
2 Article 50 power, because Parliament has not taken that
3 away from them, and it is part of the constitutional
4 background that they have that power.

5 MS MOUNTFIELD: Yes. My Lord---

6 LORD JUSTICE SALES: You are not showing us anything that
7 suggests that that basic background is different in
8 Scotland than it is in England.

9 MS MOUNTFIELD: No, if I address what the government says
10 about this, they say two things. One is that the issue
11 of evident utility is not justiciable, and for that they
12 cite Gibson, and we accept that, but we say it affects
13 public law rights and private law rights. We are not
14 talking about justiciability; we are saying you don't
15 even get to an act of Parliament, because -- ask has
16 Parliament acted consistently, because there is no Act
17 of Parliament.

18 Then what the government says is that it is
19 a misinterpretation of the Acts of Union, or our
20 submission is based on a misinterpretation of the Acts
21 of Union, because they say at paragraph 71, on page 27
22 of the skeletons bundle, that Scots private law is not
23 only a matter for the UK Parliament.

24 What we say to that is it is not quite clear what
25 they are saying. If the point is that the Scottish

1 Parliament can also alter Scots law, then that is
2 correct. But section 37 of the Scotland Act, which has
3 again been inserted into the back of bundle E because it
4 was missing, specifically says that the Acts of Union
5 have effect subject to that Act. So if that is what you
6 are talking about, that doesn't get around the point.

7 But if what is being said is that ministers do have
8 a prerogative power, ministers of the Crown, of the
9 United Kingdom, have powers to amend Scots public and
10 private law without the reference to the Parliament of
11 the United Kingdom, and that that is a matter that can
12 be recognised in the courts of England and Wales, that
13 is something that we say there is no authority cited for
14 the assertion, either in the law of the Scotland or the
15 law of England and it is wrong; because if it were right
16 that there were a prerogative power to change Scots law,
17 then the requirement of evident utility in relation to
18 private law would be otiose. The government of the day
19 could just alter Scots public and private law with no
20 Parliamentary consideration at all.

21 I repeat that I am not saying, not saying, that
22 rights cannot be removed from Scots law, or that the Act
23 of Union cannot be repealed or altered. But whether or
24 how to remove rights which arise in Scots law is
25 a judgment of the UK Parliament and not a minister of

1 the Crown. So in effect, yes, if we are looking at
2 Scottish private law, or public law rights, those are
3 matters which have been removed from the prerogative by
4 the language of the Act of Union. I suppose it becomes
5 another abrogation point, really, to what extent does
6 the Act of Union abrogate a prerogative power over the
7 law of Scotland. And the seventh and final --

8 THE LORD CHIEF JUSTICE: You have one final point.

9 MS MOUNTFIELD: Yes, the proposition is about devolution and
10 the statutes that govern the more recent but nonetheless
11 delicate constitutional balance and relationships
12 between UK government, the UK Parliament, and the
13 governments and legislatures of the devolved nations.

14 I should say at the outset, that although in our
15 handed up list of propositions, we have said that
16 removing the elements of EU law which underpin the
17 devolution statutes would remove limitations on the
18 powers of the devolved legislatures and governments to
19 interfere with citizens' rights, it is equally true, and
20 perhaps even more important, that removing EU law from
21 that legal framework will take away competencies that
22 are currently exercised by the devolved governments.

23 We have set out our position on this in our skeleton
24 argument at paragraphs 42 to 46. We handed up a note
25 this morning, as I said in the opening, and in

1 paragraphs 1 to 7 we have set out what we understood
2 from the government's skeleton argument in the Northern
3 Irish litigation to be the case as regards overlap
4 between the Northern Irish proceedings and these
5 proceedings. We have said that we didn't understand our
6 submissions to trespass on ground to be determined in
7 the Northern Irish court proceedings, because that is
8 what the government said in their skeleton argument,
9 paragraph 5, which was lodged after they have seen our
10 skeleton argument in these proceedings; apart from what
11 we say in paragraph 44 in our skeleton argument, on the
12 impact of the Good Friday Agreement, which we
13 consequently did not propose to pursue at this level to
14 avoid a potential overlap.

15 Since writing that note, I have been informed by
16 Mr Coppel QC, who was in the Northern Irish proceedings,
17 that in fact they may have ranged somewhat wider about
18 the effect of EU law on the Northern Ireland Act, but
19 our submissions on devolution are wider points about the
20 devolution settlements in all three nations in general,
21 so I will briefly make them. I focus mostly in any
22 event on the Scotland Act.

23 So the devolution statutes provide for devolved
24 governments to observe, transpose, and implement EU law.
25 They preclude devolved governments from legislating or

1 acting in a manner contrary to EU law, and the relevant
2 provisions are at bundle E, tabs 5, 6 and 7 and
3 summarised in paragraph 43 of our skeleton argument.

4 It is common ground that these statutes have been
5 held to have a constitutional character, and are
6 entrenched in the sense that they cannot be impliedly
7 repealed because Parliament has legislated them to apply
8 going forward.

9 We submit that it must be equally right, given the
10 purpose behind that constitutional principle, that they
11 cannot be removed by executive action, either. It is
12 useful to articulate the basis for saying that the
13 devolution statutes have some constitutional character,
14 worthy of special respect, or careful consideration, as
15 to whether the purported use of executive power to
16 hollow them out can be regarded as lawful.

17 On this, I have, with respect, been guided by the
18 analysis in recent extrajudicial writing by my Lord,
19 Lord Justice Sales, and I haven't put it into the
20 bundle, but what is argued there is the constitutional
21 force of the statutory provision has to be inferred from
22 the circumstances in which it was forged and the
23 significance which it has acquired over time, by the
24 prominence which it is given in constitutional debate,
25 and therefore the role it plays in informing citizens'

1 expectations and the expectations of other
2 constitutional actors, the court, the legislature and
3 the executive.

4 My Lords, you know how sensitive the devolution
5 settlements have been, especially in Northern Ireland,
6 not touching on the Good Friday Agreement, but in
7 Scotland too, the issues as to the division of
8 competence between Westminster and the Scottish
9 Parliament have been the subject of an ongoing, highly
10 political process of negotiation and debate, and there
11 have been amendments to the Scotland Act before and
12 since the Scottish independence referendum in 2014. The
13 current arguments are in part a reflection of the
14 outcome of that other democratic exercise.

15 THE LORD CHIEF JUSTICE: Now, Ms Mountfield, we have to
16 stick to the time, because if everyone adds five
17 minutes, we may be able to find a bit more flexibility
18 at the end of the day, but we are going to get into
19 trouble. Are you nearly finished?

20 MS MOUNTFIELD: I think I need to simply say, in fairness to
21 other people, then, that that is why the logic prevents
22 implied repeal, and also prevents executive action, or
23 changes to the application and content of EU law within
24 national law, because they would inevitably alter the
25 balance of reserved and devolved matters as between

1 Westminster on the one hand and Edinburgh, Cardiff and
2 Belfast on the other.

3 In those circumstances, we say that the prerogative
4 has been abrogated, or at least it would be an unlawful
5 exercise of the prerogative which would be used in a way
6 which hollows out elements of that constitutional
7 settlement.

8 We agree with the claimants that the defendant may
9 only lawfully notify the binding intention in accordance
10 with our constitutional arrangements, and under our
11 constitution, it is for the Parliament and not the Crown
12 to decide whether and on what terms to notify the
13 European Council of a decision to withdraw from the EU.

14 THE LORD CHIEF JUSTICE: Thank you. Thank you very, very
15 much indeed, Ms Mountfield. Mr Green.

16 Submissions by MR GREEN

17 MR GREEN: May it please your Lordships, as your Lordships
18 know, I appear on behalf of the individuals named as the
19 Expat Interveners in the order in the hearing of the
20 19 July, who have particular interests because they
21 either reside or have personal, family or business
22 interests in other EU countries.

23 The approach I would respectfully wish to take is to
24 draw the court's attention to two particular rights as
25 examples of rights which cannot properly be replicated

1 by Parliament and are outside Parliament's gift, and
2 which are enjoyed by two of those who have provided
3 witness statements, and then to identify, if I can call
4 it the penumbra of the EU legal order which enforces
5 general principles of EU law in relation to the member
6 state's compliance with the treaties. Because that is
7 also a matter which cannot be replicated by Parliament.

8 My Lords, the two examples I will give, and if your
9 Lordships will forgive me, I shan't name the witnesses
10 because we too have received some unhelpful
11 correspondence, they are the witness whose witness
12 statement appears at tab 19 in the hearing bundle, who
13 is a Canadian citizen, and whose right to reside in
14 France is derived through her husband's British
15 citizenship.

16 My Lords, that takes the quality of the present
17 rights one hop further, if I may say so, because it in
18 fact means that, for reasons which I will seek to
19 explain by virtue of the nature of the EU legal order,
20 what Parliament has in fact done is conferred not only
21 on British citizens certain rights exercisable on
22 foreign soil, but also through the treaty provisions
23 conferred on their family members, who can include --
24 and other dependants -- non-British citizens.

25 My Lords, I won't take your Lordships through the

1 rights because we have set them out in annex A in some
2 detail, and I have limited time.

3 The second type of right is that which your
4 Lordships will find referred to by the witness at tab 20
5 in the hearing bundle, which refers to access to
6 healthcare.

7 LORD JUSTICE SALES: I am so sorry, when you say annex A,
8 that is to your skeleton, is it?

9 MR GREEN: Behind the skeleton, my Lord, yes.

10 LORD JUSTICE SALES: Annex 1.

11 MR GREEN: I do apologise, annex 1.

12 LORD JUSTICE SALES: Yes.

13 MR GREEN: The access to healthcare, your Lordships will
14 find on page 186 behind tab 20, and in that section, the
15 witness explains that he has suffered from cancer twice
16 and is in the process of enjoying a course of treatment
17 and monitoring which is done in a particular way in
18 France, that there is substantial evidence to suggest
19 would not be replicated if he were to have to move here.
20 He enjoys that access to healthcare through his
21 citizenship rights, because it is parasitic on the EU
22 citizenship rights which are conferred upon him through
23 the treaties and through directive 2004/38, to which we
24 referred in, as I now will call it, hopefully safely,
25 annex 1.

1 So my Lords, at something of a canter, I will take
2 your Lordships briefly, if I may, to the authority which
3 I hope has found its way into the back of your
4 Lordships' bundles, in bundle E, at tab 26, which is the
5 decision in a case brought by the Commission of the
6 European Communities against the United Kingdom I hope
7 your Lordships have that in bundle E at tab 26.

8 THE LORD CHIEF JUSTICE: Yes.

9 MR GREEN: My Lords, there were two points in the case.
10 Your Lordships are only concerned with one of them.
11 Just above the bottom hole punch, on the right-hand side
12 of the first page, your Lordships will see a paragraph
13 beginning:

14 "In order to help employers and workers understand
15 the regulations, the DTI issued guidelines which, with
16 regard to the daily and weekly rest periods, state that
17 employers must make sure that workers can take their
18 rest periods, but are not required to make sure that
19 they do take their rest."

20 Now, my Lords, as a matter of English law, that
21 would normally have been regarded as a correct statement
22 of the limits of the employers' obligations literally
23 found in the working time regulations. However, the
24 court held that effectively the DTI had breached the
25 principle of effectiveness by giving employers a nudge

1 and a wink that they didn't really have to ensure that
2 the rest was taken, and therefore the effectiveness of
3 the literal provisions was undermined by the DTI, the
4 government, giving guidance to that effect.

5 For your Lordships' notes, the relevant passages,
6 and I won't take you to them, are between 65 and 70. At
7 70, I can just read out. Against that background, the
8 passage of the DTI guidance at issue, what is at the
9 very least misleading. The first half of the sentence
10 correctly cites the requirement for the employers to
11 make sure that workers can take their rest. The second
12 half of the sentence, however, adds that employers are
13 not required to make sure that workers do take their
14 rest. At paragraph 70, my Lord.

15 THE LORD CHIEF JUSTICE: I don't think we have --

16 LORD JUSTICE SALES: Yes, I am missing it.

17 MR GREEN: Paragraph 70, my Lord.

18 THE LORD CHIEF JUSTICE: 70?

19 MR GREEN: Yes.

20 LORD JUSTICE SALES: We seem to be missing some paragraphs
21 from the report.

22 THE LORD CHIEF JUSTICE: Does it matter? We go from 61 to
23 66.

24 LORD JUSTICE SALES: In fact generally I think every other
25 page has been copied.

1 MR GREEN: Someone has helped us and I am sorry that that
2 has not helped your Lordships.

3 THE LORD CHIEF JUSTICE: Can that be rectified?

4 MR GREEN: That can be rectified.

5 THE LORD CHIEF JUSTICE: Let's carry on.

6 MR GREEN: The short point your Lordships have, which is
7 beyond the process point to which my learned friend
8 Lord Pannick referred, which is also an important point,
9 the right to go to the ECJ to determine the scope of the
10 rights themselves, there is also the role of the
11 Commission, and my learned friend Lord Pannick has
12 referred to that in his note in passing to the court.
13 The role of the Commission in determining whether the
14 general principles of EU law, which include the
15 principle of effectiveness, have been observed by member
16 states in the implementation of treaty provisions.

17 THE LORD CHIEF JUSTICE: Yes.

18 MR GREEN: So, my Lord, I pause there just to say that there
19 are clearly rights at stake which Parliament cannot
20 itself replace. One way of analysing this issue is that
21 there are only, really, two categories of rights at
22 stake in this case: rights which are within Parliament's
23 gift and rights which are not. The fact that at some
24 later date there may be a negotiation by which the
25 possibility of those rights being replaced, but the fact

1 that such an opportunity exists is not an answer, and to
2 borrow an analogy from private law, that goes to
3 mitigation, not breach.

4 So, my Lords, we respectfully adopt and gratefully
5 adopt the submissions made by my learned friends in
6 relation to the removal of these rights by the
7 triggering of Article 50. But I would invite your
8 Lordships to consider the issue also from a different
9 perspective. That is from the perspective of the unique
10 legal order of the Community. That perspective,
11 I respectfully submit, will provide answers to some of
12 the points that your Lordships have put to my learned
13 friend Lord Pannick in argument, and will illuminate the
14 issue that falls before the court from a perspective
15 which is shown in sharp focus by the rights of the
16 Expatriate Interveners.

17 That is the short point that not only did the 1972
18 European Communities Act bring into effect individual
19 rights for citizens, and confer rights on UK citizens in
20 other countries, but it also made a structural change to
21 the constitutional settlement in this country, because
22 Parliament conferred a legislative competence on the EU
23 institutions.

24 My Lord, I can make this point good by reference to
25 articles 4 and 5 of the treaties, which specifically

1 refer to the competencies conferred upon the Union and
2 the limitation of the powers of the Union with respect
3 to those, and the principle of conferral.

4 My Lords, the correct analysis in our submission is
5 this: that the effect of the 1972 Act, read with the
6 treaties which it effectively permitted to be ratified,
7 is the following: Parliament conferred upon the EU
8 legislative powers which were only Parliament's to
9 exercise and only Parliament's to confer. So in answer
10 to my Lord, the Lord Chief Justice's question to
11 Lord Pannick on Thursday, about whether the government
12 could at the EU level alter individuals' rights, and
13 what the quality of the interrelationship between
14 Parliamentary sovereignty and the international plane
15 was, in our respectful submission the correct analysis
16 is this: that when the government is participating in
17 the legislative processes provided for by the treaties
18 themselves, the government is not acting purely on the
19 international plane in the exercise of the prerogative;
20 the government is participating in a delegated aspect of
21 the legislative functions which Parliament has
22 voluntarily conferred upon the EU institutions to be
23 exercised in accordance with the treaty provisions.

24 So in our respectful submission, it would be wrong
25 to characterise, or find any difficulty with, the

1 prospect of rights being reduced by the government's
2 negotiations at the EU level. That is part and parcel
3 of a conferred legislative exercise which Parliament has
4 itself authorised.

5 My Lords, that brings me to an important point of
6 distinction.

7 THE LORD CHIEF JUSTICE: Sorry, can I just follow what you
8 are saying? For example, if a minister of the Crown
9 goes to the Council of Ministers, which is part of the
10 legislative process of the EU, to go with Parliament,
11 you are saying that when the minister of the Crown
12 assents to something there, he is not exercising
13 a prerogative power but part of the delegated powers.
14 Is that what you mean?

15 MR GREEN: That is exactly the submission, my Lord. That
16 flows from the nature of the Community legal order.

17 THE LORD CHIEF JUSTICE: Okay.

18 MR GREEN: Because functions which were only Parliament's to
19 exercise, the powers -- I respectfully adopt the
20 submissions of my learned friend Mr Chambers in that
21 respect, as to Parliamentary sovereignty -- were only
22 Parliament's powers to exercise. They were therefore
23 only Parliament's powers to confer on a third party, in
24 this case a supranational organisation in the form of
25 what we now know as the EU.

1 THE LORD CHIEF JUSTICE: Why is the relevant power with
2 which we are concerned, which is Article 50, part of
3 that process?

4 MR GREEN: My Lord, that is not part of the legislative --
5 I was seeking to address the fact that by triggering
6 Article 50, the effect, the treaties will disappear and
7 the conferral by Parliament of legislative power on the
8 EU institutions will thereby be taken away, contrary to
9 Parliament's will expressed in the various acts to which
10 I will take your Lordships, and preempting any decision
11 of Parliament about that.

12 So that is a different prism, in addition to and in
13 support of the arguments advanced by my learned friends,
14 through which the constitutional significance of the
15 1972 Act and the abrogation arguments which I will
16 address directly, my Lord, in a moment, the abrogation
17 arguments fall to be assessed.

18 So, my Lords, I am not suggesting that the
19 Article 50 notification itself is part of the
20 legislative process. The point I was seeking to answer
21 was that identified by my Lord, the Lord Chief Justice,
22 on Thursday, as to whether or not rights could be varied
23 downwards or taken away --

24 THE LORD CHIEF JUSTICE: I follow.

25 MR GREEN: -- by EU legislation. It is by that conferred

1 power, legislative power belonging to Parliament and
2 only to Parliament, which Parliament itself has
3 conferred on the EU institutions.

4 My Lords, that brings me to the distinction which
5 I seek to draw before I address the abrogation
6 point: the distinction between a variation of rights and
7 a variation of competence. Because what Parliament did
8 in the 1972 Act and has done since is to confer
9 a legislative competence upon the EU institutions. But
10 that legislative competence is strictly defined. I will
11 show your Lordships how that legislative competence can
12 be varied. But it is essentially a matter for
13 Parliament. The variation of rights conferred through
14 legislation within those fields of competence, is
15 a quite separate and distinct matter, upon which I have
16 just already addressed the court.

17 So focusing now, if I may, on the question of
18 implied abrogation. The question from my Lord,
19 Lord Justice Sales and indeed from my Lord, the Master
20 of the Rolls, about what Parliament intended in the 1972
21 Act can be briefly stated. The background to the 1972
22 Act was clear authority at the EU level -- it wasn't the
23 EU then, but the European Communities level -- that
24 there was a transfer -- this is the Costa case that
25 I have put in the back of the bundle -- of power to the

1 EU, and I am going to take your Lordships in a moment to
2 the reference to a permanent transfer of sovereignty; in
3 that case, which is decided in the mid 1960s, and I will
4 show your Lordships. So pre-dating the 1972 Act.

5 Then one also has the authority in Blackburn, it is
6 Lord Denning's speech in Blackburn, where he says that
7 freedom once given cannot be taken away and so forth,
8 where at the very highest, he suggests that it is at
9 best doubtful that Parliament could go back, but he will
10 decide it when the point arises. But he doesn't
11 envisage that it would go back.

12 That is against the background of Article 56 of the
13 Vienna Convention, which provides that unless a treaty
14 specifically has a provision in it for denunciation or
15 termination or two other limbs, implicit or nature of
16 the treaty, there is no such right. So it would have
17 been a matter for negotiation in 1972 if, immediately
18 after joining the Community, or for example in 1975
19 after the referendum, there had been a wish to leave.

20 My Lords, against that background, the 2011 Act puts
21 the matter, in my respectful submission, beyond any
22 doubt at all, and I will, if I may, take your Lordships
23 to that. It is in bundle A, tab 4 at page 108.

24 THE LORD CHIEF JUSTICE: Yes.

25 MR GREEN: The relevant sections for the court are sections

1 2 and 3. My Lords, just to put it in context, there are
2 two procedures in the relevant treaty provisions. There
3 is the procedure which your Lordships will see for
4 amending a treaty, which is dealt with under section 2.
5 Then there is a separate procedure, dealt with under
6 section 3, which is the Article 48(6) procedure, and
7 I can't actually make the submission without taking your
8 Lordships to Article 48(6) and then back to this
9 statute. So I apologise for taking your Lordships to
10 two bundles of authorities at once.

11 My Lords, I don't know that this has found its way
12 into your Lordships' bundles. It is in all of ours.

13 The end of Article 48 is in the bundle at bundle A.

14 THE LORD CHIEF JUSTICE: We have it in tab 7, so let's put
15 it before it. Let's put it in tab 7 of bundle A, then
16 we --

17 MR GREEN: We were hoping to insert it into bundle A at
18 tab 6, because the rest of --

19 THE LORD CHIEF JUSTICE: I am sorry, tab 6, I beg your
20 pardon.

21 MR GREEN: If that would be all right.

22 THE LORD CHIEF JUSTICE: Yes.

23 MR GREEN: It comes immediately before what is already
24 there.

25 THE LORD CHIEF JUSTICE: Yes.

1 MR GREEN: Your Lordships will see in Article 48, that
2 Article 48 made provision for amendment of treaties, and
3 this is the competence point, for variation of
4 competence, with an ordinary revision procedure or
5 simplified revision procedures. The ordinary revision
6 procedure is at 2 to 5, and I would only invite your
7 Lordships to look at the third line of 2, or maybe the
8 whole of the second sentence of 2:

9 "Those proposals may inter alia serve either to
10 increase or reduce the competencies conferred on the
11 Union in the treaties."

12 So that is increasing competence or reducing. Then
13 the simplified procedure, as your Lordships will see at
14 the bottom of the page, is only any treaty change that
15 does not increase the competencies conferred on the
16 Union in the treaties. So it is the same or downwards
17 for simplified revision procedures, and ordinary
18 revision procedure is up or down in terms of competence.

19 So, my Lords, when one turns back, then, to sections
20 2 and 3 --

21 THE LORD CHIEF JUSTICE: Yes.

22 MR GREEN: -- your Lordships will see that section 2(1) of
23 the 2011 Act says:

24 "A treaty which amends or replaces TEU or TFEU is
25 not to be ratified unless ... "

1 The material one is 2(1) (b):

2 "... a treaty is approved by Act of Parliament."

3 To understand the scope of that provision, your
4 Lordships need to turn back to the interpretation of
5 part 1 on the previous page, section 1(4), which says
6 that:

7 "... a reference to a treaty which amends TEU or
8 TFEU includes a reference to a treaty resulting from the
9 application of Article 48(2) to (5)."

10 So, my Lords, the up or down ones fall under
11 section 2 and the same or downwards only changes fall
12 under section 3. The short point for your Lordships is
13 that both section 2 at 2(1)(b) and section 3 at 3(1)(b)
14 require the decision to be approved by Act of
15 Parliament.

16 My Lords, we respectfully say, in support of the
17 submissions of my learned friends, but in any event,
18 that if there were any scope for doubt by reason of the
19 domestic rights conferred by Parliament, by reason of
20 the legislative power conferred by Parliament, and all
21 of the other arguments that your Lordships have heard,
22 if there were any remaining doubt, my Lord, the point
23 raised by the Master of the Rolls first and then
24 Lord Justice Sales as to the implied abrogation is
25 unanswerable on the basis of sections 2 and 3 of the

1 2011 Act. There can be no scope for the government at
2 the stroke of a pen to claim for itself the
3 United Kingdom's decision to take away those treaties
4 and the powers conferred on the Union by Parliament,
5 when much smaller and less significant steps are so
6 regulated in the 2011 Act.

7 My Lords, I hope I have taken those matters at
8 a gallop. There is a small point of a gloss on my
9 learned friend Ms Mountfield's submission on devolution.
10 That is this: in taking away the limitation on devolved
11 assemblies from legislating contrary to EU law, because
12 that is the government's contention; the effect of this
13 is to take away those EU treaties in the devolved
14 legislation. What is in fact substantially happening is
15 the government at the stroke of a pen conferring upon
16 those devolved assemblies a wider legislative competence
17 than Parliament in fact itself conferred. That is
18 a point also not without significance.

19 My Lords, my final point, if I am allowed to make
20 it, and it is a rather important one, and I am conscious
21 of the time, but it is the point on the decision. And
22 it is extraordinary, in my respectful submission, that
23 a decision of this importance comes before the court in
24 a manner which the decision of a minister on a licence
25 to make pipes would not.

1 In a smaller case, your Lordships would have a copy
2 of the decision, know who took the decision, when it was
3 taken, what the content of the decision was, which we
4 still do not know, what were the grounds for the taking
5 of the decision and the course of reasoning adopted, and
6 what level of scrutiny was applied to the rights which
7 were thereby being affected. All proper questions of
8 public law.

9 Your Lordships have nothing of that. And the only
10 thing we would respectfully say is it should not be
11 right in a jurisdiction where there is a duty of candour
12 for the government to be able to take advantage of
13 ambiguity as to the content of its decision and the
14 reasons for it, less still in a case of this
15 constitutional importance.

16 But your Lordships should infer from the first two
17 paragraphs of the defendant's skeleton argument that the
18 substance of the decision which has been taken by the
19 government is to take away those rights and to withdraw
20 from the European Union. So the government has answered
21 the question in its decision as to what the effect of
22 triggering Article 50 is, and it has answered that
23 question by saying it has claimed for itself the
24 decision to take away those domestic rights, reverse
25 Parliament's conferral of power on the European Union

1 institutions and to do that without authorisation by
2 Parliament.

3 So my Lords, those are my submissions, delivered at
4 something of a gallop. Unless I can help your Lordships
5 further.

6 THE LORD CHIEF JUSTICE: Yes, my Lord, the Master of the
7 Rolls.

8 THE MASTER OF THE ROLLS: Yes, I just want to clarify on two
9 points because I may have lagged behind on you a couple
10 of these. You made the point that the people who are
11 affected by any withdrawal of the rights would include,
12 for example, non-British citizens who are family
13 related.

14 MR GREEN: My Lord, yes.

15 THE MASTER OF THE ROLLS: Is this a matter relevant to the
16 question of Parliamentary sovereignty and the
17 question: to whom is it that Parliament owes its duties
18 and functions. What is the significance of this
19 particular category?

20 MR GREEN: Yes. My Lord, I am grateful for the opportunity
21 to clarify that. It is not our submission that
22 Parliament owes its duty to those people who are not UK
23 citizens for the purposes of Parliamentary sovereignty.
24 The submission is that the fact that Parliament has,
25 through the machinery of the treaties, and the 1972 Act,

1 been able to confer rights not only upon British
2 citizens in foreign countries, but also upon non-UK
3 citizens in those countries, shows that those are
4 rights -- starkly shows that those are rights which
5 Parliament itself cannot replace. They are beyond
6 Parliament's writ and outside of its gift.

7 My Lord, it may be that on a close analysis, because
8 of the relationships of those citizens, Parliament
9 should now regard itself as owing a duty to citizens who
10 are family members, because of the Human Rights Act and
11 the Convention. But my Lord, that was not necessary to
12 the point I was seeking to develop. But I think that is
13 probably right as a matter of law.

14 THE MASTER OF THE ROLLS: Okay. The second question was,
15 really, I fully understand the significance of your
16 submissions on the 2011 Act, particularly sections 2 and
17 3.

18 MR GREEN: My Lord, yes.

19 THE MASTER OF THE ROLLS: One of the arguments on implied
20 exclusion of the royal prerogative depends entirely on
21 the interpretation of the 1972 Act and the provisions of
22 that. Am I right in thinking that you are adding
23 a further limb, not in relation to and not on the terms
24 of the 1972 Act, but arising from and implicit in the
25 2011 Act, which is yet a further ratification?

1 MR GREEN: Absolutely. My Lord, I basically take it three
2 ways, three points. First, the 1972 Act simpliciter.
3 THE MASTER OF THE ROLLS: Yes.
4 MR GREEN: When you look both at the conferral of rights and
5 the conferral of power. Second, when you look at the
6 legislation as a piece, and include the 2011 Act, and
7 you see a consistent practice, I think it was my learned
8 friend Ms Simor who may have produced the tab E22, which
9 analyses the ratification process, legislative process,
10 in each case. So it is absolutely consistent, and it
11 would be right for the court to approach the task of
12 statutory construction with regards to what follows.
13 Then the third point is the point which your
14 Lordship put to me, I think, which is am I asserting
15 a freestanding argument on the 2011 Act; and the answer
16 is positively yes.
17 THE MASTER OF THE ROLLS: I see.
18 MR GREEN: I say it is not dependent on the 1972 Act, it is
19 a freestanding argument, and in our respectful
20 submission, it is dispositive.
21 THE MASTER OF THE ROLLS: Thank you.
22 MR GREEN: My Lords, unless I can help your Lordships
23 further.
24 MS MOUNTFIELD: My Lord, just before Mr Gill stands up, and
25 in answer to the Master of the Rolls' first question, we

1 have an answer which is in our note in paragraphs 12 and
2 13. I didn't draw attention to it. It is there. That
3 is our take on that.

4 THE MASTER OF THE ROLLS: Thank you very much.

5 MR GREEN: My Lords, would you give me a moment just to
6 afford my learned friend some space.

7 THE LORD CHIEF JUSTICE: Just take your time, Mr Gill, until
8 you have some room.

9 Submissions by MR GILL

10 MR GILL: My Lords.

11 THE LORD CHIEF JUSTICE: Yes.

12 MR GILL: Can I first of all check that your Lordships have
13 a speaking note?

14 THE LORD CHIEF JUSTICE: We do.

15 MR GILL: Together with the case of Jones, which was
16 attached to it, or should have come with it.

17 THE LORD CHIEF JUSTICE: I am afraid that --

18 LORD JUSTICE SALES: I have the speaking note, but not the
19 case.

20 MR GILL: I think the usher is providing your Lordships with
21 a copy of that case. My Lords, I will deal with that at
22 the appropriate time in the submissions.

23 THE LORD CHIEF JUSTICE: Okay, fine. We have another copy
24 of your speaking note, yes.

25 MR GILL: My Lords, I do not propose, coming at the order in

1 which I do, to repeat any of the submissions that you
2 have heard. I adopt them. Particularly the submissions
3 on behalf of the claimants themselves, because they are
4 the ones who bring the claim.

5 There are, so far as the principles are concerned,
6 two or three short points which are set out in
7 paragraph 2 of the speaking note. Essentially they
8 simply are the points in paragraph 2(c) and 2(d), just
9 to make our position absolutely clear. We say that
10 a notice of a decision cannot be given on a conditional
11 basis. I will say something about that, if I have the
12 time, at the end. But that is just a bald statement to
13 that effect.

14 We also say that an Article 50(2) notice is
15 irrevocable, and once given, it will inevitably lead to
16 withdrawal from the EU on a date which is subject to
17 negotiation, but cannot be any later than two years from
18 the point of notice, unless extended unanimously.

19 So far as the principles themselves are concerned,
20 I emphasise only the point that was in our original
21 grounds for supporting the claim; that is the emphasis
22 in *Van Genden v Loos* on the fact that this is a new
23 constitutional legal order that we are in. Everything
24 that my learned friends have said has emphasised that,
25 but this, I fear, has been rather lost sight of in the

1 defendant's skeleton argument. Everything in the
2 defendant's skeleton argument seems to hold on to
3 an approach which fails to recognise that there is a new
4 constitutional order. Some of what you have just heard
5 from Mr Green supports the points that I have just made.

6 But I needn't take up any more time over questions
7 of principle. What I propose to do in a limited space
8 of time is simply to consider the impact that there will
9 be on certain categories of persons, in particular EEA
10 nationals and children. Now, those are very truncated
11 headings. They are, in fact, to be explained in
12 a rather more fuller way. That is set out at
13 paragraph 8 of this speaking note.

14 We say that there are three types of categories that
15 are affected. British citizens, including for these
16 purposes expatriates. Secondly, EEA nationals, and that
17 term, as your Lordships will know, is used in the
18 legislation to mean EU nationals other than British
19 citizens. The EU national family members. Then non-EU
20 national family members who derive their rights of
21 residence under EU law, so partners and so on, and
22 extended family members who are in a relationship of
23 dependency.

24 My Lords, footnotes 1 and 2 are going to be quite
25 important for understanding something that the

1 defendants say, but I simply invite you to read it and
2 simply to take on board the points, that the concept of
3 dependence and the concept of dependency under EU law is
4 defined much more broadly and much more favourably than
5 it is under human rights law. This will become
6 important for a purpose that will become clear later;
7 because the other side say: we can find alternative ways
8 of protecting the classes that you are concerned about,
9 possibly through the application of human rights law.
10 There could be a lot of legal submissions in relation to
11 this, to explain all of this, but there isn't really the
12 time here to do that.

13 The third category is, at the top of page 4 of the
14 speaking note, British citizens, in particular children
15 or the disabled, whose continued presence in this
16 country is dependent on others who themselves are only
17 permitted to reside because of the statutory rights
18 derived from EU law.

19 Now, this is most graphically displayed by one of
20 the persons whom I represent, Mrs AB, who is not an EU
21 national at all. The child, however, is a British
22 citizen and therefore an EU national. Just in case
23 there is confusion as to what is meant by Zambrano
24 carers, there is quite a detailed body of case law on
25 this, but very simply for present purposes, Luxembourg

1 case law has developed to the point where we have
2 reached a position which is this: that if a British
3 citizen child, or possibly even a disabled person,
4 requires the presence of a non-EU national in this
5 country to make that British child's rights to reside in
6 the UK as a European citizen effective, then the other
7 person, the non-EU person, the carer, will also be
8 entitled to remain. This is the concept of Zambrano
9 carers.

10 Again, I take that as read; it is a very fundamental
11 concept. Nothing like it appears in human rights case
12 law, which is subject to all sorts of other constraints.
13 This is a matter of entitlement. This is a matter of
14 right. This also arises even when there is abuse.
15 Again, I take all of these points as being
16 uncontentious, and as being read, because they are not
17 in fact disputed by the other side. Their response is
18 different to all of my points.

19 But just so the court doesn't misunderstand, even
20 if, for instance, the Zambrano carer were present in
21 this country on the basis of having abused rights of
22 residence, even then -- that immigration rights for
23 instance -- that would not prevent that person being
24 granted a derivative right if it were necessary to make
25 the child's right as a European Union citizen -- a

1 British citizen who is a European Union citizen --
2 effective to continue to live here. If the child is to
3 be forced off EU territory as a result of removing the
4 carer, then the carer must be allowed to remain. That
5 is the concept of Zambrano care.

6 THE LORD CHIEF JUSTICE: Yes.

7 MR GILL: My Lord.

8 My Lord, we say that as far as EEA nationals are
9 concerned, and this is the point in paragraph 10, or
10 indeed for any class of persons, but I am here focusing
11 on EEA nationals, the prerogative cannot be used to
12 expose the class of persons to potential criminal
13 liability.

14 Now, what is this about? Your Lordships will have
15 seen that in our skeleton argument, in paragraph 15 of
16 the skeleton argument, there is a submission there made
17 that at the point that we leave the EU, the rights of
18 EEA nationals who are in this country and their family
19 members and others who derive rights of residence from
20 them, those rights all fall away. There is no dispute
21 about that. They fall away. Those persons are here
22 without leave. They will need leave at that point.
23 Leave in the context of the Immigration Act 1971.

24 As things stand at the moment, there is no mechanism
25 in place to give them that leave. They will therefore

1 be subject, be committing criminal offences and be
2 liable to summary removal on the day that we leave the
3 EU. So we say that the giving of the notice, the
4 Article 50 notice, brings about a situation where
5 inevitably at the point of withdrawal, there is going to
6 be this exposure to criminal liability and to summary
7 removal.

8 Now, the defendants do not in fact meet this point,
9 they do not dispute this point, but what they say at
10 paragraph 48 of their skeleton argument is simply this,
11 and if I can ask you to just look at paragraph 48 of
12 their skeleton argument. What they say is, not really
13 meeting this point head on, but doing it at the end of
14 paragraph 48 in a different way, they say that the AB
15 parties assert that the issue of a notification, the
16 notice, will have the effect of changing their residence
17 rights for the foreseeable future with the implication
18 of immediate liability, which we have never said, we
19 never used the word "immediate" in our paragraph 15, to
20 criminal prosecution:

21 "That is legally incorrect. The UK remains a member
22 of the EU, subject to EU law, until the point of
23 withdrawal."

24 My Lords, paragraph 15 of our skeleton argument does
25 not say that criminal liability will arise at the point

1 of the giving of the Article 50 notice. What it says is
2 that it will arise at the point that we withdraw from
3 the EU. The point is a rather more subtle one, with
4 respect, than the defendant may have appreciated. We
5 say in paragraph 11 of the speaking note -- well,
6 paragraph 10, which your Lordships may have seen, the
7 fourth line:

8 "The AB parties submit that if the prerogative can
9 be used at all in this case to give the Article 50
10 notice, and it cannot for the reasons already explained
11 by the claimants, it certainly cannot be used in
12 circumstances where prior statutory steps have not yet
13 been taken to afford the affected persons protection
14 from the exposure to criminal liability."

15 We say the defendant hasn't refuted that argument,
16 but has mischaracterised it. That is what we say in
17 paragraph 11.

18 THE LORD CHIEF JUSTICE: Good, yes.

19 MR GILL: In paragraph 12 we begin to explain this a bit
20 more by reference to the case of Proclamations and to
21 the case of Jones. We say that the giving of the
22 Article 50 notice sets in train events which on present
23 law -- which contains no protections, will expose that
24 affected class at a definable future point in time to
25 criminal liability, and also liability to removal. The

1 executive has no legal power, whether by the use of the
2 prerogative or otherwise, either to create a new
3 criminal offence, see the case of Proclamations, or to
4 expose, whether directly or indirectly, see Lord Denning
5 in Laker Airways, a class of persons to liability for
6 an existing criminal offence at an ascertainable future
7 point in time, to which they are not currently subject.
8 In short, this class of persons is not currently subject
9 to criminal liability.

10 What the Secretary of State is doing by giving of
11 the notice is to say not at the point of the notice, but
12 at an ascertainable point, that is the point of
13 withdrawal: you people who fall within this class will
14 be committing a criminal offence; I could take steps to
15 put in place protections; I do have the power to do so;
16 that power exists, the Immigration Act 1988,
17 section 7(2); but I haven't done it.

18 THE LORD CHIEF JUSTICE: Yes.

19 MR GILL: So we say, if you proceed in that sort of way,
20 what you are doing is exposing a class to potential
21 criminal liability, and as far as the case of Jones is
22 concerned, can I simply invite the court to look at
23 certain passages in that case, paragraph 29.

24 THE LORD CHIEF JUSTICE: Yes.

25 MR GILL: Where certain arguments, it says:

1 "These reasons taken together are very strong
2 grounds for rejecting the appellant's contentions since
3 they reflect what has become an important democratic
4 principle in this country, that it is for those
5 representing the people of the country in Parliament,
6 not the executive, not the judges, to decide what
7 conduct should be treated as lying so far outside the
8 bounds of what is acceptable in our society as to
9 attract criminal penalties."

10 Paragraphs 60 to 62 makes the same point and it says
11 that judges no longer have the power to create offences
12 themselves, let alone the executive.

13 THE LORD CHIEF JUSTICE: Yes.

14 MR GILL: And paragraph 61, past judicial opinion that there
15 was power for judges to create offences was repudiated.
16 Then it says this in Knüller, Lord Reed said:

17 "The courts do not have some general or residual
18 power, either to create a new offence or so to widen
19 [and this is the point] existing offences as to make
20 punishable conduct of a type hitherto not subject to
21 punishment on a date which can be ascertained in the
22 future."

23 62:

24 "New domestic offences should in my opinion be
25 debated in Parliament, defined in a statute and come

1 into force at a prescribed date. They should not creep
2 into existence as a result of an international
3 consensus~..."

4 At the end of paragraph 29, we have at the bottom of
5 page 162 at letter H, the point about -- I am sorry, not
6 there, in paragraph 158, at letter H, where Lord Bingham
7 says that by 1945, the creation of new offences lay
8 outwith the royal prerogative.

9 THE LORD CHIEF JUSTICE: Yes. Now, Mr Gill we have looked
10 at your speaking note in respect of this part. There is
11 another section dealing with withdrawal and then there
12 is a section dealing with children. I am just concerned
13 that you said your time is --

14 MR GILL: 20 minutes, my Lord. I think I have about five
15 minutes, or so.

16 THE LORD CHIEF JUSTICE: Yes.

17 MR GILL: My Lord, this point, therefore, is there.

18 Paragraph 14. I would invite you in due course to look
19 at the case of Munir, and you have the references there,
20 which indicates that where matters of leave are
21 concerned, immigration leave and so on, because this
22 class of persons will require leave, that is something
23 which is purely within the purview of Parliament, not
24 the executive.

25 THE LORD CHIEF JUSTICE: Yes.

1 MR GILL: Moving on to the second aspect of this, which is
2 in paragraph 15, the withdrawal will give rise to
3 negative irreversible impacts. My Lords, we add in
4 these sections at paragraph 15 to 19, well, through to
5 21, really, arguments as to what types of rights will be
6 lost, will be incapable of being given back; and to the
7 extent that some of them may be capable of being given
8 back under human rights law, which is really the other
9 side's point, they say some form of other protection
10 could be given. Well, so it might. It might not. But
11 that is not going to replicate the rights that we have
12 at the moment. But again, my Lords, I will leave that
13 to be considered.

14 As regards the point about children, my Lords, the
15 point about children is simply this: our submission is
16 not, as the defendant characterised it, that an
17 unincorporated treaty, that is the UN Convention on the
18 Rights of the Child, requires that before the UK decides
19 to withdraw from the EU, there should be a prior act of
20 Parliament. It is not the fact that there is an
21 unincorporated treaty which requires that.

22 What we are saying is that an Article 50 decision,
23 taken in pursuance of the prerogative, cannot lawfully
24 be taken if it impacts on national law rights and if it
25 impacts on rights which sound in national law but are

1 derived from treaties. So in essence, this point is
2 really illustrative of the submissions of principle made
3 by Lord Pannick.

4 As to the specific points that the defendant makes,
5 those points, my Lords, we have sought to meet in
6 paragraph 20 of the written note.

7 My Lords, I am conscious of the time, but we say
8 that their answer actually provides no answer to the
9 question of principle outlined by the claimants.
10 Because all it comes to is this: the children and their
11 carers may be protected under human rights legislation.
12 Well, you have heard the submissions in relation to that
13 from the claimants, and we adopt them.

14 My Lords, the points about whether any EU law
15 question arises in the present circumstances, I have put
16 my position very briefly at paragraphs 25 and following.
17 We say in the present context, it does not. I do not
18 exclude the possibility that in some other context, for
19 extreme reasons set out in paragraph 29, there may be
20 an issue. But that does not arise here.

21 My Lords, that is my 20 minutes, I believe.

22 THE LORD CHIEF JUSTICE: It is indeed, Mr Gill. Thank you
23 very much. I think we ought to allow the shorthand
24 writers to have a short break. We will start again
25 precisely in five minutes. Maybe you could give us some

1 indication if you would like longer at the end of the
2 day, and we can see if we can accommodate it, or what
3 you want in relation to tomorrow as well. Obviously we
4 are going into tomorrow; it would be useful to just have
5 some idea. Thank you.

6 (11.20 am)

7 (A short break)

8 (11.30 am)

9 THE LORD CHIEF JUSTICE: Mr Attorney.

10 Submissions by THE ATTORNEY-GENERAL

11 THE ATTORNEY-GENERAL: My Lords, the court is well aware
12 that the backdrop in this case is the long running and
13 contentious political debate about whether the
14 United Kingdom should remain part of the European Union
15 or leave it. In establishing whether a valid decision
16 to leave the European Union under Article 51 on the
17 treaty of the European Union has been breached, we
18 submit on behalf of the defendant that the relevant
19 points in the recent history of that debate are these
20 and I set them out for clarity.

21 I heard my learned friend Mr Green call in to
22 question the clarity of that decision and it may assist
23 the court if I set out how that decision has been
24 reached.

25 The first point is that the former Prime Minister,

1 David Cameron, in a speech on 23 January 2013, in which
2 he announced his intention that should the Conservative
3 party win an overall majority in the forthcoming general
4 election, to hold what was described as a referendum.

5 Secondly, a majority Conservative government having
6 been elected in the general election on 7 May 2015, the
7 European Union Referendum Bill was introduced in
8 Parliament on 28 May and became an act on 17 December
9 that year. It provided for a referendum asking
10 the question: should the UK remain a member of the
11 European Union or leave the European Union. We will
12 submit that it was clear during the passing of that
13 legislation that the government intended to act in
14 accordance with the outcome of the referendum. (Pause)

15 The third point I was going to make was that the
16 referendum itself took place on 23 June 2016, with
17 a clear majority of those voting in favour of leaving
18 the European Union.

19 Fourthly, the then Prime Minister made it clear on
20 24 June that the will of the British people expressed in
21 the referendum result would be respected and acted upon.

22 Fifth, on the resignation of David Cameron as Prime
23 Minister, the current Prime Minister announced her
24 candidacy, saying she would also act on the result of
25 the referendum.

1 Sixth, on becoming Prime Minister, Theresa May has
2 made it clear repeatedly that the government will
3 deliver the departure of the United Kingdom from the
4 European Union and statements of other ministers have
5 confirmed the same.

6 So my Lords, it is the defendant's clear contention
7 that by the steps I have set out, a decision has been
8 taken by the government to leave the European Union in
9 accordance with the provisions of Article 50(1) of the
10 treaty on European Union. And in accordance with
11 Article 50(2) of the treaty, the next step to be taken
12 is the notification of that decision to the
13 European Council.

14 My Lords, in essence, all the claimant parties have
15 confirmed in their oral observations that they challenge
16 not only notification under Article 50(2), but also the
17 prior decision under Article 50(1). They say that
18 decision is one that only Parliament can take and that
19 the government is not entitled to take it using the
20 royal prerogative.

21 My learned friend Lord Pannick, on behalf of the
22 lead claimant, accepted that articles 50(1) and 50(2)
23 are closely linked, but that he was focusing the lead
24 claimant's challenge on a decision to notify under
25 Article 50(2). But, my Lords, he complains that the

1 executive proposes to act unlawfully, by removing EU law
2 rights, and thereby preempting Parliament's decision as
3 to whether or not to retain those rights. But if, we
4 submit, Parliament is to decide that, then it must be
5 deciding whether the United Kingdom should withdraw from
6 the EU at all. In other words, that Parliament should
7 now be asked to answer the same question as put to the
8 people in the referendum.

9 We submit it is important that there is clarity
10 about the nature of the challenge and its implications.
11 This is not, we submit, a narrow legal challenge
12 directed to the technical procedural matter of
13 notification. In reality, it seeks to invalidate the
14 decision already taken to withdraw from the
15 European Union and to require that decision to be taken
16 by Parliament.

17 In response, the defendant's central submission is
18 that the decision to trigger Article 50 of the treaty on
19 European Union, and to notify that decision, are acts in
20 the making and unmaking of treaties and are classic
21 examples of the proper and well established use of the
22 royal prerogative by the executive in that field left
23 available to it by Parliament; and that the use of the
24 prerogative to give effect to the will of the people as
25 expressed in the referendum was wholly within the

1 expectation of Parliament.

2 We say that despite multiple opportunities for
3 Parliament to do so, the prerogative has not been
4 supplanted or eroded so as to preclude its exercise in
5 the present circumstances. We say that is highly
6 significant. We say that in relation to the claimant's
7 attempts to rely on a principle that the prerogative may
8 not be exercised inconsistently with statutory rights,
9 that they overstate the reach of that principle and
10 inaccurately analyse its application in the present
11 context.

12 My Lords, I am going to focus on the 2015 Act on the
13 case law and the relevant legal tests and then on the EU
14 legislative scheme and its implications for the
15 prerogative. My learned friend Mr Eadie will then deal
16 with your Lordship's consent with the alleged
17 inconsistency between the use of the prerogative and
18 domestic law rights; and then our submissions on
19 justiciability and remedy; and my learned friend
20 Mr Coppel will then deal briefly with the additional
21 points made by Mr Pigney and others regarding EU
22 citizenship rights and devolution.

23 THE LORD CHIEF JUSTICE: Fine.

24 THE ATTORNEY-GENERAL: My Lords, before turning to the
25 principal submissions I want to make, may I deal with

1 a question your Lordships raised on Thursday about the
2 revocability of an Article 50 notification, and seek to
3 make the position of the government on this matter
4 clear.

5 My Lords, we do not argue that an Article 50 notice
6 can be revoked, and we invite the court to proceed in
7 this case on the basis that a notification under
8 Article 50(2) is irrevocable. We do not in any event
9 accept that this question is central to the arguments
10 before the court; if the claimants are right that the
11 use of the prerogative to notify under Article 50(2) is
12 unlawful, either by virtue of a common law principle or
13 by implication from the 1972 Act, then an act of the
14 executive seeking to do so would still be unlawful, even
15 if Parliament was able to step in and stop the process.
16 But the defendant is also content to proceed on the
17 basis that as a matter of firm policy, once given
18 a notification will not in fact be withdrawn.

19 My Lords, if I may turn to the central submissions
20 that I wish to make.

21 THE LORD CHIEF JUSTICE: I am sorry, Mr Wright, are you
22 coming back to deal with the question of whether
23 a conditional notice can be given, or do you accept what
24 Lord Pannick said, that the notice cannot be
25 conditional, for example conditional on Parliament

1 subsequently saying, ratifying it --

2 THE ATTORNEY-GENERAL: I do accept that, my Lord,

3 I apologise, I should have made that clear. It is of

4 course our case that Parliament's consent in the form of

5 an act of Parliament is not required.

6 THE LORD CHIEF JUSTICE: No, but you cannot give

7 a conditional notice is the question I asked.

8 THE ATTORNEY-GENERAL: Indeed, we accept that.

9 THE LORD CHIEF JUSTICE: Mm-hm.

10 THE ATTORNEY-GENERAL: My Lord, the first submission that

11 I want to make is that it has been long established that

12 the royal prerogative provides a source of power to

13 the Crown to make and to unmake international treaties.

14 That is a fundamental point and as I understand it, my

15 Lords, it is undisputed. We do accept, of course, that

16 there is precedent for the prerogative being constrained

17 by Parliament when it comes to ratifying treaties, and

18 I will come in more detail to look at how and when that

19 is done. But we submit there is no precedent for the

20 ruling the claimants ask this court to make, that the

21 court must seek the authorisation of Parliament by

22 primary legislation to commence the process of

23 withdrawal from a treaty. This, of course, is not the

24 first time that the United Kingdom has withdrawn from

25 a treaty.

1 So we say, as a matter of general principle, that
2 withdrawal from a treaty is for the Crown by use of the
3 prerogative, and that principle would be well known by
4 Parliament and is the context in which any particular
5 legislative scheme which can be said to impact on the
6 existence or exercise of the prerogative, should be
7 considered.

8 That, my Lords, brings me to the content and
9 circumstances of the 2015 EU Referendum Act. The lead
10 claimant draws attention to the fact that the 2015 Act
11 is silent as to the consequences of the referendum. But
12 we also submit that this is significant, but for the
13 opposite reason: that there is no mention of further
14 legislation required, as a pre-condition to even the
15 first step of giving effect to the referendum outcome,
16 were it to be a vote to leave.

17 We say that it is demonstrated thereby that if it
18 were the intent to do so, the Act would say so. The
19 process, we submit, of commencing withdrawal from the EU
20 treaty, to give effect to the referendum result,
21 prescribed by Article 50, had been set out and was clear
22 by the time the 2015 Act was being considered by
23 Parliament. It is, we submit, a classic exercise of the
24 prerogative.

25 We say, then, that the natural inference from the

1 silence of the 2015 Act, as to the legal consequences of
2 a vote to leave, is that the usual legal principles
3 would apply. More than that, it was entirely clear,
4 prior to and during the passage of that legislation,
5 that in the event of a leave vote, the government
6 intended to trigger Article 50. Both Houses of
7 Parliament heard that in direct terms from ministers.

8 If I could please take your Lordships to bundle D2
9 and tab 35, what your Lordships will see there is the
10 Hansard record of the Foreign Secretary's second reading
11 speech, and the passage I want to draw your Lordship's
12 attention to is at the 12.41 time marking, some three
13 lines down into the Foreign Secretary's speech, where he
14 said this:

15 "This is a simple but vital piece of legislation.
16 It has one clear purpose. To deliver on our promise to
17 give the British people the final say on our EU
18 membership in an in/out referendum by the end of 2017."

19 We submit it is clear by the Foreign Secretary's
20 reference to the British people having the final say,
21 that as far as the government was concerned, no further
22 decision would be required from Parliament.

23 Then, my Lords, at the next tab, tab 36 in the same
24 volume of the bundle, you will see an extract from the
25 Hansard report from the House of Lords at report stage.

1 If I can take your Lordships in the left-hand column to
2 the penultimate paragraph, in fact the last paragraph in
3 that column, half way through that paragraph, the
4 minister of state, Baroness Anelay, said this:

5 "As the prime minister has made very clear, if the
6 British people vote to leave, then we will leave.
7 Should that happen, the government would need to enter
8 into the processes provided for under our international
9 obligations, including those under Article 50 of the
10 treaty on European Union."

11 Now, my Lords, the claimants say that this is just
12 an expression of government policy. But we say it is
13 more than that. We say it goes to the basis on which
14 Parliament legislated. It is clear in our submission
15 that Parliament legislated against the background of
16 an established legal principle that withdrawing from
17 a treaty is a matter for the executive and a proper use
18 of the prerogative; and in the clear knowledge of the
19 government's expressly stated and wholly unsurprising
20 intent to act without further legislative stage, to
21 implement the result of the referendum if there was
22 a leave vote.

23 If Parliament had intended something different, it
24 could and would have said so and we submit needed to, if
25 its true intention had been to override the usual

1 position and insist on express primary legislative
2 authority before the process of giving Article 50
3 notification could be commenced.

4 A contrast is drawn by the claimants with the
5 alternative vote referendum legislation, the
6 Parliamentary Voting System and Constituencies Act of
7 2011. Your Lordships will find that at volume C.
8 Perhaps I don't need to take your Lordships to it at
9 this point, but it is at tab 30. But there are,
10 I submit, two important differences between the
11 situations covered by that Act and by the 2015 Act.

12 The first of them is that if the people had voted
13 for it, legislation was required to set up
14 an alternative voting system. There was no prerogative
15 power to change the electoral system as opposed, of
16 course, to, we say, withdrawing from a treaty.

17 Secondly, the 2015 Act must be read in the light of
18 the existence of Article 50. Parliament knew full well
19 the procedure by which the UK would leave the
20 European Union if that was voted for in the referendum.
21 It had dealt with it when the Lisbon Treaty was included
22 in domestic law by virtue of the 2008 Act.

23 Indeed it was by then, we submit, the only way to
24 give effect to a leave vote in accordance with the
25 United Kingdom's international legal obligations. So

1 there was no need to set it out in the 2015 Act.

2 My learned friend Mr Chambers, on the other hand,
3 compares the 2015 Act with the legislation making
4 provision for the 1975 European referendum and points
5 out that unlike in 2015, in 1975 the relevant government
6 minister made it clear that the government's view at
7 that time was that further legislation would be needed
8 to effect a decision to withdraw from the then European
9 Economic Community.

10 May I make two points on that.

11 The first is that the government view in 1975 was
12 expressed long before the considered regime of
13 Parliamentary controls of some areas of the prerogative,
14 in later EU-related legislation, on to which I will
15 come, and which was present in 2015. Also, of course,
16 before Article 50 laid down a formal mechanism for
17 giving effect to withdrawal.

18 The second point is this: the minister in 1975
19 doubtless had in mind the need to repeal the European
20 Communities Act if withdrawal was to be effected. But
21 the government now has made it clear that Parliament
22 will be asked to do the same. The point in this case,
23 of course, is a different one: that the process since
24 laid down by Article 50 does not, we say, require
25 legislation before it is triggered. My Lords, for the

1 avoidance of doubt --

2 THE LORD CHIEF JUSTICE: I don't want to interrupt you, but
3 are you coming back to the way in which the legislation
4 will operate in due course?

5 THE ATTORNEY-GENERAL: My Lord, yes. What I propose to do
6 is take the court through the legislation
7 chronologically as it deals with the European Union and
8 its predecessor, so that I can demonstrate, I hope, how
9 the prerogative has not, we say, been restricted.

10 THE LORD CHIEF JUSTICE: No, and then come back to how in
11 future legislation effect will be given to any result of
12 the Article 50, because the heart of the argument
13 advanced is that by triggering it, Parliament becomes
14 nugatory. But you are coming back to that point, or one
15 of your juniors will come back to that.

16 MR GREEN: Yes, one of my very learned juniors will be able
17 to deal with that. The point around whether or not, to
18 use my learned friend Lord Pannick's analogy of the
19 bullet from a gun, and there are inevitable consequences
20 following from the triggering, is indeed a matter that
21 my learned friend Mr Eadie will deal with --

22 THE LORD CHIEF JUSTICE: Good, on be.

23 THE ATTORNEY-GENERAL: -- I am sure in some detail. May
24 I say so, at this point, for the avoidance of any doubt,
25 my Lords, that the government's case is not that the

1 2015 Act provides the source of power for the government
2 to give an Article 50 notification.

3 THE LORD CHIEF JUSTICE: No.

4 THE ATTORNEY-GENERAL: It simply leaves in place --

5 THE LORD CHIEF JUSTICE: The pre-existing one.

6 THE ATTORNEY-GENERAL: -- the pre-existing power, precisely,
7 my Lord. But of course I should say also that the
8 giving of an Article 50 notification by use of the
9 prerogative would not end Parliament's role in the
10 process of the United Kingdom withdrawing from the
11 European Union. Parliament has many and varied means of
12 holding the government to account, and, indeed, I submit
13 it is doing so.

14 Only last week, as the court may be aware,
15 Her Majesty's official opposition put down a motion for
16 debate in the House of Commons which was debated,
17 amended and passed as amended without dissent.

18 My Lords, I don't propose to take the court to
19 anything that was said in the course of that debate, but
20 it may be of assistance if I set out the terms of the
21 motion as was passed. It said as follows:

22 "That this House recognises that leaving the
23 European Union is the defining issue facing the UK,
24 believes that there should be a full and transparent
25 debate on the government's plan for leaving the EU, and

1 calls on the Prime Minister to ensure that this House is
2 able to properly scrutinise that plan for leaving the EU
3 before Article 50 is invoked, and believes that the
4 process should be undertaken in such a way that respects
5 the decision of the people of the UK when they voted to
6 leave the EU on 23 June, and does not undermine the
7 negotiating position of the government as negotiations
8 are entered into which will take place after Article 50
9 has been triggered."

10 My Lords, the court will note that the motion does
11 not ask for a vote, much less for an act of Parliament,
12 before Article 50 is triggered, but my point is simply
13 that the motion could have done so if Parliament had so
14 wished, and Parliament could if it wanted passed
15 legislation which inhibited or prevented the government
16 from proceeding to notify under Article 50(2) or indeed
17 vote on resolutions on that matter.

18 The issue in this case, however, is whether the
19 government should be obliged to introduce further
20 legislation before it is able to trigger Article 50.

21 My Lords, in arguing that further legislation is
22 required, before the prerogative is used, and because it
23 is said that the prerogative is not lawfully available
24 to the government to use in notifying under Article 50,
25 the lead claimant relies on two cases which concern the

1 question of abrogation of the prerogative by
2 Parliamentary intention, and I want, if I may, to make
3 submissions on both. But both derive their reasoning
4 from that of an earlier case, namely Attorney
5 General v De Keyser's Royal Hotel Limited from 1920
6 which to which you have not yet been taken.

7 The principle, I submit, which this line of
8 authority establishes is that a recognised prerogative
9 ceases to be available as a source of power to the
10 extent that Parliament has decided that it should be
11 cease to be available, whether by expressly so
12 legislating or sometimes by the necessary implication of
13 its legislation. In the particular context of the EU
14 treaties, however, we further submit that only
15 an express restriction on the prerogative will be taken
16 to establish the necessary Parliamentary intention,
17 given the express provisions to that effect which have
18 been enacted in the past.

19 So my Lords, may I take you, please, first to the
20 case of De Keyser's, and your Lordships will find that
21 at bundle A and at tab 8. In this case, the Army
22 Council requisitioned the hotel in question for use of
23 the Royal Flying Corps during the First World War,
24 denying the hotel owners a legal right to compensation.
25 Compensation was claimed under the Defence Act of 1842.

1 Before the House of Lords, the Crown claimed the
2 right to requisition under the prerogative. The
3 critical question therefore was whether or not the
4 requisition was entitled to be done in exercise of the
5 prerogative, for which no compensation was payable, or
6 under the Defence Act 1842 for which compensation was
7 payable.

8 The speeches in the House of Lords indicate the type
9 of test to be considered when determining whether the
10 royal prerogative has been abrogated or supplanted, as
11 the court concluded that it had been in the
12 circumstances of that case.

13 May I take your Lordships first, please, to the
14 speech of Lord Parmoor. Your Lordships will find the
15 passage I have in mind at page 262 of the bundle, which
16 is page 575 of the case report.

17 The passage that I am going to refer your Lordships
18 to is approximately halfway down that page. And Lord
19 Parmoor said the following:

20 "I am further of opinion that the plea of the
21 appellant that the prerogative right of the Crown,
22 whatever it may have been, has not been abated, abridged
23 or curtailed by any of the Defence Acts 1842 to 1873 or
24 by any other statute cannot be maintained. I propose to
25 examine the main statutory provisions which regulate the

1 rights of the subject and the obligations of the
2 executive when lands or buildings are taken temporarily
3 for use and occupation on the occasion of a public
4 exigency. The constitutional principle is that when the
5 power of the executive to interfere with the property or
6 liberty of subjects has been placed under Parliamentary
7 control and directly regulated by statute, the executive
8 no longer derives its authority from the royal
9 prerogative of the Crown but from Parliament, and in
10 exercising such authority, the executive is bound to
11 observe the restrictions which Parliament has imposed in
12 favour of the subject."

13 He goes on to say:

14 "I think that the statutory provisions applicable to
15 the interference by the executive with the land and
16 buildings of the respondents bring the case within the
17 above principle. It would be an untenable proposition
18 to suggest that courts of law could disregard the
19 protective restrictions imposed by statute law where
20 they are applicable. In this respect, the sovereignty
21 of Parliament is supreme. The principles of
22 construction to be applied in deciding whether the royal
23 prerogative has been taken away or abridged are well
24 ascertained. It may be taken away or abridged by
25 express words, by necessary implication or as stated in

1 Bacon's abridgement where an Act of Parliament is made
2 for the public good, the advancement of religion or
3 justice and to prevent injury and wrong."

4 My Lords, others of their Lordships in that case
5 describe the test in similar terms. So may I take you
6 next to page 248, and the speech of Lord Sumner. The
7 passage that I wish to read is some six or seven lines
8 down on that page. Lord Sumner says this:

9 "The legislature by appropriate enactment can deal
10 with such a subject matter as that now in question, in
11 such a way as to abate such portions of the prerogative
12 as apply to it. It seems also to be obvious that
13 enactments may have this effect, provided they directly
14 deal with the subject matter, even though they enact
15 a modus operandi for securing the desired result which
16 is not the same as that of the prerogative."

17 Finally, in this line of quotations, to the speech
18 of Lord Dunedin at page 213 of the bundle and my Lords,
19 in this case the quotation is, again, approximately half
20 way down the page. Page 213, where Lord Dunedin said
21 the following:

22 "Nonetheless, it is equally certain that if the
23 whole ground of something which could be done by the
24 prerogative is covered by the statute, it is the statute
25 that rules."

1 So my Lords, the submission that we make is that the
2 principles which emerge from the De Keyser's case are
3 these: first, that the prerogative may be taken away or
4 abridged by express words or by necessary implication.
5 Secondly, that the prerogative is excluded where
6 a matter is directly regulated by statute; or, thirdly,
7 where the whole ground of something which could be done
8 by the prerogative is covered by the statute. And my
9 Lords, those principles set out in De Keyser's were
10 applied in the case of Laker Airways v the Department of
11 Trade to which your Lordships have been taken which is
12 at tab 10 of bundle A.

13 I would invite your Lordships first of all to look
14 at page 350 of the bundle, where your Lordships will
15 find the judgment of Lord Justice Roskill, and at
16 paragraph E on that page he says this:

17 "The relevant principles upon which the courts have
18 to determine whether prerogative power has been fettered
19 by statute were exhaustively considered by the House of
20 Lords in Attorney General v De Keyser's Royal Hotel."

21 He also says at page 352 of the bundle, having set
22 out the principles drawn from the speeches in the De
23 Keyser's case, at paragraph F on page 352:

24 "Thus the principles to be applied are plain and
25 further citation of authority is superfluous."

1 My Lords, as you have been told in Laker Airways, as
2 in De Keyser's, primary legislation had provided for
3 a particular means of achieving something, but the
4 government had sought to achieve the same thing with the
5 prerogative, thereby avoiding the constraints of the
6 statutory route. In the case of Laker, the Civil
7 Aviation Act of 1971 has provided for a process through
8 which licences were to be obtained from the Civil
9 Aviation Authority, with accompanying procedural rights
10 for applicants, and it gave the Secretary of State
11 powers to revoke licences in specific circumstances.

12 In its effort to stop Mr Laker operating his Sky
13 Train airline, the government did not seek to use
14 the comprehensive statutory route available, a route
15 described by Lord Justice Roskill, at page 352, you will
16 see leading directly on from the quote I have just
17 given, as an "elaborate code". He says:

18 "When one looks at the Act of 1971 and its elaborate
19 code in relation to licensing and the other matters
20 entrusted to the authority~..."

21 Indeed, he repeats the phrase "elaborate code" on
22 the next page of his judgment.

23 Despite that, the Secretary of State sought instead
24 to issue new guidance to the CAA, guidance which was
25 found to be unlawful, and then to withdraw a crucial

1 designation under an international treaty by use of the
2 royal prerogative. In deciding that the Secretary of
3 State could not lawfully do so, the Court of Appeal in
4 Laker was straightforwardly in our submission applying
5 the De Keyser's principles. The court concluded that
6 Parliament had directly regulated the achievement of
7 objectives, which the Secretary of State had sought to
8 achieve by means of the prerogative, and again in the
9 language of De Keyser's, that the whole ground of
10 something which could be done by the prerogative is
11 covered by the statute. So that by a proper
12 construction of the Civil Aviation Act of 1971,
13 Parliament had, in the circumstances of Laker, intended
14 to fetter the prerogative.

15 And in the Laker case, the principle in De Keyser's
16 that the prerogative can be abrogated only by express
17 words or by necessary implication was applied. Again,
18 may I take you finally in this case to the judgment of
19 Lord Justice Lawton at page 359 of the bundle at
20 paragraph C. Lord Justice Lawton said:

21 "The Act made provision for revocation by the
22 authority under section 23 and by the Secretary of State
23 under section 4. These provisions regulate all aspects
24 of the revocation of licences. By necessary
25 implication, the Act in my judgment should be construed

1 so as to prevent the Secretary of State from rendering
2 licences useless by the withdrawal of designation when
3 he could not procure the authority to revoke them nor
4 lawfully do so himself."

5 My Lords, the other case that the lead claimant
6 relies upon in this context is the Crown v the Secretary
7 of State for the Home Department ex parte Fire Brigade's
8 Union, which again, the De Keyser's principles were
9 applied. Your Lordships will find this at tab 13 of the
10 bundle A. In the Fire Brigade's Union case, Parliament
11 had legislated for the way the Secretary of State was to
12 act in order to achieve a particular objective, in this
13 case the criminal injuries compensation scheme, but the
14 Secretary of State had sought to achieve different
15 results using the prerogative, contrary to Parliament's
16 intention.

17 The Criminal Justice Act of 1988 provided for
18 a criminal injuries compensation scheme to come into
19 force on such a day as the Secretary of State may
20 appoint. But instead, the Secretary of State sought to
21 replace the existing non-statutory scheme with a new
22 non-statutory scheme using prerogative powers. This new
23 scheme would be inconsistent with the statutory scheme.
24 So in this case too, there was a specific scheme
25 Parliament had laid out in statute and the Secretary of

1 State sought to get around it by use of the prerogative.
2 The House of Lords by majority concluded that this was
3 impermissible. In the words of Lord Browne-Wilkinson,
4 in his judgment at page 422 of the bundle, he said this:

5 "By introducing the tariff scheme he, that is the
6 Secretary of State, debars himself from exercising the
7 statutory power for the purposes and on the basis which
8 Parliament intended. For these reasons, in my judgment
9 the decision to introduce the tariff scheme at a time
10 when the statutory provisions and his power under
11 section 171(1) were on the statute book was unlawful and
12 an abuse of the prerogative power."

13 I should also ask your Lordships in this context to
14 look at page 420 at paragraph F, where again
15 Lord Browne-Wilkinson said:

16 "But under the principle in *Attorney General v De*
17 *Keyser's Royal Hotel*, if Parliament has conferred on the
18 executive statutory powers to do a particular act, that
19 Act can only thereafter be done under the statutory
20 powers so conferred. Any pre-existing prerogative power
21 to do the same Act is pro tanto excluded."

22 So in other words, my Lord, to exclude the
23 prerogative entirely, a statutory scheme must cover the
24 whole ground in the words of *De Keyser's*, or if not, the
25 prerogative is excluded only to the extent that the

1 statutory powers apply.

2 My Lords, that same approach is taken in other
3 cases.

4 May I invite your Lordships to look at the case of
5 ex parte Northumbria Police Authority, and that is to be
6 found at bundle B and at tab number 18. In this case,
7 the question was whether a statutory power for police
8 authorities to provide equipment required by the
9 police---

10 THE LORD CHIEF JUSTICE: It is B1, tab 18?

11 THE ATTORNEY-GENERAL: It is B1, forgive me, yes, B1,
12 tab 18. So the question, my Lords, in this case was
13 whether a statutory power for police authorities to
14 provide equipment required by the police excluded the
15 government by use of the prerogative from maintaining
16 a central store of certain equipment from which police
17 forces could also be supplied. The court found the
18 prerogative could be used for this purpose, because the
19 statutory scheme did not expressly grant a monopoly, to
20 use the words of Lord Justice Crune-Johnson (?); your
21 Lordships will find that at page 601. Towards the
22 bottom of the page at paragraph G, what
23 Lord Justice Crune-Johnson said was:

24 "It is clear that the Crown cannot act under the
25 prerogative if to do so would be incompatible with

1 statute. What was said here is that the Secretary of
2 State's proposal under the circular would be
3 inconsistent with the powers expressly or impliedly
4 conferred on the police authority by section 4 of the
5 Police Act 1964. The Divisional Court rejected that
6 submission for reasons with which I wholly agree, namely
7 that section 4 does not expressly granted a monopoly and
8 that granted the possibility of an authority which
9 declines to provide equipment required by the chief
10 constable, there is every reason not to imply
11 a Parliamentary intent to create one."

12 It was also said in that case that the relevant act
13 was not a complete code and your Lordships will find
14 that over the page at 604 in the judgment of
15 Lord Justice Purchas, that is towards the end of
16 paragraph E. What Lord Justice Purchas says is:

17 "Mr Keane submitted that it provided a complete code
18 but with respect to his careful submissions I do not
19 think that this contention can be sustained in the sense
20 that it exclusively embraces all of the powers and
21 duties involved in carrying out their functions by the
22 three parties involved, namely the Secretary of State,
23 the chief constables and the police authorities."

24 And finally, my Lords, also in the judgment of
25 Lord Justice Purchas, the expression that there was no

1 express and unequivocal inhibition sufficient to abridge
2 the prerogative powers is used, and that is to be found
3 at page 610, again at paragraph G. Lord Justice Purchas
4 said:

5 "Even if I am not justified in holding that these
6 sections afford positive statutory authority for the
7 supply of equipment, they must fall short of an express
8 and unequivocal inhibition sufficient to abridge the
9 prerogative powers otherwise available to the Secretary
10 of State, to do all that is reasonably necessary to
11 preserve the peace of the realm."

12 So again, my Lords, I submit that the court
13 concluded in that case that the prerogative, if it's to
14 be excluded, must be excluded expressly.

15 The final authority in this particular line I would
16 invite your Lordships to look at is that of Crown on the
17 application of *XH v the Secretary of State for the Home*
18 *Department*. And this is to be found in bundle E at
19 tab 16. My Lords, this case concerned the cancellation
20 or withdrawal of passports from those considered to be
21 involved in terrorism related activity.

22 "Although cancellation or withdrawal of a passport
23 has long been recognised as a prerogative power, the
24 relevant challenge in this case was on the basis that
25 the Terrorism Prevention and Investigation Measures Act

1 2011 permitted steps to be taken in relation to
2 passports, including their surrender, and that the Act
3 had therefore displaced the prerogative power to achieve
4 the same effect or outcome under the prerogative."

5 The court rejected that challenge for the reasons
6 set out in Lord Justice Hamblen's judgment, which your
7 Lordships will find beginning at page 495 of the bundle,
8 or paragraph 38 of the judgment. The court set out the
9 principles derived from *De Keyser's* and made reference
10 to both *Laker Airways* and the *Fire Brigade's Union*
11 cases, and indeed to the test that statute must exclude
12 the prerogative either expressly or by necessary
13 implication. Your Lordships will find at paragraph 41
14 of the judgment on page 496 that reference to
15 *Laker Airways*, and indeed to the test that I have just
16 described.

17 The court also at paragraph 42 on page 497 relies on
18 the definition given in the case of *Morgan Grenfell* to
19 what is meant by necessary implication in the statutory
20 context. Your Lordships will note the quote is said to
21 be by Lord Walker in the case of *Morgan Grenfell*, in
22 fact it is by Lord Hobhouse. And I can certainly take
23 your Lordships to the *Morgan Grenfell* case if necessary.
24 But the passage I seek to rely on is the passage set out
25 in paragraph 42 of this case, *XH*. I accept, of course,

1 that the application of the principles to the passport
2 context is fact specific but I submit that the
3 definitions here given are nonetheless useful in the
4 case with which your Lordships are dealing. So what is
5 said in Morgan Grenfell about a necessary implication is
6 this, and it is in the quote referred to in paragraph 42
7 on page 497:

8 "A necessary implication is not the same as
9 a reasonable implication [as was pointed out in the case
10 referred to]. A necessary implication is one which
11 necessarily follows from the express provisions of the
12 statute, construed in their context. It distinguishes
13 between what it would have been sensible or reasonable
14 for Parliament to have included or what Parliament would
15 if it had thought about it, probably have included and
16 what it is clear that the express language of the
17 statute shows that the statute must have included. A
18 necessary implication is a matter of express language
19 and logic, not interpretation."

20 We submit, my Lords, it is also helpful and relevant
21 to the matters to be considered in this case before your
22 Lordships. The court in XH commented in paragraph 51 of
23 its judgment, which your Lordships will find at page 499
24 of the bundle and that paragraph reads as follows:

25 "As the Secretary of State submits, it would be

1 surprising if Parliament had impliedly excluded well
2 established prerogative powers in this very important
3 field of national security without any express
4 indication that it was doing so."

5 And we say, of course, that the same applies in this
6 case to the prerogative in treaty making. And indeed,
7 we say it is helpful that the court in XH discussed the
8 true nature and degree of overlap between the
9 prerogative power and the legislative scheme, which we
10 say is akin to the language of De Keyser's in terms of
11 the statute covering the whole ground. And the court in
12 XH concluded, as we invite the court to do here, that
13 that overlap was not sufficient to exclude the
14 prerogative.

15 My Lords, finally on the authorities to which I wish
16 to take the court, and in the particular context of the
17 exercise of the prerogative in relation to the
18 European Union treaties, the position is, we submit,
19 even narrower. Given the express but limited
20 interventions of Parliament in the past, only a further
21 express restriction on the prerogative will be regarded
22 as excluding it. And that, we submit, was the decision
23 of the Divisional Court in the case of Rees-Mogg which
24 I invite the court to look at. It can be found at
25 bundle A at tab 12 and my Lords, the claimants in that

1 case argued that the government was not entitled to
2 ratify the protocol on social policy annexed to the
3 Maastricht Treaty using prerogative powers, because
4 section 2(1) of the European Communities Act would give
5 the protocol effect in domestic law. Domestic law would
6 thus be altered by the ratification, and only Parliament
7 had the power to change domestic law, an argument with
8 which your Lordships are familiar.

9 The primary basis for rejecting that argument, as
10 the court did, was that neither the ECA or any other
11 statute was capable of imposing an implied restriction
12 upon the Crown's treaty making power in relation to
13 community law. And I would invite your Lordships to
14 look at the judgment of Lord Justice Lloyd at page 376.
15 And again at paragraph G. Lord Justice Lloyd said in
16 relation to the argument I have just highlighted:

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

1 Parliament has by implication curtailed or fettered
2 the Crown's prerogative to alter or add to the EEC
3 treaty."

4 So the court was in my submission concluding that in
5 the context of community law, express fetters to the
6 prerogative are to be expected. An implication, even
7 a necessary one, will not do.

8 So the defendant submits that the line of authority,
9 beginning with De Keyser's, sets out the principles to
10 be applied in determining whether Parliament has
11 excluded the use of the prerogative on a given subject.

12 And so my Lords, applying those principles from the
13 authorities, the question is has Parliament acted to
14 limit the availability of the prerogative to the
15 government to withdraw from the EU treaties either
16 expressly or assuming, contrary to Rees-Mogg, that the
17 test extends this far, by necessary implication. And
18 the answer, we submit, is clearly no. There is nothing
19 express in legislation to indicate that Parliament
20 intended to circumscribe the treaty withdrawal
21 prerogative. Parliament has never legislated for the
22 circumstances in which the government may withdraw from
23 the European Union. And withdrawal from the
24 European Union is not a matter directly regulated by
25 statute. There are no detailed rules in legislation for

1 doing the very thing that would otherwise be done under
2 the prerogative and there can be no necessary
3 implication of that from the legislation that has been
4 passed.

5 So we submit that the case before this court is
6 a long way from De Keyser's, Laker Airways or the Fire
7 Brigade's Union cases. Indeed, we submit that
8 Parliament has conspicuously refrained from legislating
9 on withdrawal from the European Union, despite repeated
10 opportunities to do so had it so wished. And that, we
11 say, a powerful argument against the principle of
12 abrogation from the prerogative.

13 And when one looks at the entirety of the statutory
14 scheme, Parliament must be taken to have consciously
15 refrained from displacing or abrogating the Crown's
16 otherwise ordinary prerogative power to withdraw from
17 a treaty.

18 My Lords, that scheme begins, of course, with the
19 1972 Act. Your Lordships have been taken to it a number
20 of times, it is at bundle A tab 2. There is of course
21 no express provision regulating any future withdrawal
22 from the treaties, and that is a point, as I understand
23 it, not in dispute.

24 Parliament could of course have made such provision.
25 And would do so against the background of the

1 established position under customary international law
2 that states we are entitled to withdraw from or
3 renunciate treaties. We submit --

4 LORD JUSTICE SALES: You say that is international law?

5 I think that that was in dispute in light of Article 56
6 and 62, I think it was, of the Vienna Convention.

7 THE ATTORNEY-GENERAL: Yes. The submission we make,
8 my Lord, is that as a matter of customary international
9 law that was the position in 1972. The
10 Vienna Convention on the law of treaties did not come
11 into force until 1980, so we submit that it was a matter
12 of customary international law which Parliament would
13 have understood at the point at which the 1972 Act was
14 passed.

15 LORD JUSTICE SALES: And the authority for that is?

16 THE ATTORNEY-GENERAL: Well, we submit it is a matter of
17 customary international law. I don't believe that is
18 disputed. But of course I will be corrected, I am sure,
19 if I am wrong about that.

20 THE LORD CHIEF JUSTICE: Would it be possible for some
21 member of your team to give us a sort of reference point
22 to one of the authorities, which no doubt will not be --
23 going back to 1962, they won't be as extensive as they
24 are today. But if someone could give us a note of that
25 and provide it to Lord Pannick and if there is an issue

1 on customary international law, we can then indicate it.

2 THE ATTORNEY-GENERAL: My Lord, we will certainly do that.

3 We submit, though, that the European Communities Act
4 in a broader sense placed no restriction on treaty
5 prerogative at all, whether negotiating new obligations
6 or withdrawing from existing treaties. The rights in
7 domestic law arising from the treaties are of course
8 those created or arising from time to time. Again, your
9 Lordships have been taken to this part of the Act. It
10 is section 2(1), which means, we submit, that they can
11 change. And indeed as my learned friend Lord Pannick
12 accepted on Thursday, they can be reduced or even
13 removed. So a new treaty expanding or removing rights
14 could be negotiated under the 1972 Act regime, by the
15 government, by use of the treaty prerogative. Of
16 course, it would then have been necessary, in order to
17 comply with the United Kingdom's new international law
18 obligations, to amend the list of treaties in
19 section 1(2) of the European Communities Act and that
20 would be done by primary legislation unless the new
21 treaty was ancillary to the main treaties, in which case
22 it could have been done by order in council (?) with
23 approving resolutions in Parliament.

24 But that we submit is the function of our dualist
25 system and again, I submit, it is not a fetter on the

1 use of the prerogative to withdraw from a treaty or, as
2 in the case before this court, to begin the process of
3 withdrawal.

4 My Lords, again there are a number of other points
5 on rights which, as I have indicated, my learned friend
6 Mr Eadie will return to. But may I take the court next,
7 please, to the 1978 --

8 THE MASTER OF THE ROLLS: Can I just ask, Mr Attorney, can
9 I ask this question. In making that submission are you
10 making for your purposes a fundamental distinction
11 between amending an existing right or otherwise under EU
12 law and withdrawing completely from it, because the one
13 does require a legislation and change. You seem to be
14 saying that the other one is of a different species
15 entirely.

16 THE ATTORNEY-GENERAL: Well, my Lord, we say that there is
17 no requirement in terms of the negotiation of a new
18 duty, whether it's entering into a new treaty or
19 withdrawing from an existing one, in order for the
20 executive to do that there is no requirement for
21 Parliamentary intervention. The 1972 Act sets out no
22 such requirement. There is a subsequent stage to the
23 process which is the incorporation of that new treaty if
24 one is negotiated to domestic law, and we submit that is
25 the purpose and the intent of the 1972 Act.

1 The point I make, however is there is no suggestion,
2 even more so than that, that there is anything to be
3 said by Parliament about the beginning of the process of
4 withdrawal, which is the decision in question, we
5 submit, in this case. That is the submission that
6 I make.

7 THE LORD CHIEF JUSTICE: I think, sorry, if I understood my
8 Lord's question, you accept that if the government
9 wanted to amend the treaties or withdraw from them so
10 that effect was given to withdrawal in domestic law,
11 there would have to be an Act of Parliament.

12 THE ATTORNEY-GENERAL: Yes.

13 THE LORD CHIEF JUSTICE: Whether it is amending or
14 withdrawing, it doesn't make any difference.

15 THE ATTORNEY-GENERAL: Yes.

16 THE LORD CHIEF JUSTICE: I think that was the point. It is
17 the effectiveness in domestic law. There is no
18 difference between amending and withdrawing, you have to
19 have a statute?

20 THE ATTORNEY-GENERAL: Yes, in order for there to be
21 an effect in domestic law we accept that Parliament's
22 involvement would be necessary. But we say that there
23 is a process of negotiating or withdrawing from treaties
24 which is preliminary to that stage and we say that in
25 relation to that matter there is nothing in the 1972 Act

1 that takes the prerogative away from the Crown.

2 THE LORD CHIEF JUSTICE: Yes. Thank you very much.

3 THE ATTORNEY-GENERAL: My Lord, the next statute that
4 I invite your Lordships to look at, as I say, is the
5 1978 European Parliamentary Elections Act, originally
6 known as the European Assembly Elections Act of 1978,
7 and if I can invite your Lordships to look at that, it
8 is bundle C, tab 7.

9 THE LORD CHIEF JUSTICE: Yes.

10 THE ATTORNEY-GENERAL: We submit that this is a significant
11 piece of legislation, because it is the first time that
12 Parliament decides to expressly control an aspect of the
13 treaty prerogative. But it is we submit a specific and
14 limited control. If your Lordships look at section 6 of
15 that Act, that is where that control is set out. And it
16 applies of course where a treaty provides for any
17 increase in the powers of the Assembly, later the
18 European Parliament.

19 If, of course, Parliament had considered a broader
20 restriction of the prerogative, it could have legislated
21 to that effect and we submit that it chose is not to.
22 And if of course the lead claimant was right that
23 Parliament intended by implication from the European
24 Communities Act to exclude the treaty prerogative in
25 this respect, then this more limited provision would

1 have been unnecessary, and that of course was the point
2 that was made by Lord Justice Lloyd in the case of
3 Rees-Mogg. But section 6 was passed, and had an effect
4 in limiting the Crown's ability to ratify EU treaties
5 increasing the power of the European Parliament without
6 Parliamentary consent and it had an effect consequently
7 on the subsequent chronology of Parliamentary
8 involvement.

9 The lead claimant made much of the fact that
10 Parliament routinely passed implementing legislation for
11 major new EU treaties before and not after they were
12 ratified. But aside from political reasons which may
13 well exist to do so, the reason we submit that this has
14 happened is substantially because of the operation of
15 section 6 of the 1978 Act. The powers of the European
16 Parliament were increased and therefore section 6
17 required prior Parliamentary approval in the examples to
18 which your Lordships have been taken. It applied -- and
19 I don't propose, unless your Lordships wish me to, to
20 invite the court to turn up each of these acts in
21 turn -- but the point I make in relation to each of them
22 is similar. The point I make applies to the European
23 Communities Amendment Act of 1986 implementing the
24 Single European Act, where section 3 (4) gives section 6
25 approval in this sense; the European Communities

1 Amendment Act of 1993 implementing Maastricht, where
2 again section 1(2) gives the section 6 approval
3 required; the European Union Accessions Act 1994,
4 covering the accession of Austria, Norway, Finland and
5 Sweden, section 2 of that Act gives the section 6
6 approval; the European Communities Amendment Act 1998
7 implementing the Amsterdam treaty, section 2 gives the
8 section 6 approval; the European Communities Amendment
9 Act 2002 implementing the Nice treaty, section 6 of that
10 gives the section 6 approval; and finally the
11 European Union Amendment Act 2008 implementing the
12 Lisbon Treaty, section 4 gives the approval necessary in
13 that Act.

14 So in relation to all of those statutes we submit
15 that the reason that Parliamentary involvement came
16 before ratification was not as a matter of legal
17 requirement in a more general sense, but because of the
18 operation of section 6 of the 1978 Act.

19 And the focus of the 1978 Act, we say, was to
20 protect Parliamentary sovereignty by ensuring that there
21 was a check on the expansion of the powers of the
22 European Parliament rather than to put in place
23 a broader check on the treaty making prerogative. And
24 when the 1978 Act was replaced by the 2002 Act of the
25 same title, section 12 replacing section 6 of the 1978

1 Act was drafted in similar and therefore not wider
2 terms, despite this further for Parliament to do so.

3 My Lords, the next piece of legislation in
4 chronological sequence is the European Union Amendment
5 Act of 2008. Your Lordships will find that at bundle A
6 and at tab 3. This was we submit important, because it
7 incorporated the Lisbon Treaty, and so introduced and
8 gave effect to Article 50 of that treaty. And this was
9 at the time recognised as a significant addition,
10 described in the explanatory notes to the bill as one of
11 the principal changes brought in by the Lisbon Treaty.
12 It was also one of the provisions which expanded the
13 role of the European Parliament, because the European
14 Parliament has to approve a withdrawal agreement under
15 Article 50(2), and therefore needed Parliamentary
16 approval under the 2002 Act. So we submit Article 50
17 could not have gone unnoticed at that point by
18 Parliament.

19 At the same time, and for the first time, Parliament
20 passed in section 6 of the 2008 Act a series of new
21 Parliamentary controls over decisions ministers might
22 take under the treaties. Functions included under the
23 existing treaties, rather than simply the negotiation of
24 new ones. And I should say, my Lords, of course that
25 section 6 of that Act was repealed by the European Union

1 Act of 2011, so on the version of the 2008 your
2 Lordships have in the bundle, section 6 no longer
3 appears but it is available in your Lordships wish to
4 see it at bundle E and at tab 9. I didn't propose to
5 take your Lordships to it unless you wish me to but it
6 is there to be seen and it sets out a number of
7 Parliamentary controls.

8 But the point I make is simply this: that there was
9 no Parliamentary control imposed, however, in relation
10 to Article 50, despite, I submit, both its novelty at
11 that point and indeed its significance. So in the 2008
12 Act Parliament had controlled some exercises of the
13 prerogative treaty functions but had left Article 50
14 alone. In dealing with the relevant statutes
15 chronologically, it may be worth mentioning, too, the
16 Constitutional Reform and Governance Act. Your
17 Lordships will find that at bundle C and at tab 29.

18 THE LORD CHIEF JUSTICE: Sorry, C?

19 THE ATTORNEY-GENERAL: C29. This act we submit does not
20 deal specifically with European legislation but does
21 make provision for Parliament to exercise influence over
22 ratification by the Crown of treaties made more
23 generally, with no distinction, of course, made between
24 treaties which involved the reduction of rights or which
25 did not do so. And again, it does not we submit take

1 over prerogative powers in treaty making and indeed
2 assumes their use prior to Parliamentary involvement.
3 And it does not impinge at all, we submit, on a decision
4 to withdraw from a treaty or to begin the process of
5 doing so.

6 So the short point, my Lords, on the 2010 Act is
7 that that Act was therefore another opportunity for
8 Parliament to control the Crown's use of the prerogative
9 in connection with Article 50 and it did not do so.

10 May I take your Lordships now to the European Union
11 Act of 2011. Your Lordships will find that at bundle A
12 and at tab 4. Under this legislation, of course,
13 section 6 of the 2008 Act and indeed section 12 of the
14 2002 Act were repealed and replaced with a series of
15 detailed and focused controls that Parliament chose to
16 impose on the use of the prerogative under the EU
17 treaties. It did so against a backdrop of concerns
18 about Parliamentary sovereignty in a European context
19 and of course against the backdrop of pressure for
20 a referendum on withdrawal from the European Union.

21 So Parliament chose in the 2011 Act to impose
22 a series of different sorts of controls, from
23 referendums to motions of approval, over a series of
24 different types of action pursuant to the treaties, all
25 of which would ordinarily be carried out using

1 prerogative powers.

2 And my Lords, on any view this was the most
3 significant and extensive set of legislative controls on
4 the treaty prerogative ever seen, building on what was
5 done in the 1978, 2002 and 2008 Acts. And it may be
6 helpful, my Lords, to go through what the Act provides
7 for. So turning first to page 108 of the bundle, and
8 beginning with section 2, and you have been taken to
9 this already this morning, section 2 sets out that
10 a treaty amending the TEU or TFEU to confer a new
11 competence on the EU may not be ratified unless the
12 treaty is approved by an Act of Parliament and by
13 a referendum. Sections 3 and 4, which again you have
14 been taken to, set out in more detail of how precisely
15 that is to be done.

16 Section 6 of the Act, which your Lordships will find
17 at page 113, sets out certain types of ministerial act
18 in the exercise of treaty functions which are subject to
19 control which primary legislation and referendum and
20 they include, for example, adopting the euro or removing
21 border controls.

22 Then over the page, section 7, deals with other
23 types of ministerial acts, subject to control by primary
24 legislation, but this time not by referendum, including,
25 it is worthy of note, under section 7(2)(a), which your

1 Lordships will find at the top of page 115, the
2 strengthening of rights of EU citizens, but not of
3 course the weakening or removing of those rights. And
4 them in section 8, that particular section restricts
5 ministers' freedom to vote on measures proposed at EU
6 level, to pursue objectives of the treaties without
7 either an Act of Parliament or motions passed by
8 Parliament.

9 And section 9 on the next page prevents ministers
10 notifying the UK's intention to take part in measures
11 relating to the areas of security, freedom and justice
12 without the Parliamentary vote.

13 And finally on page 118, section 10, it sets out
14 further decisions under the TFEU, for which a minister
15 may not vote without Parliamentary approval.

16 So my Lords, this is a detailed and focused
17 statutory scheme, but it is not a complete code,
18 covering every decision previously covered by the use of
19 the prerogative. Parliament we submit has carefully
20 selected the areas it wishes to control and left others
21 in which the prerogative remains available.

22 It is all the more telling, then, that in this
23 detailed scheme nothing in the 2011 Act purports to
24 restrict or control the Crown's decision making process
25 under Article 50. And the court must, we submit, infer

1 from that that Parliament did not wish to regulate it.
2 My Lords, for the sake of --

3 THE LORD CHIEF JUSTICE: Will you be coming back to the
4 point that if one looks at Article 50, and don't deal
5 with it now, Mr Eadie may be dealing with it, I am not
6 sure, but where in Article 50 it says that an agreement
7 can be concluded under Article 50(2), the Union shall
8 negotiate and conclude an agreement with that state,
9 setting out the arrangements of withdrawal, taking
10 account of the framework, et cetera. That agreement,
11 presumably, therefore, can be concluded by the Crown
12 under the royal prerogative, and is to be distinguished
13 from anything that amends the treaty. Don't answer it
14 now, and I don't know whether it falls within Mr Eadie's
15 side of the argument or your side, so maybe you could
16 come back to that at some convenient time.

17 THE ATTORNEY-GENERAL: We will one of us deal with it,
18 certainly.

19 THE LORD CHIEF JUSTICE: Thank you.

20 THE ATTORNEY-GENERAL: I am grateful. I was going to say
21 for the sake of completeness in relation to the
22 chronological list of statutes to which I wished to draw
23 your Lordships' attention---

24 THE LORD CHIEF JUSTICE: I didn't want to leave -- because
25 one implication of the argument that you have made is

1 that that is a necessary implication from the 2011 Act,
2 ie as Parliament hadn't done anything, the whole freedom
3 of what is encompassed within Article 50 lies within the
4 royal prerogative, therefore the agreement with the
5 European Community could be made without any reference
6 to Parliament. Come back to that.

7 THE ATTORNEY-GENERAL: We will certainly come back to that.

8 I suppose the short point I could make --

9 THE LORD CHIEF JUSTICE: No, come back to it, it is much
10 easier to see how it fits into the argument.

11 THE ATTORNEY-GENERAL: Thank you. The final statute that
12 I wanted to mention to your Lordships is simply for
13 completeness, the 2015 European Union Referendum Act,
14 I don't propose to go through it in any detail. Your
15 Lordships have heard my submissions about it.

16 The point simply is, I repeat the point, it does not
17 contain any restriction on the government's use of the
18 prerogative to effect the implementation of a leave vote
19 using Article 50, despite that Act being perhaps the
20 most obvious place for Parliament to do so.

21 So, my Lords, if I may summarise the submissions
22 I wish to make, they are these: the other parties in
23 this case have sought, perfectly properly, to defend
24 Parliamentary sovereignty, but we submit Parliament can
25 retain and demonstrate its sovereignty as much by

1 choosing not to do something as in doing it. Parliament
2 has legislated repeatedly on the executive's freedom of
3 action, using the prerogative in relation to Europe. It
4 had the specific opportunity to do so in relation to the
5 use of Article 50 in 2008 and again, most obviously, in
6 2015. It chose not to restrict the prerogative in this
7 respect, on any of the multiple opportunities it had to
8 do so. Its intention in relation to this use of the
9 prerogative must therefore be plain.

10 The limited interventions it has chosen to make in
11 restricting the prerogative triggers the Rees-Mogg
12 principle, we say, and it requires express restriction
13 of the prerogative which there has not been. But even
14 if a necessary implication would do, it cannot be drawn
15 from the fact that Parliament has legislated to limit
16 the availability of the prerogative in matters other
17 than withdrawal from the European Union treaties.

18 The logical inference must be the opposite.
19 Parliament cannot taken to have done other than leaving
20 the field unoccupied in relation to the specific use of
21 the prerogative, at issue in this case, making the
22 situation in this case wholly different from that found
23 in the cases of De Keyser's, Laker Airways and Fire
24 Brigade's Union.

25 The prerogative remains available, we say, for the

1 government to use to give effect to the clear wish of
2 the people of the United Kingdom that we should begin
3 the process of leaving the European Union, and the clear
4 expectation of Parliament and the people was and is that
5 it should do so.

6 My Lords, as I have indicated, there are further
7 submissions which the defendant seeks to make, and my
8 learned friends Mr Eadie and Coppel will make them.
9 Unless I can assist the court further in relation to the
10 submissions I have made.

11 THE LORD CHIEF JUSTICE: Mr Attorney, thank you very much.

12 That has been extremely helpful to go through all of the
13 legislation. Thank you very much.

14 THE ATTORNEY-GENERAL: I am grateful.

15 THE LORD CHIEF JUSTICE: Mr Eadie, just to be sure on
16 timing, the court has conferred and we would be able, if
17 time is difficult for you, or Mr Coppel, to go on
18 until -- we didn't think beyond 5.00 would suit anyone,
19 but until 5.00 we could. Do let us know after the
20 adjournment and what the arrangements are likely to be
21 for tomorrow.

22 MR EADIE: I am very grateful. I suspect the best time to
23 judge whether we will seek to avail ourselves of that
24 opportunity is in the mid-afternoon shorthand writers'
25 break. I am very grateful for that.

1 THE LORD CHIEF JUSTICE: I wanted to tell you that we
2 thought going on beyond 5.00 would not meet with
3 anyone's approbation.

4 MR EADIE: No, and we will try very hard not to avail
5 ourselves of that invitation. But we are grateful for
6 it anyway.

7 Submissions by MR EADIE

8 MR EADIE: My Lords, I intend to address head on
9 Lord Pannick's primary argument, which is that it is not
10 open to the executive to decide that the UK should
11 withdraw from the European Union and commence the
12 Article 50 procedure accordingly, because that would be
13 to use the prerogative power in such a way as to affect
14 or change current economic law, principally statute law.

15 I will also address, but much more briefly because
16 the Attorney has traversed this ground already to some
17 extent, the alternative argument that it is a necessary
18 implication from sections 1(2) and 1(3) of the 1972 Act,
19 that rights enjoyed under section 2 of that Act cannot
20 be substantially altered without prior Parliamentary
21 authorisation. That was put as an alternative argument
22 by Lord Pannick.

23 It might be thought just before addressing that
24 primary argument that it could benefit with at least
25 a little, with respect, refinement. It is of course

1 obvious that the executive cannot use the prerogative to
2 legislate so as to remove statutory rights, and of
3 course the sending of the notification pursuant to
4 Article 50(2) would not amount to legislation. The
5 consequence of that is that any change to current
6 statutory rights following notification will be caused
7 by (a) legislation by Parliament during or after the
8 withdrawal process, and or (b), the Article 50 procedure
9 in its entirety, which will bring the United Kingdom
10 membership of the EU to an end after two years from the
11 notification in default unless the period is extended.
12 But it is those two things that will effect a change in
13 the law.

14 It might be thought that therefore, by way of
15 refinement of that primary argument, that given the
16 possible, indeed the overwhelmingly likely, role of
17 Parliament during the withdrawal process, and I will
18 come back to the fact that it is a process, the real
19 objection of the claimant is to the executive taking
20 a step which may require Parliament to legislate, so as
21 to change the corpus of rights which are currently
22 enjoyed pursuant to EU law. It is really the so-called
23 preemption point that is the constitutional vice at
24 which my Lord, Lord Pannick's argument points.

25 My submission in summary on that primary argument,

1 and I will develop these steps if I may, but my
2 submission on the primary argument proceeds by way of
3 these steps: first, we submit that the key question is
4 whether Parliament has left the relevant power in the
5 hands of the executive, notwithstanding that this
6 exercise may, more or less directly, impact upon current
7 statutory rights. So has Parliament left that power in
8 the hands of the executive?

9 Secondly, that the relevant principles for answering
10 that question are those to be found in the case law that
11 the attorney has taken you through, De Keyser's, and
12 Rees-Mogg in particular. And there is, we submit, no
13 broader principle asserted by Lord Pannick on the back
14 of Lord Oliver's comments in the Raynor case, there is
15 no broader principle that the executive may never act,
16 including in the field of foreign affairs, so as to
17 cause interference with domestic legal rights.

18 Indeed, and thirdly, far from that being
19 a restriction upon the prerogative, it is, we submit,
20 the standard position that, save where Parliament has
21 otherwise provided, the Crown acts on the international
22 plane, and the commitments which it enters into or has
23 withdrawn from, like I say, unless Parliament has
24 decided otherwise, are where appropriate then given
25 effect to in the domestic plane by Parliament.

1 Fourthly, and finally by way of stages in answer to
2 Lord Pannick, there are in addition, I will submit,
3 a number of features of the present case and the present
4 context which tend further against existing statutory
5 rights operating as a restriction upon the prerogative
6 to withdraw from these EU treaties.

7 The attorney has spoken of some of those, the 2008
8 Act in particular, and the 2011 Act, but also the 2015
9 Act and the express restrictions on the use of the
10 treaty making and unmaking prerogative. But I will rely
11 in addition on three particular features. Firstly, that
12 the giving of notification under Article 50 starts
13 a process and does not itself have any immediate effect
14 in domestic law. Secondly, the fact that Parliament
15 will be intimately involved in this process including,
16 inevitably, through the passage of primary legislation.
17 And thirdly, that, as we submit, the claimants have
18 greatly exaggerated the impact on domestic law rights of
19 the commencement of the process of withdrawal from the
20 EU.

21 Before turning to the stages of that argument, my
22 Lords, you will bear in mind, and I know my Lord, the
23 Lord Chief justice has said on a number of occasions
24 this is purely a narrow point of law which concerns the
25 court, and of course it is. But there is a reason why

1 there are so many people in court, and that is because
2 this is a case which has profound constitutional
3 implications, has profound political implications,
4 however irrelevant for the purposes of this particular
5 legal process. But also raises a series of questions
6 about how the British constitution should react in the
7 unique set of circumstances that confront the court and
8 confront the country at this time.

9 And I wanted to refer you to one statement which
10 principally goes to emphasise the flexibility of the
11 British constitution, one statement by Lord Bingham,
12 which I hope will be acceptable, in a case coming to the
13 House of Lords from the Northern Irish courts, and which
14 is the Robinson decision. And that is in bundle E, if
15 you can take that up, behind tab 12. The facts don't
16 terribly matter for the purposes of this, because I rely
17 upon it simply as a statement of principle. But you get
18 a flavour of the facts from the headnote, and a better
19 and more specific description of the nature of the issue
20 from paragraph 1 of Lord Bingham's judgment. It is
21 still the House of Lords. Lord Bingham's speech in the
22 law report at page 392 on the internal page numbering
23 and the relevant statement of principle which I invite
24 you to note is at paragraph 12 where he says:

25 "It would no doubt be possible in theory at least to

1 devise a constitution in which all political
2 contingencies be would be the subject of pre-determined,
3 mechanistic rules to be applied as and when the
4 particular contingency arose. But such an approach
5 would not be consistent with ordinary constitutional
6 practice in Britain. There are of course certain fixed
7 rules, such as those governing the maximum duration of
8 Parliaments or the period for which the House of Lords
9 may delay the passage of legislation. But matters of
10 potentially great importance are left to the judgment
11 either of political leaders, whether and when to seek
12 a dissolution, for instance, or even to a diminished
13 extent to the Crown, whether to a grant a dissolution,
14 where constitutional arrangements retain scope
15 ...(reading to the words)... flexible response to
16 differing and unpredictable events in a way which the
17 application of strict rules would preclude."

18 And I take you to that not because it is of course
19 directly applicable to our situation here but it is, we
20 respectfully submit, an expression of realistic
21 constitutional principles. We are dealing here with
22 exceptional and probably unique circumstances. There is
23 no written constitutional formula. And our submission,
24 ultimately, is what the claimants have sought to do in
25 this litigation is to take principles developed from

1 very different constitutional and legal circumstances
2 and make them fit their argument. And the consequence,
3 at least it might be thought of their argument, is
4 precisely to deny the constitutional flexibility which
5 lies at the heart of our constitution.

6 Can I then turn to the relevant question, or the
7 relevant framework of principle which was the first of
8 the stages of the argument that I apply, and make
9 a series of what might be thought -- apologies if they
10 are -- to be tolerably basic principles.

11 THE LORD CHIEF JUSTICE: Yes.

12 MR EADIE: The prerogative, it has often been said, is the
13 residue of powers left in the hands of the Crown. We
14 submit that words need to be added to the end of that
15 description of the prerogative and the correct and true
16 principle is that the prerogative is the residue of
17 powers left in the hands of the Crown by Parliament.
18 That is true as a general proposition. It is all the
19 more true in circumstances in which Parliament has
20 decided to impose some, but specific, controls in the
21 relevant area, where the prerogative operates.

22 THE MASTER OF THE ROLLS: Sorry, how does that fit in in
23 a case where there are fundamental rights which are not
24 embodied? They are common law rights, they are not
25 embodied in statute. What is the restriction then,

1 would you say, on the exercise of prerogative powers to
2 withdraw them, to abrogate them?

3 MR EADIE: My Lord, Parliamentary sovereignty dictates that
4 Parliament in our constitution is supreme and if it
5 wants to leave in the hands of the Crown a prerogative
6 which is a common law power, then it leaves the Crown in
7 a place to effect common law rights.

8 THE MASTER OF THE ROLLS: Yes, I am picking you up because
9 it looked as if the addition of the words "by
10 Parliament" in your definition meant that Parliament
11 must in some way expressly carve out some residue for
12 the prerogative. Are you saying that as long as
13 Parliament doesn't touch the prerogative then the
14 prerogative is exercisable?

15 MR EADIE: That is precisely the import of the De Keyser's
16 line of authorities, exactly the point my Lord put to
17 me. If there is a bespoke set of principles that govern
18 the question whether Parliament can be taken to have
19 intervened so as to control or abrogate, pro tanto or
20 otherwise.

21 THE MASTER OF THE ROLLS: Yes but the point you have
22 a common law right, Parliament hasn't intervened at all
23 in that. Do you accept that at common law the executive
24 cannot remove a fundamental right without going through
25 Parliament, that is the question. Parliament hasn't

1 intervened, it is simply left blank. The definition
2 would suggest that the broad prerogative would enable it
3 to remove those rights.

4 MR EADIE: My Lord, Parliament, if it had left, for example,
5 a -- and I will come back to this point -- but if it had
6 left, for example a treaty making power in the hands of
7 the Crown, then to the extent that the exercise of that
8 power to make a treaty or to withdraw from a treaty
9 affects rights in domestic law that exist as a matter of
10 common law, then the Crown can exercise those rights to
11 create that effect. So the short answer to my Lord's
12 question is yes, but by that route. I don't exclude
13 from that answer, the words "that Parliament has left in
14 the hands of the Crown", because it is of course open to
15 Parliament to intervene in that way, in that sphere in
16 any way it sees fit. So it is still ultimately
17 Parliament that makes the decision, here negatively, if
18 I can put it that way. I think that may lie at the
19 heart of my Lord's question. Negatively rather than
20 positively. But that is the implication of the De
21 Keyser's line of authority, it tells you how you
22 determine that question of Parliamentary intention. And
23 the answer is you determine it by assuming that
24 everyone, including Parliament, knows that the
25 prerogative power to do the thing in question exists,

1 and if and to the extent that Parliament wants to enter
2 the field it will either do so expressly to abrogate it
3 or it will do so by necessary implication. That is the
4 essence of it.

5 And so I was making the proposition, it was
6 a restatement that the residue of the exercise of the
7 power left in the hands of the Crown by Parliament is to
8 a general proposition and all the more so, we say, in
9 a sphere such as the present, where the making and
10 unmaking of treaties, that power is left in the hands of
11 the Crown, despite Parliamentary intervention in other
12 parts of it, in other words where it has intervened to
13 a certain extent.

14 But the question in a context involving a well
15 established prerogative, such as withdrawing from
16 a treaty, is whether Parliament is ultimately whether
17 Parliament intended to control or abrogate the
18 prerogative which is being or is to be exercised. That
19 is ultimately a question of ascertaining Parliamentary
20 intention. And you will appreciate why I emphasise that
21 point; because that then poses the question what set of
22 principles governs the answering of that question? How
23 do you determine the Parliamentary intention in a sphere
24 where you are dealing with a well recognised
25 prerogative? And it leads to the submission -- it might

1 be thought to be close to the heart of Lord Pannick's
2 case -- that there is no separate constitutional
3 principle, we submit, that would preclude Parliament, if
4 that was its intention, from leaving in the hands of the
5 Crown a prerogative power, even if its exercise would,
6 more or less directly, interfere with current rights or
7 obligations or liabilities.

8 THE LORD CHIEF JUSTICE: And is the distinction here being
9 drawn between a power to make a treaty which has no
10 effect internally, domestically, on the rights, because
11 it operates on the international plane and it doesn't
12 affect citizens internally, so you can't, well, you can
13 make a treaty, you can't affect it. In the case of
14 withdrawal from a treaty you can actually thereby affect
15 rights that have been enacted in law, in consequence of
16 it.

17 MR EADIE: I don't rely upon that distinction. You will
18 appreciate that the point I am on --

19 THE LORD CHIEF JUSTICE: No, I know, but that must be at the
20 heart of the argument. If it is accepted that you --
21 obviously it depends on the "bullet" point, but is it
22 the case, and maybe you can come back to this at
23 2 o'clock, is it the case that you are saying that
24 the Crown has the prerogative power to withdraw from
25 a treaty even if that affects the rights that are

1 accrued under domestic law?

2 MR EADIE: Yes, is the short answer to that question.

3 THE LORD CHIEF JUSTICE: Because obviously it will be very
4 important to look at the authorities which underpin that
5 proposition.

6 MR EADIE: My submission is yes, one can test it to some
7 extent --

8 THE LORD CHIEF JUSTICE: No, we would like to look. Because
9 the other proposition, the proposition the other way
10 round is you don't need it. It is accepted by everyone
11 that if the Crown enters into a treaty it has no effect
12 on the rights of the citizen until it is given effect to
13 by domestic law. But what is clear you are saying,
14 I think, is that the opposite isn't true; that you can
15 withdraw from a treaty and defeat the rights that
16 Parliament has conferred.

17 MR EADIE: You can withdraw from a treaty, but the reason
18 I say I don't rely on that distinction is because my
19 base proposition is that the impact, whether or not the
20 exercise of the prerogative impacts to increase rights
21 or to decrease them, whether or not that position ensues
22 from either the making of the treaty or from the
23 withdrawal of the treaty ultimately involves asking the
24 same question, which is whether or not Parliament has
25 chosen to leave that power in the hands of the Crown.

1 Parliament could, for example, have passed an act that
2 said in in sphere the rights and obligations that are
3 available in domestic law shall be those that flow from
4 the making of a treaty.

5 LORD JUSTICE SALES: But might not the inferences to
6 Parliament's intent be rather different depending on the
7 two contexts my Lord just put to you?

8 MR EADIE: It is possible.

9 LORD JUSTICE SALES: It might not be surprising that
10 Parliament doesn't seeks to control or exercise the
11 prerogative when it knows the exercise has no effect in
12 domestic law, which is Parliament's concern. It might
13 be said that the context is rather different if the
14 background is that Parliament contemplates that exercise
15 of a particular prerogative power, here the right to
16 withdraw from treaties, will have effects on domestic
17 law which might be said to be contrary to very strong
18 traditions of the common law, as illustrated by the case
19 of Proclamations and the Bill of Rights.

20 MR EADIE: My Lord, I don't disagree with the proposition
21 that the context is thoroughly important. The question
22 is what is Parliament's intention, and once one accepts
23 the proposition that Parliament could leave in the hands
24 of the Crown a power, a prerogative power, to make or to
25 unmake treaties, even though that power might have

1 direct or indirect impact on domestic legal rights, the
2 only question that remains is was that Parliament's
3 intention?

4 My Lord puts to me well, that is a factor, it is
5 almost like the principle of legality brought into this
6 context, as it were, which is one of the arguments again
7 me which I will come back to. But my proposition starts
8 from a submission that Parliament can, and I gave you
9 the example of Parliament doing it expressly,
10 a hypothetical example of Parliament doing it expressly.
11 Parliament can do that even if the exercise of that
12 prerogative will have a direct and immediate effect.

13 LORD JUSTICE SALES: You see, it might be said that both
14 your argument and Lord Pannick's argument both refer
15 back to background constitutional understandings in
16 order to inform the proper inference as to the intention
17 of Parliament in the 1972 Act. You say there is
18 a background constitutional settlement understanding
19 that conduct of international affairs is for the Crown.
20 Lord Pannick says there is a background constitutional
21 context that the Executive can't change rights which
22 exist in domestic law, whether it be by common law or by
23 statute.

24 So at some level there seems to be a contest between
25 what we derive from these two aspects of the

1 constitutional background as indicators for the proper
2 interpretation of, well, whichever Act one is looking
3 at.

4 MR EADIE: My Lord, you are right and listening to the
5 argument, there is an element of two ships passing in
6 the night because we both assert a constitutional
7 assumption upon which Parliament has legislated. That
8 is the reason for trying to trace through the steps of
9 this first stage of the argument, because the punch line
10 of it is going to be that the courts have specifically
11 and expressly grappled with the principles that should
12 apply when you are dealing with the abrogation of
13 a pre-existing power of the Crown by way of prerogative
14 and that the appropriate approach in principle is the
15 one developed by the House of Lords and in repeated
16 cases in the Court of Appeal thereafter from De
17 Keyser's, which it might be thought it is notable
18 Lord Pannick was quite keen not to base his case upon,
19 no doubt because he wanted his ship to be passing to the
20 right of the light or the flag, but my Lord is right.

21 THE LORD CHIEF JUSTICE: It is a good advocate's point.

22 Shall we stop there and carry on at 2 o'clock.

23 MR EADIE: My Lord.

24 THE LORD CHIEF JUSTICE: And let us know, in discussions
25 with you all, what you want to do this evening.

1 (1.02 pm)

2 (the luncheon adjournment)

3 (2.00 pm)

4 MR EADIE: I was on the first proposition, which was
5 examining the relevant test of principle, the relevant
6 question or relevant framework of principle, within
7 which to answer, it is essentially the objective -- to
8 approach it through De Keyser, same question, what is
9 Parliament's intention. And we respectfully suggest
10 that the framework of principle surrounding the very
11 specific question of whether Parliament did indeed
12 intend to abrogate the prerogative has been set out. It
13 has been set out in that succession of cases from
14 De Keyser onwards, Parliamentary and the principle that
15 that line of cases establishes are precisely that in
16 approaching that question, you start, as it were, from
17 the assumption that Parliament knows full well that the
18 prerogative power exists. It then asks the
19 question: has Parliament evinced an intention expressly
20 or by necessary implication in some cases to abrogate
21 that.

22 That is, to pick up the language of the New Zealand
23 court that you were taken to this morning in Fitzgerald
24 and we can go back to it, it is bundle B, tab 10, 622 at
25 line 30, that asked the very question whether the

1 prerogative is being exercised with the authority of
2 Parliament. The words used by the New Zealand court,
3 "by or with authority".

4 THE MASTER OF THE ROLLS: Can I just ask a quick question
5 based on De Keyser's Royal Hotel. Lord Parmoor, in the
6 passage to which the Attorney took us, which is in
7 bundle A, tab 8, page 576, actually has a third
8 category. He says:

9 "The prerogative may be taken away or abridged by
10 express words, by necessary implication or, as stated in
11 Bacon's Abridgement, where an Act of Parliament is made
12 for the public good, the advancement of religion and
13 justice and to prevent injury and wrong."

14 I just wondered what your submission on that last
15 category came to.

16 MR EADIE: I am not sure that has ever been picked up and
17 run with, either in any of the other speeches in this
18 case, or in any subsequent case law. I confess,
19 I haven't gone back to Bacon's Abridgement to see
20 precisely what category that is referring to, or quite
21 why it is split out in that that way, but every case
22 subsequent to this one, including in the House of Lords,
23 in Fire Brigade's Union and elsewhere, has proceeded on
24 the basis that it is final. It is either express or by
25 implication. There isn't some third category. I am not

1 entirely sure what the source of that was in argument~--

2 LORD JUSTICE SALES: Thank you very much.

3 MR EADIE: Can we have a look and see whether, if we can
4 track down Bacon's Abridgement, if that assists in any
5 way.

6 LORD JUSTICE SALES: What I was wondering is whether one in
7 modern times would treat what is listed, what seems to
8 be a third category, really is potential factors bearing
9 upon whether one gets there by necessary implication,
10 but I don't know.

11 MR EADIE: I don't know, I am afraid is the answer. We will
12 have to see what Bacon's Abridgement has to say.

13 We respectfully submit that the test that
14 Parliament -- or that the case law and common law has
15 set out for answering that question, is clear and is
16 bespoke. It is, as it were, the *lex specialis*; the set
17 of principles that they developed in *De Keyser* are the
18 *lex specialis*, and that in large part is our direct
19 answer as well to the question Lord Justice Sales asked
20 before the short adjournment, about how relevant it
21 might be that the impact in a particular context of the
22 exercise of the prerogative would be directly to affect
23 important rights. In other words, what play does the
24 principle of legality have in this context?

25 As you will appreciate, it is extremely difficult to

1 square, if I can put it that way, extremely difficult to
2 square De Keyser's Hotel as an approach which says: has
3 Parliament expressly or by necessary implication
4 abrogated the prerogative on the one hand; and
5 an application of the principle of legality, which again
6 refers to expressly or by necessary implication, but
7 does so, as it were, the other way round.

8 So we respectfully submit that the bespoke set of
9 principles for which the court should reach when
10 answering the questions of, did Parliament intend to
11 abrogate the prerogative, are indeed those, subject to
12 my learned friend Lord Pannick's point about Lord Oliver
13 that I am going to come to, in De Keyser. That requires
14 an intense focus on the actual legislation bearing upon
15 the existence and exercise of the particular prerogative
16 in question, which is why the Attorney focused as he did
17 on the various EU acts in particular.

18 Can I turn to the Lord Oliver principle. I start by
19 making it clear that some basic propositions aren't in
20 dispute. My submission is that they don't resolve the
21 issue before the court. The basic position is of
22 course, one, that Parliament is supreme and sovereign;
23 two, that the executive cannot simply decide to change
24 or ignore the law, whether legislative or common law.
25 You don't need authority for that basic proposition.

1 One has it in the case of Proclamations, and one has it
2 elsewhere in the case law. It is a basic proposition.

3 But it is also basic, we submit, that Parliament can
4 decide, entirely consistently with its own sovereignty,
5 to permit a power vested in the executive to continue to
6 be exercised, even if it would necessarily, a fortiori
7 if it might, have an impact on domestic legal rights.
8 Once one puts those basic propositions together, the
9 principle espoused by Lord Pannick, we submit is not
10 a solution or an answer to the problem in this case, it
11 simply raises the question. The question is: has
12 Parliament done so here? Has Parliament evinced
13 an intention to abrogate this prerogative? For that you
14 reach for the bespoke set of principles in De Keyser and
15 the following cases.

16 Lord Oliver in the Tin Council case, the Tin Council
17 case is in bundle B2 at tab 19. The context will be
18 well known to the court. The creditors claimed several
19 hundred millions of pounds from the United Kingdom in
20 its capacity as a member of the International
21 Tin Council. It was an organisation established by
22 treaty and the ITC was recognised under English law by
23 statutory order, but the order did not incorporate the
24 treaty under which the ITC was constituted.

25 But one of the bases on which the creditors sued the

1 government was that the treaty imposed liability on
2 state contracting parties, because under the treaty, the
3 ITC acted as agent for the member states. That argument
4 was rejected because the question of whether the ITC was
5 an agent for the member states was not justiciable in
6 the UK courts; a treaty was not incorporated; and to
7 decide what the treaty imposed liability on member
8 states would have meant that the treaty concluded by
9 the Crown had altered domestic law without the
10 intervention of the legislature. 511, B to C.

11 The principles which my learned friend alighted upon
12 is around about page 500. If we pick up the title of
13 the section within which it sits, it starts at 499, "The
14 principle of non-justiciability". Can I invite you just
15 to cast your eye down. The bit he specifically alights
16 upon is between B and C on page 500. Can I ask you to
17 put it in context, I won't read it out unless you want
18 me to, that first section starting under the heading,
19 "The principle of non-justiciability".

20 So that whole section between 499, E, and 500, D,
21 is, as it were, a background to the ruling that then
22 appears later in the judgment at 511, B to C, as I have
23 indicated. It is addressing the basic principles as
24 a lead-in to considering what is described at 499 F as
25 the area of operation of the principles of

1 non-justiciability, with a view to fining down those
2 issues as he then does at 501, B to E.

3 So this is part of a section that seeks to identify
4 with clarity the true nature of the issue arising in
5 this case. The important point is that he is not
6 addressing, still less saying anything to undermine the
7 possibility, that Parliament could choose the lead to be
8 exercised by the state, a prerogative power in relation
9 to treaties, the making of them or the withdrawal from
10 them, which might have an impact on rights. He is
11 simply not considering that issue at all.

12 THE LORD CHIEF JUSTICE: But the basic principle is, it is
13 reflected in the cases dealing with our adherence to the
14 European Convention before the Human Rights Act; that if
15 the Crown enters into a treaty, no rights can be derived
16 by citizens under that treaty as a matter of domestic
17 law and so it can't affect domestic law, so you don't
18 quarrel with that principle.

19 MR EADIE: I don't, I don't quarrel with that basic
20 principle.

21 THE LORD CHIEF JUSTICE: Okay.

22 MR EADIE: The issue in this case is whether Parliament has
23 continued to consent to the use of our prerogative, the
24 well established prerogative of withdrawing from
25 specific treaties, in the knowledge that the withdrawal

1 will create various legal effects within the system, or
2 may do, and I will come to precisely what legal effects
3 are created in due course.

4 But that is the relevant question here, and that
5 isn't a question that is answered by the basic
6 principle, which Lord Oliver sets out, which is
7 uncontroversial. As my Lord rightly points out, the
8 only point that is being then made by Lord Oliver here,
9 which one can get from many other cases, including the
10 ones my Lord has in mind, Queen v Lyons --

11 THE LORD CHIEF JUSTICE: All of that, yes.

12 MR EADIE: -- is simply that treaties are not
13 self-executing. That is the sentence. It might be
14 thought to be the punch line on this particular point,
15 which Lord Oliver is dealing with in the passage on
16 which my learned friend relies. He is simply saying in
17 a nutshell that the English legal system is juris and
18 treaties are not self-executing. Indeed, that is the
19 very point he makes in the sentence, I think immediately
20 after the passage my learned friend took you to; just
21 above C: treaties as sometimes expressed are not
22 self-executing.

23 That is a summary of the point he has made in the
24 previous sentences, no more, no less. It doesn't say
25 Parliament couldn't make them self-executing. And

1 indeed, and it is a point I will come back to in due
2 course, but he then makes the point, while we are here
3 we might as well just note it, it doesn't go directly to
4 this issue, but he then makes the point that the
5 position whether or not the entering into or withdrawal
6 from treaties, the question of whether that has any
7 effect in domestic law, is not straightforward.

8 But of course the basic position is that treaties
9 are not self-executing, they exist on the international
10 plane and require Parliamentary intervention before they
11 interpose rights into a domestic legal system. But as
12 all that line of case law before the ECHR became part of
13 domestic law through the interposition of the 1998 Act,
14 there were a whole series of potential impacts, and
15 subsequently recognised to be a whole series of impacts
16 that an action on the international plane can have on
17 domestic legal rights, even if they do not self-execute.

18 So our short submission in relation to Lord Oliver
19 is that one is quibbling with the principle established
20 by Lord Oliver. It is well known. It was well known
21 before the Tin Council case and has been repeatedly
22 adhered to thereafter. But neither that statement of
23 principle nor any of the subsequent case law expresses
24 or embodies anything other than the general principle.
25 The question that we are here addressing is whether or

1 not a specific prerogative such as withdrawing from
2 a treaty has indeed been abrogated; as I have said
3 repeatedly now, that is a question of ascertaining
4 Parliamentary intention. How do you judge that? You go
5 to De Keyser and the set of case laws that De Keyser
6 sets out.

7 So our case involves no injury to the statement of
8 common law of Lord Oliver. We simply submit that in our
9 case, Parliament has advisedly decided not to abrogate
10 the prerogative, and if and to the extent that the step
11 that would be taken by notification would or might have
12 an impact on to current legislative rights, Parliament
13 will need, in the usual way, to deal with that by
14 legislating.

15 I will come back to the various different effects,
16 if I may. Just on the scope and reach of the
17 Lord Oliver principle, I think in short my answer to the
18 Lord Oliver point was the one that my Lord, the Lord
19 Chief Justice anticipated might be coming which
20 I confess -- to accept the principle.

21 THE LORD CHIEF JUSTICE: But it is irrelevant.

22 MR EADIE: It simply doesn't address this issue.

23 THE LORD CHIEF JUSTICE: No, no, I follow that.

24 MR EADIE: There was a question about Walker v Baird and
25 whether or not Walker v Baird affected matters. I know

1 my Lord, Lord Justice Sales was interested in that,

2 having seen --

3 LORD JUSTICE SALES: Only in that Lord Justice Lawton,

4 I think it was, in Laker Airways referred to

5 Walker v Baird in a passage which Lord Pannick seemed to

6 be relying upon for some wider principle than that of

7 implied abrogation.

8 MR EADIE: My Lord, yes, we have copies of Walker v Baird.

9 LORD JUSTICE SALES: Yes, I think we were given that.

10 MR EADIE: Were you?

11 THE LORD CHIEF JUSTICE: Yes, indeed. Where do we put it?

12 MR EADIE: Everything seems to go into bundle E. I can't

13 remember what number we have got up to in bundle E, I am

14 afraid. Late 20s.

15 THE LORD CHIEF JUSTICE: If you put it in bundle E at the

16 end and give it a number. So it will be number 31.

17 MR EADIE: 31? I am grateful.

18 Before coming to the judgment, if you have that

19 there, you will remember what Lord Justice Lawton said

20 in the Laker case about this:

21 "The Secretary of State cannot use the Crown's

22 powers in this sphere in such a way as to take away the

23 rights of citizens; see Walker v Baird."

24 Our submissions, just before coming to the facts of

25 Walker v Baird, can I give you the submissions first.

1 The first submission is that Lord Justice Lawton's
2 judgment in Laker is not to be taken, and cannot
3 properly be taken, whether by reference to this
4 authority or otherwise, as being an espousal of a more
5 general principle. It is and was a straightforward
6 application of the De Keyser principles, as the judgment
7 makes clear, in the context of the Civil Aviation Act
8 1971. That is why, he said, the Crown's powers in this
9 sphere, we underline, that is in the particular context,
10 could not be used to undermine statutory rights.

11 The reason for that was straightforward De Keyser.
12 It was because the necessary implication of the
13 introduction of an inconsistent statutory scheme had
14 occupied the whole of the territory and led, indeed, to
15 the necessary implication that the Crown couldn't act in
16 any way other than consistently with it. So we don't
17 have any difficulty at all with the proposition that
18 Lord Justice Lawton relied upon, as long as it is
19 clearly understood what he was doing, which was to apply
20 the De Keyser principle.

21 Walker v Baird itself, we submit, is certainly of no
22 assistance to my learned friend Lord Pannick in
23 establishing his much broader proposition. As you see
24 if you go into the judgment, the facts, if I can
25 summarise them, were that a Royal Navy captain, Walker,

1 took possession of Baird's lobster factory allegedly in
2 order to enforce the terms of an agreement made between
3 the United Kingdom and France which prohibited new
4 lobster factories which had not been consented to by
5 both the French and the British authorities. You can
6 see that from page 495, the tolerably specific set of
7 facts from which to draw an extremely general principle,
8 but there is no sign of the general principle.

9 The Attorney General, who argued Walker's case,
10 conceded that the Crown, if you go to 497 and look at
11 the first full paragraph, could not sanction an invasion
12 by its officers of the rights of private individuals
13 whenever it was necessary in order to compel obedience
14 to the provisions of a treaty. That is, if you will,
15 the Lord Oliver point that treaties aren't
16 self-executing. That was common ground.

17 He contended for, in the passage that follows,
18 starting with "the proposition contended for", about six
19 lines into that first full paragraph on page 497, the
20 proposition, the more limited proposition that he
21 contended for, you see there set out.

22 Then you see what the judicial committee of the
23 Privy Council does not answer, I put that negatively,
24 that is in the sentence about two-thirds of the way down
25 the paragraph, beginning:

1 "Whether the power contended for does exist in the
2 case of treaties of peace~..." and so on.

3 They don't answer that question; they say it raises
4 grave questions. Their holding is encapsulated in the
5 single sentence at the very end of that paragraph:

6 "Their Lordships agreed with the court below in
7 thinking that the allegations contained in the statement
8 of defence do not bring the case within the limits of
9 the proposition for which alone Walker's counsel had
10 contended."

11 So the short point on Walker v Baird, we
12 respectfully submit, is that it doesn't support
13 Lord Pannick's broader principle; it is simply further
14 authority, if further authority was needed, that under
15 our dualist system, treaties are not self-executing. It
16 says nothing about the circumstances in which Parliament
17 was said to have abrogated the prerogative, nor does it
18 conflict with the De Keyser principles, neither in
19 itself or as applied by Lord Justice Lawton in Laker.
20 So that is a diversion to Walker v Baird.

21 THE MASTER OF THE ROLLS: The question he doesn't answer is
22 the question dealing with a situation where the
23 provisions of a treaty arrived at for the purposes of
24 putting an end to a state of war. That is the question
25 he is looking at there, in that specific situation.

1 MR EADIE: My Lord, yes.

2 THE MASTER OF THE ROLLS: He is not dealing with the more
3 general issue.

4 MR EADIE: He is not.

5 THE MASTER OF THE ROLLS: No, but the more general issue, it
6 may be said, is that in the first sentence of the
7 paragraph you just read out, which wasn't in dispute.
8 What was in dispute was the effect of a treaty aimed at
9 terminating a war.

10 MR EADIE: Yes, it was conceded -- the point about
11 'self-execution was conceded. We respectfully submit it
12 doesn't establish a broader proposition that says in
13 some way, shape or form, either the Crown could never be
14 left with a power by Parliament, the exercise of which
15 might have an impact on rights, nor does the case
16 establish any departure from the De Keyser line of
17 principles and the right test, which is: whether or not
18 Parliament has done so is to be judged by asking whether
19 it has done so expressly or by necessary implication.
20 It simply doesn't advance this.

21 THE LORD CHIEF JUSTICE: If one looks at the argument at
22 page 492, where it would appear that the
23 Attorney-General in those days could appear for private
24 litigants, it is quite clear that the answer given by
25 Mr Webster, that it is a very narrow point. It is the

1 last paragraph on the page. He is not contending that
2 you can do anything under a treaty; it is only to deal
3 with the peace treaty.

4 MR EADIE: Yes. So we respectfully submit that
5 Walker v Baird, the only reason for going to
6 Walker v Baird was to see whether it could be relied
7 upon as authority for all of the broader propositions
8 which my Lord, Lord Pannick suggests.

9 THE LORD CHIEF JUSTICE: Okay.

10 MR EADIE: My Lord, I said that Lord Oliver was also, with
11 respect, right to note that which lots of other courts
12 have noted as well, which is that international law in
13 the form of treaties entered into in the exercise of the
14 prerogative can indeed have impact into domestic legal
15 rights. That is a principle which accords consistently
16 with the general point that treaties are not
17 self-executing. That doesn't mean they don't have or
18 can't have some really quite significant impacts into
19 rights that exist domestically.

20 So, for example, they can have effect because they
21 shape the interpretation that a court puts on any
22 legislative provision. That is a well-established use
23 of international treaties. If legislation is passed to
24 give effect to an international treaty entered into
25 under the prerogative without the prior permission of

1 Parliament, that can have an effect upon and you see all
2 of that contained very clearly and very clearly set out
3 by Lord Hoffmann in the Lyons case. I am not going to
4 go to it now, paragraph 27, bundle B2, tab 30.

5 LORD JUSTICE SALES: I have slightly lost the thread of the
6 argument. I understand the principles you are referring
7 to, but how do they help us in this case?

8 MR EADIE: My Lord, they don't touch the approach which
9 respectfully recommend to the court, which is the
10 De Keyser principle, but I will come in due course to
11 try and analyse a little bit more closely the true
12 nature and scale of the effect of actually starting the
13 process by giving the Article 50 notification on
14 domestic legal rights. It is quite important, we
15 respectfully submit, to recognise that for that purpose,
16 given one is trying to do that nuanced analysis, to see
17 that the principle that English law is dualist does not
18 mean, even at its height, that things done by the Crown
19 in the exercise of the prerogative on the international
20 plane cannot have really quite a significant impact on
21 rights, even if treaties are not self-executing.

22 LORD JUSTICE SALES: Thank you.

23 MR EADIE: So that is one way, the Lyons example, or the
24 well known example of the Crown entering into
25 international -- or taking steps on the international

1 plane which have an effect on, direct and potentially
2 adverse effect, on domestic legal rights. The Assange
3 case is another --

4 LORD JUSTICE SALES: I am sorry, just on that, the principle
5 you have just referred to doesn't take rights away, it
6 just informs the interpretation to be given to statutory
7 provisions that create rights.

8 MR EADIE: It does. And the limits of all of these impacts
9 is -- are constitutional, as I accept. I mean, the
10 interpretation of rights and legislation or obligations
11 imposed by legislation informed by international
12 conventions, is an aspect of that. It doesn't take
13 rights away. But it nevertheless, it is an example of
14 steps being taken on the international plane to have
15 a direct and immediate impact. It is only for that
16 limited proposition --

17 LORD JUSTICE SALES: Yes, thank you.

18 MR EADIE: The Assange case is another example. I am not
19 going to go to it now, but you will recall the facts of
20 it. It is in bundle E, tab 14. There the Supreme Court
21 construed the 2013 Extradition Act in accordance with
22 the EU framework decision. The interest, potentially,
23 of that is the EU framework decision was not a species
24 of international act or agreement which had any sort of
25 direct effect under the 1972 Act. Nevertheless,

1 the Crown in the exercise of the prerogative votes for
2 or signs up to the framework decision, and the
3 consequence of that is that the courts approach the
4 particular legislative provision in a particular way;
5 and potentially having quite a significant impact on the
6 argument, at least being run by Assange in that case,
7 about the meaning of judicial authority in that
8 legislation.

9 Lord Oliver himself referred to, when he was dealing
10 with this point, ie that some steps taken on the
11 international plane by the Crown in the exercise of the
12 prerogative can have a more or less immediate impact on
13 domestic legal rights. He referred to a case which is
14 in the bundle, and it is referred to in our skeleton
15 argument. I will just refer to that very briefly, if
16 I may. It is the Post Office v Estuary Radio case,
17 bundle B1, tab 12. You see the nature of the issue from
18 the leading judgment given by Lord Justice Diplock, as
19 he then was. Sorry, it is the judgment of the court.
20 Lord Justice Diplock giving the judgment of the court.
21 It starts at page 752 on the internal numbering.

22 So the issue here was whether or not it was lawful
23 for a radio station, in effect, to continue to broadcast
24 from where it was in the Thames estuary. The directive
25 was whether or not it was situated in the internal

1 waters of the United Kingdom, as you see in 752, D to E.
2 If it was there situated, then the Post Office were
3 entitled to an injunction to in effect shut down
4 Red Sand Tower which continued to broadcast. You see
5 letter G on page 752.

6 What you see in a nutshell is that the basic
7 prohibition on broadcasting in the United Kingdom or in
8 the territorial waters and so on was contained in the
9 Telegraphy Act of 1949. After that had been on the
10 statute books for some years, the Crown entered into, in
11 the exercise of its prerogative -- or the Crown in
12 Council, and the exercise of the prerogative, redefined
13 the territorial waters of the UK so as in effect to
14 bring the transmitting power within the previously
15 formulated statutory definition.

16 The reasoning which led the court to conclude that
17 the consequence of that prerogative step had in effect
18 been to alter the law, you see from 753. In particular,
19 the second full paragraph on that page, half way down.
20 Can I just invite you to read from there to the letter D
21 on the next page, rather than my reading it all out.

22 (Pause)

23 My Lords, of course neither this case, nor any of
24 the other examples we give, are directly in the sphere
25 of the issue that you have to consider here, but what

1 they do illustrate is that one needs to exercise pretty
2 considerable caution before simply assuming that there
3 is out there some broad principle that the prerogative
4 cannot be exercised on the international plane if the
5 effect of exercising it would be to create impact into
6 domestic legal rights.

7 The position is actually a great deal more subtle
8 than that. It is more subtle than that in point of
9 principle but also in point of fact, because there are
10 numerous examples of situations in which people no
11 doubt, as they are perfectly entitled to do, in which
12 they organise their affairs, both natural and legal
13 persons, by reference to unincorporated treaties which
14 could then be renounced or withdrawn from by the Crown.

15 So, for example, when everyone has a bilateral
16 treaty situation, as you often do in the context of all
17 sorts of things to do with pensions, social security,
18 removal of visa requirements, and we have given some
19 examples in the skeletons and indeed in the bundles
20 where, to take a visa example, individuals might well
21 have relied on ease of movement because of family
22 connections and organise their lives or businesses
23 accordingly, and then the Crown withdraws from the
24 treaty, the reciprocity goes and then they no longer
25 have the rights on which they have previously been

1 operating, albeit rights in that case afforded by the
2 foreign state to allow them in.

3 An example of that in the visa field we have given,
4 between United Kingdom and Morocco, in bundle C1,
5 tab 32, if anyone is concerned about that. One can take
6 that into the sphere of categories of commercial debt.
7 Under some of those agreements, the United Kingdom acts
8 on behalf of UK companies or individuals to whom money
9 is owed by another state and hasn't been paid by that
10 state.

11 Ultimately, that is a matter of treaty negotiation
12 and those treaties, once entered into, can be either
13 amended as they frequently are, for example, to alter
14 the rate of interest which is paid, or withdrawn from
15 entirely.

16 Again, to give an example in our skeleton and in the
17 bundle, Madagascar, bundle C2, tab 40. We have referred
18 to the skeleton at paragraph 36 and footnote 11 to
19 double taxation treaties, which obviously impact on the
20 rights and liabilities of individuals, and are
21 periodically renegotiated without any prior
22 Parliamentary approval. Examples of that in operation,
23 bundle C, tab 36, 48 and 49.

24 But the point that is made on the back of all these
25 is that none of this is dispositive, but it does

1 indicate that the prerogative, ie the exercise of the
2 Crown's power on the sphere of international relations,
3 can have real practical and sometimes real legal impacts
4 on to rights and obligations, and there isn't anything
5 terribly constitutionally surprising about that.

6 The correct approach is to analyse whether
7 Parliament has set its face against the exercise of the
8 prerogative in any particular sphere or has imposed
9 control. That is ultimately the question. But one
10 cannot derive from the authorities, we submit, any sort
11 of broad and absolute proposition of the kind on which
12 my learned friend Lord Pannick sought to build his case.

13 We respectfully submit, therefore, that the
14 Lord Oliver principle is entirely unsurprising and
15 uncontroversial, but merely begs the relevant question,
16 which is how does De Keyser work in our context with our
17 legislative scheme. There isn't any broad, general
18 proposition that steps on the international plane and
19 the exercise of the prerogative are unlawful, if and to
20 the extent that they either do or they might have
21 an impact on domestic legal rights.

22 THE MASTER OF THE ROLLS: Can you give me an example in
23 practice of how a double taxation treaty negotiation,
24 withdrawing a benefit under it without legislation,
25 could be applied by analogy here? Can you give me,

1 rather than taking the general principle, can you give
2 me an exact example of such a situation.

3 MR EADIE: Of the situation of the double taxation treaty?

4 THE MASTER OF THE ROLLS: You are relying on the double
5 taxation principle as somehow supporting the
6 proposition. I am not baulking at that, I just want to
7 a concrete example. Because for example in my own mind,
8 if you have a double taxation agreement, it might be
9 something along the lines, so far as British citizens
10 are concerned, of saying that you can make a deduction
11 for British taxes in relation to something that occurs
12 elsewhere, your company or whatever, operating in some
13 foreign country.

14 MR EADIE: Yes, in Malta. The examples I gave you, the
15 documents I gave you are Maltese by way of illustration.

16 THE MASTER OF THE ROLLS: There, let's assume that the Crown
17 negotiates something which involves a curtailment of
18 that right. It would still need Parliamentary
19 intervention to remove the right, by way of some finance
20 bill, from a person in this country to make the
21 deduction. That would be necessary. And indeed
22 Parliament might, one would have thought, Parliament
23 might say: well, actually we don't agree with the
24 government that this deduction should be disallowed, we
25 would like to continue it.

1 MR EADIE: Yes.

2 THE MASTER OF THE ROLLS: I just want to understand you how
3 say that a double taxation agreement would serve to
4 support the general argument that you are advancing.

5 MR EADIE: My Lord, I think the answer to that is that the
6 double taxation treaties do indeed involve -- I think
7 they involve a bespoke process by which you do have to
8 go back to Parliament, but afterwards. Much of this --
9 there is therefore a sequencing involved. What happens
10 in terms of sequencing is that the double taxation
11 treaty is renegotiated or different provisions are
12 arrived at. Then, as my Lord says, there is
13 interposition into domestic law and Parliament reacts.

14 But the fact of the matter is and the point is that
15 the royal prerogative has been exercised to create, as
16 it were, the new agreement, which if Parliament then
17 said: we don't like that; which they would be
18 constitutionally perfectly entitled to do because they
19 are supreme, they do that afterwards.

20 THE MASTER OF THE ROLLS: Yes.

21 MR EADIE: So, as it were, it could just as much be said in
22 that context as it could in ours, that there is
23 preemption by the exercise of the prerogative right
24 there, which is to renegotiate and enter into a new --
25 double taxation or whatever it might be, agreement. It

1 doesn't preclude Parliament from then saying: well,
2 actually, we don't much like the look of it; nor does it
3 necessarily preclude -- maybe my Lord is right in terms
4 of that specific context -- Parliament having
5 potentially necessarily to alter the domestic scheme to
6 take account of that new arrangement~--

7 THE MASTER OF THE ROLLS: All I am saying is that all that
8 shows, that particular example, is that a Parliamentary
9 intervention -- in order to give effect to what has been
10 negotiated by the Crown and its prerogative power, in
11 order to give effect to it, Parliamentary intervention
12 is necessary and it is substantive. It is not
13 simply: well, there is nothing else we can do; it is
14 actually a substantive exercise of Parliamentary
15 supervision. That is the point I am making.

16 MR EADIE: My Lord, yes. I don't mind that, if I can put it
17 that way. For the purposes of my argument, I don't mind
18 that because in that context, whether it intervenes
19 substantively or not to alter things, the fact of the
20 matter is that the prerogative has been exercised in
21 that way. Now, that isn't an example of, as it were,
22 having a direct and immediate impact on to domestic law;
23 it is an example of the Crown exercising its power on
24 the international plane to enter into an agreement which
25 it then, as it were, presents to Parliament to say yes

1 or no. If it says no, then the Crown has to go back and
2 renegotiate, or put up with the fact that it would be in
3 breach of its international obligations.

4 THE MASTER OF THE ROLLS: Yes.

5 MR EADIE: If one gets to how the rights are going to work
6 here, and how it is all going to pan out when the
7 process starts to go through, you have a whole variety
8 of different potential impacts which are of some
9 subtlety. I don't want to get too far ahead in the
10 argument, but one has in our context, just as a basic
11 taxonomy, a set of rights that would require legislative
12 intervention directly, were they to be altered, because
13 they currently sit on the domestic legal statute book,
14 and they would have to be altered by primary legislation
15 which Parliament intervenes to do.

16 You have another set of rights that currently exist
17 under EU law which might or might not be replicated.
18 That would depend on the outcome of the negotiations,
19 whether an agreement is reached and so on. We know that
20 if an agreement is reached, you have CRAG, the
21 legislation that says you have to go back before you
22 ratify; that legislation is in relation to agreements.

23 Then you have a third lot of rights, which is why my
24 learned friend Lord Pannick liked this lot more than the
25 other lot, where in effect the right which is

1 an incident of being and continuing to be a member of
2 the club is hollowed out. I will come back to those,
3 but there are a whole variety of different ways in which
4 those rights would ultimately fall to be dealt with.

5 My limited point in relation to double taxation
6 treaties, accepting all of my Lords' points, is that
7 that is an example of the Crown exercising a prerogative
8 to create at least a degree of -- preemption is not the
9 right word, but it enters into the agreement in
10 a sequence. It then requires legislative intervention,
11 substantive or otherwise.

12 I say requires, but you will understand why I use
13 that word deliberately loosely. Because Parliament is
14 supreme, it can always say: you can enter into whatever
15 agreement you want, I don't like it; and you, the Crown
16 will then have to go back and put up with being in
17 breach of your international obligations or renegotiate
18 the agreement.

19 As I say, the broader point that I make, and it is
20 a limited point in relation to this aspect of it, is
21 don't be seduced, as it were, by the idea that says: if
22 the Crown exercises its prerogative on the international
23 plane, and that more or less has an impact on current
24 domestic rights, that fact in itself renders the
25 exercise of the prerogative unconstitutional and in some

1 way unlawful.

2 I think that discussion has taken me into the third
3 of the topics that I was going to deal with. I have
4 done the relevant question and the framework of
5 principle. I have done the Lord Oliver principle, and
6 I was going to make some brief submissions in relation
7 to this area, which is the relationship between
8 the Crown and Parliament in this sphere. I have made
9 the first submission, which is the fact that executive
10 action on the international plane may provoke, or
11 require, using the concept loosely, Parliament to change
12 domestic law rights as a result of commitments entered
13 into or indeed withdrawn from on the international
14 plane, does not mean that those existing prerogative
15 rights are abrogated by necessary implication.

16 The standard position, and I will make submissions
17 in support of it, is that save where Parliament has
18 otherwise provided, the Crown does indeed act on the
19 international plane. It negotiates, it commits to, or
20 withdraws from treaty obligations all the time, and when
21 that power is exercised, it is exercised by the Crown on
22 behalf of the United Kingdom and all of its
23 institutions, including Parliament.

24 It is a point that is echoed in the judgment of
25 Lord Denning in the Blackburn case. Bundle A, tab 9, if

1 you would, very briefly. It is a short passage so can
2 I just invite you to highlight it. Bundle A, tab 9. We
3 will see that this was a case in which the
4 Court of Appeal rejected a challenge, again in the EU
5 context or the EEC context as it then was. (inaudible)
6 Ground principle, but I don't want the case at this
7 stage for that controversial proposition; I want it for
8 the more limited one. 1040, internal page number if you
9 would, just above B:

10 "The treaty-making power of this country rests not
11 in the court but in the Crown, that is Her Majesty
12 acting upon the advice of her ministers, when the
13 ministers negotiate and sign a treaty, even a treaty of
14 such paramount importance as this proposed one, they act
15 on behalf of the country as a whole. They exercise the
16 prerogative of the Crown ... cannot be challenged or
17 questioned in these courts~..."

18 But correctly recognises there, we respectfully
19 submit, that when that power is exercised on the
20 international plane by the Crown, it is doing so on
21 behalf of the UK as a whole, the country as a whole,
22 including all of the relevant institutions and including
23 Parliament. It is back to the same theme, that the
24 prerogative in all of its forms, including specifically
25 in this form, exists as a result of the permission,

1 express or implicit, of Parliament. The Crown
2 therefore, on the international plane, is the
3 personification of the state.

4 What then happens is that once that has been done,
5 Parliament then gives effect to the Crown's actions by
6 domestic legislation, where necessary, in order to
7 comply with international obligations. So this state of
8 affairs, we submit, is a constitutional joint
9 enterprise, if you will.

10 The second and consequential point is that the
11 standard position, as I have just described, is not
12 an abrogation of Parliamentary sovereignty, it is not an
13 abrogation of it either before or after the exercise of
14 the prerogative on the international plane. It is
15 simply -- the constitutional position is as long as it
16 hasn't taken it away, pursuant to De Keyser principles,
17 Parliament has entrusted to the Crown the authority to
18 make the primary decision on entry or withdrawal from
19 treaties on behalf of the whole country, as Lord Denning
20 wrote. And Parliament is then playing its domestic part
21 in giving effect to that decision-making pursuant to
22 that trust proposed in the Crown.

23 To the extent that Parliament wishes to control that
24 process, it has ex post and ex ante ability to do that.
25 It has ex ante ability to do that, pursuant to De

1 Keyser, that is the De Keyser question; and it of course
2 in constitutional terms has ex post control over that,
3 because it is open to Parliament because it is
4 sovereign, simply to say: well, we may have entered into
5 that agreement but we are not going to give effect to
6 it. We are going to take a different decision.

7 The third point, in the context of the EU, EU law
8 and the EU legislation, there are examples of sequencing
9 involving action by the executive under the prerogative,
10 even in that context, followed by Parliament bringing
11 domestic law into line through legislative action. So
12 there is nothing surprising about it. It is the
13 Lord Oliver not self-executing principle in practice.

14 But none of that expression of principle, or that
15 basic proposition that treaties aren't self-executing,
16 means or implies that legislative permission is needed
17 before, as a sequencing matter, before making or
18 unmaking the treaty, or before taking any other step on
19 the international plane.

20 The fact that Parliament will need to legislate if
21 it is to incorporate the matters covered by a treaty
22 into domestic law doesn't limit, therefore, implicitly
23 or otherwise, the availability of that power in the
24 first place, without legislative authority, for the
25 reasons that I have given.

1 We now know, and it is part of the domestic scheme
2 which you will need to consider in considering the
3 De Keyser principles, that there is now a specific
4 limitation contained in section 20 of CRAG, the
5 Constitutional Reform Act, for treaties generally, and
6 in the European Union Act, for the main EU treaties,
7 that require Parliamentary intervention in the various
8 respects that they specify.

9 Again, that doesn't imply anything about sequencing,
10 but one can see a whole series of different examples,
11 even in the EU context, where that sequencing is
12 evident.

13 Take directives as an example. The government goes
14 off and negotiates in the Council of Ministers or
15 whereever directives are formulated, and arrives at
16 a position, votes in favour of the particular directive.
17 The directive is then made at the EU level and comes
18 back to domestic law for its result to be implemented.
19 That is what the nature of directives is. But it starts
20 with the process of the exercise of prerogative powers
21 by the Crown over in Luxembourg. Brussels, I am sorry.
22 And a framework decision is -- it ends up in Luxembourg.
23 So that is directives.

24 But framework decisions, again we saw the example in
25 Assange, is another example. Perhaps even a starker

1 example. Because framework decisions are not, as it
2 were, part of the scheme of things that directly become
3 part of domestic law, or when they are entered into,
4 automatically become an obligation as a result. The
5 Assange case and the European arrest warrant, and all of
6 the drama surrounding that, that is a good example of
7 the sequencing, of the Crown being trusted by
8 Parliament. It goes off and negotiates the framework
9 agreement.

10 Then there is an obligation -- if that is what
11 the Crown has agreed to on the international plane,
12 there is then a obligation to implement that through
13 domestic legislation, but afterwards it doesn't bind the
14 hands of the Crown, it doesn't prevent them in
15 constitutional terms, that is simply the sequence in
16 which the usual practice sits.

17 For those reasons, we submit, this is perhaps the
18 punch line of the whole of this section, it isn't
19 offensive to Parliamentary sovereignty and it is not
20 a basis for excluding the prerogative and the Crown to
21 act on the international plane in those ways, that those
22 actions by the Crown on the international plane will
23 provoke or require -- loosely again, subject to
24 Parliament's right to disagree -- Parliament to make
25 changes to domestic legislation, whether by introducing

1 wholly new legislation or by amending legislation that
2 currently exists or by affecting the rights, and so on.

3 My Lord, I said as part of the sequence of the
4 argument, the steps in the argument, the next step was
5 going to be there were other features of this case.
6 There are features of this case tending against, we
7 submit, the exclusion of the prerogative, or the
8 abrogation of the prerogative.

9 Again, all of this is to some extent an alternative
10 submission, because the primary submission the Attorney
11 made, as you will recall, was that the Rees-Mogg case is
12 authority in this particular context for the proposition
13 that if you are going to abrogate, because of the scheme
14 and depth and detail of the control that Parliament has
15 chosen to impose, if you are going to abrogate in the EU
16 law context, only express will do.

17 So all of this is alternative in the sense that it
18 goes to demonstrate that there are other good reasons
19 why necessary implication doesn't work. The Attorney
20 dealt in some detail with the nature of the legislative
21 scheme. I don't know whether it has yet found its way
22 up to my Lords, and I am sorry to bombard you with yet
23 more material, but you should have, amongst the pack of
24 materials we had, and perhaps we can locate them now so
25 you know where they are going in the bundle, do you have

1 a copy of the European Union Amendment Act 2008? The
2 explanatory note?

3 THE MASTER OF THE ROLLS: The explanatory notes, yes.

4 MR EADIE: I am grateful. Could that go into bundle A
5 tab 3, where the Act itself sits? That may be the most
6 logical place.

7 THE LORD CHIEF JUSTICE: I don't have a copy. When did it
8 come? If you have another copy that would be helpful.

9 MR EADIE: Another copy of the explanatory note?

10 THE LORD CHIEF JUSTICE: Of the explanatory memorandum.

11 MR EADIE: Sure.

12 THE LORD CHIEF JUSTICE: I think I know. I may have put it
13 in. Don't worry, I now know where to put it.

14 MR EADIE: We have the whole little clip, there is
15 Walker v Baird --

16 THE LORD CHIEF JUSTICE: No, I can find where it has gone.
17 Don't worry. Yes.

18 MR EADIE: I was proposing that this one, that is the
19 explanatory note, sits behind or in front of, wherever
20 you want, the tab where the Act sits, which is tab 3.
21 While you are doing that, just to get rid of the next
22 two, you will see that there are two academic articles
23 sitting in this clip. Those are the final two
24 documents. Do you have them?

25 THE LORD CHIEF JUSTICE: Yes. Are we going to have

1 an exchange of academic articles?

2 MR EADIE: I am sure you are. But we were rather preempting

3 Lord Mance and the Supreme Court.

4 THE LORD CHIEF JUSTICE: The last time we had an exchange of

5 articles, I think it was in relation to bits of

6 international law. We had volumes of it, and I don't

7 know if there are volumes on this~--

8 MR EADIE: Sometimes on international law you do need that,

9 because you have to do it for the purposes of the

10 customary international law arguments. We have tried to

11 restrict it entirely randomly and unselectively on the

12 basis that these two help us most.

13 THE LORD CHIEF JUSTICE: Very good.

14 MR EADIE: They are from respected academics, I should say.

15 One is Paul Craig and the other one is Gavin Phillips

16 who is a professor of law at Durham.

17 THE LORD CHIEF JUSTICE: Okay.

18 MR EADIE: They are of interest, because they are at least a

19 discussion of some of the issues with which the court

20 has been troubled over the last it few days.

21 THE MASTER OF THE ROLLS: Are they going to the back of

22 bundle E?

23 MR EADIE: Yes, they can go to the back of bundle E.

24 THE LORD CHIEF JUSTICE: Yes.

25 MR EADIE: We would ask you to cast your eye over that Gavin

1 Phillips article, and at least in relation to Paul
2 Craig, quite a lot of the beginning sections, you don't
3 have to worry about at all, because they are all history
4 and how it gets there. There is a bit at the end which
5 is interesting on non-justiciability, Article 50.

6 The reason, sorry, to come back, once you have
7 finished the bundling exercise, you will recall that the
8 Attorney made the submission to you that the 2008 Act
9 was an important part of the legislative progression,
10 because it expressly approved the treaty which
11 established the Article 50 procedure.

12 The reason for inviting you to just note the
13 explanatory notes as well is because when deciding what
14 level of Parliamentary call back Parliament wanted to
15 have in relation to alterations and rights under the EU
16 scheme, in deciding that point, which is what the 2008
17 and 2011 Acts are doing, this is important because there
18 is Article 50. It is introduced by Lisbon. It is the
19 first time it sits there and it is introduced as
20 providing the specific withdrawal power and this is not
21 one of the matters which Parliament has decided, despite
22 having called other things back, is not one of the
23 matters that it decided to call back.

24 The significance of the explanatory note is to
25 scotch any suggestion that Parliament was in some way,

1 shape or form operating with its eyes closed and it is
2 all jolly complicated. You will see in the explanatory
3 note by way of background, if you go to page 2 of that
4 document, in the fourth bullet point on the page on
5 page 2, this feature of Lisbon is being specifically --
6 Parliament's attention is being specifically drawn to
7 that specific feature.

8 LORD JUSTICE SALES: I mean, if the royal prerogative has
9 already, in a material respect, been withdrawn by the
10 1972 Act, I hadn't understood up to now, but you were
11 saying that it was restored by the 2008 Act?

12 MR EADIE: Sorry?

13 LORD JUSTICE SALES: If the royal prerogative in its
14 material respect has been abrogated by the 1972 Act,
15 I hadn't understood that it was the Crown's argument
16 that it was somehow restored by the 2008 Act.

17 MR EADIE: Well, I think the Crown's argument is that it
18 wasn't abrogated by either.

19 LORD JUSTICE SALES: Absolutely, yes, but assume against
20 yourself just for the purposes of argument. It has been
21 lost in 1972. Can you just help us? I hadn't
22 understood that you were saying that it bounces back in
23 again in 2008.

24 MR EADIE: I confess, I am sure my Lord is right, I don't
25 recall having run that argument in writing---

1 LORD JUSTICE SALES: Right. Are you running it now? I am
2 trying to understand why we are going to this Act.

3 MR EADIE: Because the thrust of the submissions that you
4 are receiving on the legislative scheme, not merely was
5 it not withdrawn in 1972, but there were repeated
6 opportunities to decide to call back~--

7 LORD JUSTICE SALES: Right.

8 MR EADIE: -- this.

9 LORD JUSTICE SALES: But if it wasn't withdrawn in 1972,
10 I think the only other candidate we had for it being --

11 MR EADIE: The 2011 Act where it was said that it wasn't, so
12 this would form part of the context~--

13 LORD JUSTICE SALES: It is in that context that we are being
14 taken, yes.

15 MR EADIE: I think it probably is. I am not sure whether we
16 have formally thought about whether or not we want to
17 run it as an alternative argument if we are wrong on
18 1972. We respectfully submit the right approach is to
19 look at the whole scheme of over-elaborating it, and
20 then you say as, of today, what has Parliament
21 decided --

22 THE LORD CHIEF JUSTICE: I think it runs in two arguments,
23 one, the prerogative, and two, the argument that the
24 Attorney made as to the scope of what the 2015 Act did.

25 MR EADIE: My Lord, yes.

1 THE LORD CHIEF JUSTICE: It is relevant to that, as well.

2 MR EADIE: It is.

3 THE LORD CHIEF JUSTICE: Okay.

4 MR EADIE: It is. As I said, you will appreciate, to pick
5 up a point that was made by Mr Green this morning, that
6 we don't accept the suggestion that in some way, shape
7 or form there is delegated authority, as it were, by
8 Parliament in the formal and express sense. But that is
9 in essence the thrust of the point that was being made
10 by the Attorney this morning; namely, there is the
11 prerogative, it is pre-existing, has Parliament
12 abrogated it, applied the De Keyser principles; answer,
13 no. So you have Parliamentary permission to continue to
14 do those things which Parliament has decided it doesn't
15 want and it has done quite a lot of calling back to
16 itself, this is not one of them.

17 THE LORD CHIEF JUSTICE: Okay, yes.

18 MR EADIE: That is the only reason for showing you the
19 explanatory note. This point about Article 50 having
20 introduced these specific matters did not pass unnoticed
21 by Parliament. It was specifically drawn to their
22 attention in the explanatory notes and they nevertheless
23 decided not, despite doing other things for call, they
24 decided that this was not one of those things that they
25 wanted.

1 The same point, just before getting to the 2015 Act,
2 and I am trespassing on grounds already covered, again,
3 a succession of submissions were made this morning by Mr
4 Green on the 2011 Act and in relation to that 2011 Act,
5 we respectfully submit that it is as good an example as
6 anything of a piece of legislation where there is
7 a detailed scheme of very specific decisions being
8 called back to Parliament for their perusal and
9 authorisation regarding the steps being taken on the
10 international plane. Again, not withdrawn. No
11 reference to withdrawal. The giving of Article 50
12 notification would not be a replacement of the TEU, to
13 use the language of that Act. It deals in any event
14 with agreements and if and when the point is reached, at
15 the end of the two-year period, that there is agreement,
16 then in all probability the CRAG mechanism for
17 authorisation from Parliament or the CRAG mechanism for
18 Parliamentary oversight will be triggered. But the key
19 point is it is only the end of that process.

20 THE LORD CHIEF JUSTICE: I think, at some stage, I want to
21 understand what is the scope of the executive's power
22 under Article 50. But come to it when you want to. And
23 whether there is a difference between the giving of the
24 notice and the conclusion of the agreement, and whether
25 the conclusion of the agreement has to be expressly

1 authorised by Parliament. I think we need clarity.
2 I think that has to be clarified, because the
3 construction, you know, the approach to Article 50 must
4 depend on what the Crown is entitled to do. And I don't
5 think you can just say well, you know, the Crown might
6 go back and do it in the subsequent stage. That may be
7 acceptable in another place. But it is not here,
8 because it goes to the analysis of the article.

9 MR EADIE: Yes, I will certainly --

10 THE LORD CHIEF JUSTICE: As I said to the Attorney this
11 morning, this is not an easy question.

12 MR EADIE: No.

13 THE LORD CHIEF JUSTICE: I did want to allow you, all of
14 you, time to think about it.

15 MR EADIE: Yes. My Lord, can I put down a general
16 reservation as it were? I am aware that there are some
17 questions that have already been thrown up which raise,
18 as it were, the requirement for careful and potentially
19 nuanced answers. I have in mind particularly, for
20 example, the Vienna Convention on the law of treaties
21 issues---

22 THE LORD CHIEF JUSTICE: Of course.

23 MR EADIE: We may, if we are allowed to, reserve a right, as
24 it were, to deal with some of those more difficult
25 points in writing.

1 THE LORD CHIEF JUSTICE: Not this one. This one is
2 fundamental.

3 MR EADIE: No.

4 THE LORD CHIEF JUSTICE: The Vienna treaty one, it is more
5 a question of law. This is a very fundamental point, or
6 may be a fundamental point as to how Article 50 is
7 interpreted.

8 MR EADIE: Yes. That is the 2008 Act. The 2011 Act, the
9 Attorney addressed you on. And again, the 2015 Act
10 isn't just, as it were, part of the introductory
11 background to this, and is in part a thoroughly
12 important part of the overall constitutional scheme,
13 which is part of the reason for taking you to the
14 Lord Bingham point and the Northern Irish case of
15 Robinson as I did this morning.

16 The 2015 Act, make no mistake about it, was
17 a Parliamentary decision that a binary issue should be
18 put to the people upon which they should vote. Whatever
19 else may be said about the 2015 Act, it is perfectly
20 clear that in passing that piece of legislation,
21 Parliament contemplated the possibility that the very
22 mechanism which existed for the taking of the first step
23 in that withdrawal process, namely the giving of the
24 Article 50 notice, would be taken. To the extent that
25 my learned friend's submissions drift into a challenge

1 to the withdrawal as well as the notification, the
2 closer they drift to those rocks, the closer they are to
3 inviting the court to say: well, you have to do
4 something which requires you to go back to Parliament
5 for the purposes of getting them to re-address the very
6 question which was the subject of 2015 referendum.

7 THE LORD CHIEF JUSTICE: Mm-hm.

8 MR EADIE: So those are the first two of the features, we
9 say, the 2008 and 2015 Act, the two features that tend
10 against the exclusion of the (inaudible). Thirdly, and
11 again, I am not going to expand upon this because the
12 Attorney took you through it all, the history of
13 Parliamentary intervention and the use of prerogative
14 powers more generally to make treaties or withdraw from
15 treaties.

16 The fourth of the features is, again I have
17 mentioned it in passing, but to make the point directly,
18 the giving of notification merely starts a process and
19 has no immediate effect in domestic law. I will come to
20 work out more directly what the effects may be, but it
21 starts the process. If one is using the gun analogy, it
22 is the starting gun. The point to which this is going
23 is that if one approaches the issue, as we respectfully
24 suggest you should do, by asking the necessary
25 implication questions, if you get past Rees-Mogg, you

1 are into the territory of De Keyser, it becomes a great
2 deal less likely that the prerogative would be abrogated
3 or excluded if the challenged action, here notification,
4 is in very significant parts remote indeed from the
5 asserted constitutional vice.

6 In other words, the more steps that sit between the
7 act complained of and the constitutional vice
8 identified, namely presenting Parliament with
9 a preempted position, the less likely it is that
10 Parliament can be taken, necessarily, but impliedly, to
11 have removed the power to take that step.

12 We know that the Article 50 process involves
13 a series of stages. The act of notification under
14 Article 50(2) merely starts the formal process of
15 negotiation. But the negotiations will then ensue. It
16 is at least worth considering those. The negotiation of
17 treaties, just as their conclusion and the withdrawal
18 from them, is a matter of the prerogative. Unless one
19 is going to say: well, you can't exercise that
20 prerogative without prior Parliamentary authority in
21 some shape or form; which takes one perilously close to
22 the opposition motion that was debated last week, unless
23 one is going to say that, then the argument becomes
24 difficult. Because if you accept the prerogative exists
25 to allow for negotiation, the logic of that acceptance

1 means that it can't be said: well, you create the
2 constitutional vice and therefore the unlawfulness and
3 therefore the implicit abrogation because you are
4 locking, effectively locking on to a path, the end
5 result of which might be or would be the change in
6 domestic law.

7 And the government, in the exercise of the
8 acknowledged power, prerogative power to negotiate,
9 might well take steps, and might well take steps which
10 are a great deal more significant than merely firing the
11 starting gun in the course of those negotiations. It
12 might decide in relation to a particular set of rights
13 that currently exist, it doesn't feel able in the
14 negotiations to advance a position under which they
15 would survive. If they have power to do that, how can
16 it be sensibly be said that they don't have power to
17 even start the process? The Article 50 notification is
18 the formal invitation, in effect, to begin the dance.
19 But the dance then has to -- and during the course of
20 those negotiations, as I said, intermediate positions
21 will be taken.

22 Why, on the logic of my learned friend's case, is
23 prior primary legislative authority not required before
24 the government, as it were, takes a starting position on
25 negotiations which might, as I say, abandon the

1 currently existing rights? And indeed, if it is going
2 to be said that that is the way the world works, then
3 how is that remotely practicable or possible? That is
4 certainly not something that Parliament has called for,
5 even in the context of the judicial motion (inaudible)
6 debate that occurred last week. What that indicates is
7 two things: firstly, the principle that my learned
8 friend has espoused needs definition and requires
9 precision. It cannot be any potential to impact on
10 current rights or the negotiations would fall within it.
11 They have to find the principle which excludes
12 negotiations as a stand point, but includes the prior,
13 and it might be thought lesser step of merely firing the
14 starting gun. The right question, we submit, banging
15 the drums, the right question is has Parliament
16 expressly or implicitly abrogated the pre-existing both
17 to negotiate and to start the process. And at the end
18 of that negotiation process, there will be an outcome.
19 Or there may be an outcome. And the extent to which
20 rights and obligations that currently exist under
21 domestic law will truly, or materially be affected or
22 impacted, simply cannot be known at this stage. And
23 simply it doesn't know. And we respectfully submit that
24 the claimants do misstate and over state the effect of
25 notification. Take the issue of immigration rights

1 which was mentioned this morning. The giving of
2 notification under Article 50 has in itself no direct
3 impact at all upon the rights of EU nationals living in
4 the UK, or those UK nationals living in other states.
5 The rights of EU nationals living in the UK and UK
6 nationals living in other EU states following the UK's
7 withdrawal will depend upon a number of factors which
8 are uncertain, including the content of the
9 Article 50(2) negotiations. Rights and duties
10 established under relevant law and the relevant
11 provisions of the domestic law of the member state in
12 question. The principal EU legislation conferring
13 rights upon EU nationals to live in the UK has already
14 been implemented, as you are well aware, by statutory
15 instrument made under section 2(2) of the 1972 Act, and
16 there are 2006 regulations, the Immigration and European
17 Economic Area Regulations, which deal with that and they
18 stand as the implementation of section 2(2) that sits
19 behind them in 2004.

20 If no change at all is made to domestic legislation,
21 between the giving of notification under Article 50 and
22 our withdrawal, the rights of residents currently
23 conferred by the 2006 regulations would continue to
24 apply after withdrawal. And I make that point to
25 demonstrate that as a matter of law the triggering of

1 the Article 50, or even the withdrawal of the UK from
2 the EU, do not themselves remove immigration rights,
3 which are currently implemented by domestic legislation.
4 THE LORD CHIEF JUSTICE: That is an example, you would say,
5 of rights that are within the control or disposition of
6 the United Kingdom Parliament.
7 MR EADIE: Exactly so.
8 THE LORD CHIEF JUSTICE: That is why I asked the question of
9 the rights that weren't within the control.
10 MR EADIE: Of course.
11 THE LORD CHIEF JUSTICE: You will come to?
12 MR EADIE: I am going to come to that.
13 THE LORD CHIEF JUSTICE: I don't want to push you any
14 further.
15 MR EADIE: I am just on immigration at the moment.
16 THE LORD CHIEF JUSTICE: No, you stay there.
17 MR EADIE: If I stay the wrong thing on immigration I will
18 be hanged by the Home Office.
19 THE LORD CHIEF JUSTICE: We would not want that fate to
20 befall you, Mr Eadie.
21 MR EADIE: That is the domestic side of immigration. The
22 flip side of that, the side of the other member states,
23 the rights of UK citizens to reside in other EU member
24 states, it must be appreciated, are not conferred by the
25 ECA or by any other domestic legislation. They are

1 afforded by the other member states of the EU pursuant
2 to the domestic and international law obligations of
3 those states. And the triggering of Article 50 will not
4 directly change those rights. Should those rights
5 change as a result of our withdrawal, that will not be
6 a change to any rights currently enjoyed by UK citizens
7 under domestic law. And so that is the position in
8 relation to, for example, just on the topic of
9 immigration, of how the process is a nuanced one. The
10 effects need to be carefully thought through. What that
11 indicates is that there are a great many things that
12 need to happen for there to be impact relation to those
13 sorts of rights.

14 Can I just pick up on one point that my learned
15 friend Mr Gill seemed to make in his oral submissions
16 this morning. That the triggering of the Article 50
17 will in some way, shape or form expand the reach of
18 domestic criminal law. With respect, I do not agree
19 with that. The fact of the matter is that whatever
20 changes might be made to immigration provisions,
21 principles and laws, will be made. The criminal law
22 only cuts in and would only cut in irrespective of the
23 nature or extent of their changes, if someone did not
24 comply with the current state of the domestic law from
25 time to time. And there is therefore no sensible causal

1 link to be drawn, however forensically attractive,
2 between the giving of the notification and the criminal
3 law of consequence. And the reality, which is
4 illustrated by the immigration provision (inaudible) is
5 that it simply is not possible to say at the stage of
6 notification what changes will eventually occur to
7 rights which are currently conferred via the 1972 Act.
8 As I say, the basic point that we make at this stage is
9 bringing the thing ever back to the De Keyser principle,
10 assuming that the necessary implication is the
11 (inaudible). The point is that many eventualities stand
12 between the giving of the notification and the place
13 that my learned friend, Lord Pannick, needs to get to,
14 which is current domestic legal rights over thrown, with
15 Parliament in some way being presented with
16 a (inaudible) position. And of course the point is that
17 the further away the consequence of alteration of
18 domestic rights sits, the less likely it is that
19 Parliament intended to preclude or abrogate the
20 important prerogative that allows the starting gun to be
21 triggered. That is the fourth feature.

22 THE LORD CHIEF JUSTICE: Whenever would suit you and your
23 argument.

24 MR EADIE: My Lord, that might be a convenient moment.

25 THE LORD CHIEF JUSTICE: Could you have a discussion as to

1 sourced rights which are currently enshrined in domestic
2 legislation.

3 The overwhelming and realistic likelihood is that
4 when and if they get to it, assume that the great repeal
5 bill happens and everything becomes part of domestic law
6 again, repeal seriatim as it were, depending on the
7 outcome, the overwhelming likelihood is that they will
8 confront matters, negotiate it, or at the withdrawal
9 point, area by area.

10 They are not realistically going to have their
11 consideration of the issues that might arise at that
12 point dictated by the precise source of the particular
13 rights in question. They will consider common
14 agricultural policy, or what the agricultural policy
15 should be, European arrest warrant, home affairs. They
16 will consider those.

17 Some of those will require, necessarily,
18 legislation, because some of the scheme of current EU
19 law rights has been transposed domestically in that way,
20 all directives, for example; but it is wholly
21 unrealistic to try and split out by reference to the
22 source of rights what Parliament will ultimately do.
23 Look at it area by area. Of course, its mechanisms for
24 intervention are dictated of course if a right is
25 enshrined in primary legislation, but it could equally

1 be enshrined in secondary legislation, as a lot of the
2 directive implementation legislation is. There is then
3 a whole series of other ways in which Parliamentary
4 involvement and oversight can take place.

5 LORD JUSTICE SALES: I follow all of that and that it is
6 very likely, indeed, that these things will happen. But
7 can I just check that I have understood the Crown's
8 submission about the effect on section 2(1) of the 1972
9 Act if theoretically all that happened was the giving of
10 notice, the expiry of the two-year period and the
11 United Kingdom exits the EU at the end of that two-year
12 period. Am I right in thinking that the effect of that
13 would be to say that there are no longer enforceable EU
14 rights which have effect under section 2(1)?

15 MR EADIE: Yes, you are.

16 LORD JUSTICE SALES: Yes, thank you.

17 MR EADIE: I say but. With the rider that that would be
18 direct EU rights, if I can put it that way.

19 LORD JUSTICE SALES: Yes.

20 MR EADIE: Some of them, of course, through the directives
21 systems, which is the most frequently used, have been
22 transposed into legislation and that would need to be
23 changed anyway.

24 LORD JUSTICE SALES: Thank you.

25 MR EADIE: My Lord, the answer to your question is yes.

1 LORD JUSTICE SALES: Yes.

2 MR EADIE: I suppose the final point on it being inevitable
3 Parliament will be involved is the basic constitutional
4 one, which is that the sequencing doesn't terribly
5 matter. As a matter of constitutional principle,
6 Parliament has and retains throughout the ability to
7 intervene in the process once the starting gun is fired
8 in any way it sees fit. That wasn't quite the purpose
9 of the opposition day motion the other day, but it could
10 have been. Parliament has various ways of saying we are
11 going to trigger a situation, for a motion, debate and
12 then the consequences of that, we are going to trigger
13 a situation which will effectively mean that you have to
14 legislate if you want to take this step.

15 It is not as though the step is secret, or being
16 exercised without the full blown glare of publicity and
17 Parliamentary scrutiny upon it. One only has to look at
18 the House of Lords select committee to see that.

19 To some extent, this fifth feature feeds into the
20 sixth, which is about the actual extent of impact on the
21 rights in question. Our submission is that the
22 claimants have greatly exaggerated both the immediacy
23 and the impact on domestic rights of the commencement of
24 the process of withdrawal. Again, just to put some
25 formality on the submissions I have touched on already,

1 we don't fundamentally dispute the basic taxonomy that
2 one sees in particular from Mr Chambers' written
3 submissions. Call them category one rights, if you
4 will.

5 There is a vast corpus of EU legislation which has
6 been implemented into domestic law by either primary or
7 secondary legislation. If nothing is done, take the
8 premise of my Lord, Lord Justice Sales' question he just
9 put to me, between firing the gun and the two-year
10 period ending with no agreement or anything, the fact of
11 the matter is that in relation to that body of rights
12 and it is the vast corpus of rights, then they would
13 simply continue in effect after the UK's withdrawal.
14 That was part of the reason for focusing on immigration
15 rights. Because they would continue to be enshrined in
16 domestic litigation.

17 So the start of the process of withdrawal is not
18 determinative, either at the beginning of its process or
19 even at the end of its process in relation to any right
20 which currently has a domestic legislative legal basis.
21 Category two rights are said to be not within the gift
22 of Parliament and concern particular rights of, for
23 example, free movement to other states of the EU. But
24 again, by reference to the immigration example which
25 I went through earlier, those are rights which are not

1 in any event currently conferred by domestic law and so
2 fall outside Lord Pannick's complaint any way, because
3 they are in the gift of --

4 THE LORD CHIEF JUSTICE: Why aren't they conferred by
5 domestic law through the treaties; that is the bit
6 I don't quite understand. As I understand it, the right
7 of free movement is a right conferred under the treaty
8 which has been made part of domestic law.

9 MR EADIE: My Lord, yes, but it is the foreign transposition
10 of that, that is the bit I am on. It isn't in
11 Parliament's gift to say to Spain, irrespective of the
12 right that exists under the treaty, you must now afford
13 us --

14 THE LORD CHIEF JUSTICE: No, they can't. But I think the
15 point made on these rights is that they are rights to
16 which the citizen of the United Kingdom is entitled,
17 under the two treaties, and therefore will be a right,
18 because Parliament can't restore it, that will simply go
19 on the conclusion of the agreement.

20 MR EADIE: Yes. My Lord, that may or may not be right.
21 I have been handed a very helpful note saying I can
22 help, which is always a jolly good start. It is in
23 section 2(1) of the ECA, but if he can help in that
24 respect, can I leave that to Mr Coppel.

25 THE MASTER OF THE ROLLS: Can I say, Mr Coppel may answer

1 this as well, but it is the same point that you are now
2 addressing, which is if you have an EU regulation which
3 is automatically effective without primary legislation,
4 without a necessity for legislation in the individual
5 member states, so that operates as a supranational
6 right, why wouldn't that be the sort of right which
7 would be abolished, but which a British citizen enjoys
8 by being a member, by being a citizen of the
9 European Union.

10 MR EADIE: My Lord, I think I will answer (a) to category
11 two which is careful with the foreign stuff. In other
12 words careful with the stuff that requires member
13 states' own domestic legal implementation to make it
14 effective. Answer 2(b), which goes I think directly to
15 both of the questions which have now been put to me, are
16 whether or not those rights continue to exist depends on
17 what happens in the negotiation, or whether or not in
18 substance they continue to exist depends on what happens
19 in the negotiation.

20 Of course, if you say the premise on which we, the
21 court, are going to assume that this all operates is if
22 you fire the gun in this two-year period and then they
23 all disappear off, then of course the points you put to
24 me are right. Those rights disappear, as it were, but
25 that is on no realistic basis what is going to happen.

1 THE MASTER OF THE ROLLS: You have a problem there, because
2 if you take, say, a right which is conferred on an EU
3 citizen by means of a regulation, your difficulty is
4 that even if as you are postulating now, you may
5 negotiate individually with all of the other member
6 states and arrive at a particular formula, the trouble
7 is that the content of that right from time to time is
8 going to be determined by different bodies. So in the
9 case of the EU, under the regulations, that is going to
10 be done by the Court of Justice of the European Union.
11 But if this country is no longer the member of the EU,
12 that won't be the final determiner of these rights as
13 between the UK on the one hand and these other EU
14 states.

15 MR EADIE: They are relying on what I call category B
16 rights. They are the rights that will be hollowed out
17 or substantially hollowed out by the very act of
18 leaving. My Lord is right to put that to me and we
19 accept that. But the overarching point in relation to
20 all of this categorisation, all of this taxonomy, is
21 that Parliament has allowed, as it were, the prerogative
22 to continue in full knowledge of the very defects.

23 But on category two, you have a combination of
24 answers which are (1) careful, because some of it will
25 depend upon actions by a member state over which

1 Parliament never had the power and will continue not to
2 have the power; and the second and more substantive
3 answer is, well, that will depend on the outcome of the
4 negotiations. Of course you can say in technical terms
5 they are going to be different rights, because they will
6 be sourced in domestic law, with a combination of
7 domestic law here and agreements in the same way as
8 currently exist but replicated in a slightly different
9 way.

10 But substantively all of that depends upon -- this
11 is the stuff of negotiation. It isn't an inevitable
12 consequence. The court should not proceed, we
13 respectfully submit, in this delicate constitutional
14 area, on unrealistic assumptions. The reality is that
15 that is what the negotiations are going to deal with; at
16 the most basic level, how does one resolve the
17 difficulties between free movement and access to the
18 single market? I mean, all of that is the stuff of
19 negotiation.

20 So that category 2 set, likewise, doesn't prove the
21 case that says in effect, serious and inevitable impact,
22 the moment you fire the trigger, the bullet goes towards
23 the target, it is bound to hit. That is wholly and
24 completely unrealistic, we respectfully submit. The
25 answer in principle on category 2 rights is it simply

1 cannot be known at this stage whether some substantively
2 equivalent right will be in place. The reality as
3 I have said is if it is or isn't going to be in place,
4 that will be a decision, ultimately, that Parliament
5 will have to make.

6 A category three right. There is a reason why they
7 have focused on what I call category three rights. That
8 is the point my Lord puts to me. Which is that they are
9 the rights which will inevitably go because they are
10 fundamentally dependent on being a member of the club,
11 a continuing member of the club; and so they involve, in
12 effect, access to the institutions of the EU which by
13 definition, almost, will go if you leave.

14 So one has in the same category as it is a different
15 person who will be determining the nature and the
16 content of the right, because CJU will disappear, the
17 same point precisely can be made by the example my
18 learned friend Lord Pannick kept coming back to, which
19 is: you will no longer have the right to be an MEP or to
20 vote for who should be a MEP; but in relation to all of
21 those, of course the position is that they would be lost
22 after withdrawal. The question is, what of significance
23 does that tell you? My respectful submission in
24 relation to that is, that there is nothing in the
25 inevitability, as it were, of those rights being

1 hollowed out, on which to base a necessary implication
2 that the prerogative has been abrogated in a relevant
3 respect.

4 LORD JUSTICE SALES: The category three rights take us back,
5 really, to the first point.

6 MR EADIE: Yes.

7 LORD JUSTICE SALES: Either by the route which the Attorney
8 went through this morning, which is it was authorised by
9 the 2015 Act, or construing the treaties, it remains
10 within the royal prerogative.

11 MR EADIE: My Lord, exactly so, and one can put it in
12 a variety of different ways, but what you would have to
13 do is say because of that consequence, and let's assume
14 for the sake of this argument only because of this
15 consequence, Parliament must have set its face against
16 the pulling of the trigger which would start the process
17 in relation to both category three and category two and
18 category one.

19 So, as it were, that is driving the process, but the
20 more substantive point is that there is nothing remotely
21 surprising about that, it is perfectly obvious and was
22 perfectly understood by Parliament when it passed the
23 2015 Act and set up as a part of our constitutional
24 requirements, the pre-condition for there to be
25 a referendum before we withdrew. If you withdraw from

1 the club, you don't get to elect the governing body of
2 the club. That is what happens.

3 But the idea that one should go back to Parliament
4 to ask that same question again, and that Parliament can
5 be taken to have set its face against the firing of the
6 starting gun for that reason, we respectfully submit is
7 entirely untenable.

8 THE LORD CHIEF JUSTICE: That argument doesn't apply to the
9 category two rights, necessarily.

10 MR EADIE: It doesn't necessarily apply to category two
11 rights. It doesn't apply because the consequence is not
12 inevitable, apart from anything else.

13 THE LORD CHIEF JUSTICE: Therefore, probably on that, we are
14 coming back to a question which you will come back to,
15 that that will involve the royal prerogative in taking
16 away rights, and you are back to the Webster point,
17 because if you conclude, and you accepted, I think you
18 accepted to my Lord, that at the end of the two years,
19 if there was no agreement, there would be an automatic
20 lapsing of the rights under the treaty. Those are the
21 category two rights.

22 But if, as part of the negotiations the government
23 decided that they didn't want freedom of movement, say,
24 that right would be lost -- and a treaty was concluded
25 on that basis, unless Parliament was to assent to the

1 deal before it was done, the rights would have gone.

2 MR EADIE: Well, the rights would have gone but whether the
3 right in substance would have gone would depend upon the
4 outcome of the negotiations and whether or not
5 Parliament would go with that outcome or not. So the
6 point is --

7 THE LORD CHIEF JUSTICE: Well, you will come back to the
8 argument about the scope of Article 50, because if you
9 are entering into a treaty and you negotiate and
10 Parliament didn't like it, right, that was the end. You
11 wouldn't implement the treaty ie the treaty conferring
12 rights. But the difficulty with this and the obverse of
13 it is that if you conclude an agreement or you negotiate
14 away a point, what can Parliament do about it?

15 MR EADIE: My Lord, as you say, that brings one straight
16 back to the question of whether or not they have
17 contemplated and abrogated so as to preclude you from
18 achieving that effect. There will undoubtedly -- there
19 will be some rights in legal theory which at the end of
20 the two-year period will drop away. The right to vote
21 in Parliamentary elections, no doubt some of those other
22 ones, the categories aren't fixed.

23 THE LORD CHIEF JUSTICE: No, okay.

24 MR EADIE: But the basic point remains, the point about the
25 category three point is, the reason they are attractive

1 to my learned friend is because they are --

2 THE LORD CHIEF JUSTICE: Inevitable.

3 MR EADIE: They are inevitable. My riposte to that is they
4 are inevitable, and that makes it all the more
5 surprising -- well, firstly that that is inevitable,
6 that is what the 2015 Act is doing. You don't get to
7 vote for the people who run the club if you are not in
8 the club any more.

9 Secondly, it makes it all the more surprising if
10 that was truly to be the base on which a necessary
11 implication of abrogation was to be founded, it makes it
12 all the more surprising that Parliament did not say,
13 when, for example, the 2008 Act was passed: there is
14 Article 50, it has the potential to have all of these
15 ghastly consequences, we had better have it back, even
16 before you give the notice. That is the second set of
17 answers. There is a basic -- the other basic point
18 around the category two point, as I said, is it simply
19 can't be assumed at the stage at which the starting gun
20 is fired that the negotiations will be a pointless and
21 fruitless exercise.

22 THE LORD CHIEF JUSTICE: Okay.

23 MR EADIE: That is an essential part of my learned friend's
24 argument, and we respectfully submit in this specific
25 context isn't a sensible or realistic one.

1 THE LORD CHIEF JUSTICE: Mm-hm.

2 MR EADIE: And the bald point of all of those, all of that
3 analysis is that there isn't, we respectfully submit,
4 some form of democratic or constitutional deficit, still
5 less is there a constitutional driver based on
6 Parliamentary sovereignty for a necessary implication
7 that taking the very first step, even if it has the
8 legal potential to have those consequence two years down
9 the line, that Parliament has removed the prerogative.
10 So most roads do end up circling back to De Keyser and
11 the legislative scheme that is in place.

12 Just before I leave this and turn to the alternative
13 case, or perhaps as a lead-in, our link between this and
14 the alternative case that Lord Pannick makes, just to
15 revisit the principle of legality and the fact that
16 Thoburn described the ECA as a constitutional statute.

17 We respectfully submit, our short answer to all of
18 that is in relation to the description of the ECA as
19 a constitutional statute by Lord Justice Laws in
20 Thoburn, the short answer to that is that he so
21 described it because he was considering the very strict
22 principles that apply to govern the question of implied
23 repeal. There is, as my Lords will be well aware, a set
24 of bespoke principles developed in the case law,
25 hammered out in the case law over the years, as to what

1 you have to demonstrate if you want to assert that
2 a particular piece of legislation has been impliedly
3 repealed. That was the context of Thoburn and it
4 doesn't help here.

5 The principle of legality likewise is a principle of
6 statutory interpretation, no more, as Lord Dyson
7 memorably put it, in *AKJ v the Commissioner of Police*
8 for the Metropolis, B3, tab 50, paragraph 28. I don't
9 invite you to turn it up now, but it is a principle that
10 is developed to govern a different circumstance, and the
11 different circumstance is whether Parliament, when it
12 does legislate in general words, has chosen to interfere
13 with fundamental rights. The courts say: no, we require
14 a strict standard to be met before general words can be
15 taken as authorising that.

16 Now, the difficulty, of course, with that is that if
17 you transpose it over and you set that alongside
18 *De Keyser*, you end up not with reconciliation
19 necessarily, but with conflict. My submission is that
20 the courts have considered in our specific context, ie
21 has the prerogative been abrogated, the principles that
22 are the appropriate and applicable ones for ascertaining
23 Parliamentary intention, effectively the same question
24 when you approach it through -- whichever prism you
25 approach it through. Those principles are the *De Keyser*

1 principles.

2 But we respectfully submit that you can't, as it
3 were, drag in by a side wind the principle of legality.
4 The fact of the matter is that courts have considered
5 what principles, what tests should govern abrogation of
6 a pre-existing power and the Crown of considerable
7 importance and they have produced a set of principles
8 which we respectfully submit should be faithfully
9 applied.

10 Can I turn briefly to the alternative case.
11 Lord Pannick, as you know, started by resting his case
12 only on his primary submission, the common law principle
13 as he asserted it against interference with rights,
14 whilst leaving others to develop the case that
15 Parliament had limited the prerogative. But then came
16 back to it and eventually espoused that as the
17 alternative way of putting it, and he has maintained
18 that position in writing in his note submitted on
19 Friday.

20 But we submit that the practice in relation to
21 section 1 of the ECA is a prime example of the dualist
22 system in action. The Crown agrees treaties and
23 Parliament implements them, here through primary
24 legislation. That is consistent with Lord Oliver.
25 A new treaty could not take effect without domestic

1 legislation. It is not suggested that section 1 of the
2 1972 Act imposes an express restriction on the
3 prerogative and we submit, as you know, that only
4 an express restriction will do. See Rees-Mogg.

5 THE MASTER OF THE ROLLS: Rees-Mogg I think, strictly
6 speaking, doesn't say an express restriction. It says
7 that the implication, rather, that the exclusion must be
8 based on express words. That is a different issue. In
9 other words as I understand the case, it is saying you
10 have to base it on some express words that are stated
11 there, not that the actual abrogation itself has to be
12 spelt out in those terms.

13 MR EADIE: Well, my Lord, go back to the passage if you
14 would. We all have the same passage in mind, that
15 paragraph at the bottom of the page. My respectful
16 submission is the fundamental and bald point and the
17 reason why the court concluded that the standard was as
18 strict as they put it, was because there had been
19 careful Parliamentary intervention in the field already.
20 And that reasoning is precisely of a piece with the
21 reasoning of Lord Justice Hamblen in the recent
22 passports prerogative case.

23 This is a context in which, for slightly different
24 reasons than that case, if Parliament was going to take
25 away the power, you would expect it to do it with great

1 clarity.

2 THE MASTER OF THE ROLLS: Yes, I understand.

3 MR EADIE: There have been, to come back to the factual
4 position, express restrictions on the entry into new
5 treaties, starting with the 1978 Act, now in the EU Act.
6 It is those express restrictions, and not a necessary
7 implication from section 1 of the 1972 Act, which
8 explain why Parliament has passed primary legislation
9 approving major new treaties, and adding them to the
10 section 1(1) list before the treaties have been
11 ratified.

12 Our submission is that but for those express
13 restrictions on ratification without Parliamentary
14 approval, there would be no legal reason why amendment
15 of section 1(1) of the 1972 Act could not occur after
16 the relevant treaty had been entered into and not
17 before. That is very often the case, where section 1(1)
18 is amended by order under section 1(3). Of course you
19 have the basic point, which is that section 1 of the ECA
20 deals with the addition of new treaties to the corpus of
21 EU law, not the withdrawal of the UK from such treaties.
22 It doesn't touch the prerogative power to withdraw.

23 My Lord, I think, the Master of the Rolls
24 said: well, does this all depend upon the fundamental
25 distinction being drawn between an amendment and

1 a withdrawal, bearing in mind the wording of that Act.
2 In my respectful submission the position is that
3 withdrawal is not touched at all by that legislative
4 scheme, despite Article 50 being brought in by Lisbon,
5 despite the explanatory notes of the 2008 Act and all of
6 that.

7 So we do respectfully submit that there is a clear
8 indication that the withdrawal was not touched, however
9 much amendment might be. So the answer that is given to
10 that by my learned friend which, I think perhaps
11 underpins my Lord, the Master of the Rolls' question
12 is: well, how does that make sense? You are legislating
13 for the lesser beast and you are legislating for the
14 least dangerous animal in the jungle and you are
15 prepared to let the tiger roam free. That is the point
16 being put against me.

17 But my respectful answer to that is that that
18 assumes, as it were, that degree of coherence in the way
19 in which Parliament has exercised the choices it has
20 about calling back in. Much of the -- on the searching
21 for, which we respectfully submit you don't need to, but
22 you are searching for a principled basis which joins
23 together all of the call back in powers. It is as
24 convincing, if not more convincing, to assert that the
25 logical thing and principal thing that joins them all

1 together is a concern that the reach and scope of EU law
2 should not be expanded without Parliamentary authority.

3 The reason that that is the more powerful
4 explanation if one was looking for coherence between
5 that group of statutory provisions is because, as we all
6 know, at the heart of the European debate at the
7 political level is the question of the extent to which
8 there is increasing encroachment upon the sovereignty of
9 Parliament to make and decide laws as the ultimate
10 arbiter of that.

11 So we respectfully submit, as I say, that the answer
12 is in two parts, I think, my Lord. We don't need to
13 establish, as it were, a coherence between the group
14 that is called in, because withdrawal is not for good or
15 ill. But if you were looking for coherence between
16 those, it isn't on the basis of lesser beast/greater
17 beast; it is on the basis of Parliamentary concern being
18 evidenced of an increasing expansion of the reach of EU
19 law and therefore an increasing encroachment upon
20 Parliamentary sovereignty.

21 THE LORD CHIEF JUSTICE: That we know. Do we interpret that
22 against the background of our political knowledge, or
23 because the legislation is framed in terms of amendment
24 up or down, and why should we? You may say: well,
25 Parliament has provided for supervision over amendment

1 to take away the powers or transfer them to Brussels,
2 increasing the power of the union. This is also
3 legislated the other way. Why don't we approach it by
4 looking at the language? Why should we look at what
5 might or might not have been the political motivation
6 behind it?

7 MR EADIE: I am not inviting you positively to do that; I am
8 saying beware of the idea that one can, as it were,
9 infer a logical coherence, in relation to the called
10 back group based upon the interference with rights. It
11 goes up and down.

12 THE LORD CHIEF JUSTICE: What you are saying is they have
13 legislated for amendment, they have legislated for
14 change, but they didn't legislate for withdrawal,
15 therefore withdrawal is outside of the scope; it is that
16 simple, I think.

17 MR EADIE: Yes, they didn't legislate for withdrawal, and of
18 course it goes up and down; an amendment can go either
19 way.

20 THE LORD CHIEF JUSTICE: Either way.

21 MR EADIE: Either way, as you say. No one is disputing that
22 proposition. But in some way there is a problem with my
23 learned friend's submission, which is that the more you
24 say: well, the consequence of issuing the Article 50
25 notification will inevitably be this ghastly consequence

1 of all of these rights, and therefore Parliament must be
2 compelled to set its face against it by necessary
3 implication; the more surprising it becomes that
4 Article 50 is not covered.

5 THE LORD CHIEF JUSTICE: But it may take you to the logical
6 position that if Article 50 isn't covered, then it does
7 take you probably -- at the moment, I don't see why it
8 doesn't -- to the fact that the Crown can agree the
9 entirety of the withdrawal arrangements without any
10 Parliamentary approval at all.

11 MR EADIE: They can. But that carries with it, as it were,
12 the implicit if only implicit stigma that says: well,
13 there is a constitutional deficit in that.

14 THE LORD CHIEF JUSTICE: No, no, that is the logic of the
15 scheme that you put forward. But I think it is --
16 I mean, I can see the neat logic of it; Parliament
17 said: if you want to increase the rights of the
18 European Union or diminish it and that affects domestic
19 laws, it has to be ratified by us; if you want to
20 withdraw together, they didn't legislate for Article 50
21 and therefore anything you do under Article 50 is
22 impliedly within the royal prerogative and the ministers
23 of the Crown can agree anything in relation to that,
24 with effect on domestic law implicit in Article 50 being
25 sufficient to authorise that.

1 MR EADIE: Yes, subject to, which is why I went through the
2 categorisation and all of the other points.

3 THE LORD CHIEF JUSTICE: Yes, yes.

4 MR EADIE: Trying to get the nuances of how the rights will
5 actually be affected, when they will be affected and
6 how. Subject to all of those nuances. Because in truth
7 when one does that analysis, other than pretending it
8 doesn't exist, the only ones that will inevitably be
9 hollowed out are those that relate to electing the
10 membership of the club, the governing committee of the
11 club. So in other words, they are the only ones that
12 can sensibly be said, which is why my learned friend has
13 placed his argument centrally around those; the problem
14 with those, as I say, is that you come back to that
15 being precisely what the 2015 Act was doing.

16 THE LORD CHIEF JUSTICE: Do come back to the Article 50
17 point tomorrow, if you want.

18 MR EADIE: Can I just pick up on a point my Lord, the Master
19 of the Rolls put to me; I think it may be worth going
20 back, to make sure I haven't misunderstood the point, to
21 Rees-Mogg.

22 THE LORD CHIEF JUSTICE: Yes.

23 MR EADIE: Could we go back to that. It is in bundle A,
24 tab 12. I said it was the paragraph at the bottom of
25 the page. It is 567. It is worth -- I am not going to

1 read it all out now, but it is quite important before
2 you get to that paragraph that you see the nature of the
3 argument that my Lord, Lord Pannick was running in that
4 case, which starts just below the letter D.

5 I think I am entitled to say, my Lord, in answer to
6 the point that you were putting to me, that if you look
7 at that first and second sentence of the final paragraph
8 on that page, when Parliament wishes to fetter
9 the Crown's treaty-making power in relation to Community
10 law it does so in express terms. That is, it fetters
11 the Crown's treaty-making power in express terms, such
12 as one finds in section 6 of the 1978 Act to which the
13 Attorney took you.

14 LORD JUSTICE SALES: That seems to be talking about
15 treaty-making power operational only on the
16 international plane, because at the top of page 568, the
17 court is careful to point out that this particular
18 protocol wouldn't have any implications for domestic
19 law. So it seems -- to put it to one side the case
20 where you are dealing with treaty change, which does
21 have an effect on domestic law, and it is saying: well,
22 if you are just dealing with a treaty that is only
23 operational on the international plane, then in effect
24 you are in the grip of your constitutional principle
25 that the Crown ordinarily has the power by the

1 prerogative to do that; and there is no reason to take
2 that away; and that is so strong that you need express
3 words.

4 MR EADIE: My Lord, you are right to point that out, of
5 course, and I am trying to avoid the paragraphs that
6 follow, as it were, and they do indeed reach the
7 conclusion that my Lord points to. If one goes back to
8 the final paragraph on that page, the logic and
9 reasoning internal to it, they have reached the position
10 that it fetters the Crown's treaty-making power in the
11 context of Community law in express terms, on the basis
12 of two things.

13 One is that you have exactly that going on in
14 section 6 of the 1978 Act and the second of them is that
15 section 6 would have been unnecessary if it was
16 impliedly excluded otherwise. That reasoning doesn't
17 depend upon it being non-domestic, or not having
18 an immediate effect for the reasons my Lord pointed to.

19 THE MASTER OF THE ROLLS: But I thought you accepted that
20 the abrogation or the curtailment of the royal
21 prerogative could be by express terms or by necessary
22 implication. Necessary implication indicates something
23 other than an express exclusion, saying it is hereby
24 abrogated.

25 MR EADIE: My Lord, I am sorry, but I don't think we have

1 accepted that. Indeed, the submissions that the
2 Attorney made, and the submission we made in our
3 skeleton argument is one, express words only will do,
4 see Rees-Mogg; two, if not, necessary implication.

5 THE MASTER OF THE ROLLS: I see.

6 THE LORD CHIEF JUSTICE: You say the EU is the exception to
7 the general rule in De Keyser.

8 LORD JUSTICE SALES: I am not sure you or the Attorney
9 confines it to the EU; it is the treaty-making power
10 I thought was the exception, that you need express words
11 to override the ordinary presumption~--

12 MR EADIE: I think it was based on Rees-Mogg, so it was
13 based on that paragraph.

14 THE LORD CHIEF JUSTICE: I think it is the treaty-making
15 power, that paragraph, and as I understand it in his
16 argument, it is to the effect that if you look at the
17 whole corpus of the restriction~--

18 MR EADIE: When they have wanted to do it, they have done it
19 expressly.

20 THE LORD CHIEF JUSTICE: Yes. I think that is -- as I
21 understood his argument, it was that twin basis upon
22 which~--

23 MR EADIE: It was, and so we are content to confine it to
24 the EU. As I said, I don't want to get too hung up on
25 it, because one has pretty much exactly the same species

1 of reasoning in the royal prerogative case, in the sense
2 that if Parliament does choose to intervene in
3 a particular area, or if for some other reason, one
4 would expect them to say very clearly they were
5 abrogating the prerogative, then you need a high
6 standard of clarity; we submit that Rees-Mogg is
7 authority for the proposition that only express will do.
8 I am content to limit that to the Community law point,
9 but if not, alternatively necessary implication.

10 THE LORD CHIEF JUSTICE: Okay.

11 MR EADIE: Some reference has been made to constitutional
12 conventions, particularly in the context of the
13 sequencing point. In other words, the Crown exercising
14 the prerogative power on the international plane and
15 then there being legislative considerations or
16 Parliamentary consideration thereafter. I can take that
17 very shortly, because the constitutional convention as
18 it were, has been, if I can put it this way, dangled by
19 the court in front of a number of those who represent
20 the claimants. The answer that comes back seemed to be
21 pretty uniform, which was yes, yes, yes, constitutional
22 convention, but no, we don't quite put our case on that
23 basis when probed.

24 The first answer is no one has ever put this case on
25 the basis that there is a constitutional convention that

1 there would be prior authorisation for this sort of
2 process. Were they to do so, no doubt interesting
3 issues of legal principle would arise around whether or
4 not it was appropriate for the courts to start seeking
5 to enforce the constitutional conventions of that kind,
6 and it might be thought that there would be pretty
7 serious arguments based on article 9 and Parliamentary
8 process and so on if one was trying to build that sort
9 of argument.

10 But I think the first and shorter answer is that the
11 case has not been advanced in any shape or form on the
12 basis of a constitutional convention, and indeed if it
13 is asserted, perhaps the second answer, that there is
14 some practice or convention that legislation should be
15 done before ratification, then it might be thought -- to
16 some extent it is a point that was made by
17 Lord Justice Lloyd in Rees-Mogg in the paragraph we keep
18 going back to, in the context of the argument that was
19 there made -- what then is the point of section 6 of the
20 1978 Act and indeed what then is the point of some of
21 the other broader controls such as the ratification such
22 that exist in CRAG. So we respectfully submit that that
23 doesn't take matters any further.

24 I wasn't proposing to do anything further on other
25 international obligations and UN Convention on the

1 Rights of the Child. And I was proposing to turn if
2 I may to non-justiciability and remedy. If I can take
3 those tolerably quickly.

4 My Lord, on timing, we have spoken about that and if
5 it would be acceptable to the court, the proposal from
6 our side at least is that I should finish, and I will
7 try and do it well within the extended time you are
8 prepared to sit a bit longer this afternoon, I will try
9 to finish this afternoon then Mr Coppel will start on
10 his bit tomorrow morning. I think he anticipates being
11 tolerably short, probably about half an hour, no more
12 than that. There is then going to need to be time for
13 replies. I don't know how long everyone is going to
14 need in reply, but the only question to which the length
15 of replies will go is whether or not you want to sit
16 earlier than 10.30 tomorrow morning, which I am sure we
17 are all in the court's hands.

18 THE LORD CHIEF JUSTICE: We don't think it will be
19 necessary. We will just sit as long as need be.

20 MR EADIE: Tomorrow?

21 THE LORD CHIEF JUSTICE: Yes.

22 MR EADIE: I am grateful.

23 THE LORD CHIEF JUSTICE: I think there becomes a limit to
24 long days.

25 MR EADIE: Yes. I think the expectation, if I can --

1 THE LORD CHIEF JUSTICE: I am sorry it put it that way.

2 MR EADIE: I think the expectation is that we will be done
3 by lunchtime, or pretty close to.

4 THE LORD CHIEF JUSTICE: And Mr Coppel will be able, he will
5 be here tomorrow. Will you be here too?

6 MR EADIE: That is the subject of some discussions.

7 THE LORD CHIEF JUSTICE: We don't want to probe into that,
8 but obviously there are some difficult questions we have
9 not yet grappled with and we need to come back to.

10 MR EADIE: Yes, and one of them I know is the meat of
11 Article 50 and all of that and what will be required
12 under CRAG. And there are issues around that on which
13 I would like to take on some instructions before giving
14 the court a final answer overnight. That, you can
15 imagine --

16 THE LORD CHIEF JUSTICE: They are quite difficult.

17 MR EADIE: Part of a political debate.

18 LORD JUSTICE SALES: And when you say required under CRAG,
19 does that cover the 2011 Act as well or do you mean just
20 CRAG?

21 MR EADIE: I mean just CRAG at the moment.

22 LORD JUSTICE SALES: Right.

23 THE LORD CHIEF JUSTICE: We will want to go back to the 2011
24 Act, as well.

25 MR EADIE: Okay. Then I may have to be here tomorrow

1 morning, if only briefly.

2 THE LORD CHIEF JUSTICE: Yes, let's carry on.

3 MR EADIE: Non-justiciability and remedy I was going to deal
4 with.

5 THE LORD CHIEF JUSTICE: Yes.

6 MR EADIE: Both of those, both of the points we make, in
7 other words the non-justiciability and the remedy point,
8 each requires focus we submit on the substance of the
9 challenges, as well as the form in which they are
10 presented. And, as the Attorney has pointed out,
11 although it is dressed up in different ways, it is now
12 clear that each of the claimant parties challenges the
13 government's decision that the UK should withdraw from
14 the EU and not merely just the proposed notification of
15 that decision. They therefore seek, we submit, to
16 challenge a decision of a type which is, according to
17 the case law at least, classically non-justiciable,
18 a decision pursuant to the foreign affairs prerogative
19 to withdraw from international treaties.

20 THE LORD CHIEF JUSTICE: If that challenge was merely to the
21 question of whether the prerogative power permitted you
22 to do it, is that, do you say that is non-justiciable?

23 MR EADIE: Well my Lord, if I may develop the submission.

24 The short answer to my Lord's question is no we don't
25 make that assertion. Of course, the court can rule on

1 the existence or otherwise of the prerogative. It is
2 a creature of the common law and the court is competent
3 to rule upon it, or require you to consider whether or
4 not the prerogative has been abrogated by the
5 legislative schemes that we have all been discussing.
6 That is why I emphasised at the beginning the point
7 about withdrawing from the treaty.

8 You probably won't need me to take you to, and
9 I wasn't proposing to unless you want me to, the series
10 of cases that establish the basic proposition. The
11 prerogative power and its non-justiciability covers not
12 just the making of a treaty, but also the performance of
13 or acts under the treaties. And the earliest case in
14 relation to that is *Rustemgee* (?), in bundle B tab 3 and
15 again I don't invite you to turn it. I am sure we have
16 quoted it in our skeleton somewhere. But it concerned
17 a treaty between the Crown and the Emperor of China,
18 under which the Crown received a large sum in respect of
19 debts owed by British subjects, there were some other
20 examples earlier on. And the relevant passage is the
21 passage in the judgment of Lord Coleridge, Chief Justice
22 at 74, where he held, and I quote:

23 "The Crown acted throughout the making of
24 ... (reading to the words) ... stipulations in her
25 sovereign character by her own inherent authority and as

1 in making the treaty so in performing the treaty she is
2 beyond the control of municipal law and her acts are not
3 to be examined in her own courts."

4 That principle has been specifically recognised in
5 the case of EU treaties, so for that purpose Blackburn,
6 bundle A tab 9, where Lord Denning disposed of the case
7 on non-justiciability grounds. As he put it at 1040,
8 even a treaty of such paramount importance as this one
9 and its being consistently recognised thereafter as the
10 paradigm example, or a paradigm example of
11 non-justiciable decision making. Again, without wishing
12 to go back to all of the cases, CCSU in the House of
13 Lords, bundle B1 tab 17 at page 418 between A and C in
14 the speech of Lord Roskill, identifying that no go areas
15 included the making of treaties. Again, the case law
16 has left us with other references of that kind.

17 You need to exercise a little caution, if I may
18 respectfully say so, with Lord Pannick's submission that
19 you don't need to bother about this point because
20 Lord Denning disposed of it in Laker in the terms that
21 he did. And true it is that Lord Denning in Laker, A
22 tab 10 at page 705 G, said that the issue is justiciable
23 because, and he put it in very broad terms:

24 "The prerogative is a discretionary power to be
25 exercised for the public's good and it can be examined

1 by the courts just as any other power can be."

2 And the note of caution is (1) that lord Justices
3 Roskill and Lawton is not put the non-justiciability
4 point in that way and the references are 718 G, 719 E
5 and 728 C to D within Laker.

6 Sorry, I said I wouldn't go to CCSU, but could
7 I just invite you very quickly to go there. B1,
8 tab 17-page 416 on the internal numbering between G and
9 H. Starting at the beginning of that paragraph, if you
10 would. But between G and H he addresses directly
11 Lord Denning, the passage from Lord Denning on
12 non-justiciability that my learned friend Lord Pannick
13 said represented the ratio of the case on
14 non-justiciability.

15 THE LORD CHIEF JUSTICE: Yes, I think what is under
16 challenge here is simply the existence of the power, not
17 how it is being exercised. I don't think Lord Pannick,
18 you are not challenging whether it is a good or a bad
19 exercise of the power, are you, you are just
20 challenging --

21 LORD PANNICK: Indeed not. I said on Thursday I am not
22 questioning justification.

23 THE LORD CHIEF JUSTICE: If the narrow question is does
24 the Crown have this power if you accept that is
25 justiciable.

1 MR EADIE: Yes, I hope I did that at the beginning of this
2 argument.

3 THE LORD CHIEF JUSTICE: You did.

4 MR EADIE: And the only reason we are spending any time on
5 this at all is because some of the other parties do
6 indeed mount a series of, as it were, public law
7 challenges, legitimate expectation, not taking things
8 into account and all of that which aren't restricted to
9 the legal power.

10 THE LORD CHIEF JUSTICE: There was the request for the
11 decision today, so yes you are right to raise that
12 issue.

13 MR EADIE: I raise it in relation to those, and I hope not
14 unrealistically.

15 THE LORD CHIEF JUSTICE: No.

16 MR EADIE: If it is a question of pure law and if it is
17 a question of does the prerogative exist, of course that
18 is a matter that the court can control because that is
19 its right.

20 THE LORD CHIEF JUSTICE: Okay.

21 MR EADIE: As far as relief is concerned, again this is
22 a substance over form question. If granted, the relief
23 sought by the claimant would have the effect that the
24 Secretary of State would have to introduce on their case
25 a bill into Parliament in order to give effect to the

1 decision to withdraw from the EU. The claimants have
2 made clear that nothing short of that will do and there
3 is a real concern about the reality of that and the
4 relief that the court can grant in relation to that.

5 THE LORD CHIEF JUSTICE: But there must be a difficulty --
6 well, if we can say that the Crown has no power to give,
7 just very baldly, to give notice under Article 50,
8 period, we must be able to say that once you accept that
9 we have the power, that we have a power to define the
10 limit of the royal prerogative.

11 MR EADIE: Well, my Lord, the difficulty that perhaps flows
12 is that there is at least some of the case law in this
13 area indicating that there may be a freestanding problem
14 in relation to that sort of relief, formal declaratory
15 relief in any event.

16 THE LORD CHIEF JUSTICE: What do we do? We could deal with
17 it this way: if we were to reach that conclusion --
18 entirely hypothetically -- and come to the view that the
19 royal prerogative does not extend to giving notice under
20 Article 50 or whatever, that would be enough, wouldn't
21 it?

22 MR EADIE: Well, it is a relief point rather than a what you
23 put in. I don't want to make it too formal, but there
24 is a line of case law, two of them involving Mr Wheeler,
25 in which the consequence of the argument that was being

1 run would have been to require the government to
2 introduce bills into Parliament and the courts have held
3 that that isn't an appropriate thing for the courts to
4 do, because it drags the courts into the political
5 arena.

6 THE LORD CHIEF JUSTICE: But what would we do? In that
7 hypothetical situation what would we do?

8 MR EADIE: My Lord, as I say, I have accepted that it is
9 part of the court's function to grapple with the
10 question of pure legal power. But the concern that we
11 have is that this whole exercise, as it were, does drag
12 the court into that arena. Because the consequence is
13 it wasn't --

14 THE LORD CHIEF JUSTICE: There are many arenas into which we
15 do not wish to be dragged. We have a duty. The
16 challenge is, at least on Lord Pannick's case, the scope
17 of the royal prerogative. If we were to reach the
18 conclusion that whatever it is isn't within the scope of
19 the prerogative, sorry to press you, but what is it that
20 we do? We might say well, we have reached that
21 conclusion but it is irrelevant. What would we do?
22 Maybe you would like to come back to us about it.

23 MR EADIE: My Lord, can I simply show you the high point and
24 then I will think about the question.

25 THE LORD CHIEF JUSTICE: Yes. You can show us the high

1 point, but then we would like to know what to do.

2 MR EADIE: Not grant the relief is the short answer.

3 THE LORD CHIEF JUSTICE: But why does that matter?

4 MR EADIE: Well, my Lord, can I just show you Wheeler

5 number 2 and then I will stop on this point.

6 LORD JUSTICE SALES: Which bundle, Mr Eadie?

7 MR EADIE: It is in bundle A tab 18.

8 LORD JUSTICE SALES: Thank you.

9 MR EADIE: And the relevant paragraph for our purposes is

10 paragraph 46.

11 THE LORD CHIEF JUSTICE: The relief claim there would have

12 been the direct conclusion of the work of Parliament.

13 MR EADIE: Well, more or less direct.

14 THE LORD CHIEF JUSTICE: I mean, telling them there must be

15 a vote in the House of Commons is pretty direct.

16 MR EADIE: Yes, but it didn't -- the claim in substance

17 would have required one, and if the claim in substance

18 would have required it, then --

19 THE LORD CHIEF JUSTICE: Assuming (inaudible) for you to

20 hold that there isn't a power, then that is for the

21 government to decide what to do.

22 MR EADIE: Well that isn't quite enough on my learned

23 friend's case, as I understand it. He says only primary

24 legislation would do it. It isn't a question of what

25 the government would have to do. They couldn't do

1 anything, on his case, unless they were to introduce
2 primary legislation for the purposes of seeking a prior
3 authority. One may say well, once you see the force of
4 that one accepts it is justiciable and what can you do.
5 THE MASTER OF THE ROLLS: That is the point, isn't it, once
6 you accept that something is justiciable there must be
7 a remedy.
8 MR EADIE: Well, yes.
9 THE MASTER OF THE ROLLS: That is the other side of the
10 coin.
11 THE LORD CHIEF JUSTICE: But I do appreciate these are very
12 difficult issues. Maybe it is not sensible to carry
13 this argument further on this point at this hour of the
14 afternoon. I mean, of course obviously you can reflect.
15 MR EADIE: My Lord, can we mull, and can we mull that and
16 the other issues you want us to think about? I suspect
17 I will have to be here for a short while tomorrow.
18 THE LORD CHIEF JUSTICE: Subject to checking what we are
19 doing in the morning, would it assist you if we sat
20 earlier?
21 MR EADIE: No, don't go out of the court's way to do that.
22 THE LORD CHIEF JUSTICE: I am just very concerned people
23 have been sat here all day. They will want to think
24 about what they have to say in reply. And I am also
25 thinking of ourselves. The less time you give people to

1 think about a reply, the longer the reply tends to be.
2 MR EADIE: Yes, on that note I will be very short and go to
3 my other place.
4 THE LORD CHIEF JUSTICE: Does Mr Coppel want to deal with
5 his points?
6 MR EADIE: Can I suggest we stop now and come back and deal
7 with it?
8 THE LORD CHIEF JUSTICE: Yes. Thank you very much for the
9 assistance received from you and from all other counsel.
10 I am sorry we did keep you all to your time limit, but
11 you did agree to it. Thank you all very much.

12 (4.30 pm)

13 (the hearing adjourned until 10.30 am on Tuesday
14 18 October 2016)

15

16

17 Submissions by MS MOUNTFIELD2
(continued)

18 Submissions by MR GREEN27

19 Submissions by MR GILL47

20 Submissions by THE ATTORNEY-GENERAL60

21 Submissions by MR EADIE109

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