

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.

Tuesday, 18 October 2016

1

2 (10.30 am)

3

Submissions by MR EADIE (continued)

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MR EADIE: My Lords, good morning.

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THE LORD CHIEF JUSTICE: Good morning.

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MR EADIE: My Lords, the Lord Chief Justice asked on

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a number of occasions yesterday about the details of

8

Parliamentary supervision of the stages of the

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process --

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THE LORD CHIEF JUSTICE: Yes.

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MR EADIE: -- laid down in Article 50(2), which are intended

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as you know to culminate in a withdrawal from the EU,

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concluded between the UK and the EU, represented by the

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Council, acting by qualified majority with the consent

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of the European Parliament; that is the phraseology.

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THE LORD CHIEF JUSTICE: Yes.

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MR EADIE: I think the question posed on a number of

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occasions is can we work through how that process might

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work. That is the only topic on which I am going to

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return to this morning and then I am going to hand over

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to Mr Coppel if that is acceptable.

22

THE LORD CHIEF JUSTICE: Yes.

23

MR EADIE: Before getting into the detail of how that

24

process might work, can I simply reiterate, as you are

25

aware and -- the submissions I made yesterday, there has

1 already, as you know, been Parliamentary involvement in
2 the process of withdrawal from the 2015 Act to the
3 opposition motion on Article 50 issues last week. For
4 all of the reasons I gave yesterday, there will on any
5 view be considerable further Parliamentary involvement
6 in the future.

7 THE LORD CHIEF JUSTICE: Mm-hm.

8 MR EADIE: Of course that involvement, both past and future,
9 tends, we respectfully submit, against any implication
10 from the statutory scheme that the start of the process
11 cannot be the subject of the exercise of prerogative
12 power. But to turn directly to the Article 50(2)
13 process, the first point to make is that the
14 Article 50(2) withdrawal agreement, if of course one can
15 be concluded, and Article 50 contemplates the
16 possibility that there wouldn't be one.

17 THE LORD CHIEF JUSTICE: Yes.

18 MR EADIE: But if there was an Article 50(2) withdrawal
19 agreement, that would be a treaty between the
20 United Kingdom and the EU.

21 THE LORD CHIEF JUSTICE: Yes.

22 MR EADIE: As such, it is likely that it will come within
23 the procedures in CRAG. You have CRAG behind tab 29 in
24 bundle C.

25 THE LORD CHIEF JUSTICE: Yes.

1 MR EADIE: I use the word -- sorry. Tab 29.

2 THE LORD CHIEF JUSTICE: Yes.

3 LORD JUSTICE SALES: Would it come within the 2011 Act?

4 MR EADIE: Can I answer --

5 THE LORD CHIEF JUSTICE: Can we take it in turn.

6 LORD JUSTICE SALES: I am going too quickly, sorry.

7 MR EADIE: The answer to that is no, for reasons to which

8 I will come.

9 THE LORD CHIEF JUSTICE: I thought it would be.

10 MR EADIE: But they are mutually --

11 THE LORD CHIEF JUSTICE: We will find out why in a moment.

12 MR EADIE: They are mutually exclusive regimes, as you will

13 have picked up from the legislation, and I will show you

14 that.

15 THE LORD CHIEF JUSTICE: Yes.

16 MR EADIE: I will start with CRAG, if I may. It will be

17 a treaty, but I say likely to fall within the procedures

18 within CRAG, because CRAG, like the Ponsonby memorandum

19 which it sought to embody, and the Ponsonby memorandum

20 which preceded CRAG is in bundle D1, tab 2.

21 THE LORD CHIEF JUSTICE: Yes.

22 MR EADIE: I don't invite you to turn it up now, but CRAG

23 only applies to treaties which are subject to a formal

24 process of ratification. See, amongst other things,

25 section 25(3) and (4), and indeed the process of

1 ratification which is the cornerstone of the Act in
2 section 20. Now, almost all treaties are, but not all
3 treaties are, subject to ratification. In other words
4 you can on the international plane enter into
5 an agreement without ratification necessarily following.

6 LORD JUSTICE SALES: So it is just immediately effective as
7 soon as you sign on the dotted line.

8 MR EADIE: Exactly so. In international legal theory, those
9 agreements do happen but they are pretty rare, and it is
10 considered very likely that this agreement, if entered
11 into, in other words the 50(2) agreement, would be
12 a treaty requiring ratification. Of course one can't
13 exclude the theoretical possibility that it wouldn't be.

14 THE LORD CHIEF JUSTICE: So the effect would be?

15 MR EADIE: Where a treaty falls within CRAG, CRAG then sets
16 out a detailed scheme of steps that must be taken before
17 the treaty can be ratified. So if you look at
18 section 20, the treaty must be laid before Parliament at
19 least 20 days before ratification. Both Houses of
20 Parliament will have the opportunity to vote on it.

21 There is then a detailed scheme within section 20
22 with regard to what can and can't be done in respect of
23 ratification in light of the opinion of the Houses of
24 Parliament. You will see the basic division within the
25 subsections of section 20 is to draw a distinction

1 between a situation in which the House of Commons
2 negatively resolves, if I can put it that way, see (3)
3 and (4) and (5) and (6); in effect you end up with
4 a double negative resolution procedure if the House of
5 Commons votes against it first time round; and
6 a slightly lighter process if the House of Lords votes
7 against it first time round, see (7) and (8).

8 THE LORD CHIEF JUSTICE: Has this ever been done? This is
9 of critical importance. As to why this may be
10 important, I think we will come when we turn back to the
11 2011 Act, but does this mean, therefore, that if there
12 is a final agreement reached and the two-year trigger
13 does not operate, that any agreement is then subject to
14 approval by Parliament?

15 MR EADIE: Well, I have chosen my words deliberately
16 carefully, and you will understand as a matter of law
17 why I have done so. I have used the word
18 "likely" because, as I say, this Act applies to treaties
19 that need to be ratified. As I say, the overwhelming
20 likelihood as we understand it is that this will be one
21 of those treaties. If that is the position, as we
22 expect it to be, the answer to my Lord's question is
23 yes. But you will understand, I hope, why I am guarded
24 on the basis of the strict language of the legislation.
25 It can't be a guarantee at this stage. Because the

1 possibility might exist they would say no.

2 THE LORD CHIEF JUSTICE: The reason I wanted to ask you the
3 question, that would mean, therefore, that on
4 Lord Pannick's bullet point, that in the contingency
5 that there was an agreement, Parliament could say no.

6 MR EADIE: Yes. Well, could operate these procedures.

7 THE LORD CHIEF JUSTICE: What would the result be? Has it
8 ever been operated, these provisions?

9 MR EADIE: Yes, I think they have in relation to other
10 treaties. I don't know the full history of it.

11 THE LORD CHIEF JUSTICE: I know, but operated so that it
12 negatives, so that the government --

13 MR EADIE: My Lord, the consequence of it being negative is
14 set out on the face of the legislation. If the House of
15 Commons, for example, negatively resolves twice --

16 THE LORD CHIEF JUSTICE: Yes.

17 MR EADIE: -- then it can't be ratified. Look at 20(1): a
18 treaty is not to be ratified unless that process is
19 followed.

20 THE LORD CHIEF JUSTICE: Mm-hm. Okay. So that everyone, so
21 that I fully understand it, and everyone else
22 understands, the question of whether it is a treaty that
23 requires to be ratified is dependent upon what?

24 MR EADIE: It is ultimately dependent upon the agreement of
25 the parties to the treaty, whether they want it to be

1 subject to ratification or not. But as I say, the view
2 within government is that it is very likely that this
3 treaty will be subject to ratification process in the
4 usual way. Most of them are. It is a pretty rare event
5 for the things to take effect immediately upon
6 accession, as it were.

7 THE LORD CHIEF JUSTICE: But, for example, if one goes to
8 Article 50 -- let me go back to Article 50. It is
9 easier to just look at the precise words.

10 MR EADIE: Tab 6, I think, in the core authorities bundle,
11 A.

12 THE LORD CHIEF JUSTICE: The agreement would be between the
13 European Union, as one would understand it, and the
14 United Kingdom.

15 MR EADIE: Yes.

16 THE LORD CHIEF JUSTICE: But could the United Kingdom and
17 the European Union agree it didn't need ratification?
18 Is that what you mean?

19 MR EADIE: They could in theory. One can't --

20 THE LORD CHIEF JUSTICE: No, of course not.

21 MR EADIE: They could, yes.

22 LORD JUSTICE SALES: But you might have a divergence of
23 views.

24 MR EADIE: You might.

25 LORD JUSTICE SALES: Conceivably, the European Union

1 says: we don't want the uncertainty of being subject to
2 this ratification procedure, therefore we are proposing
3 an agreement without ratification; UK government
4 says: no, we want ratification; but then you might be in
5 a situation where you don't get the agreement under
6 Article 50(2).

7 MR EADIE: It is possible.

8 LORD JUSTICE SALES: You run into the two year --

9 MR EADIE: It is possible. Again, one can't exclude it.

10 That is why I chose the wording so carefully, because
11 that theoretical possibility exists. As I say, the
12 government's view at the moment is it is very likely
13 that any such agreement would be subject to
14 ratification, and therefore fall within the provisions
15 of this Act.

16 LORD JUSTICE SALES: Right. Just to tease it out, that
17 depends upon UK government's view at the end of a
18 process of negotiation and the view of the European
19 Union.

20 MR EADIE: Necessarily.

21 LORD JUSTICE SALES: They both have to agree.

22 MR EADIE: Necessarily, because the requirement for
23 ratification is a term of the international agreement,
24 which requires therefore the agreement of both parties
25 before it goes in.

1 LORD JUSTICE SALES: Yes.

2 THE LORD CHIEF JUSTICE: I just wanted you to explain that
3 so people actually understood.

4 MR EADIE: Yes, I hope that is helpful and I hope you
5 understand why we can't go further in terms of
6 likelihood or certainty.

7 THE LORD CHIEF JUSTICE: Of course you can't. So long as
8 the position is explained so people understand it. It
9 is not for us, or I think for you, to go any further.

10 MR EADIE: That is the position in relation to the Crown,
11 therefore.

12 LORD JUSTICE SALES: To state the obvious, it is not
13 Parliamentary approval in the form of primary
14 legislation, but in the form of resolutions of both
15 Houses as set out in section 20.

16 MR EADIE: The section 20 process does not require primary
17 legislation, unlike the 2011 Act, to which I will come
18 in a moment.

19 THE LORD CHIEF JUSTICE: Okay. Well, thank you very much
20 indeed.

21 MR EADIE: That is CRAG.

22 THE LORD CHIEF JUSTICE: Yes.

23 MR EADIE: Just before, and as it were, as the interlude
24 between CRAG and the 2011 Act, you will have
25 appreciated, also, that even before one gets to that

1 stage, in other words the stage of the possibility of
2 an agreement and CRAG being operated, Parliament will
3 have, in advance of any of that, or is likely to have
4 a central role in the amendment of the domestic
5 legislation.

6 You know that prior to the UK withdrawing, prior to
7 that two-year period being reached and prior to any
8 agreement being reached, the government have announced
9 that they will bring forward legislation in the next
10 Parliamentary session, the great repeal bill. Its
11 effect as publicly announced, and if enacted, will be to
12 repeal the European Communities Act 1972, but to repeal
13 it effective at the point of withdrawal; and also to
14 bring in, if I can put it that way, the existing -- and
15 where possible, existing EU law, into domestic law at
16 the point of withdrawal.

17 Now, that, of course, is consistent with my
18 sequencing point. It is permissible and indeed standard
19 for Crown action on the international level to be
20 followed by Parliamentary action implementing that. But
21 the crucial points, it might be thought, that flow from
22 the repeal act for the purpose of this case are first
23 that Parliament will have an opportunity to decide which
24 rights deriving from EU law will be retained following
25 withdrawal.

1 That is because the effect of the great repeal bill
2 will be, enacted, in effect, to drag in where possible
3 current EU law rights that are not already enshrined in
4 domestic legislation in the first place. The
5 consequence of that, and the second point, therefore, is
6 if the bill is enacted, that swathe of EU law rights
7 which are to be added, as it were, to the block that are
8 already implemented through current domestic
9 legislation, that new swathe of EU law rights will have
10 been domesticated; and the consequence of that is that
11 legislation will also then be required to effect further
12 alteration to those current rights, and Parliament would
13 necessarily have to be involved in that.

14 THE LORD CHIEF JUSTICE: Mm-hm.

15 MR EADIE: So if that bill is enacted, you will then have
16 the current domestic legislative implemented rights; you
17 will have all the acquis, if that is the right way of
18 putting it, dragged in through the great repeal bill,
19 which might be thought not to be the best title, as it
20 were, given what it actually does, which is to drag in
21 EU law rights and then allow it to be taken off
22 seriatim, as it were.

23 THE LORD CHIEF JUSTICE: I don't think it would be wise for
24 anyone in this court to think of a name for it.

25 MR EADIE: I am not suggesting you should. Names are

1 sourced in a variety of different -- explorations.

2 THE LORD CHIEF JUSTICE: Correct.

3 MR EADIE: But its effect, let's make no mistake, is not
4 just to repeal; it is to drag in; and the consequence of
5 that is that Parliament will then have the opportunity
6 and will need, before any further changes are made to
7 the Acts that are domesticated thereby, Parliament will
8 need again to be involved.

9 So, as it were, it is a reinforcement of the point
10 and an expansion of the point that I made yesterday,
11 which is that one needs to be realistic about, and
12 appreciate, the extent, necessary and inevitable extent
13 of Parliamentary involvement in this process --

14 THE LORD CHIEF JUSTICE: Yes.

15 MR EADIE: -- before rights are withdrawn. Currently,
16 legislation provides for certain rights. Parliament
17 would have to be involved legislatively to deal with
18 those. A great repeal bill is enacted. Parliament will
19 then, again, necessarily, and inevitably, be involved in
20 any further alteration to the newly domesticated rights.

21 In any event, even if one could ascertain, leave
22 aside the hollowed-out rights that I made the
23 submissions on yesterday, the rulings of the club point,
24 if there were any further rights, as it were, that fall
25 through the cracks as a result of both current domestic

1 legislative implementation, and also the great repeal
2 bill adding to that swathe of rights, one needs to be
3 realistic about how Parliamentary processes are actually
4 going to work.

5 Parliament will not, on any realistic basis, be the
6 least bit interested in debating and considering a set
7 of rights and obligations otherwise than policy area by
8 policy area. It is a point I made yesterday. On any
9 realistic basis, they are going to be deeply
10 uninterested in the thoroughly interesting and
11 entertaining legal issues around the source of those
12 rights. They are going to say agriculture or it is Home
13 Office, or it is foreign affairs, or whatever else it
14 may be, and they are going to legislate accordingly.

15 That means that when Parliament comes to consider
16 the question of what should it do about currently
17 domesticated legislative rights, the points I made
18 earlier, it will almost inevitably consider whether any
19 other rights and obligations that might not fall within
20 that current legislatively covered category will need to
21 be dealt with.

22 THE LORD CHIEF JUSTICE: Are you in effect saying, that bill
23 will deal with what we shorthand described as
24 category one rights. Those are ones that are within the
25 control of Parliament. You know, domestically, for

1 example, if someone decided they wanted to make part of
2 UK law something like -- a Working Time Directive is
3 a very good example. Because that really applies
4 domestically. That would be a category one right.

5 MR EADIE: Yes. It will deal with a bit of category one in
6 part and category two in part. I don't want to get too
7 sucked into the categories. It doesn't need to deal
8 with those EU law sourced rights, if I can put them that
9 way, that are currently and already implemented into
10 domestic law through either primary or secondary
11 legislation, because you need legislation for those
12 anyway. What will be domesticated is the remaining sets
13 of rights, as it were, that might be directly applicable
14 from Europe -- my Lord is right about the Working Time
15 Directive.

16 THE LORD CHIEF JUSTICE: Yes, but then as regards the
17 rights -- they are two different rights, the rights,
18 say, of freedom of movement which a British citizen
19 enjoys by virtue of the treaties, and what you call the
20 hollowed-out rights, the category three rights, the
21 ability to stand for the European Parliament and vote on
22 it, those would be subject, are you saying, to
23 Parliamentary control, because if the treaty was subject
24 to ratification, Parliament could reject the agreement
25 made by the executive?

1 MR EADIE: Yes. That is the answer to those ones. But
2 before you get even to that point, which is why this is
3 the interim point rather than the same point as
4 the Crown.

5 THE LORD CHIEF JUSTICE: No, but trying to understand the
6 argument in its entirety, the deprivation of what one
7 would call the voting, by way of illustration,
8 category three voting, category two freedom of movement,
9 those would be rights that would, if the agreement under
10 Article 50 is subject to ratification, subject to the
11 point you made on that, Parliament would have the
12 control by saying: well, we don't like it, we are not
13 ratifying what the government has agreed. Therefore the
14 agreement under Article 50 couldn't be made without
15 Parliamentary approval.

16 MR EADIE: I think once that agreement goes in, that would
17 prompt the question, I suppose, of whether, in relation
18 to rights or obligations which were not expressly
19 covered in the agreement, whether the ratification
20 process would cover those.

21 THE LORD CHIEF JUSTICE: Yes.

22 MR EADIE: Whether those would simply be necessary incidents
23 of leaving the club. It would raise that question.

24 THE LORD CHIEF JUSTICE: Yes.

25 MR EADIE: But frankly, once it is before Parliament, the

1 legal and practical reality is a yes to my Lord's
2 question.

3 THE LORD CHIEF JUSTICE: Okay.

4 LORD JUSTICE SALES: Can I just ask, how do you say the
5 CRAG, which I think is 2010, and the likely procedures
6 which you say will follow now are relevant to
7 interpretation of the 1972 Act? So one of the arguments
8 you face is the 1972 Act impliedly excludes the
9 prerogative on the part of the Crown to seek to withdraw
10 from the EU, or EEC treaties as then, EU treaties as
11 now.

12 MR EADIE: Yes, my Lord --

13 LORD JUSTICE SALES: The argument being the 1972 Act
14 achieved that. It is very helpful, what you have set
15 out for us, in relation to what is likely to happen now.
16 I just wanted to get your submission as to whether this
17 has any relevance to that question of statutory
18 interpretation. Maybe it doesn't, on your submission.

19 MR EADIE: I think it may be difficult as a matter of
20 technicality, as it were, to assert that a subsequent
21 statute affects the scheme before. There have been some
22 recent Supreme Court cases on that very point, including
23 one, I think, called JB Jamaica, where there was
24 an amendment subsequently to legislation. The Supreme
25 Court took into account the later legislation, because

1 it formed part of the overall statutory scheme that
2 existed as of today.

3 So if there was an interpretation issue surrounding
4 a piece of legislation on the current statute books,
5 there are circumstances in which later passed
6 legislation, however, as it were, constitutionally
7 illogical that might feel, there are circumstances in
8 which they have allowed the later legislative position
9 to affect the issue of interpretation.

10 LORD JUSTICE SALES: I was just trying to explore your
11 submission. Are you saying that that is the case here?

12 MR EADIE: Yes.

13 LORD JUSTICE SALES: Should we look at JB Jamaica?

14 MR EADIE: My Lord, I am afraid we don't have JB Jamaica in
15 the bundles.

16 LORD JUSTICE SALES: Right.

17 MR EADIE: You will appreciate that our submissions
18 throughout has been that you look at the statutory
19 scheme as a whole. The 1972 Act doesn't impliedly
20 abrogate the convention -- the prerogative, rather.
21 Neither is it part of a --

22 LORD JUSTICE SALES: I follow that that is your argument.

23 MR EADIE: It is, and you are saying, well, on the premise
24 that you are wrong on that---

25 LORD JUSTICE SALES: No, it is not on the premise that you

1 are wrong.

2 MR EADIE: Does it inform that question.

3 LORD JUSTICE SALES: It is that one of the primary arguments

4 you face is that the change was effected by the 1972

5 Act, as a matter of interpretation of the Act, or on

6 some wider principle.

7 MR EADIE: Yes.

8 LORD JUSTICE SALES: I just wanted your submission as to

9 whether, and if so, how, you say this later information

10 is relevant to that question.

11 MR EADIE: Well, if necessary, I make the submission that it

12 can be relevant to the interpretation of the earlier

13 piece of legislation. But I can't develop that

14 submission because we haven't got JB Jamaica in court.

15 LORD JUSTICE SALES: Right.

16 MR EADIE: But we can certainly provide it and provide

17 a note or do whatever on that. Apologies, it is

18 difficult to predict all of the possible ways in which

19 arguments might run.

20 LORD JUSTICE SALES: Of course.

21 THE LORD CHIEF JUSTICE: Is there anything else on CRAG?

22 MR EADIE: There is nothing else on CRAG. Shall we go to

23 the 2011 Act?

24 THE LORD CHIEF JUSTICE: Yes, to explain why that doesn't

25 work. I think I understand why, but --

1 MR EADIE: Yes, that is in bundle A if you are still in
2 there, tab 4.

3 THE LORD CHIEF JUSTICE: Yes.

4 MR EADIE: Sorry, I meant to say, if you still have CRAG and
5 before you put it away, I said they were exclusive
6 regimes, I am so sorry.

7 LORD JUSTICE SALES: You did, yes.

8 THE LORD CHIEF JUSTICE: It is C, isn't it.

9 MR EADIE: It is C/29. 23(1)(c).

10 THE LORD CHIEF JUSTICE: Yes.

11 MR EADIE: Yes.

12 LORD JUSTICE SALES: So it looks as though the prior
13 question is: are you within the 2011 Act? If answer no,
14 then it is CRAG that applies.

15 MR EADIE: Yes.

16 LORD JUSTICE SALES: But if answer on the 2011 Act is you
17 are within that, it is that that excludes CRAG.

18 MR EADIE: Then we don't need CRAG. It is that which
19 governs necessarily and unsurprisingly because when we
20 get to the 2011 Act, you will see that what is required
21 is a higher beast in terms of legislative intervention,
22 an Act and/or a referendum.

23 LORD JUSTICE SALES: Right, thank you.

24 THE LORD CHIEF JUSTICE: I think I see how this works now.
25 Let's wait until we get to the 2011 Act.

1 MR EADIE: At least I am offering some assistance. Tab 4 in
2 bundle A is the 2011 Act. The issue we are considering
3 is assume the negotiations happen and assume that
4 an agreement is reached under Article 50(2) with the
5 Council. It may well be that there are different ways
6 in which treaties are entered into.

7 THE LORD CHIEF JUSTICE: Or whatever the body is on the
8 other side.

9 MR EADIE: Or whatever the body is on the other side.

10 THE LORD CHIEF JUSTICE: I think, as we agreed, Article 50
11 envisages an agreement between the United Kingdom and
12 the European Union.

13 MR EADIE: Acting in a certain way through the Council with
14 qualified majority and European Parliamentary approval.

15 THE LORD CHIEF JUSTICE: Yes.

16 MR EADIE: The question ultimately is whether or not the
17 treaty -- whether that would be a treaty which, quote,
18 amends or replaces TEU or TFEU, section 2(1) of the 2011
19 Act.

20 THE LORD CHIEF JUSTICE: Mm-hm.

21 MR EADIE: Of course, if it did, there might be all sorts of
22 other inconveniences and difficulties potentially, but
23 it would provide, as it were, a silver bullet on behalf
24 of government, because we would then say: well, there is
25 the Act of Parliament, what are you worrying about? But

1 we respectfully submit that that is not the correct
2 reading of section 2(1). That agreement would not be
3 an agreement amending or replacing the TFEU on the
4 proper interpretation of that piece of legislation.

5 LORD JUSTICE SALES: Why wouldn't it replace the TEU or the
6 TFEU?

7 MR EADIE: Because this piece of information, we
8 respectfully submit, establishes a regime for dealing
9 with treaty changes, and other EU level decisions, and
10 notifications which are of concern to the UK in general,
11 and to Parliament in particular as a result of UK
12 membership of the EU. That is what we say this is
13 designed to do.

14 One can see a literal argument that says, well, it
15 would drop away or it would replace, I am not sure it
16 would necessarily replace, because it would be a wholly
17 different agreement which wouldn't operate in the same
18 way at all. The TFEU and the TEU are all signed up to
19 by all the existing members as it were---

20 LORD JUSTICE SALES: I thought that the mechanism under
21 Article 50(2) is that the member states negotiate what
22 their relationship -- how their relationship is to be
23 governed by a treaty which is going to replace the TEU
24 and TFEU.

25 MR EADIE: But that is exactly how the process would work.

1 But this issue is an issue of the correct interpretation
2 of a piece of domestic legislation.

3 LORD JUSTICE SALES: Certainly, but why, since the mechanism
4 under Article 50(2) is as you have agreed it is, is that
5 treaty, which is to be negotiated if it can be, not
6 a treaty that replaces the TEU or TFEU?

7 MR EADIE: Because it represents a different species of
8 agreement, in my submission. This is premised, this
9 piece of legislation, on the assumption that we continue
10 to be members, and the TEU and the TFEU are agreements
11 on the international plane which govern the
12 relationship, as it were, inter se, of those member
13 states who are all members of the club, if I can put it
14 that way.

15 What we are dealing with is a fundamentally
16 different beast which is a new relationship between the
17 EU, as it were, on the outside and us on the outside.
18 It is as though the EU were entering into an agreement
19 with America or Colombia. It isn't what this piece of
20 legislation is designed to do. The purpose of this
21 piece of legislation was to say: before you do anything
22 which amends or replaces in relevant respects the
23 existing relationship whilst we continue to be members
24 of the club, you have to come back to Parliament,
25 because we are worried about further encroachments on

1 Parliamentary sovereignty and everything else. That is
2 why you have the referendum conditions.

3 So although I can see on a literal meaning or
4 a literal approach to replaces -- even on that basis,
5 query whether the TEU and the TFEU would be replaced.
6 They would presumably stay in the same form and this
7 would just be a new agreement alongside.

8 THE LORD CHIEF JUSTICE: Can we look at Article 50. That
9 may help. I do appreciate that the interpretation of
10 Article 50 is not a matter of domestic law, but what it
11 seems to conclude under Article 50(1) is that there is
12 a specific agreement made under the terms of the treaty
13 under Article 50. You obtain an Article 50(2) agreement
14 and you say that, I assume, is not an agreement which is
15 amending or replacing the TFEU.

16 MR EADIE: It is a different beast.

17 THE LORD CHIEF JUSTICE: The consequence of that is the
18 treaties then cease to apply, because that is what
19 Article 50(3) says.

20 MR EADIE: Yes. They are not amending or replacing. They
21 are not introducing, as it were, new rules for the club.
22 This would be, albeit that it happens under the auspices
23 and pursuant to the processes in Article 50 which is
24 part of that treaty process, the equivalent of an EU
25 agreement, as I say, with America.

1 THE LORD CHIEF JUSTICE: But does that then tie to the
2 argument made by you and by the Attorney yesterday that
3 the way in which the 2011 Act was enacted expressly
4 didn't deal with Article 50 at all. The point, I think,
5 as I understood the Attorney, yours and the Attorney's
6 argument yesterday, that if one reads the 2011 Act, it
7 doesn't deal at all with Article 50 being subject to the
8 2011 Act. The argument, I think, was made that as it
9 doesn't, therefore there is no requirement for the
10 notice to be given under Article 50, to be subject to
11 Parliamentary approval, and I assume therefore by
12 extension you say that therefore there is no reason for
13 the agreement to be made, any agreement made under
14 Article 50(2) to be subject to the 2011 Act, but it is
15 subject to the 2010 Act. Is that how it locks together?
16 MR EADIE: Yes, exactly that way, in exactly that way. But
17 there is a prior question here, which is whether or not,
18 and for the purposes of this argument, as I say, it
19 might have all sorts of other inconveniences, but for
20 the purposes of this argument, the temptation, as you
21 will appreciate, was great, because it would provide the
22 Act of Parliament in which you are interested. But we
23 respectfully submit that that would not be the correct
24 reading.
25 THE LORD CHIEF JUSTICE: No, but that is how it works.

1 MR EADIE: That is how it works.

2 THE LORD CHIEF JUSTICE: How the argument fits together.

3 MR EADIE: My Lord, exactly.

4 THE LORD CHIEF JUSTICE: The operation of Article 50 in its
5 entirety is outside. What Parliament would have
6 envisaged is it falls under the 2010 Act and
7 Parliamentary approval is obtained that way.

8 MR EADIE: Exactly so.

9 THE LORD CHIEF JUSTICE: Okay.

10 MR EADIE: On any view, just to pick up a point made by
11 Mr Green, we are now debating, as it were, on the
12 hypothetical premise that an agreement is made. That is
13 the interest, as it were, of the issue of interpretation
14 under section 2(1). But Mr Green made the broader
15 argument, which said: you can imply from this
16 legislation and from this set of provisions
17 an abrogation of the prerogative power, even to give the
18 notification and start. Of course you will appreciate,
19 none of this set of provisions remotely touches that.

20 As my Lord has rightly pointed out, the 2011 Act
21 doesn't deal at all with that initial stage in the
22 process and they wouldn't on any view fall within these
23 provisions.

24 THE LORD CHIEF JUSTICE: Yes.

25 MR EADIE: But even if they would, this is dealing with

1 a later point in time and assumes the making of a
2 treaty. This is nothing to do with taking the step that
3 starts the negotiating process.

4 THE MASTER OF THE ROLLS: This is also, it seems to me,
5 a reflection of the point you are making under the 1972
6 Act, there being a fundamental distinction, this is part
7 of your case, between amendment and withdrawal. I think
8 what you are saying, also, is if we are looking at your
9 wider point of what the latter is in the Parliamentary
10 (?) statutes, or reading the statutory succession as
11 a whole, I think what you are saying is looking at the
12 2011 Act, and reading it as part of the whole, that is
13 a distinction that runs through all of these statutes.
14 I am trying to interpret what you are saying in
15 relation, for example, to looking at the scheme as
16 a whole.

17 MR EADIE: My Lord, yes. I am sorry if you had to interpret
18 it rather than it being made overt and clear for you.
19 But my Lord, that is the thrust of it.

20 LORD JUSTICE SALES: I wonder if you get assistance from the
21 long title to the 2011 Act. Because it seems to be
22 envisaging provision about treaties relating to the
23 European Union and decisions made under them.

24 MR EADIE: Yes.

25 LORD JUSTICE SALES: Do you make any argument based on that?

1 MR EADIE: Assuming continuing membership, therefore.

2 LORD JUSTICE SALES: Yes, thank you.

3 MR EADIE: Yes.

4 THE LORD CHIEF JUSTICE: I think the effect of your -- just
5 to follow this through -- argument is that if the
6 government makes an agreement, if the executive makes
7 an agreement using ordinary prerogative powers, that
8 agreement will be subject to the 2010 Act and Parliament
9 can say yea or nay to it, subject to the point on
10 ratification. Therefore the only oddity about the bit
11 where there isn't control is --

12 MR EADIE: If no agreement.

13 THE LORD CHIEF JUSTICE: -- the two-year point.

14 MR EADIE: And assuming no agreement.

15 THE LORD CHIEF JUSTICE: Yes, it is the two-year point.

16 MR EADIE: Exactly. In relation to that, you have all my
17 submissions about Parliamentary intervention, the
18 legislative rights they would have to deal with, the
19 great repeal bill, the reality and so on.

20 THE LORD CHIEF JUSTICE: But the fundamental answer is that
21 actually at the end of the day, if there is to be
22 a negotiated agreement, subject to ratification, it
23 would be up to Parliament to say yes or no.

24 MR EADIE: Yes, I have used the words I have used
25 deliberately, in terms of likelihood, but for the reason

1 I have explained. I don't want to keep coming back to
2 that point.

3 THE LORD CHIEF JUSTICE: But the likelihood only depends on
4 the question of ratification.

5 MR EADIE: Yes. The court may or may not have appreciated
6 this; there is an exceptional circumstances thing which
7 I probably should draw your attention to.

8 THE LORD CHIEF JUSTICE: Yes.

9 MR EADIE: In CRAG, just so you have the complete picture,
10 which is again another reason for saying likely.
11 I don't think anyone is envisaging that that either
12 would or could be operated other than in circumstances
13 which are genuinely and truly exceptional. So it is
14 section 22 of CRAG, behind tab 29 of C. I am sorry,
15 CRAG really needs to be in the A bundle.

16 THE LORD CHIEF JUSTICE: Now it should certainly be in the A
17 bundle because it has become so important, yes.

18 LORD JUSTICE SALES: Sorry, what is the~...

19 MR EADIE: Section 22.

20 LORD JUSTICE SALES: Yes. So there is a sort of opt out for
21 the executive --

22 MR EADIE: If there are exceptional circumstances.

23 LORD JUSTICE SALES: -- from the ratification.

24 MR EADIE: No doubt subject to both legal and Parliamentary
25 control. No one is envisaging that outcome at the

1 moment.

2 THE LORD CHIEF JUSTICE: Yes, okay.

3 MR EADIE: My Lords, those are my submissions, and I will
4 with your permission hand over to Mr Coppel.

5 THE LORD CHIEF JUSTICE: Mr Eadie, we really meant to say,
6 we do appreciate this has taken longer than we had
7 anticipated, and if you had to be elsewhere, or the
8 Attorney had to be elsewhere, we wouldn't regard it as
9 a discourtesy.

10 MR EADIE: I am extremely grateful.

11 THE LORD CHIEF JUSTICE: We will for the sake of the
12 shorthand writer have a break at about 11.30.

13 MR EADIE: In which case I shall offer moral support to
14 Mr Coppel on whom I have landed the finality of the
15 argument.

16 THE LORD CHIEF JUSTICE: Yes.

17 Submissions by MR COPPEL

18 MR COPPEL: Thank you, my Lords. I wanted to make some
19 short submissions to deal with what you heard from the
20 three intervener parties, Mr Pigney, the expats and AB.
21 As far as Mr Pigney is concerned, first of all, the
22 submissions of Ms Mountfield fell into two areas which
23 I will deal with in turn: loss of EU citizenship rights
24 and the additional impact of the devolution statutes on
25 the argument.

1 Citizenship rights, then, and here I build on and
2 reinforce to some extent the submissions that Mr Eadie
3 made to you yesterday. We submit that the interveners
4 have seriously overstated the effect of the decision to
5 withdraw from the EU and the notification of that
6 decision on the rights which are conferred on
7 individuals by UK domestic law. The case of the
8 interveners does depend to a significant extent on the
9 magnitude of the impact on rights that notification,
10 they say, would inevitably have. It is said there would
11 be a very serious impact on citizenship rights, and that
12 that very serious impact means that by necessary
13 implication, the prerogative has been excluded.

14 The proposition that I want to put to you first of
15 all is that UK citizens have very few rights as EU
16 citizens which are enjoyed as a result of the 1972 Act.
17 Of those rights, none are directly affected by
18 notification and as a matter of law, all could be
19 preserved upon withdrawal, should Parliament so choose.

20 Now, the starting point for this submission is
21 section 2 of the European Communities Act so can I ask
22 you to turn that up, please, in bundle A and it is
23 tab 2. It is section 2(1), which we have seen before,
24 of course. It is the point that all such rights,
25 powers, liabilities, et cetera from time to time

1 provided for by or under the treaties are without
2 further enactment, and it is this: to be given legal
3 effect and be enforced. Sorry: to be given legal effect
4 or used in the United Kingdom. So it is to be given
5 legal effect in the United Kingdom or used in the
6 United Kingdom.

7 What this section does, we submit, is to ensure the
8 recognition in domestic law of directly affected rights
9 against the UK state, the emanations of the state first
10 and foremost, but also against other individuals in the
11 UK in the case of provisions of the EU law which have
12 horizontal effect. We know that some treaty articles in
13 particular have horizontal effect.

14 Now, the short point is the right to live in France,
15 to take the first right which was cited by Mr Green for
16 the expats, that is not a right which is conferred by
17 the European Communities Act to be enjoyed in the UK or
18 against the government of the UK.

19 LORD JUSTICE SALES: But if the government imposed, say,
20 a fine for anyone that was going to live in France, that
21 would be a directly enforceable right.

22 MR COPPEL: Yes, I will refine that submission. The right
23 is first and foremost, we say, a right which is enjoyed
24 against the government of France pursuant to the
25 domestic and international law obligations of that

1 government, in particular the obligations which France
2 has assumed under the EU treaties to allow UK citizens
3 to come and live on its territory. So in general terms
4 UK citizens can take advantage of the right to go and
5 live in France because of the international agreements
6 which the Crown has entered into with France, amongst
7 other member states.

8 THE LORD CHIEF JUSTICE: But that is a right directly
9 enforceable through the European court.

10 MR COPPEL: Well, my Lord, it is a right which is directly
11 enforceable against France, and it is not a right which
12 is conferred by the European Communities Act for that
13 reason.

14 THE LORD CHIEF JUSTICE: Why? Because the right conferred
15 by the European Communities Act surely must include
16 a right to go to the European court.

17 MR COPPEL: No, my Lord, the right of a UK citizen currently
18 in France, currently living in France --

19 THE LORD CHIEF JUSTICE: Yes.

20 MR COPPEL: -- is conferred, we say, pursuant to French
21 immigration law. If there is some issue about --

22 THE LORD CHIEF JUSTICE: What I don't quite follow is
23 I had -- you know, we may need to look at the European
24 case law on this subject, but surely they are rights
25 arising out of, as the ECJ would see it, the citizenship

1 of the Union.

2 MR COPPEL: Yes they are. Yes.

3 THE LORD CHIEF JUSTICE: But then the right of a UK citizen,
4 he has been given these rights, hasn't he, by the Act?
5 Ie the right of European citizenship.

6 MR COPPEL: No, my Lord, that is not the right analysis --

7 THE LORD CHIEF JUSTICE: Oh.

8 MR COPPEL: -- in our submission. Just to refine the
9 submission in response to the point put to me by
10 Lord Justice Sales, in relation to the right to go and
11 live in France, the obligation of the UK government, and
12 therefore the rights conferred by the European
13 Communities Act, those rights are limited. They are
14 a right against the government not to stop you from
15 leaving the country, or not to deter you from leaving
16 the country, by fining you, for example, and to allow
17 you to come back to France once you have had enough of
18 the good life.

19 But that right, those rights, are currently provided
20 for under domestic law. They fall in to the category
21 of, if nothing were changed they would continue and on
22 any view, they are rights which Parliament could
23 continue, or could ensure will continue after
24 withdrawal.

25 But the substantial part of the right to reside in

1 France, is a right which France confers, pursuant in
2 particular to EU law, as a result of the international
3 obligations which the Crown has entered into on behalf
4 of the UK in the EU treaties.

5 LORD JUSTICE SALES: But in a certain sense, that is a
6 product of the European Communities Act because we have
7 been told that the European Communities Act and
8 subsequent primary legislation was necessary in order
9 for the United Kingdom to ratify those treaties, and
10 therefore to secure the benefit of those treaties for
11 its citizens.

12 MR COPPEL: Well, no. My Lord, what was --

13 LORD JUSTICE SALES: Sorry.

14 MR COPPEL: -- necessary as far as domestic law was
15 concerned, yes, certainly was to ratify the treaties,
16 and because of the 1978 Act and subsequent statutes,
17 Parliamentary approval was necessary for that. But the
18 right to live in France was not a right which was ever
19 conferred by the European Communities Act itself,
20 because that confers rights to be used and given effect
21 in the UK. That is what it says.

22 So should a UK citizen be expelled from France
23 unjustifiably, his right is under French immigration
24 law. He goes to the French court, he doesn't rely on
25 the European Communities Act, he goes to the French

1 courts and he relies on their equivalent of the European
2 Communities Act and their immigration law, and
3 says: because of your international obligations you are
4 not allowed to do this; but this is not as a result of
5 the European Communities Act.

6 THE LORD CHIEF JUSTICE: That is because of the words, "as
7 in accordance ... without further enactment to be given
8 legal effect or used in the UK shall be recognised and
9 available in law ... and followed accordingly".

10 MR COPPEL: Yes, it is the words, my Lord, but it is also
11 common sense. What business would Parliament have,
12 enacting in domestic legislation the obligations of
13 a foreign state?

14 THE LORD CHIEF JUSTICE: That is what I don't understand.
15 I thought that the EU Act, and we may need to look at
16 this, conferred, or certainly in view of the Luxembourg
17 court, there is such a thing as Union citizenship.

18 MR COPPEL: Yes.

19 THE LORD CHIEF JUSTICE: Which is distinct from French and
20 British citizenship.

21 MR COPPEL: Yes.

22 THE LORD CHIEF JUSTICE: That European citizenship,
23 I thought, flowed from the treaties.

24 MR COPPEL: Yes. My Lord, yes, it does. It implies, and
25 contains, a package of different rights.

1 THE LORD CHIEF JUSTICE: Yes.

2 MR COPPEL: We will look at those rights in a bit more
3 detail in a moment. But the rights which are conferred
4 by the European Communities Act, as far as going to live
5 in France is concerned, let's stay with that example,
6 those rights are the right to leave the country and to
7 be allowed back in. Not the right to live in France.
8 That is what I say.

9 THE LORD CHIEF JUSTICE: But he gets the right to live in
10 France through citizenship of the European Union.

11 MR COPPEL: Well, my Lord, yes, that is the ultimate origin
12 of it; that is the international treaty provisions,
13 which give him, ultimately, that right. But when he
14 goes to the French courts to complain about being
15 unjustifiably expelled from France, his rights are under
16 French law implementing --

17 THE LORD CHIEF JUSTICE: That is how you put it, anyway.

18 MR COPPEL: -- citizenship rights. So you saw Mr Gill
19 handed up yesterday the 2006 immigration regulations.

20 THE LORD CHIEF JUSTICE: Yes.

21 MR COPPEL: Which implement in the UK the Citizenship
22 Residence Directive, which you also have in the bundles.
23 He made submissions as to the effect on those
24 regulations of withdrawal, which I will come to. But
25 those govern the position in the UK. There will be

1 equivalent legislation in France and in each of the
2 other member states of the EU which confers the
3 equivalent rights. One does not, and I will stop
4 repeating myself in a moment, get the right to live in
5 France from that domestic legislation or any other
6 domestic legislation.

7 So what we say is that the whole range of rights
8 within category two, which have been said to not be
9 within Parliament's gift, and that is said on the other
10 side to make the claimant's case a stronger one, we say
11 that doesn't make the claimant's case stronger, it makes
12 it weaker. Because if a right is not within
13 Parliament's gift, that is a sure sign that it wasn't
14 conferred by Parliament in the first place.

15 LORD JUSTICE SALES: But again, in a certain sense in 1972
16 it was within Parliament's gift, because it was only if
17 that legislation was passed that the UK would ratify the
18 treaties and thereby acquire all of these rights for its
19 citizens in other countries.

20 MR COPPEL: Well, my Lord, I think you will have been told
21 already, in 1972 we don't accept that it was a condition
22 of the ratification of the treaties that Parliament did
23 have to pass legislation. The legislation complies, and
24 was passed so as to ensure, compliance with the UK's
25 obligations under the treaties, but a legislative

1 control that required Parliamentary assent before
2 ratification only came in in 1978 and only in relation
3 to treaties which extended the role of the European
4 Parliament.

5 LORD JUSTICE SALES: I thought we had been told that
6 ratification was necessary in 1972 precisely because it
7 was known that European law would create directly
8 effective rights within the UK's domestic legal system,
9 and therefore before the UK would ratify the treaties,
10 it needed domestic legislation to give that effect and
11 indeed that is what happened with the 1972 Act.

12 MR COPPEL: Well, that is what the claimants say. We have
13 said in our skeleton argument and subsequently that that
14 is the wrong analysis; that the passing of the 1972 Act
15 was necessary, sure, to comply with the UK's obligations
16 it was going to assume under the treaties, but it was
17 not a condition of ratification. The only legislative
18 control that required Parliamentary approval of
19 ratification came in 1978, and subsequently. So
20 my Lord, one mustn't confuse the steps which are
21 necessary to ensure that the UK complies, or can comply,
22 with the treaty obligations and what is necessary and
23 what is required in order to permit the Crown to ratify.
24 Those are two different matters.

25 LORD JUSTICE SALES: Thank you.

1 Just for our note, the paragraphs in the skeleton
2 argument? I am not inviting you to read them, but just
3 so we can follow.

4 MR COPPEL: In our skeleton argument it is from 28 onwards,
5 paragraph 28 onwards of our skeleton argument.

6 LORD JUSTICE SALES: Thank you.

7 MR COPPEL: So, my Lord, can I just ask you then to look at
8 the citizenship rights and it is important, in my
9 submission, to separate the status of citizens, which of
10 course we don't dispute arises under the treaties, from
11 the rights which come with that. In bundle C, tab 31
12 you have the provisions of the treaty on the functioning
13 of the European Union. And article 20 establishes Union
14 citizenship.

15 THE LORD CHIEF JUSTICE: Mm-hm.

16 MR COPPEL: And 21 and 22, 20(2) sets out, A, B, C, D,
17 different citizens' rights which are then set out in
18 articles 21 onwards. These are all rights which the
19 interveners rely on.

20 21, Article 21(1) is the right to move and reside
21 freely within the territory of the member states, and
22 I have made my submissions on that, the UK has the
23 obligation to let you go and let you come back, but the
24 actual right to live in France, et cetera, that is for
25 France.

1 22, every citizen residing in a member state of
2 which he is a national shall have the right to vote and
3 stand as a candidate in local elections in the member
4 state in which he resides.

5 In the next paragraph, to elections to the European
6 Parliament in the state in which he resides; those are
7 also rights which are not conferred by the European
8 Communities Act. It is a right to vote in French local
9 elections, it is a right to vote in Spanish, Romanian,
10 Bulgarian local elections.

11 THE LORD CHIEF JUSTICE: But these rights couldn't be
12 altered, because Parliament could control the alteration
13 of these rights, because that is what flows from all of
14 the subsequent legislation.

15 MR COPPEL: My Lord, these are not rights which are ever
16 conferred by the European Communities Act for the
17 reason --

18 THE LORD CHIEF JUSTICE: But Parliament has control over
19 these rights because you can't amend these rights
20 without Parliamentary approval.

21 MR COPPEL: My Lord, I am sorry, but plainly Parliament has
22 control over these rights in the sense that EU citizens
23 living in this country can enjoy these rights in this
24 country, and Parliament must ensure that that takes
25 place.

1 THE LORD CHIEF JUSTICE: Yes.

2 MR COPPEL: But so far as the rights to vote in local
3 elections in Romania is concerned, that is not a right
4 which comes from the European Communities Act.

5 THE LORD CHIEF JUSTICE: But what I don't understand is
6 this: these rights are rights under the treaty.

7 MR COPPEL: Yes.

8 THE LORD CHIEF JUSTICE: If we were talking about the
9 amendment of the treaty, Parliamentary approval would
10 have to be obtained.

11 MR COPPEL: Because of section 2 of the European Union Act.

12 THE LORD CHIEF JUSTICE: And expressly, we have just been
13 looking at the 2011 Act.

14 MR COPPEL: I am sorry, yes.

15 THE LORD CHIEF JUSTICE: Right.

16 MR COPPEL: Indeed, yes. But my Lord, the --

17 THE LORD CHIEF JUSTICE: Therefore what I don't -- I am
18 sorry, I am slightly baffled. I don't understand why
19 the content of these rights are not controlled by
20 Parliament.

21 MR COPPEL: Yes. Well, my Lord, in part they are. But the
22 case against us is that the act of notification, the
23 withdrawal of the UK from the European Union will bring
24 rights to an end which are conferred by domestic law
25 through the European Communities Act. That is the case

1 against us.

2 THE LORD CHIEF JUSTICE: But they must be, because if you
3 can't alter, if you can't amend the treaty, is this
4 a different argument to the -- I understand completely,
5 which the Attorney and Mr Eadie have so elegantly put,
6 the argument in relation to the on 2011 Act and the 2010
7 Act, but if you were to amend the treaty, you couldn't
8 change these rights without Parliamentary approval, and
9 the argument is you can withdraw from the rights. That
10 I understand. The difference between amending and
11 replacing. If you were amending these rights,
12 Parliament would have to agree, wouldn't it?

13 MR COPPEL: Yes, if there were a treaty which amended these
14 rights and the UK was still a member of the European
15 Union, then Parliament would have to approve it under
16 section 2 of the European Union Act. That is not the
17 purpose of this submission. The purpose of this
18 submission is that there is a complaint made by the
19 interveners that notification will remove the right
20 under article 22 for UK citizens to vote in local
21 elections in other countries to which I say: well, yes
22 it will. But that is not the removal of a right which
23 is conferred by domestic law. If Romania prevents
24 a British citizen from voting in Romanian local
25 elections, their cause of action is not under the

1 European Communities Act, it is under Romanian law,
2 which Romania has implemented as a result of its
3 international obligations under the treaties.

4 THE LORD CHIEF JUSTICE: Can I just see how this fits in.
5 If the Attorney, and the argument presented by the
6 Attorney is right, then you can withdraw, none of this
7 arises. If the argument is wrong, why does this help
8 you?

9 MR COPPEL: Well, my Lord, why this --

10 THE LORD CHIEF JUSTICE: That is what, at the moment, I am
11 baffled by.

12 MR COPPEL: Why this helps is because the interveners and
13 the claimants' case, as well, is that the Crown cannot
14 withdraw, cannot exercise the prerogative to withdraw,
15 because of the serious impact that that would have on
16 rights which are conferred by domestic law.

17 THE MASTER OF THE ROLLS: I think it goes further than that.
18 They were saying that you can't -- their general broad
19 principle was you can't by executive action withdraw
20 a right conferred by statute. Only Parliament can do
21 that. And really you are meeting that point.

22 MR COPPEL: Yes, indeed.

23 THE MASTER OF THE ROLLS: But it doesn't deal with my Lord's
24 point, which is the wider point, the secondary point
25 about the implication arising from control over

1 amendment of statutes.

2 MR COPPEL: Yes.

3 THE MASTER OF THE ROLLS: This goes to the broader first
4 point.

5 MR COPPEL: This goes to the first point, what domestic law
6 rights are actually being removed. That is what I am
7 trying to address, and I am sorry if I haven't been
8 clear about that.

9 THE MASTER OF THE ROLLS: Yes.

10 MR COPPEL: So article 22 isn't, as far as UK citizens are
11 concerned, is not a right that is conferred by the
12 European Communities Act. Neither is article 23, the
13 right to diplomatic or consular protection by the
14 authorities of other member states. That is not
15 a directly affected right to be used or enjoyed or given
16 effect in the UK. That is for people in countries
17 overseas who get into difficulty and don't have
18 a British Embassy there, and they have a right against
19 other member states as a result. Not a European
20 Communities Act right.

21 Similarly, article 24, the right to approach, to
22 petition the European Parliament. That is conferred by
23 rules made by the European Parliament. It is not
24 a directly affected right conferred by the European
25 Communities Act to be enjoyed against the UK government

1 or otherwise in the UK. Same sort of point arises.

2 Now, the same point can also be made about the
3 rights of Mr Green and also Lord Pannick to some extent,
4 who say they exist to approach the European Commission
5 to ask it to take infringement proceedings against
6 a member state. That is not a right at all, in fact.
7 That is a duty of the Commission under the treaty.
8 Nobody has a right to force the Commission to do
9 anything. But it is not a right to be used or given
10 effect or enjoyed in the UK, enforceable against the UK
11 government or anyone else in the UK; it is the
12 Commission.

13 The same could be said about the right as it is put
14 to approach the Court of Justice of the European Union.
15 There is no right to seek to have a preliminary
16 reference made to the Court of Justice. There is
17 a procedure under the treaty which enables the Court of
18 Justice to accept preliminary references. Now, that
19 will fall away once the UK has left the European Union,
20 but that is the rules of the club, as Mr Eadie has put
21 to you. Again, it is not a right that is conferred by
22 domestic law that would be interfered with by the act of
23 notification.

24 My Lords, if you look at Mr Pigney's skeleton
25 argument, paragraph 72, there is a whole series of

1 rights which are set out, including the ones that I have
2 mentioned. So it is Ms Mountfield's skeleton argument
3 at paragraph 72.

4 Would my Lords wish to break now before I embark?

5 THE LORD CHIEF JUSTICE: Yes, just for the shorthand writer.

6 Five minutes.

7 (11.34 am)

8 (A short break)

9 (11.40 am)

10 THE LORD CHIEF JUSTICE: Yes.

11 MR COPPEL: My Lord, just quickly on paragraph 72 of

12 Ms Mountfield's skeleton.

13 THE LORD CHIEF JUSTICE: Yes.

14 MR COPPEL: These are said to be the rights which citizens
15 of the UK will inevitably lose upon the UK leaving the
16 EU. And you have the right to move to other member
17 states with family members. I have made my submission
18 about that. The right to seek employment, work,
19 exercise the right of establishment or provide services
20 in any member state; the same point arises. You have
21 a right against the UK to not stop you from leaving, or
22 not to discourage you from service provisions in the
23 other states, but the substance of the rights is a right
24 enforceable against other states under their legislation
25 in due course. C, dealt with.

1 THE LORD CHIEF JUSTICE: Yes.

2 MR COPPEL: Again, D I have dealt with. E, the right to
3 non-discrimination. Well, I think Lord Pannick in his
4 note from Friday described this right correctly as
5 a right not to be discriminated against in other member
6 states on grounds of your nationality. So if the UK
7 citizen goes to France, Spain, wherever, they have
8 a right to be treated equally within the material scope
9 of the treaty. But again, that is a right not used, or
10 given effect, in the UK. It is in other member states
11 under their law against them.

12 LORD JUSTICE SALES: But presumably if there was a French
13 person in the UK, they would have rights under our law
14 here.

15 MR COPPEL: Yes, yes.

16 LORD JUSTICE SALES: Right.

17 MR COPPEL: Indeed. These are expressed, para 32, as the
18 rights of UK citizens which would be lost. As far as
19 the French citizen is concerned in the UK, they have at
20 the moment rights under UK domestic legislation in the
21 Equality Act not to be discriminated against on grounds
22 of nationality. As a matter of law, the act of
23 notification and even the UK's withdrawal from the EU
24 doesn't change that. As a matter of law, that
25 continues. They will continue to have a right not to be

1 discriminated against on grounds of nationality. So
2 nothing is lost.

3 The right of petition I have dealt with. Right to
4 equal pay, G, that again is enshrined in the
5 Equality Act 2010. The act of notification, the
6 withdrawal from the EU, in itself as a matter of law
7 changes nothing. The right to receive healthcare that
8 is free at the point of use, paid for by the NHS, this,
9 again, has two aspects to it. The right to be treated
10 in a French hospital or a Spanish hospital or whatever,
11 that is a right which is or should be afforded under
12 their legislation and if it is not, there will be
13 directly effective rights under the directive against
14 them, not rights that are conferred by the European
15 Communities Act to be used, given effect in the UK.

16 There is a right in certain circumstances for the
17 NHS to pay for your treatment abroad. That is in
18 domestic regulations. Again, the act of notification,
19 the withdrawal from the EU, as a matter of law changes
20 nothing.

21 Then you have the rights under the charter, and
22 would have to go through it right by right, which I am
23 not going to do. Some of these rights are only
24 enjoyable against other member states, some are the same
25 as the Convention on Human Rights which we already have,

1 some are implemented under UK legislation. There isn't
2 really anything different in the analysis.

3 Mr Gill relied in particular on the rights of
4 Zambrano carers, the carers of UK citizen children to
5 remain in this country so as to avoid their children
6 having to leave the EU. That is a right which, as he
7 mentioned, is conferred by the 2006 regulations that he
8 handed up to you and the particular provision, just for
9 your note, is regulation 15A(4)(a). But again, this is
10 within the category of a right which has been
11 implemented in to UK law. It is in domestic
12 legislation. In itself, as a matter of law, notifying
13 and then leaving the EU has no effect on that
14 legislation.

15 THE LORD CHIEF JUSTICE: Mm-hm.

16 MR COPPEL: So it is simply fanciful for him to suggest that
17 his clients would automatically be exposed to criminal
18 liability as a result of notification when as a matter
19 of law, nothing changes.

20 Lord Pannick sets out a series of rights in his note
21 from Friday. He includes the right to sell medicinal
22 products in other member states of the EU, the rights to
23 perform services as a medical practitioner in other
24 states of the EU. Again, the same analysis, there are
25 certain rights which are enjoyed by EU nationals in the

1 UK which may continue after withdrawal. But the
2 substance of the right is a right to be enjoyed against
3 other member states; it is not conferred by section 2(1)
4 of the European Communities Act.

5 So what this all comes down to is in the three
6 categories, and I hope I haven't lost track of the
7 typology, the category one rights are those which are
8 either already in domestic law and will continue to be
9 as a matter of law, no change due to notification; or
10 can be transposed into domestic legislation. I think
11 this category particularly includes directly applicable
12 regulations to which the Master of the Rolls referred
13 yesterday. Those need not currently be implemented in
14 domestic legislation but they could be. That is the
15 great repeal bill that Mr Eadie was discussing.

16 Then you have the category two rights not within the
17 gift of Parliament, but as I have said, that indicates
18 that they were never actually conferred by Parliament in
19 the first place. It could not do so and it did not do
20 so.

21 LORD JUSTICE SALES: Just so we are clear, the category two
22 rights are the rights, for instance, of the UK citizen
23 in France that you have been referring to.

24 MR COPPEL: Yes, as I understand the categorisation.

25 THE LORD CHIEF JUSTICE: How did the British citizen acquire

1 the right of free movement?

2 MR COPPEL: How does the?

3 THE LORD CHIEF JUSTICE: How has the British citizen

4 acquired the right of free movement?

5 MR COPPEL: Well, that is as a result of the international

6 obligations which the UK has entered into with the other

7 member states of the EU at a high level. What does the

8 right of free movement mean, one has to ask what that

9 means.

10 THE LORD CHIEF JUSTICE: No, no --

11 MR COPPEL: On the ground, when you move to France, Spain or

12 whichever country, the UK citizen has a right of free

13 movement either as a result of their domestic

14 legislation, or if they haven't got domestic

15 legislation, he can rely directly upon the treaty

16 against that country.

17 THE LORD CHIEF JUSTICE: And his right to Union citizenship,

18 similarly, comes from the treaty?

19 MR COPPEL: Yes, his status as an EU citizen with the rights

20 which come with that, comes from the treaty.

21 THE LORD CHIEF JUSTICE: Okay.

22 MR COPPEL: If he is in France and he is not being treated

23 as an EU citizen should be treated, then he has a cause

24 of action against the French authorities, and he may

25 rely on his directly affected rights under the treaty

1 against them. He doesn't rely on the European
2 Communities Act.

3 THE LORD CHIEF JUSTICE: Yes.

4 MR COPPEL: Then you have your category three rights, which
5 are the rights to belong to and use the institutions of
6 the club while you are a member of the club. Now, you
7 have heard submissions about that. It is a small
8 category, in my submission. In terms of a right which
9 is conferred by domestic law, there are the rights to
10 vote and stand in European Parliament elections, not
11 conferred by the 1972 Act but by later legislation.

12 THE MASTER OF THE ROLLS: But aren't the category three
13 rights any rights which haven't been given effect in
14 domestic legislation and are derived, for example, as
15 you have just been saying, directly from the treaty?
16 Any rights which are directly enforceable, even without
17 primary legislation, here or in any other country for
18 that matter, who are members of the European Union.

19 MR COPPEL: My Lord, as I understood category three, and
20 again I apologise if I have lost track of the typology,
21 but as I understood it, category three contains the
22 rights which would inevitably be lost as a result of
23 leaving the EU, because they relate to the institutions
24 of the club.

25 THE MASTER OF THE ROLLS: That is what I am talking about.

1 MR COPPEL: Certainly there are current EU law rights in the
2 treaty in directly enforceable regulations which are not
3 correctly reflected in domestic legislation but could
4 be.

5 THE MASTER OF THE ROLLS: Here or elsewhere. For example
6 you have been describing categories. You have been
7 describing those circumstances where the rights have not
8 been granted, as it were, by the 1972 Act, but which are
9 nonetheless are enjoyed directly by UK citizens by
10 virtue of the membership of the EU in all of the other
11 member countries.

12 MR COPPEL: Yes.

13 THE MASTER OF THE ROLLS: Well, category three in a sense
14 covers all of those where not given effect in primary
15 legislation either here or in any of those countries.

16 MR COPPEL: As I understood the categorisation, those rights
17 that are not within the gift of Parliament, rights, were
18 in category two.

19 THE MASTER OF THE ROLLS: I see.

20 MR COPPEL: The position is that much depends upon the
21 content and outcome of the negotiations.

22 THE MASTER OF THE ROLLS: Yes.

23 MR COPPEL: Certainly they aren't within the gift of
24 Parliament.

25 THE MASTER OF THE ROLLS: What you could say is -- I think

1 you are addressing here that narrower point about what
2 rights have actually been granted by the 1973 Act, which
3 affect here, the words used here. But there is this
4 wider category of rights enjoyed by British citizens in
5 all of the other member states. What I am saying is
6 those are not within the gift of the UK government.

7 MR COPPEL: That's right.

8 THE MASTER OF THE ROLLS: That applies to all of these
9 rights which they derive from, as EU citizens.

10 MR COPPEL: Yes. So those rights were not conferred by
11 domestic law to start with, so never within the gift of
12 the UK government. They won't be within the gift of the
13 government in the future, but, depending on the content
14 and outcome of the negotiations, they may be enshrined
15 in domestic law.

16 But my Lord, the critical point is that the argument
17 against us is all about impact on rights conferred by
18 domestic law. Now, the point of my submission, which
19 I will finish in a moment, which I have been making, is
20 that the category of domestic law rights which will
21 inevitably be affected by notification is very small,
22 and really is principally within that category of rights
23 to use the institutions of the club, which you have
24 heard about from Mr Eadie. That does impact, we say,
25 upon what implications should be drawn from the

1 statutory scheme.

2 Just finally, before I leave this subject, there is
3 a timing point here, as well. My Lord,
4 Lord Justice Sales has been putting to Mr Eadie: well,
5 don't we just freeze time in 1972 and look at what the
6 1972 Act did? Well, that is not the case on the other
7 side. Citizenship rights came about in 1992. We are
8 being faced with the whole plethora of EU law rights as
9 they have developed over the years up until now, and not
10 with a case which is frozen in time in 1972. So that is
11 of some relevance, we say, to the intention of
12 Parliament.

13 So that is my response to the submissions for the
14 interveners on citizenship rights. That deals in
15 substance with the argument on the Bill of Rights. The
16 great majority of the rights which Ms Mountfield, on
17 which she rests her case, were never conferred by
18 Parliament in the first place and so certainly haven't
19 been dispensed with. Those which have been conferred by
20 Parliament, or by subordinate legislation, as a matter
21 of law will remain notwithstanding notification and even
22 withdrawal. Parliament will be consulted, as you have
23 heard, and will have control over the corpus of domestic
24 law as it stands after the withdrawal.

25 Devolution, then, the other aspect of her

1 submissions, very briefly, there are two points that she
2 makes. The first point is that leaving the EU would
3 remove one aspect of the scheme of vires of the devolved
4 governments set out in the devolution legislation. They
5 all have to comply with EU law. And just one example of
6 that, if I may, bundle E, tab 6. In the Scotland Act.

7 THE LORD CHIEF JUSTICE: Yes.

8 MR COPPEL: Section 29 of the Scotland Act, legislative
9 competence:

10 "An Act of the Scottish Parliament is not law so far
11 as any provision of the Act is outside of the
12 legislative competence of Parliament. Provisions
13 outside that competence ... apply~..."

14 And then (d), it is incompatible with EU law.

15 Then EU law is defined on page 75 in section 126(9):

16 "All of those rights, powers, liabilities,
17 obligations ... from time to time created ... under the
18 EU treaties~..."

19 Similar wording as one finds in the European
20 Communities Act. My submission, quite simply, is that
21 the submission on the other side is on the 1972 Act is
22 what it is; it doesn't get any better when one looks at
23 different manifestations of the 1972 Act in different
24 legislation. The same arguments apply, we say, it
25 assumes and doesn't require membership. The other side

1 say what they say, but it is the same point. This exact
2 point in the context of the devolution legislation is
3 going to be decided in the context of the
4 Northern Ireland Act, which has similar provisions by
5 Mr Justice Maguire as a result of the hearing in Belfast
6 the week before last.

7 The second point which Ms Mountfield made was
8 Article 18 of the Union with Scotland Act. The
9 principal submission we make, adopting the point by
10 my Lord, Lord Justice Sales, to which, with respect,
11 Ms Mountfield did not reply, there is nothing to suggest
12 that the basic constitutional background is any
13 different in Scotland than England, and the same issue
14 arises whether Parliament has left in the hands of the
15 Crown the prerogative power to decide to withdraw.
16 There are a number of other reasons why Article 18
17 doesn't help; non-justiciability, no impact on private
18 law, there is a whole range of them; but really it
19 suffices for my purposes to say that it just doesn't
20 change the argument.

21 So my Lords, those are my submissions. Unless I can
22 assist further.

23 THE LORD CHIEF JUSTICE: Thank you very much, Mr Coppel.

24 Yes, Lord Pannick.

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Reply submissions by LORD PANNICK

LORD PANNICK: My Lords, can I begin my reply by emphasising some core points which are fundamental to our case. First of all, the defendant accepts that a notification under Article 50(2) will inevitably result in the EU treaties no longer applying to this country. It won't happen immediately, as Mr Eadie pointed out, but it will happen either within two years or longer if there is an unanimous agreement to extend the time period. The Attorney did not suggest that a conditional notification may be given or that notification, once given, may be withdrawn.

The second preliminary point is this: the consequence of the treaties no longer applying is that the rights conferred under section 2(1) of the 1972 Act are stripped away. They are destroyed. Subject, subject, to any steps which Parliament may take to preserve rights. Subject to that, there is no dispute, as I understand it, no dispute, that once notification is given, there is a direct causal link between notification and removal of statutory rights.

The third point is that we say notification will inevitably cause some statutory rights enacted by Parliament to be destroyed. It will take the preservation of other statutory rights out of the hands

1 of Parliament. There are two categories.

2 First of all, there is the rights which Parliament
3 simply could not maintain. I emphasise it is quite
4 sufficient for our purposes that there is one such
5 right. I don't have to show your Lordships that there
6 are dozens, hundreds of these rights. For my purposes
7 the prerogative cannot be used in order to take away,
8 destroy, abrogate, a constitutional right that is
9 recognised by statute. We say there are at least some
10 statutory rights which Parliament simply could not
11 maintain.

12 First of all, Mrs Miller's right to vote in and
13 stand as a candidate in elections to the European
14 Parliament. That is a statutory right under the 2002
15 Act, volume C, tab 21. It is a constitutional right.
16 It is accepted, as I understand it, that once
17 notification is given, it is inevitable that that
18 statutory right is destroyed. I will come to the
19 argument of: well, it is because you are no longer
20 a member of the club. But the fact is that right is
21 destroyed. It will be destroyed. Necessarily,
22 inevitably.

23 The second right that is inevitably destroyed is
24 Mrs Miller's right to seek to have her case referred,
25 her case on any issue, referred to the Court of

1 Justice in Luxembourg for a ruling on the scope of her
2 other rights derived from EU law. Mr Coppel says that
3 isn't a right, but it is undoubtedly a right. It is
4 a right in domestic law, section 3(1) of the 1972 Act,
5 to ask the UK court to make a reference and the
6 consequence may be damages, it may be an injunction. It
7 is an important constitutional right of access to
8 a court for the determination of legal rights.

9 The third right that inevitably disappears is
10 Mrs Miller's right to seek the assistance of the
11 European Commission. For example, suppose she has
12 a competition complaint in this country -- in this
13 country -- against a rival business. At the moment she
14 can go to the European Commission and seek their
15 assistance in resolving the problem in this country.
16 The consequence of notification is inevitably that is
17 lost.

18 Now, Mr Coppel says this category of lost rights,
19 inevitably lost rights, is very small. But there are at
20 least three of them. They are each of them important
21 rights, constitutional rights, and as I have said, the
22 removal of one right suffices for my purposes.

23 Mr Eadie said, and I quote:

24 "These are rights which are incidents of membership
25 of the club."

1 Of course he is right. But that description does
2 not alter the importance of the rights currently
3 enjoyed, rights created by Parliament, and it does not
4 alter the fact that the inevitable consequence of
5 notification by the minister is to destroy those rights
6 and to destroy them whatever Parliament may think about
7 the matter. Parliamentary consideration is preempted.
8 That is the first category of rights.

9 There are also other rights which, as Mr Eadie put
10 it, are not in the gift of Parliament. Rights which
11 might be restored, depending, as Mr Eadie put it,
12 accurately put it, on the result of negotiations. For
13 example the right to free movement. The right to
14 freedom of services. There are many other examples. It
15 is possible -- possible, one doesn't know -- that some
16 of these rights may be preserved as a result of the
17 negotiations which take place following notification.
18 Our point is that the consequence of notification is
19 that whether these rights survive is taken out of the
20 hands of Parliament. That is our point. These rights
21 are lost, whatever view Parliament may take, unless
22 third parties, that is the EU states, the other EU
23 states, agree to maintain those rights in some new
24 agreement. Parliament is simply preempted. Parliament
25 may wish, may wish, to preserve the right to freedom of

1 services. But it cannot do so of its own volition.

2 That is the point. And there are many such rights.

3 Now, my Lord the Lord Chief Justice had an exchange
4 this morning with Mr Eadie on Parliament's opportunity
5 post notification to consider these matters. And
6 I entirely understand, and accept, that under CRAG the
7 probability, as Mr Eadie put it, is that Parliament will
8 need to be engaged if there is a new agreement. But
9 that is no answer, in my respectful submission, it is no
10 answer to our point. The reason why it is no answer to
11 our point is that the inevitable consequence of
12 notification is that statutory rights are destroyed --
13 that is the first category -- and the preservation of
14 other rights is taken out of the hands of Parliament.
15 By the time Parliament comes to look at the matter, post
16 notification, the die is cast, that is the point.

17 LORD JUSTICE SALES: Lord Pannick, can I just check. You
18 said you accept that there would be that level of
19 control under CRAG. That seems implicitly to accept
20 that --

21 LORD PANNICK: If there was an agreement.

22 LORD JUSTICE SALES: Yes, and that is what I wanted to ask
23 you about. You accept that if there is an agreement
24 under the Article 50(2) process, that would not fall
25 within the procedures under the 2011 Act.

1 LORD PANNICK: It is no part of my case to contend --

2 LORD JUSTICE SALES: I just wanted to check.

3 LORD PANNICK: -- that section 2 of the 2011 Act does apply.

4 If it did, if it did, I would be making the same point
5 in any event. I would be saying that whether Parliament
6 looks at the matter at a later stage under the 2010 Act,
7 or the 2011 Act, its hands are tied by that stage.
8 Parliament simply cannot preserve the rights that are
9 destroyed -- that is the right to vote and stand for
10 election to the European Parliament, the right to have
11 a case referred to the Luxembourg court, the right to
12 involve the European Commission; they go, whatever
13 Parliament thinks. And the other rights, rights to free
14 movement, freedom of services, are taken out of the
15 hands of Parliament. That is the complaint.

16 Now, my Lord, the Lord Chief Justice suggested to
17 Mr Eadie this morning in the course of arguments that
18 Parliament might force the retention of these rights by
19 refusing its agreement, by Parliament refusing its
20 agreement under CRAG. But if Parliament refuses its
21 agreement, we still leave the EU. Parliament cannot
22 reverse the notification. All that happens -- I say
23 all, it is a very important matter. What happens, is
24 either then that there is no agreement and therefore we
25 still leave, or there is a new agreement. But the new

1 agreement cannot restore the rights that are
2 irretrievably lost, and whether there is a new agreement
3 is out of the hands of Parliament. That is my point.

4 Mr Coppel had an argument earlier this morning --

5 THE LORD CHIEF JUSTICE: Can I stop you there?

6 LORD PANNICK: Yes, of course.

7 THE LORD CHIEF JUSTICE: If you are right about the
8 Referendum Act, the 2015 Act, ie that that hasn't
9 somehow conferred authority on government, and I think
10 it is more an authority argument rather than anything
11 else, probably; your argument logically follows that if
12 there is no authority from that, Parliament has to take
13 the decision. It is no part of your case to say: well,
14 Parliament, you know, can decide in any particular way.
15 It is just it goes to Parliament for Parliament to deal
16 with.

17 LORD PANNICK: Yes.

18 THE LORD CHIEF JUSTICE: You have to say that because
19 otherwise you fall into the argument that you are trying
20 to go back on the referendum.

21 LORD PANNICK: I am not seeking to persuade your Lordships
22 other than the basic core fundamental proposition that
23 the consequence of notification is to destroy rights and
24 to take the preservation of other rights out of the
25 hands of Parliament, and that cannot be done. That

1 process cannot be started without the approval of
2 Parliament itself. Because you are preempting
3 Parliament's consideration in relation to rights which
4 Parliament itself has created. Or at least has
5 recognised.

6 THE MASTER OF THE ROLLS: Can we just deal with that,
7 because Mr Coppel -- you are going to come to this,
8 perhaps -- had this argument this morning that actually
9 the number and range of rights actually granted by
10 Parliament from the 1972 Act is very, very small. I am
11 looking at your three rights that you have referred to
12 in particular, the right to vote in the elections of the
13 EU Parliament, to stand, the right to have a case
14 referred to the CJU, and the right to refer
15 a competition claim, for example, to the Commission.

16 LORD PANNICK: Yes.

17 THE MASTER OF THE ROLLS: Do you agree or disagree with
18 Mr Coppel's argument that some or all of those were not
19 actually granted by the 1972 Act; they arise by virtue
20 of being an EU citizen, they arise outside the Act.
21 What is your position on that?

22 LORD PANNICK: The right to vote and stand as a candidate in
23 elections arises both under the 2002 Act, because it is
24 a specific Act, but it is also a consequence of EU
25 citizenship, Article 20 of the TFEU that your Lordships

1 saw this morning. It is both. But it suffices for my
2 purposes that there is a statutory right under the 2002
3 Act. That was the case I presented in opening. And it
4 remains my case. My case is the same, whether the right
5 arises under the 1972 Act or some other primary
6 legislation. There is no doubt there is such a right
7 expressly recognised by Parliament. The consequence of
8 notification is that that right is frustrated. It is
9 stripped away. It is nugatory.

10 THE MASTER OF THE ROLLS: Then can we just go through. What
11 about the second one, the right to refer to the CJU?

12 LORD PANNICK: The second one, the right to seek a reference
13 from the European court is under the 1972 Act. It is
14 a right recognised under section 3(1). Section 3(1) of
15 the 1972 Act, which your Lordships saw in opening, deals
16 with judicial procedures. So it is a right under the
17 1972 Act. Does your Lordship want to go back to it?

18 THE MASTER OF THE ROLLS: No, not at all. I suppose what
19 you could say -- this might be a very bad point, but you
20 might say well, even where EU legislation, directives,
21 let's say, have been incorporated into primary
22 legislation, insofar as it reflects the derivation of
23 the rights from Europe, ultimately matters of dispute
24 over that would go to the CJU.

25 LORD PANNICK: Absolutely.

1 THE MASTER OF THE ROLLS: In other words even in respect of
2 primary legislation, which incorporates the directive,
3 is that a point?

4 LORD PANNICK: This is not a minor right; this is a right of
5 access to a supreme constitutional court to have
6 a determination of issues that have their origin in
7 European law. It is no part of the defendant's case to
8 dispute that after we leave, important elements of
9 United Kingdom law will remain which have their origin
10 in EU law. Yet Mrs Miller and others will be deprived
11 of what I say is the important opportunity to have
12 questions as to the scope and interpretation of those
13 rights resolved by the Court of Justice.

14 THE MASTER OF THE ROLLS: What about the third of your
15 categories?

16 LORD PANNICK: The third one relating to the
17 European Commission, I say that comes under
18 section 2(1). One of the rights that is conferred in
19 the United Kingdom is the right for my client in the
20 United Kingdom, in relation to, for example,
21 a competition issue, to rely on the provisions of the
22 treaties which establish the Commission and give it
23 a role in competition issues. That is well within this.

24 THE LORD CHIEF JUSTICE: That competition regime operates in
25 parallel to our own competition regime.

1 LORD PANNICK: Precisely so. It is interlinked. It is
2 interlinked under the Competition Act. The
3 European Commission currently plays a very important
4 role in relation to the enforcement of competition law
5 rights. It is inevitable, whatever Parliament thinks,
6 that the consequence of notification is that the
7 important role of the European Commission in relation to
8 competition issues in the United Kingdom is stripped
9 away.

10 THE MASTER OF THE ROLLS: I ought to know, but I can't
11 remember this. Is there something in the
12 Competition Act itself which refers to the Commission?

13 LORD PANNICK: Yes, there is. We can give your Lordship the
14 references if necessary. In fact I think I recollect
15 our skeleton argument specifically addressed competition
16 law. Section 58A. I am very grateful to Ms Howard.
17 Section 58A of the Competition Act 1998 specifically
18 deals with the role of the European Commission. That,
19 of course, will be stripped away. The
20 European Commission cannot sensibly be said to be
21 preserved in relation to matters, competition matters,
22 in the United Kingdom once we leave the EU. The right
23 to complain to the Commission, is that article 20? Yes,
24 it is one of the citizenship rights.

25 Also, I don't need to go this far, but in relation

1 to other rights, the right to free movement within
2 Europe, freedom of services, many other examples, I do
3 say those are rights across Europe recognised by
4 section 2(1). They are rights consequent upon EU
5 citizenship. What Parliament has done by section 2(1)
6 is to recognise the whole panoply of EU law rights.
7 Parliament has entered into a legal system in which
8 British citizens enjoy all of the rights under EU law
9 including EU citizenship, including free movement,
10 freedom of services. These are valuable rights
11 recognised by Parliament.

12 Then there is a fourth preliminary matter and it is
13 this: it is and must be the logic of the defendant's
14 case as to his legal powers that because the prerogative
15 powers are exercised on the international plane, there
16 can be cases where it is open to the minister to notify
17 under Article 50(2), with all of the rights enjoyed
18 under section 2(1), 3(1), the voting Act, all of it to
19 be stripped away and for the minister not to return to
20 Parliament at all, on his case, on the defendant's case.

21 For example, if the 2010 Act does not apply. And it
22 does not apply. It does not apply. Mr Eadie accepted
23 this, and rightly so, if there is no agreement. Suppose
24 we notify. There is no agreement within two years.
25 There is no extension, because the EU states don't agree

1 to an extension, let's assume. The 2010 Act therefore
2 doesn't apply. On my friend's case, it is open to the
3 minister to secure the removal of all the rights
4 currently enjoyed under section 2(1) and 3(1) and the
5 European Parliamentary Elections Act without going back
6 to Parliament as a matter of constitutional principle.
7 That is and has to be his case. And the enormity of
8 that proposition as a matter of --

9 LORD JUSTICE SALES: Just so I can follow, is that on the
10 footing that the minister or the government could seek
11 to negotiate a withdrawal agreement which did not
12 require ratification? Is that the point that you are
13 making?

14 LORD PANNICK: No, the point I am making is that for the
15 purposes of Article 50 and certainly for the purposes of
16 the first stage, Article 50(2) envisages -- I think the
17 answer to your Lordship's question is yes -- that there
18 will be cases or may be cases where there is no
19 agreement.

20 LORD JUSTICE SALES: Yes, that was your first point. And
21 sorry, maybe you weren't making --

22 LORD PANNICK: It is the same point.

23 LORD JUSTICE SALES: It is the same point, right.

24 LORD PANNICK: That we are out. We leave the EU as a result
25 of notification with no agreement within the two-year

1 period and with no extension of the two-year period. My
2 point, this point that I am making, is that on the case
3 advanced by my friends, they say, they have to say, as
4 a matter of constitutional principle it would be open to
5 the defendant, to the minister, to secure that result
6 without going back to Parliament, even though rights are
7 stripped away under section 2(1) and 3(1).

8 LORD JUSTICE SALES: It was that sentence that I was trying
9 to follow. Is that because the minister might just not
10 make an agreement with the European Council?

11 LORD PANNICK: Yes. Yes.

12 LORD JUSTICE SALES: Right.

13 LORD PANNICK: He may, for example, say, and your Lordships
14 are as aware of the politics as everybody else in court,
15 one possibility, I don't invite your Lordships to
16 pronounce on this at all, but one possibility is that we
17 reach no agreement with the EU. We go our own way.

18 LORD JUSTICE SALES: Right.

19 LORD PANNICK: And we reach agreements with other countries.

20 LORD JUSTICE SALES: So as I understand it, the point you
21 are making is failure to reach agreement may be because
22 of a position adopted by the Council, or may be because
23 of a position adopted by the minister.

24 LORD PANNICK: Yes, by this country. One or the other. It
25 is possible that there will be no agreement, and the

1 point I am making is that the argument advanced by the
2 defendant has to be as a matter of logic that it would
3 be open to the defendant, because all of this is done on
4 the international plane, not to go back to Parliament at
5 all. I am not suggesting that that is what is going to
6 happen, but it is the logical legal proposition for
7 which they are contending.

8 I say that the enormity of that proposition, that as
9 a matter of constitutional principle the minister can
10 use prerogative powers to remove all of the rights under
11 section 2(1), 3(1), nothing is added back in, they just
12 all go without any need for Parliamentary authority at
13 any stage is so extraordinary that it should, in my
14 submission, cause the court to doubt the constitutional
15 correctness of the arguments which lead to that
16 conclusion.

17 One other preliminary point before I come to the
18 arguments advanced, the main arguments advanced by the
19 Attorney and Mr Eadie in particular. I want to make one
20 general point about the use of prerogative powers in the
21 context of the treaties, because Mr Eadie in particular
22 emphasised the breadth of this prerogative power: the
23 power to enter into a treaty, to amend treaties and to
24 resile from treaties.

25 My point is a very simple one. The nature of the

1 prerogative power to make, to amend, to terminate
2 treaties is inextricably linked to the limits on the use
3 of that prerogative power. Now, what I mean by that is
4 this: the very nature of the prerogative power in
5 question is that it is the exercise of authority on the
6 international plane. It is a prerogative power which
7 does not and cannot create rights and duties in national
8 law. That is its essence. My submission is that just
9 as the prerogative power cannot create domestic law
10 rights or duties, so equally it cannot be used to defeat
11 domestic law rights, by which I mean statutory rights.
12 The two elements are the mirror image of each other.
13 That is the point which was being made, I say, by
14 Lord Oliver in the Tin Council case.

15 Can we please go back to Tin Council, I hope for the
16 last time. I apologise to your Lordships, but it is B2,
17 tab 19. It is absolutely fundamental to the argument.
18 Because Mr Eadie says we are taking what Lord Oliver
19 says out of context. I agree, the context is absolutely
20 essential. But the context is this mirror image point.
21 If your Lordships have tab 19 of bundle B2, it is
22 page 500.

23 Lord Oliver, as your Lordships recall, he is
24 speaking for the Appellate Committee and the first point
25 he makes begins at 499 H, and this is all about the

1 validity of treaties can't be challenged in municipal
2 law. Then at 500 B, he turns to the second of the
3 underlying principles. The second is that as a matter
4 of the constitutional law of the UK, the prerogative,
5 whilst it embraces the making of treaties, does not
6 extend to altering the law or conferring rights upon
7 individuals or depriving individuals of rights which
8 they enjoy in domestic law without the intervention of
9 Parliament.

10 Then this:

11 "Treaties, as it is sometimes expressed, are not
12 self-executing. Quite simply, a treaty is not part of
13 English law unless and until it has been incorporated
14 into the law by legislation. So far as individuals are
15 concerned, it is *res inter alios acta* from which they
16 can't derive rights and by which they cannot be deprived
17 of rights or subjected to obligations. It is outside of
18 the purview of the court, not only because it is made in
19 the conduct of foreign relations which are a prerogative
20 of the Crown, but also because, as a source of rights
21 and obligations, it is irrelevant."

22 That is the point. The point is that the two parts
23 of the equation are closely linked. They are the mirror
24 image of each other. Yes, the defendant has a broad
25 prerogative power, but the reason he has a broad

1 prerogative power is because what he does on the
2 international dimension cannot either create rights or
3 remove rights already recognised in domestic law.

4 What is so exceptional about the present context is
5 that the action which the minister is proposing to take
6 on the international plane will have an inevitable
7 destructive effect on statutory rights created by
8 Parliament. That is what is so exceptional about this
9 case, and what causes the legal problem for the
10 defendant.

11 I therefore say it cannot assist the defendant to
12 emphasise, as my friend Mr Eadie does, the breadth of
13 the prerogative in relation to treaties without the
14 defendant recognising the inherent limitations on that
15 prerogative power.

16 My Lord, the Lord Chief Justice put the point to
17 Mr Eadie: if the minister negotiates a treaty and
18 Parliament does not like the treaty, Parliament can
19 refuse its agreement. The law of the land is not
20 affected. The terms of the treaty do not become part of
21 the law of the land. But, as I have sought to explain,
22 in this case if the minister notifies under
23 Article 50(2), Parliament's hands are tied, statutory
24 rights are removed, and in relation to other statutory
25 rights, their preservation is taken out of the hands of

1 Parliament.

2 My Lords, I can think, and certainly no example has
3 been given in court, of no other context where action on
4 the international plane of itself defeats rights,
5 statutory rights, created by Parliament. Of course, as
6 Lord Oliver himself recognised and it is the next
7 passage and I don't invite the court to go back to it,
8 but it is page 500, D to H, of course action on the
9 international plane may have an effect on the proper
10 interpretation of the rights which have been created by
11 Parliament or indeed the duties imposed by Parliament.

12 Lord Oliver himself refers to the Estuary Radio
13 case, which was cited by Mr Eadie. It was B1, tab 12.
14 Your Lordships may recall, the international treaty
15 expanded the territorial waters of the UK, and that was
16 the statutory concept which was in issue in the Estuary
17 Radio case. But the principle remains, certainly
18 Lord Oliver thought that the principle remains as stated
19 by him, by his Lordship, treaties cannot create rights
20 and they cannot remove statutory rights.

21 My Lords, in this context my friend Mr Eadie
22 referred to double taxation agreements, and my Lord, the
23 Master of the Rolls asked for clarification in relation
24 to this. In fact, in the double taxation context,
25 changes agreed at international level only take effect

1 with the approval of the House of Commons. There is
2 a statute that deals with this, and can I invite your
3 Lordships' attention, please, to volume C at tab number
4 28.

5 At C/28 your Lordships will find part of the
6 Taxation (International and other Provisions) Act 2010.
7 It is part 2, double taxation relief. Section 2, if
8 your Lordships have that, tab 28, the first page of
9 tab 28, the heading is "Part 2 double taxation relief".
10 Section 2:

11 "Giving effect to arrangements made in relation to
12 other territories. If Her Majesty by order in Council
13 declares that arrangements specified in the order have
14 been made in relation to any territory outside of the UK
15 with a view to affording relief from double taxation in
16 relation to taxes within sub-section 3 and that it is
17 expedient that such arrangements should have effect,
18 those arrangements have effect."

19 If your Lordships turn on to section 5, it is
20 page 237, the last page of this tab, section 5, orders
21 under section 2, it is section 5(2):

22 "An order under section 2 is not to be submitted to
23 Her Majesty in Council unless a draft of the order has
24 been laid before and approved by resolution of the House
25 of Commons."

1 So this is not an exception, not an exception.

2 LORD JUSTICE SALES: In point of form, it is a form
3 of Henry VIII clause.

4 LORD PANNICK: Yes.

5 LORD JUSTICE SALES: It is Parliament giving authority for
6 changes to be made to primary legislation by other
7 means.

8 LORD PANNICK: Yes, exactly, and in this context, Parliament
9 has given thought to the best way in which that could be
10 achieved and it has devised a specific means, and that
11 is entirely a matter for Parliament. My point is that
12 that is certainly not an exception to the general
13 principle that international treaties have no effect
14 unless and until they are recognised by Parliament.

15 We also have, if your Lordships want to look at it,
16 the previous provision, which was very similar,
17 section 788 of the Income and Corporation Taxes Act
18 1988. That was at E4. But it is in very similar terms.

19 It is also the case, because my friend Mr Eadie
20 referred to the specific agreement with Malta, that the
21 international agreement with Malta did not in fact come
22 into force as an international agreement until after
23 Parliamentary approval had been given under these
24 provisions. If your Lordships want the detail, I doubt
25 whether your Lordships will, but if your Lordships do

1 want the detail, it is given on page 29 of our skeleton
2 argument at footnote number 6.

3 LORD JUSTICE SALES: Is that because ratification was only
4 to occur after that had happened---

5 LORD PANNICK: The international agreement provided that the
6 agreement would not come into effect unless and until
7 there was domestic implementation.

8 LORD JUSTICE SALES: So it is not a ratification point, it
9 is a condition written into the treaty itself?

10 LORD PANNICK: Yes, as I understand it, it was part of the
11 international agreement that it would have no effect on
12 the international plane unless and until there was
13 domestic implementation, for very understandable
14 reasons.

15 So my Lords, those points, I say they are important
16 points, with respect, are contextual points in which the
17 defendant's arguments should be addressed. The
18 defendant's action to notify will remove important
19 statutory rights, and it will do so despite the normal
20 limitations, which I say are inherent in the use of
21 prerogative powers.

22 Now, the first main point made by the defendant, and
23 it was Mr Eadie's core submission, is that the
24 prerogative may be used on the international plane even
25 if it destroys statutory rights unless, unless,

1 Parliament has stated in the statute itself that the
2 prerogative power is removed. That is his case.

3 My answer is that that puts the proposition
4 180-degrees the wrong way round. We say that the
5 relevant constitutional principle is that where
6 Parliament has created statutory rights, they cannot be
7 removed by executive action, whether under the
8 prerogative or by any other executive action. There is
9 a need for Parliamentary authority.

10 We say that there is high authority for that
11 proposition.

12 First of all, Lord Oliver in the Tin Council case.
13 I have dealt with that. Secondly, the case of
14 Proclamations which was dealt with by Mr Chambers and
15 Ms Mountfield in their opening. Indeed the Bill of
16 Rights 1689, and indeed, as Mr Chambers put it,
17 Parliamentary sovereignty itself. To use prerogative
18 powers to remove rights created by Parliament is simply
19 inconsistent with the fundamental principle of
20 Parliamentary sovereignty. I leave those points to my
21 friends.

22 The argument is also supported, I say, by the Privy
23 Council case of Walker v Baird which your Lordships will
24 recall was referred to by Lord Justice Roskill in Laker,
25 and my Lord, Lord Justice Sales suggested that we might

1 look at Walker v Baird. We say it is on point. If your
2 Lordships go back to volume A of the core authorities,
3 just to remind your Lordships what Lord Justice Roskill
4 said in Laker.

5 LORD JUSTICE SALES: I thought it was Lord Justice Lawton.

6 THE LORD CHIEF JUSTICE: I think it is Lord Justice Lawton.

7 LORD PANNICK: I am sorry, my Lord, Lord Justice Lawton,
8 your Lordships are absolutely right.

9 Lord Justice Lawton in Laker, page 728. There is the
10 simple statement, 728 at A:

11 "The Secretary of State cannot use the Crown's
12 powers in this sphere in such a way as to take away the
13 rights of citizens. See Walker v Baird."

14 Now, what was it that Walker v Baird decided? If we
15 go, please, to volume E, your Lordships put
16 Walker v Baird behind tab number 1 at the back of the
17 volume.

18 THE LORD CHIEF JUSTICE: Yes.

19 LORD PANNICK: What Lord Justice Lawton must have had in
20 mind, in my submission, because there is no other
21 finding in the case, is the concession by the
22 Attorney-General which is accepted by the board. It is
23 497:

24 "The learned Attorney-General [first new paragraph,
25 497] who argued the case before their Lordships on

1 behalf of the appellant conceded that he could not
2 maintain the proposition that the Crown could sanction
3 an invasion by its officers of the rights of private
4 individuals whenever it was necessary in order to compel
5 obedience to the provisions of a treaty."

6 Then there was a more narrow submission that was
7 given. And the context of the case is illuminating. If
8 your Lordships go back to 495, for the judgment of
9 Lord Herschell, it was a eight-man board, we see at the
10 bottom of 491, Lord Herschell gives the judgment. Your
11 Lordships see what had happened; that the respondents
12 owned a lobster factory. The appellant was the captain
13 of the HMS Emerald, and what he does, he says that by
14 command of Her Majesty:

15 "... the care and charge of putting in force and
16 giving effect to an agreement embodied in a *modus*
17 *vivendi* for the lobster fishing in Newfoundland during
18 the season was an act and matter of state and public
19 policy. It had been entered into by Her Majesty with
20 the government of the Republic of France that this
21 agreement provided amongst other things that on the
22 coasts of Newfoundland where the French enjoy rights of
23 fishing conferred by the treaties, no lobster factories
24 which were not in operation on a particular date should
25 be permitted unless by the joint consent of the

1 commanders of the British and French naval stations."

2 Then halfway down page 496:

3 "The complaint is that the action taken by the
4 defendant in putting in force the provisions of this
5 said modus vivendi had, with full knowledge of all the
6 circumstances and events, been approved and confirmed by
7 Her Majesty, as such act and matter of state and public
8 policy, and it was in accordance with the instructions
9 of Her Majesty's government."

10 The Supreme Court of Newfoundland didn't think much
11 of that argument. At the bottom of the page in their
12 Lordships' opinion, their judgment was clearly right:

13 "... unless the defendant's acts can be justified on
14 the grounds that they were done by the authority of the
15 Crown for the purpose of enforcing obligations of
16 a treaty or agreement entered into between Her Majesty
17 and a foreign power~..."

18 Then we have the concession, and then the board deal
19 with the narrower proposition that this was a treaty to
20 preserve peace.

21 LORD JUSTICE SALES: I am not sure this helps us very much,
22 because I think the passage that you are particularly
23 focusing on is the concession.

24 LORD PANNICK: Yes.

25 LORD JUSTICE SALES: But it just was a concession by

1 counsel, and although it is the Attorney-General,
2 I think, as was pointed out, he is just appearing for
3 a private party, so it is not an authoritative statement
4 by the court.

5 LORD PANNICK: I understand that, my Lord, of course
6 I accept that. But the concession is accepted by the
7 board. There is no suggestion that there is any broader
8 power to implement international agreements. On the
9 contrary, the finding of the court, of the board, is to
10 reject the narrower proposition, and I would also show
11 your Lordships in argument the argument from the other
12 side, Sir JS Winter QC for Newfoundland at 494, in the
13 middle of the page, the new paragraph, Mr Winter's
14 submission:

15 "No case can be found in which the Crown has
16 attempted in times of peace to affect by treaty the
17 private rights of its subjects. For that purpose an Act
18 of Parliament is necessary."

19 We say precisely so.

20 LORD JUSTICE SALES: Right, but again, that wasn't the
21 subject of the ruling by the court.

22 LORD PANNICK: No.

23 LORD JUSTICE SALES: Because the court looked at the
24 submission that was made by the Attorney-General which
25 was that there was a special power, if there was a peace

1 treaty, and they say even if there is, you are not
2 within it.

3 LORD PANNICK: I entirely accept that. The reason why we
4 are looking at this is because Lord Justice Lawton
5 regarded this as stating a point of principle, and my
6 submission is that when one goes to the case, it is
7 quite apparent that the principle that
8 Lord Justice Lawton must have had in mind is the
9 principle that was the concession by the
10 Attorney-General, because there is no other relevant
11 statement that is made in those proceedings. But I take
12 your Lordship's point. But it is at least consistent
13 with the case that we put forward.

14 Perhaps more substantially, we rely on the principle
15 of legality to which my friend Mr Eadie referred.
16 Mr Eadie says that the principle of legality is no more
17 than a principle of statutory construction. Our answer
18 is that the principle of legality is a constitutional
19 principle. It is a principle that where Parliament
20 confers fundamental rights, it is to be assumed that
21 Parliament intended that those rights should only be
22 removed by a later enactment where Parliament clearly so
23 states.

24 Can I take your Lordships back to Simms, which is B2
25 at tab number 24. This is the Appellate Committee. It

1 is the statement of Lord Hoffmann with which Lord Steyn
2 agrees and the Appellate Committee in later cases has
3 approved. Page 131 of B2, tab 24. It is page 131. Its
4 between letters E and G. And Lord Hoffmann's statement
5 of principle is that:

6 "Parliamentary sovereignty means that Parliament
7 can, if it chooses, legislate contrary to fundamental
8 principles of human rights. The Human Rights Act will
9 not detract from this power. The constraints upon its
10 exercise by Parliament are ultimately political, not
11 legal, but the principle of legality means that
12 Parliament must squarely confront what it is doing and
13 accept the political cost. Fundamental rights cannot be
14 overridden by general or ambiguous words. This is
15 because there is too great a risk that the full
16 implications of their unqualified meaning may have
17 passed unnoticed in the democratic process. In the
18 absence of express language or necessary implication to
19 the contrary, the courts therefore presume that even the
20 most general words were intended to be subject to the
21 basic rights of the individual. In this way the courts
22 of the UK, although acknowledging the sovereignty of
23 Parliament, apply principles of constitutionality little
24 different from those which exist in countries where the
25 power of the legislature is expressly limited by

1 a constitutional document."

2 Now, we submit in answer to Mr Eadie that because,
3 if Parliament confers rights as here, even Parliament
4 itself is to be taken as not having authorised their
5 removal without express authority and clear authority.
6 It would be remarkable indeed if the executive could
7 remove statutory rights of importance in the absence of
8 clear and express Parliamentary authorisation. That is
9 the submission.

10 We take the point a little further, because my Lord,
11 the Master of the Rolls has asked during these
12 proceedings on more than one occasion whether there is
13 a similar principle that common law rights cannot be
14 removed without clear statutory authorisation. The
15 answer is yes, there is such a principle. The case that
16 establishes this -- well, there are two cases, the first
17 is Witham, which is B2, same volume, at tab 20.

18 This was a judgment of the Divisional Court given by
19 Mr Justice Laws, Lord Justice Rose agreeing. Could
20 I take your Lordships to that. B2, tab number 20.

21 The context here is that the Lord Chancellor
22 introduced delegated legislation which would have
23 prevented the applicant from being able to bring his
24 case for defamation in court, because the regulations
25 made him no longer eligible for legal aid. That is the

1 context. The relevant statement by Mr Justice Laws as
2 he then was for the court is at page 585 at letter G.
3 At letter G, 585, his Lordship says:

4 "It seems to [his Lordship] from all of the
5 authorities to which I have referred [and there is a lot
6 of case law cited] that the common law has clearly given
7 special weight to the citizen's right of access to the
8 courts. It has been described as a constitutional
9 right, although the cases do not explain what that
10 means. In this whole argument, nothing to my mind has
11 been shown to displace the proposition that the
12 executive cannot in law abrogate this common law right,
13 the right of access to justice, unless it is
14 specifically so permitted by Parliament. And this is
15 the meaning of the constitutional right. I must
16 explain, as I have indicated I would, what in my view
17 the law requires by such a permission. A statute may
18 give the permission expressly. In that case it would
19 provide in terms that in defined circumstances, the
20 citizen may not enter the court door."

21 Then at the end of the page, after the authority:

22 "I vouchsafed that it could also be done by
23 necessary implication. However, for my part [says
24 Mr Justice Laws] I find great difficulty in conceiving
25 a form of words capable of making it plain beyond doubt

1 to the statute's reader that the provision in question
2 prevents him from going to court, because that is what
3 would be required, save in a case where that is
4 expressly stated. The class of cases where it could be
5 done by necessary implication is, I venture to think
6 [says his Lordship] a class with no members."

7 LORD JUSTICE SALES: But Lord Pannick, how does this help
8 us, because I don't understand anybody to be suggesting
9 that whatever statute we are looking at, or in
10 particular the removal of the rights under the European
11 Communities Act, that that will affect these common law
12 rights.

13 LORD PANNICK: It helps us to this extent, my Lord: that if,
14 as is the case, common law rights cannot be removed by
15 the executive, save with express statutory
16 authorisation, it would be, in my submission, quite
17 extraordinary if a minister, the executive, can defeat
18 rights created by Parliament without express statutory
19 authority. That is the submission.

20 LORD JUSTICE SALES: Thank you.

21 THE LORD CHIEF JUSTICE: Yes. Okay. Second case.

22 LORD PANNICK: The other case is ex parte Pearson, which is
23 B2, tab 21. It is the next case. This is the case
24 where the Home Secretary of the day increased the tariff
25 imposed on a mandatory life prisoner. The question was

1 whether or not the Home Secretary could lawfully so act.
2 There are helpful passages in the speech of
3 Lord Browne-Wilkinson and if your Lordships, please,
4 would go to 573, E, where his Lordship refers to the
5 submissions of Mr Fitzgerald that:

6 "... the statutory power, although expressed in
7 general terms, should not be construed so as to
8 authorise acts which infringe the basic rules and
9 principles of the common law~..."

10 There is a bit of analysis in relation to that, and
11 the statement of principle is at 575 after his Lordship
12 has referred to a number of cases, including the Witham
13 case at 575, B. 575, D, just above D, his Lordship
14 says:

15 "From these authorities I think the following
16 proposition is established. A power conferred by
17 Parliament in general terms is not to be taken to
18 authorise the doing of acts by the donee of the power
19 which adversely affect the legal rights of the citizen
20 or the basic principles on which the law of the UK is
21 based, unless the statute conferring the power makes it
22 clear ["makes it clear"] that such was the intention of
23 Parliament."

24 So that is our answer to my Lord, the Master of the
25 Rolls' question.

1 LORD JUSTICE SALES: I think it is B to C where
2 Lord Browne-Wilkinson expresses doubt about how strictly
3 Mr Justice Laws expressed it in Witham --
4 LORD PANNICK: Yes.
5 LORD JUSTICE SALES: -- in terms of it can't be excluded by
6 necessary implication.
7 LORD PANNICK: Yes, I think your Lordship is right.
8 LORD JUSTICE SALES: I think at D when Lord Browne-Wilkinson
9 says "makes it clear", he is meaning either expressly or
10 by necessary implication; is that right?
11 LORD PANNICK: I would accept that, but I would emphasise,
12 however, the statement of principle that clarity in the
13 legislation is required.
14 LORD JUSTICE SALES: Yes.
15 LORD PANNICK: Therefore we respectfully dispute my learned
16 friend Mr Eadie's contention that the defendant can
17 lawfully use prerogative powers, even though this will
18 defeat statutory constitutional rights created by
19 Parliament unless, as Mr Eadie puts it, Parliament
20 itself has made clear that there is to be a limit on the
21 use of the prerogative power. That is how my friend
22 Mr Eadie put it. And I do submit, with great respect,
23 that that formulation by Mr Eadie reverses the true
24 principle. The true principle is that where, as here,
25 Parliament has created statutory and constitutional

1 rights, the minister has no power to destroy those
2 rights, or any of them, through the use of the
3 prerogative unless Parliament has clearly conferred on
4 him a power to do so. That is the true principle. It
5 is vital in this case which of those approaches one
6 adopts.

7 Mr Eadie then relies on two main authorities. He
8 relies on De Keyser and he relies on Rees-Mogg and let
9 me address those. De Keyser is at volume A at tab
10 number 8. My submission is that De Keyser does not
11 affect, it doesn't address, the principle for which we
12 are contending, relating to whether prerogative powers,
13 and when prerogative powers may be used to remove
14 statutory constitutional rights. De Keyser is concerned
15 with a different issue.

16 The issue with which De Keyser is concerned is
17 helpfully summarised by Lord Atkinson at page 539. If
18 I can invite your Lordships to A/8. Volume A, tab 8,
19 page 539 of the law report. It is in the middle
20 paragraph on the page, or rather the final paragraph
21 beginning on the middle of the page, this is Lord
22 Atkinson:

23 "It is quite obvious [says his Lordship] that it
24 would be useless and meaningless for the legislature to
25 impose restrictions and limitations upon, and to attach

1 conditions to the exercise by the Crown of the powers
2 conferred by a statute if the Crown were free, at its
3 pleasure, to disregard these provisions and by virtue of
4 its prerogative to do the very thing the statutes
5 empowered it to do. One cannot in the construction of
6 a statute attribute to the legislature, in the absence
7 of compelling words, an intention so absurd."

8 That is what the case is about. It is concerned
9 with the circumstances in which Parliament confers
10 a power on a minister to act, subject to defined
11 conditions, the minister cannot then choose to act under
12 the prerogative, to do the very thing which the statute
13 empowers him to do, and disregard the conditions.
14 Lord Moulton is to like effect at 554. Again, the final
15 paragraph on the page, starting in the middle of the
16 page, 554, his Lordship says:

17 "This being so, when powers covered by this statute
18 are exercised by the Crown, it must be presumed that
19 they are so exercised under the statute, and therefore
20 subject to the equitable provision for compensation
21 which is to be found in it. There can be no excuse for
22 reverting to prerogative powers simpliciter."

23 Similarly Lord Sumner at 562 at the top of the page,
24 first line on 562, Lord Sumner:

25 "Is it to be supposed that the legislature intended

1 merely to give the executive as advisers of the Crown
2 the power of discriminating between subject and subject,
3 enriching one by electing to proceed under the statute
4 and impoverishing another when it requisitions under the
5 alleged prerogative? To presume such a intention seems
6 [to his Lordship] contrary to the whole trend of our
7 constitutional history for over 200 years."

8 That is what the case is about. It is a different
9 issue.

10 THE LORD CHIEF JUSTICE: But what here the House of Lords
11 was concerned with was a prerogative power to act in the
12 defence of the realm, and therefore the extent to which
13 that power survived. But there is no power to alter
14 fundamental rights.

15 LORD PANNICK: No, indeed.

16 THE LORD CHIEF JUSTICE: So this is concerned with actually
17 the scope of the prerogative, which is in issue, where
18 what we are concerned with is a case where there is no
19 prerogative power.

20 LORD PANNICK: Yes, indeed, precisely so. There is no
21 question here of a war power or a power to preserve
22 peace, or as in Northumbria, the Northumbria case, the
23 power to preserve the peace in Her Majesty's realm. One
24 is concerned here with a case where executive action is
25 proposed to be taken to defeat statutory rights. I say

1 that De Keyser simply does not assist on that issue.

2 THE LORD CHIEF JUSTICE: But the reason I asked you that

3 question is this: when one comes to look at the question

4 of the legislation, the Communities Act, one is looking

5 at it through a different prism. You are looking at it,

6 I think you say, through the prism of is there something

7 in the Act that gives the power, rather than --

8 LORD PANNICK: Clearly.

9 THE LORD CHIEF JUSTICE: Rather than is there anything in

10 the act that takes away the power.

11 LORD PANNICK: Yes. I say the starting point is that the

12 minister cannot use his executive powers, prerogative or

13 otherwise, to defeat rights created by Parliament unless

14 Parliament itself has clearly conferred on him such

15 a power. That is my submission. I next need to deal

16 with Rees-Mogg.

17 THE LORD CHIEF JUSTICE: Yes. What is the timetable?

18 LORD PANNICK: I am going as quickly as I can, my Lord.

19 I may take another 45 minutes or an hour.

20 THE LORD CHIEF JUSTICE: What are the arrangements of

21 replies by others?

22 MR CHAMBERS: My Lord, as far as we are concerned, if

23 I could have 15 minutes that would be helpful.

24 THE LORD CHIEF JUSTICE: Let's just work it out. So you

25 want 15 minutes. We have 45, now 3 o'clock, yes.

1 MS MOUNTFIELD: My Lord, I want 25 minutes, please.

2 THE LORD CHIEF JUSTICE: 25 minutes, yes.

3 MR GREEN: My Lord, 25 minutes as well, but I will try to be
4 20.

5 MR GILL: My Lord, I don't think I will take more than 10.

6 THE LORD CHIEF JUSTICE: So we are really looking at
7 two hours.

8 MR CHAMBERS: My Lord, yes.

9 THE LORD CHIEF JUSTICE: 4 o'clock. Mr Coppel, there is so
10 far nothing you want to come back on?

11 MR COPPEL: My Lord, I may want to say something about
12 Witham and Pearson, and I would also like to put down
13 a marker as to the appropriateness of the interveners
14 having a right of reply which is almost as long as their
15 opening submissions. It is an important case but some
16 conditions need to be imposed.

17 THE LORD CHIEF JUSTICE: We will rise for a minute and then
18 come back and tell you what we are going to do, because
19 it is obviously very important.

20 (1.04 pm)

21 (A short break)

22 (1.06 pm)

23 THE LORD CHIEF JUSTICE: We think that all of the
24 interveners can have a maximum of 10 minutes. You are
25 not an intervener so you can have 15.

1 MR CHAMBERS: My Lord, thank you, that is very generous and
2 helpful.

3 MR GREEN: My Lord, could I do something very unpopular for
4 an advocate and just ask if your Lordship might consider
5 a response from me to the suggestion about interveners'
6 timings, before your Lordship crystallises that
7 indication.

8 THE LORD CHIEF JUSTICE: We will do it now because we are
9 going to start again at 2 o'clock.

10 MR GREEN: I am extremely grateful. Three brief points,
11 my Lord. At the hearing on 19 July, the President made
12 clear that all parties would be heard without
13 distinction, and it was on that basis that the parties
14 did not jockey for further integration into the process
15 and complicate what was a very truncated proceedings of
16 doing five years' litigation in five months. So we
17 sought to assist in that respect.

18 The second point is that I specifically addressed
19 the time estimate at that hearing of two days being not
20 enough. The defendant was on notice on that point. It
21 is the defendant's difficulties which were accommodated
22 by us reducing the time that we wanted to address the
23 court in the first place down to what little we had.

24 The third point is that my learned friend Mr Coppel
25 in particular has introduced points to this court which

1 have not only invited a reply, but in our respectful
2 submission, invite the court to make fundamental errors
3 about the basic premises upon which the court should
4 proceed. I didn't have enough time to develop some
5 points yesterday, but I certainly don't have time to
6 give this court the assistance which I believe it is my
7 duty to provide. So my Lord, if I am not able to,
8 I have made the court aware of that.

9 THE LORD CHIEF JUSTICE: No one suggested to the President
10 of the Queen's Bench Division that you needed more than
11 three days. We have actually expanded these days,
12 much -- you know, we have done very long days. We
13 really want some time at the end of the day to consider
14 this case. If it proves, if you cannot -- it is, and
15 would be possible, obviously, for you three to agree
16 amongst yourselves how you are going to spend the time.
17 But we are going to say we will stick to 30 minutes
18 between the three interveners. Mr Coppel, we will allow
19 you no more than five minutes. So be it.

20 (1.07 pm)

21 (The luncheon adjournment)

22

23 (2.00 pm)

24 LORD PANNICK: My Lords, ex parte Rees-Mogg volume A,
25 tab 12. I have two points on Rees-Mogg your Lordships

1 have already seen, but can I just emphasise the point,
2 at 568, A to C that, as Lord Justice Lloyd explained,
3 this was not a case where the Secretary of State was
4 seeking to use prerogative powers to remove any
5 statutory rights. The ratification of the protocol on
6 social policy, in fact, did not alter the content of
7 domestic law at all; it had no impact on domestic law.
8 That is the first point.

9 But secondly, it goes a bit further because nor was
10 Rees-Mogg a case about the use of prerogative powers
11 preempting consideration by Parliament. Rees-Mogg was
12 a case where Parliament had already included the
13 Maastricht treaty, including the protocol in
14 section 1(2) of the 1972 Act. One sees that, my Lords,
15 from page 562, letters D to E, which sets out the terms
16 of section 1 of the 1993 Act, which amended the 1972
17 Act, and as there explained, the 1993 Act received royal
18 assent on 20 July. The case started in the Divisional
19 Court on 26 July. At 566, letter A, the Divisional
20 Court held that the treaty on European Union in
21 section 1(2) means the whole treaty, including the
22 protocols. Therefore they rejected the first main
23 argument. So it is neither a case about removal of
24 statutory rights nor is it a case about preemption of
25 Parliament. Parliament had spoken in that case.

1 Ex parte Northumbria police was mentioned by
2 Mr Eadie. B1, tab 18. Please, no need to turn it up.
3 That was the case about whether the police authority had
4 a monopoly over the use of the relevant equipment, the
5 CS gas. Again, it is not a case about the removal of
6 statutory rights.

7 The final case that Mr Eadie mentioned in relation
8 to prerogative rights was the passport case, ex H and
9 AI. Again, no need to turn it up, it is volume E
10 tab 16. And the case concerned the withdrawal of
11 a passport. Of course, a passport is granted under the
12 prerogative and the Secretary of State was withdrawing
13 it under the prerogative. The Divisional Court gave
14 a number of specific reasons why it could not accept the
15 argument from the claimants that the conferral of
16 a statutory power to withdraw a passport in the
17 terrorism statute confined the prerogative power.

18 So it was another case about the scope of
19 a statutory power to act, subject to conditions, and
20 whether that affected the prerogative power. The
21 relevant paragraphs, if your Lordships wish to note
22 them, are 47 through to 67, specific to the legislation
23 in that case. None of it has any relevance here, where
24 the issue is whether the executive may act to destroy
25 statutory rights. The case, I am told, is on appeal to

1 the Court of Appeal.

2 So my Lords, my submission, my main submission, is
3 that the executive cannot remove statutory rights unless
4 they are clearly so authorised, unless the minister is
5 clearly so authorised by Parliament.

6 The Attorney and Mr Eadie relied on a number of
7 other statutes that they took your Lordships to,
8 statutes which either impose general controls on
9 ratification of treaties, that was the 2010 Act, or
10 a number of specific treaties relating to the
11 ratification of EU instruments.

12 But it is important when one looks at these statutes
13 to bear in mind that the defendant's case, the
14 defendant's case, is not that any of these statutes
15 confers, far less clearly confers, a power to remove
16 statutory rights. That is not the case against me. The
17 defendant's case has always been, and remains, that he
18 has a prerogative power to act. The defendant
19 is relying on these other acts of Parliament for the
20 different proposition, which I have submitted is simply
21 the wrong test. The defendant relies on these acts of
22 Parliament to support the contention that none of those
23 later acts remove prerogative powers.

24 I respectfully submit, that is nothing to the point,
25 if I am correct in my earlier submission that a minister

1 can only act so as to defeat statutory rights if he, or
2 she, is clearly so authorised by Act of Parliament. And
3 it is not the case against me that any of these later
4 acts fall within that description. I don't just rely on
5 the absence of argument; it is plainly not the case that
6 any of these later statutes clearly authorises the
7 minister to act so as to remove statutory rights.
8 Indeed, none of the later acts address the statutory
9 rights that are conferred either in the elections
10 legislation or in the 1972 Act. They are concerned with
11 the circumstances in which treaties may be ratified at
12 international level.

13 The Attorney relied on the 2015 Referendum Act, but
14 again, he emphasised that the government's case is not
15 that the 2015 Act confers on the minister a prerogative
16 power to defeat statutory rights. The Attorney said,
17 again, and his point is that the 2015 Act does not
18 remove prerogative power. But this simply begs the
19 question of whether there is, in law, any prerogative
20 power to act so as to remove statutory rights. If, as
21 we submit, there is no such power, the 2015 Act cannot
22 assist the defendant.

23 The Attorney also drew specific attention to
24 statements made by ministers in Parliament, your
25 Lordships will recall, statements that the referendum

1 would be acted upon. It was D2, 35 and D2, 36. No need
2 to turn it up. I simply say that the reference to
3 Hansard doesn't assist. There is no ambiguous provision
4 of the 2015 Act which the court is being asked to
5 interpret, and even if there were, it wouldn't suffice,
6 because on our analysis, the defendant has to point to
7 an Act of Parliament which clearly authorises the
8 removal of statutory rights.

9 There may or may not be force in the Attorney's
10 argument that in the light of the referendum, the
11 government believes that notification is justified. But
12 I stress, the issue in these proceedings is not whether
13 the minister's proposed action is justified. The issue
14 is not whether the minister's proposed action is
15 reasonable. The only question as far as our submissions
16 are concerned is whether the minister has a legal power
17 to notify.

18 Similarly, we respond to the Attorney's submission
19 that Parliament has not enacted any provision
20 specifically to control the exercise of the
21 United Kingdom's power to notify under Article 50(2).
22 Again, we respectfully submit that that misses the
23 point, because if we are correct that prerogative powers
24 cannot be used to defeat statutory rights unless there
25 is clear statutory authorisation, we do not need to

1 point to any specific legislative control over
2 Article 50 powers.

3 The Attorney and Mr Eadie emphasised that Parliament
4 has many means of controlling the actions of the
5 executive. And self-evidently that is true. The answer
6 is that given by Lord Diplock, as approved by Lord Lloyd
7 in the Fire Brigade's Union case. Can I take your
8 Lordships to Fire Brigade's Union, volume A, tab 13.
9 Volume A, tab 13. It is page 572, my Lords. And at the
10 bottom of page 572 Lord Lloyd says, letter H:

11 "No court would ever deprecate or call in question
12 ministerial responsibility to Parliament. But as
13 Professor Wade pointed out, ministerial responsibility
14 is no substitute for judicial review ... in ex parte
15 National Federation of Self-Employed, Lord Diplock said
16 this ... it is not in my view a sufficient answer to say
17 that judicial review of the actions of officers or
18 departments of central government is unnecessary because
19 they are accountable to Parliament for the way in which
20 they carry out their functions. They are accountable to
21 Parliament for what they do, so far as regards
22 efficiency and policy. And of that Parliament is the
23 only judge. They are responsible to a court of
24 justice for the lawfulness of what they do. And of
25 that, the court is the only judge."

1 Then Lord Lloyd made some observations on the
2 Lord Advocate's argument, and I respectfully submit that
3 that is the point. The question for the court and only
4 for the court is the question of legality. It is
5 nothing to the point that Parliament has many means of
6 controlling the efficiency, the propriety, the policy,
7 of that which ministers do.

8 Mr Eadie then mentioned recent academic analysis of
9 the issues. My Lord, for every academic supporting the
10 defendant's argument, we can cite an academic supporting
11 our argument. I anticipate that the court not going to
12 be assisted by further references, other than if
13 I remind your Lordships that in the recent report of the
14 House of Lords constitution committee, this matter was
15 addressed. If your Lordships would go to D2 at tab 40.

16 THE MASTER OF THE ROLLS: Does that really help,
17 Lord Pannick, because in that report it expressly says
18 that they don't touch on the legality of the position at
19 all.

20 LORD PANNICK: No, they don't.

21 THE MASTER OF THE ROLLS: So is it going to help us?

22 LORD PANNICK: Simply that they refer to -- it is a useful
23 way of seeing where the academic authorities are, if
24 your Lordships are interested in the point. It is
25 tab 40, page 1014 and paragraph 15. I simply show your

1 Lordships that not in order to make any points on the
2 substance of the report; although the report at
3 paragraphs 24 and 27 thought that it was
4 constitutionally inappropriate that Parliament should
5 not have a role, they certainly didn't say anything
6 about the law, as your Lordship rightly points out.

7 But at paragraph 15 there is a reference, in the
8 footnotes, to the various academic authorities relating
9 to this matter. It is a footnote, but I ought just to
10 point out, I wasn't part of the committee, my Lords,
11 that reached these conclusions. See 1025.

12 For our part, and I am sure this is true of the
13 defendant as well, we have extracted from the academic
14 analysis the arguments which support our respective
15 cases.

16 THE LORD CHIEF JUSTICE: That is apparent.

17 LORD PANNICK: Indeed, my Lord. And I respectfully say,
18 very respectfully say, that the problem with all of the
19 academic analysis is that it is subject to the
20 limitations stated famously by Mr Justice Megarry when
21 counsel cited to him as authority the law of real
22 property, and what Mr Justice Megarry said, it is
23 Cordell, 1969, 2 Chancery, page 9 at 16, he said "argued
24 law is tough law", and that is the point. Your
25 Lordships have, I hope, the advantage---

1 THE LORD CHIEF JUSTICE: We have had the great advantage.

2 LORD PANNICK: Your Lordship is very kind.

3 THE LORD CHIEF JUSTICE: And I am going to add everyone else
4 in the course of yesterday, and today.

5 LORD PANNICK: Mr Eadie then emphasised the flexibility of
6 the British constitution. He referred to the
7 observations of Lord Bingham in Robinson. It was E12 at
8 paragraph 12. My Lords, flexibility is of course
9 an attractive concept. But there are limits to
10 flexibility. However much flexibility there may be,
11 a minister, we submit, for the reasons I have given,
12 cannot validly act to remove statutory rights, rights of
13 a constitutional nature, without, we say, breaking the
14 back of the constitution and crippling it.

15 My Lords, we had an alternative argument which we do
16 maintain, and the alternative argument is that even if
17 we are unsuccessful in the contention that it is
18 sufficient for us to show that the prerogative cannot be
19 used to defeat statutory rights without clear
20 Parliamentary authority, we say in any event in the
21 context of the 1972 Act, Parliament has made very clear
22 that by section 1(2) and section 1(3), that any
23 alteration to the treaties which provide, of course, the
24 substance of the section 2(1) rights, requires
25 Parliamentary authority. We dealt with this in detail,

1 perhaps too much detail, in the notes that we sent to
2 your Lordships last Friday. Your Lordships have seen
3 that.

4 THE LORD CHIEF JUSTICE: Yes.

5 LORD PANNICK: We do say that in the context of an Act of
6 Parliament, the 1972 Act, which requires Parliamentary
7 authorisation for any amendment of the section 2(1)
8 rights, it is, it would be surprising indeed if
9 Parliament had envisaged that all of those section 2(1)
10 rights could be removed by the action of the executive
11 without any statutory authority whatsoever.

12 If Parliament was taking the approach that
13 an amendment required statutory authority, then it
14 should be assumed, if this is the right test, and it is
15 not, it should be assumed to require that statutory
16 authority is needed to remove all of the rights.

17 THE MASTER OF THE ROLLS: Don't you have to go a bit further
18 than that? If you want to advance this argument, it has
19 to be implication by necessity.

20 LORD PANNICK: If I am wrong on the test, yes. If the test
21 is the other way round to that point.

22 THE MASTER OF THE ROLLS: Yes, that is what this point goes
23 to, isn't it?

24 LORD PANNICK: Yes, this is what it goes to. Your Lordship
25 has my point, that is not the right test.

1 THE MASTER OF THE ROLLS: I know.

2 LORD PANNICK: The onus is on the defendant. But I do make
3 this point, and I make it simply on the basis that if
4 Parliament required statutory authority for
5 an amendment, then Parliament should not be assumed to
6 strain at a gnat but swallow a camel, and it would be
7 a camel, to allow the minister without Parliamentary
8 authority to sweep away all of the rights that are
9 created.

10 THE MASTER OF THE ROLLS: I think the point I was trying to
11 make was on this alternative basis, the alternative
12 basis, to say that Parliament should not be assumed do
13 this or that is not necessarily the same high standard
14 as necessary implication.

15 LORD PANNICK: No, I see the force of that. I submit that
16 that test would be satisfied, but I take your Lordship's
17 point. Necessary implication requires something clear,
18 and that is why I say the essential focus of the dispute
19 between my friends and our side is where the onus lies.
20 It is not a burden of proof case, but it is
21 a fundamental question. Is it for us to show that there
22 is something in the legislation which restricts the
23 power of the defendant to act, or is the true analysis,
24 as we contend, that the defendant is acting to remove
25 statutory rights and therefore he, the defendant, must

1 show that Parliament has clearly authorised him to so
2 act. That is really the dispute.

3 But I do have this alternative point and I don't
4 wish to be understood to have abandoned it.

5 But my main submission is, as your Lordship
6 understands, in relation to the primary case that the
7 onus is on the defendant and not merely is it the case
8 that he cannot satisfy the onus, he does not attempt to
9 do so. He does not assert that there is any legislation
10 which confers power on him to defeat statutory rights.
11 That is not his case. His case relies entirely on
12 an assertion that he enjoys prerogative power.

13 If it matters, and it may not, but on each occasion
14 when Parliament has amended the 1972 Act, it has acted
15 so as to amend section 1(2) and then separately deal
16 with section 6 of the 1978 Act, section 12 of the 2012
17 Act, and C8 is an example of that.

18 THE LORD CHIEF JUSTICE: What you are saying, Lord Pannick,
19 is that you really adhere to, but you don't want to
20 develop the argument set out in the supplementary note.

21 LORD PANNICK: Yes, indeed. Your Lordship understands I am
22 not abandoning them, far from it, but my focus is on the
23 point that I advanced this morning, which your Lordships
24 have, and on which your Lordships will pronounce in due
25 course.

1 THE LORD CHIEF JUSTICE: Yes.

2 LORD PANNICK: I say there is nothing in any piece of
3 legislation which clearly affects the principle that the
4 Secretary of State needs statutory authorisation or
5 gives him statutory authorisation to defeat statutory
6 rights, nor does he contend that that is so.

7 Mr Eadie then said our case is non-justiciable.
8 My Lord, the Lord Chief Justice suggested to Mr Eadie
9 that to the extent that we have identified a question of
10 law, that is whether the prerogative power, the
11 purported prerogative power exists, that must be
12 a question for the courts to decide. And we would
13 respectfully agree with that.

14 THE LORD CHIEF JUSTICE: I think that was agreed to.

15 LORD PANNICK: As I understood --

16 THE LORD CHIEF JUSTICE: As far as I understand it,
17 justiciability is no longer an issue.

18 LORD PANNICK: I am grateful.

19 Mr Eadie had a final point. His final point was
20 that the declaratory remedy which we seek is, as he put
21 it in the skeleton argument, constitutionally
22 impermissible. We have attempted to mollify the concern
23 by the revised declaration which your Lordships will
24 have seen in our note, which we submitted last Friday
25 and which does not mention Parliament. And we simply

1 asked for a declaration, if I can find the note --

2 THE LORD CHIEF JUSTICE: We did traverse this ground

3 yesterday, and it did seem to me that Mr Eadie hasn't

4 come back on this point.

5 LORD PANNICK: No.

6 THE LORD CHIEF JUSTICE: If we were, in the hypothetical

7 case, to decide in your favour, it would simply do

8 declare yes or no as the limit of the prerogative power.

9 LORD PANNICK: Well, indeed. And we drafted it. It is

10 a matter for your Lordships if we get this far, whether

11 this is acceptable. The defendant has no lawful power

12 to give notification under Article 50(2) of the treaty

13 on European Union of an intention by the United Kingdom

14 to withdraw from the European Union. But the reality

15 is --

16 LORD JUSTICE SALES: It does seem slightly unreal, because

17 if we accepted your argument, it would be clear from the

18 judgment of the court what the limits on the power were.

19 LORD PANNICK: I respectfully --

20 LORD JUSTICE SALES: It seems slightly strange that we can't

21 say that in the formal record of what we are deciding.

22 LORD PANNICK: Well, I agree.

23 THE LORD CHIEF JUSTICE: We can always reserve that. We can

24 make it subject to any further argument, if we get that

25 far.

1 LORD PANNICK: Yes, well, I would expect, my Lords, that
2 what is going to matter in this case is the substantive
3 judgment that your Lordships hand down.

4 THE LORD CHIEF JUSTICE: I don't think we will fall out over
5 it.

6 LORD PANNICK: The remedy, if any, will follow from that.
7 But it is the reasoning of your Lordships, if your
8 Lordships were to decide that the defendant, the
9 Secretary of State cannot act, then the substance of the
10 reasoning is what is going to matter. But we formally
11 do seek a declaration as appropriate.

12 Mr Eadie said the high point of his argument was the
13 second Wheeler case. I don't know whether your
14 Lordships want me to address that.

15 THE LORD CHIEF JUSTICE: I don't think we need to go back
16 over the declaratory relief point; don't let us get hung
17 up on that today. We can always revert to it.

18 LORD PANNICK: Well, indeed.

19 My Lord, for all of those reasons, we do say that
20 the eloquent submissions of my friends cannot disguise
21 what is at the heart of this case and what is at the
22 heart of this case is an assertion of executive power to
23 defeat statutory rights, indeed fundamental statutory
24 rights, a power which we say is simply inconsistent with
25 Parliamentary sovereignty, and we respectfully invite

1 your Lordships to allow the application, by which
2 I mean, grant us permission to bring these proceedings,
3 because this is a rolled-up hearing, we don't yet have
4 permission, to grant us permission and then to grant the
5 substantive application. My Lords, I will seek to
6 address any other points that your Lordships wish me to
7 respond to.

8 LORD JUSTICE SALES: Just on that last point, it is right,
9 is it, that the President of the Queen's Bench Division
10 didn't grant permission at the previous hearing?

11 LORD PANNICK: My recollection, I will be corrected if I am
12 wrong, what his Lordship did was to order a rolled-up
13 hearing, that we should have the leave application
14 together with the substantive hearing. That is all our
15 recollections, so formally --

16 THE LORD CHIEF JUSTICE: It would be very difficult to see,
17 if everyone is agreed that there should be a leapfrog
18 procedure, how that could be given, unless he gave you
19 permission.

20 LORD PANNICK: Indeed, my Lords, we would need permission.
21 There would be a lot of disappointed people.

22 THE LORD CHIEF JUSTICE: It tends to presuppose that
23 actually implicitly everyone must have agreed that you
24 should have permission.

25 LORD PANNICK: Well, indeed. But formally I seek that from

1 the court.

2 THE LORD CHIEF JUSTICE: Yes.

3 LORD PANNICK: My Lords, unless I can seek to assist
4 further, those are the submissions I want to make.
5 Thank you very much indeed for your patience.

6 THE LORD CHIEF JUSTICE: Thank you very much indeed.
7 Mr Chambers.

8 Reply submissions by MR CHAMBERS

9 MR CHAMBERS: My Lords, once again I gratefully adopt the
10 submissions of my learned friend Lord Pannick. In our
11 submissions we invited your Lordships to approach the
12 case from first principles under the doctrine of
13 Parliamentary sovereignty and I invite your Lordships to
14 do so for the purposes of my reply. Yesterday, my
15 learned friend Mr Eadie submitted that the starting
16 point was the prerogative by reference to
17 Attorney-General v De Keyser Royal Hotel. In our
18 submission that is not the correct starting point. The
19 correct starting point is articles 1 and 2 of the Bill
20 of Rights, which is the foundation of the doctrine of
21 Parliamentary sovereignty.

22 It is not, as the defendant submits, a question of
23 whether Parliament has left the relevant power in the
24 hands of the executive. The issue is whether executive
25 action, through an Article 50(2) notification, will

1 override, or set aside, legislation enacted by
2 Parliament. If it does, that executive action is not
3 permitted under the doctrine of Parliamentary
4 sovereignty.

5 Now, this is clear from one of the cases which was
6 referred to in our skeleton argument. I didn't take
7 your Lordships to it in my main submissions, but I will
8 now to respond to Mr Eadie's submissions. The case is
9 the Zamora which your Lordships will find in bundle B1
10 at tab 16.

11 My Lords, this was a decision of the Privy Council
12 in 1916, and the issue in the case was whether the Crown
13 had the prerogative power to prescribe or alter the law
14 which the prize courts had to administer. The Privy
15 Council held the prerogative---

16 THE MASTER OF THE ROLLS: Mr Chambers, I am struggling here.

17 B1, tab 16?

18 MR CHAMBERS: It is B2.

19 THE LORD CHIEF JUSTICE: No, it is B1, tab 4.

20 MR CHAMBERS: B1, tab 4. The Privy Council held that the
21 prerogative could not be used to alter the law which the
22 prize court administered. I want to take your Lordship
23 to the statement of general principle by Lord Parker at
24 page 90 of the internal pagination, and its half way
25 down page 90:

1 "The idea that the King in Council, or indeed any
2 branch of the executive, has power to prescribe or alter
3 the law to be administered by the courts of law in this
4 country, is out of harmony with the principles of our
5 constitution. It is true that under a number of modern
6 statutes, various branches of the executive have power
7 to make rules having the force of statute, but all such
8 rules derive their validity from the statute which
9 creates the power, and not from the executive body by
10 which they are made. No one would contend that
11 prerogative involves any power to prescribe or alter the
12 law administered in the courts of common law or equity."

13 My Lords, that is a classic exposition of the aspect
14 of Parliamentary sovereignty on which we rely as set out
15 in the Bill of Rights and as set out by Dicey. Now, on
16 the basis of the concessions which were made by the
17 defendant yesterday, it is clear that an Article 50(2)
18 notification will override or set aside legislation
19 enacted by Parliament, directly contrary to the doctrine
20 of Parliamentary sovereignty.

21 The concessions made by the defendant, which
22 I specifically rely on for the purposes of my
23 Parliamentary sovereignty argument, are four in number
24 and they are as follows: first, a notification under
25 Article 50(2) is irrevocable. That is Day 2 of the

1 transcript, page 64, lines 5 to 8. That was the
2 Attorney. Two, a notification under 50(2) cannot be
3 conditional. Again, that is the Attorney at page 65,
4 lines 6 to 8. Three, the right to stand for elections
5 to the European Parliament and to vote in European
6 Parliamentary elections will definitely be lost after
7 withdrawal from the EU. That is page 184, lines 18 to
8 22. That is my learned friend Mr Eadie. Four, the 2015
9 Referendum Act does not provide the source of power for
10 the government to give an Article 50(2) notification.
11 That is Day 2, page 71, line 23, to page 72, line 2.

12 So, my Lords, with those concessions, looked at in
13 terms of Parliamentary sovereignty, I have, first, the
14 doctrine of Parliamentary sovereignty itself which says
15 that the executive cannot take action to override or set
16 aside legislation enacted by Parliament.

17 Secondly, I have the threatened action of the
18 executive to give an Article 50(2) notification.

19 Thirdly, I have the concession that triggering
20 Article 50(2) will inevitably lead to loss of rights to
21 vote in and stand for elections to the European
22 Parliament; rights which are set out in domestic
23 legislation enacted by Parliament in the 2002 European
24 Parliamentary Elections Act.

25 Fourth, I have the concession that the 2015

1 Referendum Act does not provide the source of power for
2 an Article 50(2) notification.

3 Now, all that is all I need. For the purposes of
4 this narrow example, I don't need to go to the 1972 Act.
5 I don't need to go to the prerogative. Because I have
6 a situation where the executive is going to take action
7 which will lead to the loss of those rights. Those are
8 rights granted by Parliament, and Parliament has not
9 sanctioned the loss of those rights. So in our
10 submission the doctrine of Parliamentary sovereignty --

11 THE LORD CHIEF JUSTICE: Well, you are relying on absence,
12 presumably, of any argument that the series of the
13 European Communities Acts right through do not confer
14 any authority, as well.

15 MR CHAMBERS: My Lord, no. I don't abandon any of the
16 points under the 1972 Act.

17 THE LORD CHIEF JUSTICE: No, no, no, sorry. But on the way
18 in which you rely upon, you rely on four concessions.
19 There is a fifth point that there was no argument that
20 the European Communities Act provides -- the whole of
21 the range of Acts provides authority.

22 MR CHAMBERS: My Lord, no, I don't quarrel with that at all.

23 THE LORD CHIEF JUSTICE: No, you rely on that.

24 MR CHAMBERS: No, I do, I positively rely on that, to make
25 it absolutely clear.

1 THE LORD CHIEF JUSTICE: I am not putting it forward as
2 a submission, but I want to be clear, to make your
3 argument stick, you have to have that one as well, don't
4 you?

5 MR CHAMBERS: My Lord, yes, but not necessarily for the
6 purposes of the 2002 Act, because all I need for
7 Parliamentary sovereignty is an act of the executive
8 which will override a domestic act of Parliament.

9 THE LORD CHIEF JUSTICE: Yes, but it could have been argued,
10 and you say it wasn't, and we will look at the
11 transcript carefully, that there was no contention that
12 authority to leave was given by any of the European
13 communities acts.

14 MR CHAMBERS: My Lord, that is correct.

15 So, my Lords, we say that the doctrine of
16 Parliamentary sovereignty puts in place an absolute and
17 insurmountable road block to the executive giving
18 a section 50(2) notification, and that in our respectful
19 submission is the beginning, the middle and quite
20 frankly the end of the defendant's case.

21 My Lord, yesterday the Attorney said at page 61,
22 lines 6 to 10, and I quote:

23 "It is the defendant's clear contention that by the
24 steps I have set out, a decision has been taken by the
25 government to leave the European Union in accordance

1 with the provisions of Article 50(1). But the doctrine
2 of Parliamentary sovereignty prevents the government
3 from doing that. Only Parliament can take that
4 decision."

5 My Lords, the defendant's concession that the 2015
6 Referendum Act does not provide the source of power for
7 the notification is an important one. I will not repeat
8 the submissions I have already made, that the 2015 Act
9 was passed against the background of the fact that
10 referenda in our constitution are merely advisory, and
11 I referred your Lordships to the briefing paper for the
12 bill, the House of Lords' report on referendums, the
13 government's agreement with that part of the report, and
14 of course to Professor Bognador.

15 But the government's concession is important,
16 because it underlines that on the defendant's case, the
17 Prime Minister could simply have woken up one morning
18 and without more, decided out of nowhere to withdraw
19 from the EU. No referendum, nothing. Now, we submit
20 that cannot be right.

21 My Lords, yesterday the Attorney referred to my
22 submission where I compared the 2015 Referendum Act with
23 the 1975 Referendum Act, and I had submitted that in
24 1975 the relevant government minister had made it clear
25 that the government's position at that time was that

1 further legislation would be needed to effect a decision
2 to withdraw from the then European Economic Community.

3 Now, the Attorney answered my submission with two
4 submissions of his own. First, he said that the
5 government's stated position in 1975 was expressed long
6 before the regime of Parliamentary controls on the
7 prerogative.

8 Now, that argument by the Attorney implies that the
9 government position in 1975 was correct, which it was,
10 in our submission; but that it is no longer correct, and
11 that is where we take issue with the Attorney, because
12 it cannot be the case that the prerogative was
13 restrained in 1975 but somehow bounced back in 2008 or
14 2011. The prerogative was restrained in 1975, and it
15 did not bounce back after that, and my learned friend
16 Mr Eadie expressly disavowed any case that the
17 prerogative had bounced back. That is page 161 of
18 yesterday's transcript, lines 19 to 24.

19 The Attorney's second argument was that the 1975
20 government position had been expressed before the
21 Article 50 regime had been put in place by the Lisbon
22 treaty. But Article 50 had no impact at all on the
23 doctrine of Parliamentary sovereignty.

24 THE LORD CHIEF JUSTICE: Just give us a moment. Yes.

25 MR CHAMBERS: My Lords, the Attorney's submissions in this

1 respect overlooked the fact that in 2008, the
2 government's position was exactly the same on this issue
3 as it was in 1975, notwithstanding the extra
4 Parliamentary controls which were in place and
5 notwithstanding the introduction of Article 50.

6 The government's position on this is clearly set out
7 in its evidence to the House of Lords select committee
8 on the constitution in 2008, where the government
9 considered the interaction of Article 50 with the
10 doctrine of Parliamentary sovereignty. And the
11 government's evidence is in bundle D2 at tab 30.

12 Hopefully I have got that reference right. Bundle D2,
13 tab 30.

14 LORD JUSTICE SALES: I am just wondering what assistance we
15 get from this material. It is a different government
16 and the government is not a source of authoritative
17 statement about the law, the court is.

18 MR CHAMBERS: My Lord, that is correct. The relevance of it
19 is that the government expressly stated against the
20 background of bringing the Lisbon Treaty into domestic
21 law, that its evidence was that Article 50 made no
22 difference at all to Parliamentary sovereignty.

23 THE LORD CHIEF JUSTICE: Where is it?

24 MR CHAMBERS: My Lord, the evidence is at page 677. That is
25 the start of the government's evidence. At the very

1 bottom of 677, this is a memorandum by the Foreign and
2 Commonwealth Office under the Lisbon Treaty.

3 THE LORD CHIEF JUSTICE: Yes.

4 MR CHAMBERS: The relevant passage is at 680. Under item 6
5 at the top of the page:

6 "Our national Parliament. The question was the
7 likely impact of the treaty on the role of the UK
8 Parliament in relation to EU matters ... whether changes
9 ought to be made within the UK on the role and powers of
10 Parliament in relation to EU matters. How the principle
11 of Parliamentary sovereignty is affected by the treaty."

12 Then at the very end of that, two paragraphs up:

13 "The Lisbon Treaty has no effect on the principle of
14 Parliamentary sovereignty. Parliament exercised its
15 sovereignty in passing the 1972 Act and has continued to
16 do so in passing the legislation necessary to ratify
17 subsequent EU treaties. The UK Parliament could repeal
18 the 1972 Act at any time. The consequence of such
19 repeal is that the UK would not be able to comply with
20 its international and EU obligations and would have
21 to withdraw from the European Union. The Lisbon Treaty
22 does not change that and indeed, for the first time,
23 includes a provision explicitly confirming member
24 states' rights to withdraw from the European Union."

25 Now, that evidence led directly to the conclusion of

1 the committee at page 646. So if your Lordships go back
2 to 646 your Lordships will see how this evidence
3 influenced the committee's conclusions. Your Lordships
4 will recall that this committee was reporting for the
5 purposes of whether the Lisbon Treaty should be
6 incorporated into domestic legislation, as it of course
7 was under the 2008 Act. So paragraph 92, under the
8 heading of "Parliamentary sovereignty":

9 "We now consider whether the Lisbon Treaty would
10 change the relationship between EU law and the principle
11 of Parliamentary sovereignty."

12 Then in 93 we have the evidence from the government
13 which I have just read out. 94, some academic evidence.
14 Then in 95:

15 "We conclude that the Lisbon Treaty would make no
16 alteration to the current relationship between the
17 principles of primacy of European Union law and
18 Parliamentary sovereignty. The introduction of
19 a provision explicitly confirming members' rights to
20 withdraw from the European Union underlines the point
21 that the United Kingdom only remains bound by
22 European Union law as long as Parliament chooses to
23 remain in the Union."

24 So, my Lords, we say that is of assistance to your
25 Lordships, to show that in answer to the Attorney, the

1 position after Article 50 did not change. It was the
2 same in 1975 and it is the same today.

3 My Lords, my final point in reply relates to the
4 Attorney's submissions at page 93 of yesterday, that the
5 list of treaties, with an upper case T for treaties, can
6 be amended by primary legislation through section 1(2)
7 of the 1972 Act, and that the list of ancillary
8 treaties, lower case T for treaties, can be amended
9 through an order in Council through section 1(3) of the
10 1972 Act, after a resolution in both Houses.

11 Now, from a Parliamentary sovereignty perspective,
12 the point here is that Parliament has pre-ordained the
13 mechanism for amending the list of treaties, upper case
14 T. And ancillary treaties, lower case T, by enacting
15 sections 1(2) and 1(3) of the 1972 Act.

16 So the mechanism for any changes to the treaties has
17 already been pre-sanctioned by Parliament. Parliament
18 has pre-determined that it must be involved in the
19 mechanism for any changes to treaties, whether treaties
20 with an upper case T or a lower case T.

21 My Lords, those are my submissions in reply, unless
22 you have any questions.

23 THE LORD CHIEF JUSTICE: Thank you.

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Reply submissions by MS MOUNTFIELD

MS MOUNTFIELD: My Lords, in order that any references that I need to skip over get on to your note, I have got copies of my notes for closing that you can have, they will be distributed. I want to focus my reply on the ways in which our approach differs from that advanced by the defendant. Because Mr Eadie suggested that there were two ways of approaching this case, which he identified as ships in the night.

The first was as a case based on the principle of legality and concerned with unlawful interference with rights, which he rejected. Mr Coppel suggested that my client's case fell away because it was based on the magnitude, he said, of the alleged infringements of EU law rights, and that the rights which would be withdrawn as a result of the withdrawal from the EU were slight and replicable.

The second ship which Mr Eadie invited you to embark upon was looking at this case as depending upon only asking whether Parliament intended the European Communities Act or some other statute to abrogate a pre-existing prerogative power to make foreign policy. He said that was the correct approach, using De Keyser principles, and urged you to accept that the continuance of that pre-existing prerogative could be inferred from

1 Parliamentary silence.

2 But in my submission, those two ships skip over two
3 constitutionally prior and more fundamental questions.
4 The first is as to the Bill of Rights, and the second is
5 to the existence and extent of the prerogative, even
6 before any question of statutory abrogation arises, and
7 with respect, I agree with Lord Pannick and Mr Chambers
8 that the proper analysis starts at the beginning with
9 those.

10 Viewed through the prism of the Bill of Rights, the
11 starting point is not whether there is a removal of
12 rights under the EU treaties, or the magnitude or indeed
13 the permanence of any removal of such rights, because
14 section 1 of the Bill of Rights isn't about rights per
15 se, it is about the Crown dispensing with, that is
16 disregarding or foregoing, the putting into practice of
17 laws made by Parliament, whatever their subject matter.

18 So the questions are what is the law created by
19 Parliament; and does the proposed exercise of regal
20 authority, that is executive power, disregard that law
21 or dispense with the need to put its purpose into
22 effect. The focus is on the effects of any pretended
23 exercise of power. Like Mr Chambers, I focus on the
24 fact that the defendant accepts that an Article 50
25 notification is unconditional and he accepts, therefore,

1 that the necessary consequence of such a notification is
2 that the UK will leave the European Union and the EU
3 legal order will contract.

4 He offers no explanation of why it can therefore be
5 said that the triggering of the Article 50 bullet with
6 these consequences does not in effect dispense with
7 these laws, albeit on what Lord Bingham called in *Pretty*
8 a proleptic basis. And we respectfully agree with the
9 submission that was made by the Attorney on the
10 defendant's behalf, and the transcript reference is
11 page 64, that if the act of purported executive power to
12 trigger Article 50 is unlawful, it would still be
13 unlawful even if Parliament could step in and stop the
14 process. That is because the Bill of Rights analysis
15 doesn't depend on the inevitable permanent destruction
16 of rights for its force; it depends on the dispensation
17 of Parliamentary authority.

18 The second point which precedes the analysis which
19 Mr Eadie invites you to adopt is the premise of the
20 defendant's case that the making and unmaking of
21 treaties is a wide and established use of prerogative
22 power which exists unless and to the extent that it has
23 been abrogated by Parliament.

24 Mr Eadie invited you to accept, or assume, that
25 there was a prerogative so wide that it extended to

1 entering and indeed withdrawing from all international
2 treaties, even if by doing so the executive would
3 withdraw rights, obligations, and remedies which are
4 otherwise entrenched in the law.

5 In the transcript at page 116, he said that:

6 "If Parliament had left, for example,
7 a treaty-making power in the hands of the Crown, then to
8 the extent that the exercise of that power to make
9 a treaty or withdraw from a treaty affects rights in
10 domestic law that exist as a matter of common law, then
11 the Crown can exercise those rights to create that
12 effect. The short answer to my Lord's question is yes."

13 We say again that that is wrong. The dividing line
14 is between the two constitutional principles identified
15 by Lord Oliver in the Tin Council case and you may
16 recall I described those in opening as being in tension.
17 And as I said then, and nothing said on behalf of the
18 defendant detracts from this, the reason and the only
19 reason that those two principles, executive power to
20 make foreign policy and Parliamentary sovereignty, can
21 co-exist, is because of the strict dualism of our legal
22 system.

23 In short, the Crown can do foreign relations,
24 consistently with the Bill of Rights, only because, and
25 only to the extent, that they are irrelevant to the

1 conferral or removal of rights and obligations which
2 exist in national law.

3 So we invite you to say that there is not
4 a prerogative power that extends to the removal of
5 rights. And we invite you to think of this in the
6 context of the 17th century constitutional settlement.
7 If Lord Cook had been asked whether the King could
8 enforce, for example, a monopoly on selling currants in
9 London because he had bound himself to create such
10 a monopoly by a treaty with the King of Spain, it is
11 inconceivable that Lord Cook would have said that there
12 was a prerogative power that went that far, simply
13 because treaty-making is a prerogative matter.

14 What Lord Cook did say in the case of Proclamations
15 was that the King cannot change any part of the common
16 law or statute law or the customs of the realm. We say
17 it would be extraordinary if the King or a minister
18 exercising the power of the Crown could not change any
19 part of the law in the absence of Parliamentary
20 authority unless he did so by first exercising executive
21 power to enter a treaty, but if he did that, then he
22 could. That explains what the prior limitation on
23 executive power is, as identified by Lord Oliver.

24 So now you have two conflicting submissions on the
25 existence and the extent of the prerogative. You have

1 Mr Eadie's view and you have the view advanced by
2 Lord Pannick, Mr Chambers and myself on the claimant's
3 side. So how do you resolve this? My submission is
4 that the proper approach is that set out by Lord Bingham
5 in the Bancoult case, which is bundle B2, tab 35, and
6 perhaps I can just ask you to turn to that. It is B2,
7 tab 35. Tab 36, I am sorry. And it is paragraph 69,
8 which is 490 on the internal numbering at the top of the
9 page, and at the bottom of page 490, Lord Bingham said:

10 "When the existence or the effect of the royal
11 prerogative is in question, the courts must conduct
12 a historical inquiry to ascertain whether there is any
13 precedent for the exercise of the power in the given
14 circumstances. If it is law it will be found in our
15 books. If it is not found there, it is not law."

16 LORD JUSTICE SALES: I am not sure how that helps, because
17 we know that there is a prerogative making treaties in
18 conducting international affairs.

19 MS MOUNTFIELD: But we submit that there is no prerogative
20 to make treaties to the extent that by doing so, the
21 King makes law, or interferes with the rights of
22 subjects; that is the Lord Oliver tension.

23 LORD JUSTICE SALES: I follow that submission, but
24 Lord Bingham, it seems to me, is looking at a different
25 question, looking to see whether there is a prerogative

1 there in the first place. In general terms there is
2 a prerogative for the Crown to conduct international
3 affairs.

4 MS MOUNTFIELD: My Lord, he talks about the existence or the
5 effect of the royal prerogative and if you look at
6 paragraph 70, I would submit that includes the extent of
7 the prerogative, because there is no question there that
8 there is a prerogative power to do foreign policy. He
9 says:

10 "The House has referred to no instance in which the
11 royal prerogative was exercised to exile an indigenous
12 population."

13 So it is about the extent of the exercise of
14 prerogative, as well. So I ask where is the precedent
15 for the broad prerogative that Mr Eadie invites you to
16 assume, and I submit there isn't one. The authorities
17 which Mr Eadie cited to you related either to the
18 treaty-making prerogative in general, or to treaties
19 that operate only on the international plane with no
20 legal effect on domestic law, or where the impact on
21 individual rights was only incidental or tangential.

22 Then we say, for reasons of time I am going to have
23 to refer to my note for this, but if there were any
24 doubt about this, the Parliament, we submit, enacted the
25 European Communities Act and later legislation on the

1 basis that there was no prerogative power to enter EU
2 treaties, precisely because they do have effect on the
3 national plane and in national law. Parliament knew
4 that before it enacted the European Communities Act.
5 I have given in my note a reference to the McWhirter
6 case, which was a case brought to argue that Parliament
7 had no power to sign the Treaty of Rome. It is relied
8 on by the defendant on questions of justiciability, but
9 what Lord Phillimore said at paragraph 12, I won't turn
10 it up now, was that there was an executive power to sign
11 the Treaty of Rome because it had no effect in national
12 law, until the European Communities Act which was then
13 a bill, had been passed, and whether or not it was
14 ratified would depend upon the bill before Parliament.

15 So on the historical inquiry, we say there is no
16 example of an EU treaty having been ratified before
17 Parliamentary authority was given for doing so. We have
18 the list at E/22, we have the government saying, as
19 Mr Chambers said, that such Parliamentary authority was
20 needed for ratification, so there is no prerogative
21 power to ratify treaties to the extent that by doing so
22 creates rights, and as a matter of constitutional logic,
23 there is therefore no constitutional power to withdraw
24 from a treaty.

25 On abrogation, assuming we were wrong on that and

1 there was some prior constitutional right, we say that
2 abrogation, the test is the Morgan Grenfell test that
3 Mr Eadie urged upon you. Is there a necessary
4 implication which necessarily follows from the express
5 provisions of a statute construed in their context, that
6 Parliament would regard the requirement for
7 Parliamentary authority to withdraw from a treaty as
8 implied into the terms of the statutes that exist.

9 We say yes, and you will see in my note in relation
10 to the European Union Act 2011, Lord Pannick suggested
11 you ask whether Parliament --

12 THE LORD CHIEF JUSTICE: What paragraph are you at,
13 Ms Mountfield?

14 MS MOUNTFIELD: I think it is around paragraph 6. I am
15 skipping, my Lord. I am told it is 54. No, it isn't,
16 it is 60. I am skipping, my Lord.

17 THE LORD CHIEF JUSTICE: Yes.

18 MS MOUNTFIELD: Lord Pannick invited you to think about the
19 European Union Act and whether Parliament really would
20 have balked at the camel when it required the
21 complicated procedures to kill a gnat. We say that the
22 European Union Act, the purpose of that was to put
23 Parliamentary sovereignty beyond speculation. That was
24 the Lord Howell quotation which is set out in the notes
25 to paragraph 18 of that Act in Halsbury.

1 Parliament wanted control over the extent which the
2 EU increased the competence or changed the competence of
3 the EU institutions which would have, because of
4 section 2 of the European Communities Act and section 18
5 of the European Union act, an automatic knock-on effect
6 in domestic law rights. I suggest that we think about
7 it like a thermostat. Parliament has said we want
8 control of this system of EU law. The executive can't
9 turn the heat up unless it has our approval, and the
10 approval of the people in the direct referendum. It
11 can't turn the heat down unless it has our statutory
12 approval. I say it is quite impossible to say that if
13 they had been asked they would say: but the minister can
14 turn the heating off all together and take away the
15 thermostat all on his own with no authority at all.

16 THE LORD CHIEF JUSTICE: Mm-hm.

17 MS MOUNTFIELD: So that is the short point on implied
18 Parliamentary intention. And I also say that when we
19 are looking at Parliamentary intention, we have to ask
20 which Parliament, passing which Act? And that is where
21 the devolution statutes come in. Because we say --
22 perhaps if I skip back a stage, when Parliament passed
23 the European Communities Act 1972, I did skip too fast,
24 it passed that in the context of the Bill of Rights,
25 knowing that it was making a major constitutional change

1 for the whole UK and in the knowledge of the Acts of
2 Union which said only Parliament could change Scots
3 public or private law, knowing, because of the Van Gend
4 case and because of the observations of the courts in
5 the cases like Blackburn, that this was the most
6 fundamental alteration of domestic law framework that
7 there had ever been.

8 When Parliament, coming forward, made the devolution
9 statutes, it did this, also, in the knowledge that they
10 were underpinned -- these were constitutional statutes,
11 which -- where they assumed that the underpinning
12 features of the legal system would continue to exist
13 until they, Parliament, withdrew them. We say, and
14 I again have it in the notes and because of the time
15 I won't take you to them, but the Robinson case which
16 Mr Eadie referred you to, emphasises at paragraph 11
17 that the Northern Ireland Act was in effect
18 a constitution, and that it was the primary source of
19 authority by Lord Hoffmann in the devolutionary
20 structure.

21 The reason that that Act had been put in place was
22 to end decades of bloodshed and centuries of antagonism.
23 Lord Hope has said something similar in relation to the
24 Scottish devolution settlement in the AXA case, that the
25 devolution settlement was an exercise in law-making

1 power by the United Kingdom Parliament at Westminster.
2 We say Parliament, when it made those acts, balancing
3 who had power to do what among the nations of the
4 United Kingdom, assumed that the basis of that, the
5 fundamental features of it, would not change by
6 prerogative act, given the sensitivity of those
7 relationships. We say something similar in relation to
8 the Acts of Union.

9 Lastly, and the last four paragraphs, five
10 paragraphs of my note, on justiciability, Mr Eadie
11 rightly observed that we put our case not only on the
12 question of existence and extent of the prerogative --

13 THE LORD CHIEF JUSTICE: I don't think justiciability really
14 is an issue any more.

15 MS MOUNTFIELD: No, but there are authorities other than
16 Lord Denning in Laker to the effect that the extent of
17 the prerogative is justiciable. We have Lord Hoffmann,
18 Lord Bingham and Lord Rodger as well. Those are my
19 submissions, thank you.

20 THE LORD CHIEF JUSTICE: Mr Green.

21 Reply submissions by MR GREEN

22 MR GREEN: My Lord, I have prepared a very brief speaking
23 note, too, to amplify one or two of the points I am not
24 going to have time to develop, but it is brief and so
25 will be my submissions. My Lord, the points I wish to

1 cover are very briefly these: firstly, I obviously adopt
2 the submissions of my learned friends Lord Pannick,
3 Mr Chambers and Ms Mountfield, and specifically,
4 Ms Mountfield's submissions as to the absence of any
5 proper foundation for the existence of a relevant
6 prerogative for the purposes of this case. And
7 I respectfully adopt my learned friend Ms Mountfield's
8 submissions and I shan't amplify those due to lack of
9 time.

10 The second point is the -- I am so sorry, save to
11 make one observation in response to my Lord,
12 Lord Justice Sales, as to the possible contest between
13 what the court may derive from these two aspects of
14 constitutional background, which is footnoted in the
15 note. True it is that the parties' positions in this
16 case invite such a contest, but in fact there is no
17 contest at all, because the principle of Parliamentary
18 sovereignty is the cornerstone of our constitution, and
19 the continued existence and extent of the royal
20 prerogative to accede to and withdraw from treaties,
21 namely those treaties purely on the international plane
22 that do not confer or remove legal rights in domestic
23 law, is in fact simply a reflection of the principle of
24 Parliamentary sovereignty so eloquently expressed by my
25 learned friend Mr Chambers.

1 My Lords, the second point, which I would wish to
2 deal with briefly, is the 1972 Act point. I would ask
3 your Lordships, please, to turn to page 4 of the note,
4 because I have just given your Lordships a chronology.
5 I am not going to have time to develop it by taking your
6 Lordships to the relevant materials, but I just want to
7 make the points and tell your Lordships what they are.

8 Paragraph 12 recites the government's position, the
9 Crown's position that the UK in 1972 thought it was
10 entitled to withdraw from or renunciate treaties and it
11 was a matter of customary international law that
12 Parliament would have understood the point at which the
13 1972 Acts were passed.

14 My Lords, parenthetically, the 1972 Act was passed
15 by Parliament 44 years ago yesterday, and it received
16 royal assent 44 years ago today. Those dates, your
17 Lordships will find in the chronology. The significance
18 of the chronology is as follows: A, 15 July 1964, the
19 judgment in *Costa v ENEL* with references to the unique
20 legal order of unlimited duration and the permanent
21 limitation of sovereignty of member states.

22 One then gets the signature of the Vienna Convention
23 in the form in which Article 56 now is, including by the
24 United Kingdom.

25 One then gets in 1971 Lord Denning's decision in

1 Blackburn, which is a domestic law decision in which the
2 ability of Parliament, and I underline Parliament for
3 reasons which will become apparent, Lord Denning doubted
4 whether Parliament would able to repeal the 1972 Act.

5 One then gets ratification of the Vienna Convention
6 on 25 June 1971, about six months before the accession
7 treaty is signed by the United Kingdom and before the
8 1972 Act was passed.

9 So it would all have been fresh in the minds of
10 Parliament on the informed interpretation rule. And my
11 Lords, they all speak with one voice, to
12 an understanding at that time that the United Kingdom
13 could not unilaterally have withdrawn.

14 So my Lord, we simply respectfully say that there is
15 absolutely no foundation, certainly none before the
16 court, for the submission that was made, which I have
17 recited at paragraph 12.

18 As to the 2011 Act, the assumption that ran through
19 my learned friend Mr Eadie's, and indeed the
20 Attorney-General's submission in relation to the
21 succession of relevant Acts was that he was looking for
22 some express words. The informed interpretation rule
23 takes notice of the state of the law as it is at the
24 time at that the original Act is enacted, the 1972 Act.
25 Your Lordships have the position in relation to that set

1 out in this note and I have just taken your Lordships
2 through it.

3 So the assumption in Blackburn that it would be
4 Parliament that would decide is an assumption that
5 persists until 2015 in the Shindler case. So my Lords,
6 I would just invite the court carefully to note that the
7 submission now made by the Crown is wholly without
8 precedent in any of the cases that I have been able to
9 identify. That explains the context and the prism
10 through which the 2011 Act then falls to be judged,
11 because it puts a completely different complexion on the
12 implicit assumption that of course it is Parliament that
13 is vested with authority to take the decision to
14 withdraw, but more minor matters as my Lords have
15 identified in the course of argument, more minor matters
16 were increasingly controlled.

17 There was no novelty, whatsoever, I think contrary
18 to the submission made by my learned friend Mr Eadie,
19 there was no novelty at all in requiring Parliamentary
20 approval for changes or amendments to the treaty. What
21 was novel in 2011 was the more sophisticated and
22 finessed control of other amendments. The obvious
23 analogy, whether it is a tiger and an antelope or
24 whether it is a gnat and a camel, the point is
25 a difficult one to put out of one's mind but a clear

1 one.

2 So we respectfully say I adopt the submissions of my
3 learned friend Lord Pannick, the right starting point is
4 the principle of legality, and indeed the submissions of
5 my learned friend Mr Chambers to that effect, but as
6 a tertiary argument, after one has used the informed
7 interpretation principle, starting in 1972 and going all
8 the way through to the 2011 Act, even if your Lordships
9 were not with these arguments then, we do then say
10 express abrogation in the 2011 Act by reason of the
11 increasing finesse on control.

12 My Lords, then the 2015 Act. My learned friend
13 Mr Chambers dealt extremely helpfully with the House of
14 Commons library briefing paper which I footnoted again,
15 which described the 2015 referendum as a pre-legislative
16 or consultative referendum -- I am sorry, there was
17 an infelicity of expression in paragraph 23, I should
18 have said the 2015 referendum was described as
19 pre-legislative or consultative -- which enables the
20 electorate to voice an opinion which then influences the
21 government in its policy decisions.

22 My Lord, one quick footnote here, the government
23 fails to distinguish in the constellation of statements
24 relied upon by the Attorney-General as constituting
25 a description of a decision, the government fails to

1 distinguish between a government intention to bring
2 forward a bill and lay it before Parliament and achieve
3 a policy objective on the one hand, and the government
4 having the power to take the decision itself without
5 Parliament's involvement at all. That is the
6 distinction that matters in this case and it is not
7 a decision that appears from any of those statements,
8 less still with the clarity that would be necessary.

9 My Lord, finally I turn to the submissions of my
10 learned friend Mr Coppel about the nature and quality of
11 the rights in issue before this court, which, my Lords,
12 may I say were surprising in the sense that advocates
13 use that word, and surprising in the sense that we were
14 all surprised.

15 There is a fundamental reason for that. That is
16 that they completely overlook the unique legal order on
17 which I have already made some brief submissions, which
18 is an absolute cornerstone of principle for the
19 establishment of the Communities and then the Union, and
20 to approach those questions, ignoring the nature of the
21 unique legal order, is exactly the same as approaching
22 the common law questions ignoring Parliamentary
23 sovereignty.

24 That is the first point and I will make that point
25 good in the following way. The suggestion that there is

1 some congruence in domestic law between some of the
2 rights which are conferred in EU law and some domestic
3 statutes which would survive afterwards is not exactly
4 a surprise. That is the statutory scheme that
5 Parliament assented to in 1972 and it is reflected in
6 our domestic law. But it is absolutely no answer at all
7 to the points we have made.

8 The reason for that is this: what European Union
9 citizens and British citizens have is freestanding EU
10 rights. The fact that they are replicated in domestic
11 law is not an answer to those rights being taken away.
12 This can immediately be illustrated by the following
13 example. Let us imagine that a minister of state
14 unguardedly suggested that companies would be required
15 to list foreign workers that they were employing.
16 Hypothetically.

17 If that were the case, in the situation that would
18 result after the treaties, we have withdrawn from the
19 treaties, they would be required to rely on domestic
20 law. They would not be able to challenge the lawfulness
21 of either executive action or primary legislation to
22 which my Lord, the Master of the Rolls referred to
23 earlier, as inconsistent with their underlying EU
24 rights.

25 So the fact, first of all, replication of the rights

1 subsequently is no answer, but it completely ignores
2 a much more fundamental principle, which is that these
3 are rights enjoyed at the EU level which by virtue of
4 the 1972 Act, individuals have a right to rely on when
5 the subsequent legislation changes or a measure is
6 introduced which conflicts with those principles. That
7 is a complete answer across all of the rights to the
8 arguments advanced by Mr Coppel.

9 THE LORD CHIEF JUSTICE: I think there was something else
10 that Mr Coppel put, really. Take the example by
11 reference to free movement. He said, well, as that is
12 not a right that is exercisable within the territory of
13 the United Kingdom, it is not a right created under the
14 1972 Act.

15 MR GREEN: My Lord, that is the part that entirely ignores
16 the nature of the unique legal order.

17 THE LORD CHIEF JUSTICE: That is what I mean. It extends
18 not merely to the interpretation of an Act which is the
19 example you have given, but actually to rights you
20 acquire by virtue of being an EU citizen, and being able
21 thereby to exercise them in other territories of member
22 states.

23 MR GREEN: My Lord, the point is this: it is not right as
24 a matter of approach to make that sort of delineation,
25 territorially, which might historically have been

1 appropriate prior to the 1972 Act, when considering the
2 pooled competence which results from the 1972 Act, and
3 the treaties. Although it is right that Parliament
4 conferred a competence on the EU institutions,
5 a legislative competence, it is also correct to say that
6 in doing so, Parliament also obtained a competence
7 through the treaties to confer on those citizens upon
8 whom it conferred nationality, certain rights under
9 those treaties.

10 So that is the point I was trying to explain in my
11 submissions earlier. The consequence of the unique
12 legal order, of which Parliament was well aware, because
13 it is perfectly clear from Costa and other cases which
14 pre-date the 1972 Act, it is quite wrong on the informed
15 interpretation rule to ignore the unique legal order,
16 the character of which was perfectly clear as a matter
17 of European Union, as it now is, law prior to accession
18 in 1972.

19 THE LORD CHIEF JUSTICE: Your submission therefore is there
20 are two types to go back to, you would say that the
21 rights, for example, the right of free movement is
22 a right that has been acquired under domestic law, and
23 therefore cannot be altered without Parliamentary
24 assent. I know it doesn't go to Lord Pannick's argument
25 because he has already found two that exist under

1 domestic law, but your argument goes further and
2 says: well, even if we weren't concerned about those
3 rights, they go much more extensively.

4 MR GREEN: They do indeed, my Lord. It is an absolutely
5 fundamental question to the existence of the entire
6 European Union architecture, and the proper effect of
7 the 1972 Act.

8 THE LORD CHIEF JUSTICE: You don't put any authority here,
9 because I assume you are saying -- are you saying that
10 it was so obvious that you don't need authority.

11 MR GREEN: My Lord, yes. We were astonished that the
12 proposition was advanced as it was, because as early as
13 Costa, which by chance we had in the bundle, and it is
14 there for your Lordships to read, and in the treaties,
15 the concept of conferral of power by member states into
16 this pooled competence of the EU has been the central
17 distinguishing feature of the unique legal order which
18 is in almost every case that you read.

19 THE LORD CHIEF JUSTICE: By asking you that question, I have
20 nearly given you the 25 minutes you sought.

21 MR GREEN: I am so grateful, I shan't complain, my Lord.

22 THE LORD CHIEF JUSTICE: Anything further? Yes.

23 Reply submissions by MR GILL

24 MR GILL: My Lord, a few brief points. In addition to the
25 point that my learned friend Mr Green has just made,

1 there is of course the point in the 1972 Act, that the
2 rights that were going to be arising under the treaties
3 in whatever way, treaties as added to from time to time,
4 would be from time to time in any event. So I can't
5 really see why it is that Mr Coppel was limiting himself
6 to 1972 and saying that the citizenship rights only came
7 in in 1972 -- and are saying that the citizenship rights
8 only came in 1992 and therefore they have to be treated
9 somehow qualitatively differently, but I leave that to
10 one side by just those comments.

11 What I wanted to deal with in particular was this:
12 there were suggestions in the defendant's submissions
13 which were, notwithstanding the concessions that
14 Mr Chambers has drawn attention to, which seem to
15 suggest that the rights will somehow continue after
16 withdrawal, so they won't be a problem and we are
17 therefore exaggerating the fears.

18 On the other hand, it was being suggested that there
19 is going to be something called a great repeal bill,
20 which is going to re-enact rights following the point of
21 withdrawal.

22 I am not quite sure how they can have it both ways.
23 Either the current law is adequate, and I mean current
24 law as at today's date is adequate to continue all of
25 the protections that we rely upon post withdrawal, or it

1 is not. And if they need the great repeal bill and then
2 re-enacting, then why do they need it if the current law
3 is adequate? It is an admission that in fact the
4 current law will be inadequate. And the use of the word
5 "exaggerated" is also implicitly an admission that we
6 are right. They are not saying that we are wrong when
7 we say there will be consequences, they are saying we
8 are just exaggerating what the consequences will be.
9 And what he really meant by that is we will actually
10 take steps -- take steps; future -- to put something in
11 place. Well, that may be and that isn't what happened
12 now, and what people need to know is what is their
13 position now, and what they need to have is something
14 dealt with by Parliament which deals with what their
15 position is now.

16 LORD JUSTICE SALES: Surely, Mr Gill, their position now is
17 we are still members of the EU, everyone has their
18 rights pursuant to section 2(1) of the ECJ Act.

19 MR GILL: My Lord, I am sorry, that is absolutely right.
20 What I mean is what will be the position if the minister
21 decides to -- if a notice is to be given, in other
22 words, what will be the position then. And we say that
23 is something that has to be dealt with in Parliament,
24 for the reasons that you have heard. Because once that
25 notice is given, people's rights, people's expectations,

1 people's daily lives, dramatically change, because what
2 that notice does is to signal, certainly to the classes
3 of person -- very clearly by the actual Act -- to the
4 classes of persons that I have been particularly
5 concerned about, you have to pack up and go, because if
6 you don't, at the point of withdrawal you will be going
7 unless we change the law. So what is the law that is
8 going to be changed? What is the protection that is
9 going to be put in place? At some point a great repeal
10 bill or whatever it is called is going to provide the
11 protections? We don't know.

12 And bear in mind this: the point between the notice
13 and the withdrawal could theoretically be a few minutes.
14 Theoretically. The minister could say "well, I am
15 negotiating on the international plane. What does that
16 have to do with anybody? I haven't reached any
17 agreement as such. I am carrying out a negotiation
18 under the royal prerogative. I made a decision for
19 50(1). I am now going to give the notice, and by the
20 way, having given the notice to the secretariat of the
21 European Council, on the basis of the discussions I have
22 been having already with them here is the agreement and
23 we are withdrawing tomorrow." Now that could, on their
24 case, theoretically happen. Where does that leave the
25 room for Parliament? Nowhere. What are they going to

1 do in that day? It is absurd.

2 The submission that there is a royal prerogative
3 which enables them to act so as to make the
4 Article 50(1) decision and the 50(2) notice and then to
5 conclude an agreement is as absurd as that, because
6 there is no place for Parliament thereafter.
7 Theoretically, there may be, but even if theoretically
8 there may be Lord Pannick has dealt with why it is
9 actually -- as he put it the dye has been cast. Not
10 just cast, cut and dried.

11 In any event, my Lord, there is one more point to
12 make in relation to this point, because they appeared to
13 be suggesting also that maybe the present law is
14 adequate. I was entirely unclear about this. Yet they
15 did not in fact respond to my submission that in fact
16 the consequences of the legislative scheme, as is set
17 out in paragraph 15 of our skeleton argument -- and all
18 of that skeleton argument I pray in aid -- the
19 consequences of that will be if they give the
20 Article 50(2) notice there will be criminality and
21 liability to removal on the day of removal. Mr Eadie
22 has not got up and said "Mr Gill, I guarantee that on
23 the current law there is not that criminality". He has
24 not said that. He has not even met the argument. So
25 one assumes, therefore -- and they didn't meet it in

1 their skeleton argument, either; paragraph 48.

2 Therefore what we fear is right and therefore the
3 only way in which they can actually meet the problems
4 that we have drawn attention to is through something
5 called a great repeal bill which they only announced at
6 the party political conference post the skeleton
7 arguments, which isn't yet law and which cannot
8 therefore affect this court's deliberations whatsoever.
9 It is just a party political statement.

10 Three other short points, and they are these.
11 Firstly, the rights to free movement are rights
12 conferred under the EU treaties which have been made
13 part of domestic law. The EEA regulations, which I hope
14 were attached to my speaking notes, if they weren't we
15 can ensure copies, but I think they were. Now, those
16 EEA regulations when you look at the opening words, the
17 opening words of the EEA regulations say they are made
18 pursuant to section 2(2) of the 1972 Act, for that
19 purpose. And they are giving for that purpose a certain
20 status which comes only out of EU law. Not out of
21 domestic law concepts, but out of EU law. Once we
22 withdraw from the treaties, the EU treaties, this
23 document, the EEA regulations, becomes pointless. There
24 are no concepts in there, rights of residence --
25 LORD JUSTICE SALES: Sorry, you say it becomes pointless,

1 but it is an instrument of our law isn't it?

2 MR GILL: There is nothing for it to latch on to, there is
3 nothing to support it, it only has support if we are
4 part of the EU. The reason for that is this: the
5 regulations are not doing anything other than doing what
6 is in the citizens' directive and if we hadn't had the
7 regulations, the directive would be directly enforceable
8 in any event. So all the regulations are doing is
9 trying to put into some form of language which is
10 acceptable for our traditions, for our system, for our
11 appeal mechanisms, that which is in the directive. That
12 is all. Once we cease to be members of the EU the
13 regulations might as well be writ in water. There is
14 nothing for them to bite on to. On the day after
15 withdrawal, those people who whom I represent are going
16 to be here without leave and they are going to need
17 a form of leave, as schedule 2-paragraph 1 of the EEA
18 regulations states. They are not going to have that.
19 Therefore they are going to be unlawfully here. They
20 are going to be committing criminal offences unless they
21 do something in the great repeal bill before they give
22 the Article 50 notice, and that is not the order in
23 which they are going to do it.

24 And in any event, as the Master of the Rolls pointed
25 out, under the regulations when a dispute arises before

1 the First Tier Tribunal, the Immigration and Asylum
2 Chamber, about the regulations, what those cases do is
3 they lead you up to the Court of Justice, ultimately.

4 So it is slightly misleading, not intentionally I am
5 sure, to suggest that somehow the present law is going
6 to continue. What does that mean it is going to
7 continue? It doesn't actually give us these rights.

8 THE LORD CHIEF JUSTICE: That is the first of the other
9 points, what is the second point?

10 MR GILL: My Lord, lastly the point is, one point, which is
11 the point about the children. Can I indicate that what
12 we said in our original skeleton argument we stick with.
13 I am not sure I, in rushing towards the end of my
14 opening submissions, whether I put this properly or not.
15 But as to the UN convention on the Rights of a Child, we
16 are not relying on that as an unincorporated treaty, we
17 are relying on it as a treaty which in many ways has
18 indeed been brought into domestic law for all of the
19 reasons set out in our skeleton argument.

20 But my Lords, for all of those reasons, we say that
21 our original arguments remain unanswered, and as to
22 relief, whilst the judgment will stand to have
23 declaratory effect, there ought to be some form of
24 a declaration, if only because an order needs to be
25 there for somebody to appeal against it.

1 Lastly, I note that the case of Saneh (?) is
2 something that may have been put forward. I don't know
3 if it has been put forward or not, but it is on appeal
4 in any event to the Supreme Court. But I am sure if it
5 has gone up. Mr Coppel gave me a copy. But there it
6 is.

7 My Lord, those are my submissions.

8 THE LORD CHIEF JUSTICE: Thank you very much.

9 Further submissions by MR COPPEL

10 MR COPPEL: My Lord, finally, Witham and Pearson,

11 Lord Pannick relied on as authority for the proposition
12 that the prerogative cannot be used to take away common
13 law rights. We say first of all that those cases were
14 not concerned with anything of the sort. In both cases,
15 the issue was whether a statutory power in Witham to
16 make subordinate legislation, in Pearson to fix the
17 tariff of a sentence, whether the statutory power was
18 broad enough to allow action by the executive which
19 interfered with fundamental common law rights.

20 The answer, in accordance with the standard
21 principle of legality, is only if the statute gave
22 authority expressly or by necessary implication. We are
23 concerned by contrast with the different situation of
24 whether a recognised and well-established prerogative
25 power has been abrogated by statute.

1 THE LORD CHIEF JUSTICE: That is the power to enter into and
2 make treaties on the international plane.

3 MR COPPEL: That's right, yes. The well-established test
4 for has there been abrogation of a recognised
5 prerogative power is the test in De Keyser, Laker, Fire
6 Brigade's Union and so forth. That is not just my case,
7 that was Lord Pannick's case in writing. That is the
8 case in his detailed grounds and in his skeleton
9 arguments. It is only before this court orally that he
10 has perhaps realised the limitations and the difficulty
11 of that that it has become his alternative case and he
12 has put forward a different case. But that was his case
13 until this hearing started.

14 Now, in the context of this particular power, the
15 power to conclude international treaties and to withdraw
16 from international treaties, there is no need to argue
17 about whether it is permissible for Crown action on the
18 international level to remove domestic legal rights.
19 There is no need, because we know from Lord Oliver in
20 Raynor that the UK's commitments on the international
21 level are not capable of altering domestic law. So it
22 is not that the Crown is not permitted to enter or
23 withdraw from international commitments; those
24 commitments are not capable of altering the state of
25 domestic law.

1 Equally, in this case the notification which is
2 being challenged, the international act of notification
3 does not repeal any domestic statute. Withdrawal from
4 the European Union will not repeal any statute. Only
5 Parliament can repeal statute. That is what will
6 happen. That will be a matter for Parliament in due
7 course.

8 That is the analysis not just of the Raynor case,
9 but also one sees it from the judgment of
10 Lord Justice Phillimore in the McWhirter case, which
11 Ms Mountfield referred you to. That is the other new
12 authority which I just wanted to refer you to. Can
13 I ask you to turn it up briefly. B1, tab 13.

14 I just wanted to show you first of all at page 419
15 of the bundle, the Master of the Rolls at paragraph 6,
16 this is on the nature of the prerogative, and there was
17 a complaint that by entering into the Treaty of Rome, or
18 acceding to the Treaty of Rome, the Crown had broken the
19 Bill of Rights.

20 The Master of the Rolls said at paragraph 6 that he
21 can't accept the argument:

22 "Those provisions in the Bill of Rights deal with
23 the vesting of the Crown in King William and Queen Mary
24 and their successors. They affect the succession to the
25 Crown. They do not touch the royal prerogatives of the

1 Crown. They are preserved by the eighth clause which
2 maintains in the Crown all honours, styles, titles,
3 regalities, prerogatives, powers, jurisdictions and
4 authorities to the same belonging and appertaining. The
5 result is that the Crown retained by statute as fully as
6 ever the prerogative of the treaty-making power. That
7 prerogative has succeeded from one generation to
8 another. It is exercised on behalf of the Crown by the
9 government of the day. It cannot be impugned in any way
10 in these courts, either before or after a treaty is
11 signed. Even though the Treaty of Rome has been signed,
12 it has no effect, so far as these courts are concerned,
13 until it is made an Act of Parliament. Once it is
14 implemented by an Act of Parliament, these courts must
15 go by the Act of Parliament."

16 That is consistent with the Lord Oliver principle,
17 the Raynor principle. There is a recognised,
18 well-established and indeed under statute recognised and
19 well-established royal prerogative, which is simply not
20 capable in and of itself of changing domestic law.

21 LORD JUSTICE SALES: But it was Mr Eadie's argument that if
22 on the international plane, there is a withdrawal from
23 the EU treaties, that will denude the practical effect
24 of section 2(1) of the European Communities Act which
25 does have effect in domestic law.

1 MR COPPEL: My Lord, what it doesn't do is to change
2 domestic law.

3 LORD JUSTICE SALES: If you say denuding it of effect
4 doesn't change domestic law, then I follow the argument.

5 MR COPPEL: The principle is the sequencing point which he
6 put to you, which is the point being made by
7 Lord Denning, which is the point being made by
8 Lord Oliver, that the way our constitution works in this
9 sphere is that the Crown on behalf of the nation enters
10 into and withdraws from international commitments, and
11 then that is given effect in domestic law by Parliament,
12 and that will be given effect by Parliament to the
13 extent necessary in this case, in this case also.

14 MS MOUNTFIELD: My Lord, I am sorry, but the passage I was
15 referring to was paragraph 7 which is that once the
16 assent of Parliament is obtained, it has the force of
17 law. Until it is obtained the courts will not
18 interfere. The point I was making is that once the
19 European Communities Act had come into force, those
20 treaties did acquire the force of law, and so the
21 situation changed thereafter. I was also drawing
22 attention to Lord Phillimore, towards the end of
23 paragraph 8: whether the Treaty of Rome is ratified or
24 not depends, as far as this country is concerned, on the
25 present bill before Parliament. It is that bill which

1 will or will not alter the law of the country.

2 THE LORD CHIEF JUSTICE: Thank you. Anything further?

3 MR COPPEL: Yes, my Lord, the final thing. The

4 Vienna Convention, we had prepared a note --

5 THE LORD CHIEF JUSTICE: Yes, you promised us one.

6 MR COPPEL: -- on the position in 1972. We haven't been

7 able to finalise it --

8 THE LORD CHIEF JUSTICE: That is all right.

9 MR COPPEL: -- due to some comments from those behind me.

10 We can finalise it this afternoon. It is only two or

11 three pages.

12 THE LORD CHIEF JUSTICE: If you can provide it also --

13 rather than have five separate replies, maybe we could

14 prevail upon Lord Pannick's team, if there is anything,

15 that they can all come through one note. Would be that

16 an undue burden?

17 LORD PANNICK: Certainly, my Lord.

18 THE LORD CHIEF JUSTICE: I am not going to ask if there is

19 any more in case somebody does get up. It merely

20 remains, I am not going to shock you, as you say you

21 have been shocked, by saying we shall give judgment in

22 ten minutes. We shall take time to consider the matter

23 and give our judgments as quickly as possible.

24 We would like to thank not only the counsel who have

25 appeared and spoken but those behind them, and those who

1 have attended to listen by way of counsel, and also the
2 huge teams behind all of you. You have worked extremely
3 hard to get this done and ready on time, and we are all
4 very, very grateful. We are, three of us, grateful to
5 each and every one of you. Thank you very much indeed.

6 LORD PANNICK: Thank you, my Lords.

7 (3.40 pm)

8 (The hearing concluded)

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