

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.

1 Thursday, 13 October 2016.

2 (9.30 am)

3 Submissions by LORD PANNICK

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

22 As your Lordships well know, we are all here because
23 this is an application for permission to bring judicial
24 review proceedings, and it is an application for the
25 remedy of a declaration in a case which raises an issue

1 of fundamental constitutional importance concerning the
2 limits of the power of the executive. Can the
3 defendant, on behalf of the government, lawfully use
4 prerogative powers to give a notification under
5 Article 50 of the treaty on European Union of this
6 country's intention to withdraw from the EU.

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

12 LORD PANNICK: Certainly.

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

14 LORD PANNICK: Certainly, my Lord.

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

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

21 THE LORD CHIEF JUSTICE: No.

22 LORD PANNICK: Your Lordships know the case for Mrs Miller,
23 is that prerogative powers may not lawfully be exercised
24 by the minister because their use in this context would
25 remove rights established by Act of Parliament, and

1 would preempt the decision of Parliament, whether or not
2 to maintain those statutory rights. That is our
3 submission, which I will seek to develop. All the more
4 so, we say, when this question of the legal limits of
5 executive power arises in the context of one of the most
6 important of our statutes, the European Communities Act,
7 which is the source of so much of the law of the land.

8 My Lords, some preliminary points if I may, just to
9 clear away what we say this case is not about. First of
10 all, this claim concerns, and only concerns, whether the
11 law allows the executive to give notification under
12 Article 50. The courts, we respectfully submit, I am
13 sure there is no dispute about this, is not concerned
14 with the political wisdom or otherwise of withdrawal by
15 this country from the EU. The defendant, we
16 respectfully submit, is wrong to suggest on page three
17 of his skeleton argument, it is line 7, that for us to
18 challenge the legality of the proposed notification,
19 I quote "is merely camouflage." My Lords, of course my
20 client, Mrs Miller, wishes this country to remain
21 a member of the EU. Our skeleton argument so states at
22 paragraph 53. But that is not the issue in these
23 proceedings. Mrs Miller, I say, is entitled to complain
24 in these proceedings that if we are to leave the EU,
25 then the steps to be taken, which will deprive her of

1 rights under the 1972 Act, and other legislation, must
2 be taken in a lawful manner. Nor, my Lords, is this
3 case concerned with the political desirability, or
4 otherwise, of parliamentary involvement in the decision
5 to notify under Article 50. Our case is not that an Act
6 of Parliament is politically desirable, we accept we can
7 only succeed if we can satisfy the court that the
8 defendant has no legal power to notify under prerogative
9 powers.

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

1 need for the minister to report back to Parliament at
2 defined times. All of those would be matters for
3 Parliament to consider and decide. Our legal claim is
4 in support of parliamentary sovereignty. What
5 Parliament does with its sovereignty is, of course,
6 entirely a matter for Parliament.

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

19 My Lords, in developing my arguments on the limits
20 of the prerogative powers of the defendant in the
21 present context, I am going to adopt many of what we say
22 are the valuable points made in the skeleton arguments
23 from my friends, supporting this side of the argument.
24 And your Lordships will then be asked to hear
25 supplementary submissions from my friends. In

1 particular, Mr Chambers is going to address the court on
2 behalf of Mr Dos Santos on issues of parliamentary
3 sovereignty and on whether a decision has been taken to
4 withdraw from the EU. Miss Mountfield for the
5 Grahame Pigney set of interested parties, is going to
6 deal with devolution points; those are the points
7 arising from the special constitutional arrangements
8 governing Scotland, Wales and Northern Ireland. She,
9 Miss Mountfield, is going to deal with the acts of union
10 with Scotland. She is going to address EU citizenship
11 rights, and the Bill of Rights 1689. I am going to
12 leave those topics to her. Mr Green is going to speak
13 for the George Birnie --

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

16 LORD PANNICK: Of course.

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

19 LORD PANNICK: There is.

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

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

24 THE LORD CHIEF JUSTICE: Thank you.

25 LORD PANNICK: Then Mr Green is going to make submissions

1 for the George Birnie group of interveners. He is going
2 to focus on the rights enjoyed by British citizens
3 abroad and he too wants to address the absence of
4 an identifiable decision of the UK to leave the EU. And
5 finally on our side, Mr Gill is going to address the
6 court on the impact of the Article 50 notification on
7 children and their carers.

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

16 The defendant has raised, it is at the end of his
17 skeleton argument, an objection to the justiciability of
18 the issues of law which we raise and he has objected to
19 the constitutional impropriety, as he sees it, of the
20 declaratory relief which we seek. We agree with the
21 defendant that it is appropriate to deal with those
22 issues at the end of the argument, rather than at the
23 beginning, because the strength, we say the weakness of
24 those points, can best be understood in context, after
25 your Lordships have heard our side on the substance of

1 the case. So I will deal with them at a later stage.
2 Our case, of course, is that these proceedings raise
3 an issue of law. An issue of law is for the court to
4 decide, and the declaratory relief we are seeking would
5 not trespass on the powers of Parliament. On the
6 contrary, we say it would uphold the powers of
7 Parliament.

8 Now my Lords, I want to address, if I may, five main
9 topics. Can I identify them and then deal with them in
10 turn.

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

1 THE LORD CHIEF JUSTICE: We may ask you questions in
2 relation to those.

3 LORD PANNICK: Of course.

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

10 LORD PANNICK: Of course.

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

14 LORD PANNICK: I will deal with those --

15 THE LORD CHIEF JUSTICE: They are not easy.

16 LORD PANNICK: I will do my best to answer them, my Lords.
17 Article 50 your Lordships have at bundle A, at tab
18 number 6. Your Lordships are, by now, very familiar
19 with it. Can I just read it out. Article 51:
20 "Any member state may decide to withdraw from the
21 Union, in accordance with its own constitutional
22 requirements.
23 "(2). A member state which decides to withdraw
24 shall notify the European Council of its intention. In
25 the light of the guidelines provided by the Council, the

1 Union shall negotiate and conclude an agreement with the
2 state, setting out the arrangements for its withdrawal,
3 taking account of the framework for its future
4 relationship with the Union. That agreement shall be
5 negotiated in accordance with Article 218(3) of the
6 treaty on the functioning of the European Union. It
7 shall be concluded on behalf of the Union by the
8 Council, acting by a qualified majority, after obtaining
9 the consent of the European Parliament.

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

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

25 "(5). If a state which has withdrawn from the Union

1 asks to rejoin, its request shall be subject to the
2 procedure referred to in article 49."

3 LORD JUSTICE SALES: Lord Pannick, can I ask you,
4 Article 50, am I right in thinking it came in with the
5 Lisbon Treaty?

6 LORD PANNICK: It did, my Lord.

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

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

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

19 LORD PANNICK: I wasn't proposing to do so. I can assist
20 your Lordship or try to assist your Lordship in relation
21 to the relevant provisions but I say they do not assist
22 on the issues which are before the court. Not least
23 because our argument is not that the defendant is acting
24 in any way unlawfully, contrary to Article 50. Our
25 case, and indeed the case of the defendant, is that the

1 United Kingdom is perfectly entitled, in accordance with
2 whatever its own constitutional requirements are, to
3 withdraw from the EU.

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

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

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

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

15 LORD JUSTICE SALES: I think I should register that I, for
16 myself, am interested at least, to know that by way of
17 background.

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

21 LORD JUSTICE SALES: Thank you.

22 LORD PANNICK: For our part, we say that Article 50 does not
23 envisage any conditional withdrawal, which is the second
24 question put forward by my Lord, the Lord Chief Justice.
25 What Article 50 envisages is that under Article 50

1 sub-paragraph 2, that a member state which decides to
2 withdraw shall give a notification. And the whole
3 purpose of the Article 50 regime under article 53 is to
4 set out a very tight timetable which can only be
5 extended with the unanimous agreement of the
6 European Council, and the member state, the purpose of
7 which is to provide some end point for the application
8 of the treaties.

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

14 LORD PANNICK: No.

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

18 LORD PANNICK: Yes. The United Kingdom has to make up its
19 mind. And the United Kingdom has to decide, are we
20 going to give notification of withdrawal? That is what
21 Article 50(2) envisages. Article 50(2) then triggers
22 the consequences that are set out with clarity in
23 Article 50(3). And the consequence of giving
24 notification is that the treatise cease to apply to the
25 United Kingdom. When do they cease to apply? Well,

1 they cease to apply as soon as the withdrawal agreement
2 is entered into. But there is a time limit. This
3 treaties, in any event, cease to apply within two years,
4 and that two year period can only be extended with the
5 agreement of the European Council, in agreement with the
6 member state, if the Council unanimously decides to
7 extend the period. And the need for unanimity
8 demonstrates how serious a matter this is.

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

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

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

19 LORD PANNICK: It is of vital importance. It is of vital
20 importance to our case that the agreement or otherwise
21 of Parliament is irrelevant. It is simply irrelevant.
22 Under Article 50(2) and (3), once notification is given,
23 the United Kingdom will, will, leave the EU. It will
24 leave the EU at one of three stages. First, when the
25 withdrawal agreement is entered into, if that takes

1 place within two years. Secondly, it will take place
2 two years after notification, and thirdly, it will only
3 take place more than two years after notification, if
4 there is unanimous agreement of the European Council,
5 and of the United Kingdom, the state leaving, that the
6 time period of two years is to be extended. It is as
7 simple as that.

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

12 LORD PANNICK: Yes.

13 THE LORD CHIEF JUSTICE: And --

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

1 United Kingdom envisages a conditional notification, or
2 that it could give a conditional notification. The
3 position of the defendant is very clear; we will be
4 giving notification in March or whenever it is, and we
5 will be giving notification because we intend to leave
6 the European Union. Where the dispute arises is as to
7 the legal consequences for the domestic law application,
8 and in relation to the prerogative power.

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

18 My Lord, your Lordship's other question was whether
19 or not it would be possible to withdraw a notification
20 once it has been given. And our submission, again, is
21 that it is not possible for the United Kingdom, once
22 having given a notification, to withdraw that
23 notification. Article 50 is deliberately designed to
24 avoid any such consequence. There is no mention of
25 a power to withdraw. And the very possibility of

1 a power to withdraw a notification would frustrate,
2 again, Article 50(3), which sets out in the clearest
3 possible terms, what the consequences are of giving the
4 notification under Article 50(2). Again, I do not
5 understand there to be any dispute between us on our
6 side and the defendant in relation to that issue,
7 because there is no suggestion in the defendant's
8 skeleton argument that there is any power to withdraw
9 a notification and that that provides some sort of
10 answer to the submissions that we are making.

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

15 LORD PANNICK: Yes. Those are my submissions.

16 THE LORD CHIEF JUSTICE: That is all.

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

1 a conditional withdrawal and there is no going back.
2 And it is because of those features, and it is because
3 Article 50(3) says that "the treatise shall cease to
4 apply to the state in question from the defined date",
5 and does so whatever Parliament may later think, that
6 the notification is so important, and that it has the
7 effect of removing, we say, I will make this submission
8 in a few moments, removing the rights which are enjoyed
9 by Mrs Miller and other citizens.

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

1 notification under Article 50(2) that the treatise cease
2 to apply to the United Kingdom under Article 50(3), on
3 the dates set out in Article 50(3).

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

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

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

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

23 I should also add that there is a mention in
24 Article 50(2) of guidelines from the European Council.
25 There are no guidelines, not yet anyway, no guidelines

1 in relation to such matters.

2 That is what I wanted to say about Article 50. If
3 I may, I will reflect on Lord Justice Sales' question,
4 if any assistance is provided by the pre Lisbon
5 position, and I will come back to that. Can I reflect
6 on that.

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

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

1 That is a surprising submission in a modern democratic
2 society."

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

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

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

20 What is absent from the 2015 Act is any provision
21 specifying what consequences, if any, should follow from
22 the referendum result. The Act says nothing on that
23 subject. And it is of interest that the Act says
24 nothing on that subject, because when Parliament does
25 wish to specify the consequences that should follow from

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

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

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

20 Now, the defendant does not suggest, in his skeleton
21 argument, that the 2015 Act gave him any statutory power
22 to notify under Article 50(2). The defendant's case is
23 that he has prerogative powers which entitle him to
24 notify. Your Lordships have seen my friend's skeleton
25 argument, but the assertion of prerogative powers can be

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

25 Second, the issue in these proceedings is not

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

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

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

1 population, that adds a complicating factor which didn't
2 exist before and that the common law hadn't had to deal
3 with before, in terms of the extent of the prerogative
4 powers.

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

1 attention to page 4 of my friend's skeleton argument,
2 and it is paragraph 8(1), my Lords, page 4,
3 paragraph 8(1). And I am looking, my Lords, in the
4 fifth line. There is a sentence which says, and this is
5 the defendant's case:

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

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

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

1 1972 Act, has been abrogated by the 1972 Act.

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

22 LORD JUSTICE SALES: Yes.

23 LORD PANNICK: Developing, and continuing on the Referendum
24 Act, and I am going to deal with these points in more
25 detail, my Lord, as I go through, but just ending the

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

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

21 LORD PANNICK: Yes.

22 LORD JUSTICE SALES: Not votes in either house?

23 LORD PANNICK: No, a mere motion would not suffice. And the
24 again, the reason for that, consistent with what I am
25 submitting, is that a mere motion cannot abrogate rights

1 that have been conferred by Parliament, only --

2 LORD JUSTICE SALES: It is not primary legislation.

3 LORD PANNICK: No, you need primary legislation.

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

7 THE LORD CHIEF JUSTICE: Yes.

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

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

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

1 defendant says:

2 "It would be necessary [and this is attributing to
3 us], despite the referendum, to subject precisely the
4 same issue to a further series of votes by members of
5 Parliament."

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

18 So our submission --

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

24 LORD PANNICK: Yes.

25 THE LORD CHIEF JUSTICE: And your argument, as I understand

1 it, is that if Parliament is not consulted because of
2 the inexorable nature of Article 50, Parliament -- and
3 we do want to examine what rights you say will be
4 lost --

5 LORD PANNICK: Yes.

6 THE LORD CHIEF JUSTICE: -- if Parliament is not given a
7 say.

8 LORD PANNICK: That I am coming on to.

9 THE LORD CHIEF JUSTICE: Yes.

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

1 Act was, as a matter of law, an advisory referendum, no
2 more than that.

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

21 That is the Referendum Act.

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

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

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

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

1 Justice sets out the fundamentals. It says:

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

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

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

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

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

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

24 20:

25 "The effectiveness of that provision would be

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

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

1 European communities, to include the UK, together for
2 certain purposes, the Channel Islands, the Isle of Man
3 and Gibraltar and the provisions of the Act are well
4 known. Section 2 appears on page 49, using the
5 numbering at the bottom of the page, page 49, section 2,
6 "General implementation of treatise". And the drafting
7 of section 2(1) is informed by what your Lordships have
8 seen in Van Gend & Loos, and later of course,
9 Simmenthal:

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

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

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

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

6 "The provision that may be made under sub-section 2
7 includes, subject to schedule 2, any such provision of
8 any such extent as might be made by Act of Parliament
9 ..."

10 And then this:

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

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

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

1 in accordance with the principles laid down by and any
2 relevant decision of, the European court."

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

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

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

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

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

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

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

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

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

1 on the 1 January 1973?

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

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

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

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

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

8 LORD PANNICK: I understand, my Lord.

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

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

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

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

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

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

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

17 LORD JUSTICE SALES: Just going back to your time line
18 point, as I understand it, your argument at the moment,
19 you say in fact, things changed fundamentally on
20 1 January 1973.

21 LORD PANNICK: Yes.

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

24 LORD PANNICK: Yes.

25 LORD JUSTICE SALES: And I follow that argument. What I am

1 trying to understand at the moment is why that argument
2 changes in any relevant way by the accretion of Acts in
3 EU law. Are you maintaining some sort of alternative
4 argument that if you are wrong about 1973, something has
5 changed later?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 THE MASTER OF THE ROLLS: Yes.

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

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

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

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

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

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

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

1 anywhere near that.

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

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

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

9 THE LORD CHIEF JUSTICE: No.

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

12 THE LORD CHIEF JUSTICE: Good.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 consequence, of action by the executive, by the
2 defendant. Now, that is what I wanted to say under my
3 third point.

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

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

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

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

14 LORD PANNICK: Thank you, my Lord.

15 (11.05 am)

16 (A short break)

17 (11.10 am)

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

21 LORD PANNICK: Thank you, my Lord. I mentioned at the
22 outset, those who were here with a watching brief. They
23 include, I didn't mention him, I apologise, Conan
24 Fagan of the Northern Ireland bar, and he has very
25 helpfully brought me up to date on the Northern Ireland

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

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

16 LORD PANNICK: She heard that, my Lord, and that is the
17 position. Can I turn, please, to what we say are the
18 legal limits on the use of prerogative powers and the
19 first question that arises is what are prerogative
20 powers? And there is a helpful description in the
21 advice, the speech of Lord Bingham in the Appellate
22 Committee in the Banku case. It is B2, tab 36, one of
23 many cases concerning the Chagos Islanders. This
24 statement by Lord Bingham is in a dissenting speech, but
25 not on the nature of the royal prerogative.

1 Lord Bingham's observations, my Lord, appear in B2, 36,
2 at page 490. And at 490, if your Lordships have,
3 please, paragraph 69 of Lord Bingham's observations, he
4 says at paragraph 69, on the second line:

5 "The royal prerogative, according to Dicey's famous
6 is 'the residue of discretionary or arbitrary authority
7 which at any given time is legally left in the hands of
8 the Crown'.

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

14 And there is some further learning and at 491, just
15 above letter B, there is a reference to the *Burmah Oil*
16 case, where Lord Reed said:

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

22 So that is the nature of the prerogative, and the
23 case law, we say, establishes a principle which was
24 summarised by Lord Oliver for the Appellate Committee in
25 the same volume at tab 19. If your Lordships turn back

1 to tab 19, the JH Rayner case, concerned with the
2 International Tin Council and the relevant statement by
3 Lord Oliver, speaking for the Appellate Committee, is at
4 page 500 at letter B, tab 19. Page 500, letter B, where
5 he says:

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

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

17 And that is the fundamental principle on which we
18 rely. And may I develop our submission. Our submission
19 comes to this, and I don't in any way seek to narrow the
20 submissions that my friends are going to make, and I of
21 course, adopt them. But my submission for Mrs Miller is
22 this: first, in giving notification under Article 50(2),
23 the defendant is ensuring, by his notification, that the
24 EU treatise will cease to apply to the UK. And that is
25 the consequence of Article 50(3). There will be

1 a point, and indeed, it is the intention of the
2 defendant that there will be a point, at which the EU
3 treatise cease to apply to the United Kingdom.

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

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

1 her rights adjudicated upon by the Court of Justice in
2 appropriate cases. She loses the right of access to
3 that court. An important constitutional right, whatever
4 Parliament may think. So that is our second argument.
5 Mrs Miller loses important constitutional process
6 rights.

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

1 and its consequences.

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

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

21 Our final point is that we say it therefore follows
22 that the defendant cannot lawfully use the prerogative
23 to notify under Article 50. He cannot lawfully use the
24 prerogative because notification has the consequence,
25 the intended consequence, of depriving individuals of

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

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

1 thankfully short report, he says that:

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

1 an advised answer according to law and reason [very
2 sensible]. To which the Lord Chancellor said that every
3 precedent had first a commencement, and he would advise
4 the judges to maintain the power and prerogative of the
5 King and in cases in which there is no authority and
6 precedent, to leave it to the King to order in it,
7 according to his wisdom and for the good of his subjects
8 or otherwise, the King would be no more than the Duke of
9 Venice and that the King was so much restrained in his
10 prerogative, that it was to be feared the bonds would be
11 broken."

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

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

19 And some authority is given:

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

24 And then there is a lot of detail and then over the
25 page, just under the upper hole punch, there is a new

1 short paragraph:

2 "Also, it was resolved that the King hath no
3 prerogative but that which the law of the land allows
4 him."

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

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

21 "The commencement of the process of withdrawal from
22 the EU does not itself change any common law or statute
23 or any customs of the realm. Any such changes are
24 a matter for future negotiations, parliamentary scrutiny
25 and implementation by legislation."

1 That is the answer. I respectfully submit that
2 misses the point. It misses the fundamental point which
3 is that to give the notification using prerogative
4 powers causes the UK to leave the EU, which results in
5 there being no treaty rights or duties for the purposes
6 of sections 2 to 3 of the 1972 Act. All of those rights
7 are stripped away and other legislation, for example,
8 the European Parliamentary Elections Act, is frustrated.
9 Now, this principle has been applied in many later
10 cases. Two of them I want to refer to. The first is
11 the Laker Airways case, which is volume A of the
12 authorities at tab number 10.
13 Laker Airways v Department of Trade. In this case,
14 Mr Freddie Laker, your Lordships will recall,
15 Mr Freddie Laker operated a budget airline which was
16 called Sky Train and it flew across the Atlantic.
17 Mr Laker required two things to operate his airline. He
18 required a licence from the Civil Aviation Authority
19 under the Civil Aviation Act of 1971. And he got that.
20 He also needed the United Kingdom government to
21 designate Sky Train as an air carrier under the
22 international treaty between the UK and the US. That is
23 the Bermuda Agreement. And if the minister designated
24 Sky Train, then under the treaty, the US government was
25 obliged to grant an operating permit. And the

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

20 "The Attorney General based his submission on the
21 well known and well founded proposition that the courts
22 cannot take cognisance of her Majesty's government's
23 conduct of international relations. Laker Airways'
24 designation as a British carrier, for the purposes of
25 the Bermuda Agreement, was an act done in the course of

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

15 And then just under E:

16 "The act of withdrawing designation must come within
17 the prerogative powers exercisable by the Secretary of
18 State on behalf of the Crown."

19 So that was the argument that Mr Silkin addressed to
20 the Court of Appeal. And none of the judges accepted
21 that argument. Lord Denning began at 705, letter B, by
22 explaining why the case was justiciable and what the
23 limits were on the powers of the executive. At B on
24 705, Lord Denning says:

25 "The prerogative is a discretionary power,

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

11 And Lord Denning refers to Lord Cook's statement in
12 the Proclamations case, and he adds a reference to
13 Blackstone as well, and there is much other authority.

14 Now, the reason why Mr Laker won his case then
15 appears in the three judgments. At 706H, Lord Denning
16 says:

17 "Seeing then, that those statutory means [and he has
18 gone through the Civil Aviation Act] were available for
19 stopping Sky Train if there was a proper case for it,
20 the question is whether the Secretary of State can stop
21 it by other means. Can you do it by withdrawing the
22 designation? Can he do indirectly, that which he cannot
23 do directly? Can he displace the statute by invoking
24 a prerogative? If he could do this, it would mean that
25 by a side wind, Laker would be deprived of the

1 protection which the statute affords them. There would
2 be no inquiry, no hearing, no safeguard against
3 injustice. The Secretary of State could do it in his
4 own head by withdrawing the designation without a word
5 to anyone. To my mind, [says Lord Denning] such
6 a procedure was never contemplated by the statute."

7 To like effect is Lord Justice Roskill at 718,
8 letter G. Lord Justice Roskill says:

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

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

19 "Where a right to fly is granted by the authority
20 under the statute by the grant of an air transport
21 licence, which has not been lawfully revoked and cannot
22 be lawfully revoked in the manner thus far contemplated
23 by the Secretary of State, I [Lord Justice Roskill] do
24 not see why we should hold that Parliament, in 1971,
25 must be taken to have intended that a prerogative power

1 to achieve what is, in effect, the same result as lawful
2 revocation would achieve, should have survived the
3 passing of the statute unfettered, so as to enable
4 the Crown to achieve, by what I have called the back
5 door, that which cannot lawfully be achieved by entry
6 through the front. I think Parliament must be taken to
7 have intended to fetter the prerogative of the Crown in
8 this relevant respect."

9 LORD JUSTICE SALES: Lord Pannick, both Lord Denning and
10 Lord Justice Roskill are putting the answer to the
11 question in Laker Airways in terms of what Parliament
12 intended by the 1971 Act.

13 LORD PANNICK: I accept that and I have a submission to make
14 on that.

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

18 LORD PANNICK: No, but in our submission, that is an example
19 of the use of the court's restrictions on the use of the
20 prerogative. But it doesn't define the limits of the
21 court's involvement in confining the use of the
22 prerogative. But I entirely accept, and I am going to
23 make a submission, that that is what that case, at root,
24 is about. Can I just complete, if I may, the three
25 judgments, and then make a submission.

1 Lord Justice Norton, I have drawn attention to the
2 summary of the argument by the Attorney General and the
3 substance of the reasoning of Lord Justice Norton
4 appears on the final page, page 728, and it is in the
5 third line of 728:

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

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

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

12 So he is taking away the rights of a citizen under
13 a statute:

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

20 And there is the detail and then at C:

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

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

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

22 The second point that is to be derived from Laker is
23 that the legal limits to the exercise of the prerogative
24 powers apply even when the minister is exercising
25 functions relating to international treatise.

1 Mr Laker's complaint was that the government had taken
2 action on the international plane and the courts had no
3 difficulty in saying that action on the international
4 plane does not, of itself, immunise the action from
5 legal analysis, to determine whether the prerogative
6 power has been lawfully used.

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

16 "The strength of the Attorney General's argument
17 undoubtedly lies in the fact that nowhere in the Act
18 does one find any express fetter upon the relevant
19 prerogative power of the Crown."

20 And fourthly, we submit that the vice in that case
21 is merely one example of a more general principle which
22 Lord Justice Norton expressly recognised in the passage
23 I read at 728, letter A:

24 "The Secretary of State cannot use the Crown's
25 powers in this sphere, in such a way as to take away the

1 rights of citizens."

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

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

20 So I rely on the Laker case, although of course,
21 I recognise the point that my Lord, Lord Justice Sales,
22 has drawn attention to. We respectfully submit that
23 there is a close analogy in the present case. By the
24 use of prerogative powers, the Secretary of State is
25 triggering a process which will remove the rights

1 conferred by statute, whatever Parliament might think.

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

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

1 I need to put it in terms of implications, then I am
2 happy to do so. But I say that, with respect, that is
3 not a necessary analysis. It suffices for my purposes,
4 that rights have been created by Parliament. They can't
5 be taken away by the minister.

6 LORD JUSTICE SALES: And just to help me, are you going to
7 take us to Walker and Baird, because that seems to be
8 the --

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

11 LORD JUSTICE SALES: It is just that you now seem to be
12 putting quite a lot of weight on what you say is a wider
13 principle enunciated by Lord Justice Norton, but he
14 seems to do it by reference to Walker and Baird.

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

18 THE LORD CHIEF JUSTICE: Lord Pannick, what does
19 Laker Airways add for your purposes, to what was said by
20 Lord Oliver?

21 LORD PANNICK: To what was said by who?

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

23 LORD PANNICK: It only adds this. It is a practical
24 example.

25 THE LORD CHIEF JUSTICE: Yes, but to the principle, it adds

1 nothing.

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

9 THE LORD CHIEF JUSTICE: The Tin Council case was also on
10 the international plane.

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

12 The third case that I just want to mention is ex
13 parte Fire Brigades Union, which is at tab 13.

14 THE LORD CHIEF JUSTICE: Yes.

15 LORD PANNICK: And your Lordships know that here, the
16 Appellate Committee, by a majority, held that it was
17 an abuse of prerogative powers for the Secretary of
18 State to establish a new criminal injuries compensation
19 scheme, when a different scheme had been approved by
20 Parliament in a statute, even though the statutory
21 scheme had not been brought into force. And the two
22 members of the Appellate Committee who dissented,
23 Lord Keith and Lord Mustill, did so because the
24 statutory scheme had not been brought in to force. They
25 didn't question the more general statements as to the

1 limits of prerogative powers. And there are certain
2 passages your Lordships will wish to bear in mind.
3 Lord Browne-Wilkinson at 552, letter D, says:

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

11 There is then a reference to a white paper. Just
12 under E:

13 "It is for Parliament, not the executive, to repeal
14 legislation. The constitutional history of this country
15 is the history of the prerogative powers of the Crown
16 being made subject to the overriding powers of the
17 democratically elected legislature as the sovereign
18 body. The prerogative powers of the Crown remain in
19 existence to the extent that Parliament has not
20 expressly or, by implication, extinguished them."

21 And again, I say that that covers a case where
22 Parliament has created statutory rights. It can't be
23 open to the executive to remove them by executive
24 action.

25 Lord Lloyd at 568, letter H. Lord Lloyd of Berwick,

1 568, just above letter H. His Lordship said:

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

10 And Lord Nicholls' observations to which I draw
11 attention, are at 576, just above letter B.

12 Lord Nicholls says:

13 "The executive cannot exercise the prerogative power
14 in a way which would derogate from the due fulfilment of
15 the statutory duty. To that extent, the exercise of the
16 prerogative power is curtailed, as long as the statutory
17 duty continues to exist. Any exercise of the
18 prerogative power in an inconsistent manner or for
19 an inconsistent purpose, would be an abuse of power and
20 subject to the remedies afforded by judicial review."

21 So a broad statement of principle. At 577,
22 letter G, the line above letter G, Lord Nicholls says:

23 "He [that is the Secretary of State] cannot lawfully
24 do anything in this field which would be inconsistent
25 with his thereafter being able to carry out his

1 statutory duty of keeping the exercise of the
2 commencement date power under review. If he wishes to
3 act in a manner or for a purpose which would be
4 inconsistent in this respect, he must first return to
5 Parliament and ask Parliament to relieve him from the
6 duty it has imposed on him. Parliament should be asked
7 to repeal the sections and the relating commencement day
8 provisions."

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

10 "It is true [said Lord Nicholls] that the Secretary
11 of State has done nothing which is irrevocable, the
12 terms of the new scheme are not immutable. In that
13 sense, despite the introduction now, of the tariff
14 scheme, it would still be open to him at a future date
15 to discontinue the new scheme and bring the statutory
16 scheme into operation in its place. However, it seems
17 to me [says Lord Nichols] that such an evaluation of the
18 facts is detached from reality. The new tariff scheme
19 is not intended as a temporary solution, while the
20 minister waits a more propitious moment at which to
21 bring the sections into operation. The new ex gratia
22 scheme is intended to mark out the way ahead for the
23 foreseeable future. It is intended to be the long term
24 replacement of the existing ex gratia scheme and its
25 statutory embodiment. It is an alternative, not a stop

1 gap. It is being brought into operation on the footing
2 that the sections will never come into operation. The
3 Home Secretary will monitor the operation of the tariff
4 scheme. He will consider recommending to Parliament
5 that the tariff scheme itself should be put on
6 a statutory basis, once it has had time to settle down
7 and any teething problems have been resolved. But there
8 is no expectation of ever bringing the statutory scheme
9 into operation."

10 And then at F, just above F:

11 "By setting up the tariff scheme, the minister has
12 set his face in a different direction. He has struck
13 out down a different route and thereby disabled himself
14 from properly discharging the statutory duty in the way
15 Parliament intended."

16 And we say it is very closely analogous to the
17 present case.

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

20 LORD PANNICK: Well, indeed.

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

22 I wondered whether that --

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

25 "The inescapable conclusion is the Home Secretary

1 has effectively written off the statutory scheme and
2 once the tariff scheme has been introduced, no realistic
3 prospect of being able to keep the exercise of the
4 commencement day power under review."

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

23 LORD JUSTICE SALES: Again, Lord Pannick, as I am reading at
24 the moment, the speeches in this case, they all turn on
25 implied abrogation of the prerogative power by the

1 relevant statute. So if one reads Lord Nicholls'
2 speech, he focuses upon a statutory duty to keep the
3 commencement of the statutory scheme under review, and
4 says that the things that have been done are
5 inconsistent with that and, therefore, the prerogative
6 was abrogated, to the extent that it was inconsistent
7 with that duty. So unless you can assist us further,
8 I don't, at the moment, get from this case, support for
9 what I understood to be your wider proposition.

10 LORD PANNICK: Well, I entirely accept what your Lordship
11 puts to me; that is a strand. Your Lordship may think
12 an important strand of the reasoning in the majority.
13 But the case also is authority for the proposition that
14 the minister, by the use of prerogative powers, cannot
15 take action which will frustrate the substance of that
16 which Parliament has already enacted. And if your
17 Lordship thinks that it is necessary to put that
18 proposition in terms of what Parliament implies, then as
19 I have indicated, I am quite happy to put my submission
20 on the basis that the enactment of the 1972 Act, the
21 enactment of the Parliamentary Elections Act, impliedly
22 is a statement by Parliament itself, that the rights
23 which those statutes create, cannot be set aside or
24 frustrated by the executive. I am very happy to put the
25 case that way. But I say that that is, with respect,

1 artificial, because the more general principle on which
2 I rely is a principle that where Parliament has
3 established statutory rights, and it has, they cannot be
4 set at nought. They cannot be taken away by executive
5 action on the international plane. And this case is
6 a most unusual case, because of the context that the
7 international plane is inextricably linked to domestic
8 rights, and obligations. This is not a normal case
9 where action can be taken on the international level,
10 which does not have a consequence on the domestic level.

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

14 LORD PANNICK: No, my learned friends may wish to take your
15 Lordships to other ones, but those, as I identify them,
16 are the main passages. And as I say, I hope fairly, I
17 recognise what your Lordship puts to me, both on Laker
18 and Fire Brigades Union, but my response is that these
19 are examples of the more general principle which was
20 stated by Lord Oliver and, indeed, by Lord Cook four
21 centuries ago, of the general principle, which I say is
22 not a surprising principle. There is nothing surprising
23 about a constitutional principle that if Parliament has
24 conferred statutory rights, a minister can't take them
25 away.

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

3 LORD PANNICK: No, I accept that.

4 THE LORD CHIEF JUSTICE: But what is of more difficulty is
5 the question of how it interrelates with the
6 international.

7 LORD PANNICK: Can I come to that?

8 THE LORD CHIEF JUSTICE: Yes.

9 LORD PANNICK: Can I then come to what I understand to be
10 the main arguments that are advanced against my
11 submissions.

12 THE LORD CHIEF JUSTICE: Yes.

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

19 THE LORD CHIEF JUSTICE: Yes.

20 LORD PANNICK: The defendant's second argument is that
21 Parliament has expressly placed other limits on the use
22 of prerogative power but has not done so in any respect
23 relevant to these proceedings. And that is summarised
24 at paragraph 24 of my friend's skeleton argument. And
25 your Lordships may wish to have open what my friends,

1 the defendant, say in paragraph 24 of his skeleton
2 argument. And there are a number of statutes to which
3 the defendant draws attention. He draws attention to
4 section 12 of the European Parliamentary Elections Act
5 2002. That is volume E, tab 8. I am not going to
6 invite your Lordship to go to these, because I don't
7 dispute the substance of them. That one requires
8 primary legislation before any treaty increasing the
9 powers of the European Parliament could be ratified.
10 And there is a similar provision in section 6 of the
11 European Parliamentary Elections Act 1978. Section 12
12 of the European Parliamentary Elections Act 2002, to
13 which my friends refer at paragraph 24(2), was in fact
14 repealed by the European Union Act 2011, which imposed
15 a broader set of restrictions.

16 The defendant also refers to The European Union
17 Amendment Act 2008. That is paragraph 24(3) of my
18 friends' submissions. That is E9. And what that did,
19 was to incorporate, as they say, the Lisbon Treaty, and
20 as they say, did impose parliamentary controls over
21 certain decisions made under the treatise; section 6.
22 It did not impose any control over the use of
23 Article 50. So they rely upon section 6 of the 2008
24 Act. That provision was also repealed by the
25 European Union Act 2011, which imposed a broader set of

1 restrictions. And then we come to the 2011 Act at
2 paragraph 24(4) of my friends' submissions. The
3 European Union Act 2011 imposed a number of procedural
4 requirements in relation to ratifying amendments to EU
5 treatise or taking steps under them. And perhaps your
6 Lordships would wish to look at the 2011 Act, which
7 appears in volume A, behind tab 4. Volume A, tab 4,
8 section 2, if I can pick it up with section 2, is headed
9 "treatise amending or replacing the TEU or the TFEU":

10 "Parliament enacted that a treaty which amends or
11 replaces the TEU or the TFEU is not to be ratified
12 unless a statement relating to the treaty was laid
13 before Parliament, in accordance with section 5, the
14 treaty is approved by an Act of Parliament and the
15 referendum condition or the exemption condition is met."

16 And there is a detailed series of provisions
17 concerning when a referendum is required, section 4 in
18 particular. I don't think the detail of that is -- that
19 we need to go into that. But your Lordships see
20 a number of specific statutory restrictions on the power
21 to enter into a treaty, which amends or replaces the TEU
22 or the TFEU.

23 The defendant then refers to part 2 of the
24 Constitutional Reform and Governance Act 2010, and we
25 have that one at volume C, behind tab 29, if I can take

1 your Lordships to that one. Tab 29. "treatise to be
2 laid before Parliament before ratification." Section 20
3 of the 2010 Act. And section 20 provides:

4 "Subject to what follows, a treaty is not to be
5 ratified unless a minister of the Crown has laid before
6 Parliament, a copy of the treaty, the treaty has been
7 published, period A has expired without either house
8 having resolved that the treaty should not be ratified
9 ... "

10 And there is some detail relating to what happens if
11 one house resolves but the other house does not. And
12 then section 22 then sets out circumstances in which
13 section 20 does not apply. It doesn't apply to
14 exceptional cases.

15 THE LORD CHIEF JUSTICE: And I am assuming there was no
16 parliamentary convention in relation to these matters
17 before this statute?

18 LORD PANNICK: No.

19 Section 23, section 20 not to apply to certain
20 descriptions of treatise. That has been amended now, so
21 that it is consistent with the 2011 Act, which your
22 Lordships have seen. So the argument against me, as
23 I understand it, is that Parliament has intervened in
24 a number of respects and it has intervened in the
25 specific context of EU treatise, so as to impose

1 a number of restrictions on prerogative powers. And, it
2 is said, and it is accurately said, none of those
3 statutory restrictions assist the claimant in this case.
4 And we have two linked answers to this line of argument
5 from the defendant. The first answer is that as I have
6 already explained, the common law authorities recognise
7 that prerogative powers may not lawfully be used, where
8 their exercise deprives individuals of statutory rights
9 or where the exercise preempts parliamentary
10 consideration. That is my common law submission. It is
11 either good or it is bad. But that is the submission.
12 And the second answer that I give is that if I am right
13 in the submission that those are the common law limits
14 on the lawful use of the prerogative, then it is nothing
15 to the point that Parliament has imposed other
16 restrictions on the use of prerogative powers.
17 Parliament has not touched the common law restrictions
18 on the use, the lawful use, of prerogative powers.

19 A common law restriction on the use of prerogative
20 powers can only be removed or altered by an express
21 statutory provision. Especially, we say, in the context
22 of an interference with the rights conferred by the 1972
23 Act, given its constitutional status. The fact that
24 Parliament has not addressed the common law use on the
25 limits of prerogative powers simply means in my

1 submission, and elementarily means, that Parliament is
2 content for the common law limits to continue to be
3 applied by the courts. And the statutory limitations
4 address different subjects. They are not concerned with
5 the use of the prerogative to remove or to frustrate
6 rights which have been conferred by Parliament, either
7 in the 1972 Act or in other legislation.

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

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

12 LORD JUSTICE SALES: -- the legislation?

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

20 LORD JUSTICE SALES: I thought you were maintaining
21 an alternative submission that even if it is not
22 a common law limitation, there is implied abrogation of
23 the prerogative power.

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

25 LORD JUSTICE SALES: So just focusing on that alternative

1 argument, what do you say about (inaudible).

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

19 The fact that Parliament has introduced other
20 restrictions on the use of the prerogative does not
21 touch to upon our submission that there are the
22 limitations for which we contend. And again I would
23 rely upon the Simms principle to which I took your
24 Lordships this morning; that fundamental rights cannot
25 be impliedly removed by a statute.

1 And on a matter as significant as this -- that is
2 the limits on prerogative power -- I do respectfully
3 submit that it cannot be the law that the limitations on
4 the use of the prerogative, a matter of fundamental
5 constitutional importance, can somehow be affected
6 implicitly by an Act of Parliament which does not
7 mention any such matter. I say that cannot be right,
8 and therefore --

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

18 LORD PANNICK: I hope I haven't suggested to the contrary,
19 my Lord. Because the only basis upon which I am putting
20 forward an implication is that Parliament has created
21 statutory rights. And the argument, I accept, doesn't
22 add a great deal of substance. The only reason I put it
23 forward is because my Lord, Lord Justice Sales.

24 THE MASTER OF THE ROLLS: It was put to you as a third limb,
25 I am putting to you that it is not a third limb, but

1 just the other side of the coin.

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

23 The third argument, I just want to touch upon is
24 that the defendant then says, it is paragraph 30 of his
25 skeleton argument, and elsewhere, he says well, there is

1 nothing in the 1972 Act or indeed any other statute
2 which requires the United Kingdom to remain a member of
3 the EU. And that, of course, is correct. But it
4 doesn't address the legal complaint, which I have
5 identified on too many occasions now; that notification
6 will take away statutory rights and preempt Parliament's
7 decision on the matter.

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

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

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

21 "All such rights, powers, liabilities obligations
22 and restrictions from time to time created or arising by
23 or under the treatise, all such remedies and procedures
24 from time to time provided for by or under the
25 treatise."

1 Our submission is that those words do not assist the
2 defendant.

3 What section 2(1) undoubtedly recognises is that the
4 rights and duties consequent on EU membership will
5 change and evolve from time to time. Parliament has
6 recognised that new rights will be created, in
7 particular by the European legislature. New rights will
8 be recognised, developed, by the Court of Justice.

9 But what section 2(1) does not contemplate is
10 a situation in which there are no rights and duties
11 under the treatise for the purposes of that provision.
12 And even less so because a minister has, by the use of
13 prerogative powers, caused that to be so.

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

24 LORD JUSTICE SALES: Lord Pannick, just so you know when
25 I asked my question at the start of the hearing about

1 what was the position in international law about
2 withdrawal from the EC treatise in 1973, one of the
3 reasons I was interested in that is in the context of
4 this submission. Now, I understand you are making the
5 submission generally, what ever may have been the
6 position at that time.

7 LORD PANNICK: Yes.

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

15 LORD PANNICK: I understand.

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

19 LORD PANNICK: I thought that was why your Lordship was
20 interested in the submission, and I am going to make the
21 submission in due course relating to that specific
22 point. But I say whatever the position is in
23 international law as at 1 January 1973, the clear
24 meaning of section 2(1) is that Parliament was concerned
25 with the rights and duties which arise from time to time

1 under the treatise. Parliament recognised, it had to
2 recognise, that the rights and duties that arise on the
3 1 January 1973 would not necessarily be the same rights
4 and duties the following year, or ten years later. And
5 Parliament very wisely was emphasising that what it was
6 committing itself to was the incorporation into
7 United Kingdom law of all of the rights and duties,
8 whatever they may be under EU law from time to time.

9 But what Parliament was not contemplating, far less
10 addressing in section 2(1), was that membership of the
11 EU may exist from time to time. That was not the
12 subject matter of section 2(1), nor could it sensibly be
13 the subject matter of section 2(1), in the context of
14 an Act of Parliament which I showed your Lordships, had,
15 as its long title and had as its purpose, the
16 enlargement of the European communities to include the
17 United Kingdom. The whole purpose of the Act was to
18 implement the United Kingdom joining the European
19 community.

20 Section 2(1) is not a provision which addresses or
21 contemplates the possibility of the United Kingdom
22 ceasing to be a member of the EU. And indeed, it is
23 striking that it is no part, rightly, no part of the
24 case for the defendant that he enjoyed any statutory
25 power to give notification under Article 50 by reference

1 to section 2(1). He doesn't suggest it is implicit in
2 section 2(1) that he has a statutory power. He relies,
3 and relies only, only on prerogative powers.

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

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

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

17 LORD PANNICK: Your Lordship is putting to me if, for
18 example, the states decided that they would remove the
19 right to establishment?

20 THE LORD CHIEF JUSTICE: Yes.

21 LORD PANNICK: Or something of that sort. Yes, it would be
22 open to community law to take whatever steps they
23 thought was appropriate, consistent with community law,
24 which would have the effect of altering rights and
25 duties under domestic law. I can't dispute that that --

1 THE LORD CHIEF JUSTICE: So this paragraph 2(1) operates, it
2 permits the executive, provided you come within its
3 wording, to derogate from the rights established by the
4 treaty, by the use of the executive powers?

5 LORD PANNICK: Yes, but there is a difference in my
6 submission, a fundamental difference, in the terms of
7 section 2(1), to an alteration of the rights enjoyed
8 under the treaties which would take effect under EU law.

9 THE LORD CHIEF JUSTICE: And withdraw?

10 LORD PANNICK: And withdraw. Because what that does, for
11 the reasons I have sought to explain, is that it removes
12 the entirety of section 2(1) and section 3(1), and it
13 frustrates that which Parliament has enacted. And it
14 does so without any parliamentary authorisation. That,
15 we say, is a fundamental distinction. I accept, I have
16 to accept, that EU law is not static.

17 THE LORD CHIEF JUSTICE: No.

18 LORD PANNICK: The whole point of 2(1) is that it can be
19 expanded, it can be restricted.

20 THE LORD CHIEF JUSTICE: Just suppose we go back to 1972 and
21 prior to the enactment of Article 50, it would have been
22 within the power of the executive to go to wherever, and
23 agree with all of the other member states, all of the
24 rights, such as rights of establishment, all of that
25 could be whittled away and they would automatically fall

1 under UK law.

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

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

15 LORD PANNICK: Well, something as fundamental as what is
16 covered --

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

23 LORD PANNICK: Yes.

24 THE LORD CHIEF JUSTICE: And therefore the broader powers
25 under section 2(1), are those restricted by section 2 of

1 the Act, so that whereas, when this was originally
2 enacted, there was a power that the executive could, as
3 a matter of law, you know, agree with the other member
4 states "Well, we are getting rid of this right and that
5 right", but it can't do that now because of section 2 of
6 the European Union Act.

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

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

25 LORD PANNICK: Well, I am saying that. I am saying that

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

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

18 LORD PANNICK: Well, yes, the case for the defendant
19 certainly is that section 2 has nothing to do with this
20 case. Neither side is contending that section 2 is
21 applicable --

22 THE LORD CHIEF JUSTICE: No.

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

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

25 LORD PANNICK: And it is certainly not the argument of the

1 defendant that there are those restrictions.

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

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

16 THE LORD CHIEF JUSTICE: Okay.

17 LORD JUSTICE SALES: Just so I follow, are you saying then,
18 that if, on 2 January 1973, the government had changed
19 its mind about the desirability of the EC treaties and
20 their full scope in that time and sought to go and
21 negotiate with the other member states and said "Well,
22 let's remove the right of establishment from the
23 treaties", and they might say yes, and that would modify
24 what the EC obligations were; that the government would
25 in fact, by reason of section 2 of the European

1 Communities Act, have been disbarred from seeking to
2 exercise the prerogative in that way, ie by approaching
3 other states to see if they would agree to a change in
4 the treatise, because it would be such a fundamental
5 change within domestic law, consequent upon --

6 LORD PANNICK: They can certainly negotiate.

7 LORD JUSTICE SALES: They could, they could.

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

12 LORD JUSTICE SALES: All right, they could negotiate but
13 they would need primary legislation before ratifying the
14 revised treaty; is that right?

15 LORD PANNICK: Yes, the difference, the fundamental
16 difference caused by Article 50 is that the notification
17 commits the United Kingdom to the removal of the rights
18 which are enjoyed.

19 THE LORD CHIEF JUSTICE: I am troubled by this,
20 Lord Pannick, because of the broad terms of section 2(1)
21 which on its face, as you will accept, envisage a moving
22 content of both rights under the treaty and rights under
23 the European legislation, and if that is -- the extent
24 to which the executive can vary the treaty and effect
25 the rights, is something maybe someone can come back to

1 or you can come back to later.

2 LORD PANNICK: Yes. My submission is that it is not open
3 through the use of the prerogative power, for the state
4 to take action which will affect in some substantial
5 way, the rights which Parliament has created, has
6 recognised, under the 1972 Act.

7 THE LORD CHIEF JUSTICE: Yes.

8 LORD PANNICK: The prerogative can't be used for that
9 purpose. What is so different about the present case is
10 two things: first, that the use of the Article 50
11 notification procedure removes the whole substance of
12 section 2 and 3. I have made that point. But also that
13 this is not a case of negotiation at the international
14 level, which may or may not lead to a particular result
15 in domestic law. It is a case of starting the
16 international notification and committing the state of
17 English law to the removal of various rights, a whole
18 panoply of various rights, which are currently enjoyed.
19 And I also make the point that the constitutional
20 practice, and I will show your Lordships this, that the
21 constitutional practice is that when there are
22 negotiations at the international level in relation to
23 EU treatise, treatise that will amend substantially,
24 Maastricht, Lisbon, what has happened, deliberately so,
25 is that negotiations have taken place, but no

1 ratification, unless and until Parliament has given its
2 approval. That is what has happened. And the reason
3 for that is because everyone recognises, as a matter of
4 constitutional propriety, the enormity of the 1972 Act
5 and the close interplay between statutory rights and
6 what happens at international level.

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

16 LORD PANNICK: Well, I do say that but I say it is
17 a convention that has a very solid foundation. It is
18 a foundation that recognises the importance of the
19 rights that are created under EU law. And the unique
20 interplay between action on the international plane and
21 action at domestic level. Quite unique. And it is the
22 consequence of that, as well as the constitutional
23 importance of the 1972 Act, that the practice has grown
24 up, advisedly so, that changes at the international
25 level are not ratified unless and until Parliament has

1 given its approval. It is of fundamental importance in
2 this context.

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

6 LORD PANNICK: Yes.

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

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

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

1 LORD PANNICK: Yes.

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

7 LORD PANNICK: Yes.

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

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

21 THE LORD CHIEF JUSTICE: I fully follow the answer, but it
22 is part of the definitions section under section 2 of
23 the act.

24 LORD PANNICK: Yes, and I say that is the correct answer and
25 I apologise for being slow in getting there but it is

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

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

16 LORD PANNICK: Yes.

17 THE LORD CHIEF JUSTICE: So that precludes the executive,
18 you say, from taking away rights under a treaty?

19 LORD PANNICK: Yes.

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

25 LORD PANNICK: Precisely though. There is no lacuna here,

1 it is a consistent system and the practice is
2 consistent.

3 THE LORD CHIEF JUSTICE: I am grateful.

4 LORD PANNICK: I am particularly grateful to
5 Lord Justice Sales for providing me with the correct
6 answer, in my submission. That is my answer to
7 section 2.

8 Then, the next argument that I wanted to address is
9 yes, the defendant says he is proposing to use the
10 standard constitutional practice for entering into and
11 withdrawing from treatise. This is paragraphs 20(4) and
12 27 to 29 of the skeleton argument. And the argument is
13 well, it is customary on the international plane. You
14 use prerogative powers to negotiate treatise, and you
15 follow it up with domestic implementation. And our
16 response is that the argument from the defendant ignores
17 the fact that the EU treatise, as implemented from the
18 1972 Act, are very different from other kinds of
19 international treaty which Parliament has implemented
20 into domestic law. And that is for all of the reasons
21 that I have sought to identify. And because of the
22 exceptional characteristics of EU law, indeed unique
23 characteristics of EU law, it is the consequence of
24 notification under Article 50 that action on the
25 international plane, of itself, has a dramatic effect on

1 rights and duties in national law. And we say that the
2 defendant, with respect, was wrong in the detailed
3 grounds of resistance on this point. Can I just take
4 your Lordships to the main bundle, the agreed bundle in
5 the case. I hope your Lordships have that. It is main
6 bundle, tab 5, A5 of the main bundle, the agreed bundle
7 for the hearing. The bundle that has all of the witness
8 statements and the pleadings. And in the main bundle --
9 THE LORD CHIEF JUSTICE: Sorry, mine seems to have got lost
10 but we will manage.
11 LORD PANNICK: I am sorry, my Lord, it is called "Agreed
12 bundle for hearing on --"
13 THE LORD CHIEF JUSTICE: I know what you are referring to,
14 but it seems to have got mislaid. It doesn't matter.
15 I will share with my Lord, it doesn't matter.
16 LORD PANNICK: Well, your Lordship doesn't need it. It is
17 simply the assertion there that the giving of
18 notification under Article 50(2), paragraph 15 -- sorry,
19 not 5, paragraph 15 --
20 THE LORD CHIEF JUSTICE: Which tab are you referring to?
21 LORD PANNICK: I am sorry, my Lord.
22 THE LORD CHIEF JUSTICE: Which tab are you referring to?
23 LORD PANNICK: It is tab number 5 and it is paragraph 15.
24 This is the defendant's detailed grounds of resistance.
25 Does your Lordship have that?

1 THE LORD CHIEF JUSTICE: Yes.

2 LORD PANNICK: 15. They say:

3 "Equally, the giving of notification under Article
4 50(2) to withdraw from the EU, is an act within the
5 treaty prerogative of the Crown which takes place and
6 has effect only on the international law plane."

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

21 As to the EU treatise, the point I was making a few
22 moments ago, the position, says the defendant, if we go
23 back to the defendant's skeleton argument -- we are
24 looking at paragraph 29 of the defendant's skeleton
25 argument, skeleton argument bundle, tab number 6. This

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

19 Then the defendant relies upon the decision in the
20 Divisional Court in the Rees-Mogg case. Could I come to
21 the Rees-Mogg case. It is volume A and it is at tab
22 number 12. And in this case, the claimant, Rees-Mogg,
23 was arguing that the Secretary of State could not ratify
24 the protocol on social policy which was annexed to the
25 Maastricht Treaty, and you couldn't do it through

1 prerogative powers. And the argument was that he
2 couldn't do it through prerogative powers because
3 section 2(1) of the 1972 Act would give the prerogative
4 power effect in domestic law, and only Parliament --
5 I am sorry, would give the protocol effect in domestic
6 law and only Parliament could change the domestic law.
7 And the court rejected Lord Rees-Mogg's argument for two
8 reasons. The first reason appears at 567, letters G to
9 H:

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

22 So that was one argument. And the second strand of
23 reasoning of the court --

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

25 LORD PANNICK: The Act of 1978 was the European Parliament

1 Act, I believe. Parliamentary Elections Act 1978 --

2 LORD JUSTICE SALES: Thank you.

3 LORD PANNICK: -- which is in bundle E. And the second
4 strand of reasoning of the court rejecting the argument
5 is at 568, A to C, where the court says:

6 "Would the ratification of the protocol on social
7 policy alter the content of domestic law? The protocol
8 itself makes clear it was not intended to apply to UK.
9 Nor is the UK party to the agreement which is annexed to
10 the protocol. The protocol is not one of the treatise
11 included within the definition of the treatise in
12 section 1(2) of the Act of 1972, for it is specifically
13 excluded by section 1(1) of the Act of 1993. It follows
14 that the protocol is not one of the treatise covered
15 under section 2(1) by which alone, community treatise
16 have force in domestic law. It does not become one of
17 the treatise covered by section 2(1) merely because by
18 the Union treaty, it is annexed to the EEC treaty; see
19 section 1(3) of the Act of 1972."

20 So the court was making the point that the protocol
21 which was the subject of the claimant's litigation, was
22 not in any event, part of domestic law. It didn't
23 address, it didn't alter, domestic law. Now, there are
24 very important distinctions between the present case and
25 ex parte Rees-Mogg. First of all, the argument in

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

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

15 My Lords, that leaves, subject to any other
16 questions that your Lordships want to put to me,
17 justiciability, the constitutionality of the remedy and
18 my Lord, Lord Justice Sales' point that I want to come
19 back to, and any other questions your Lordships may wish
20 to --

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

22 LORD PANNICK: I will finish at the designated time,
23 my Lord.

24 THE LORD CHIEF JUSTICE: Good.

25 LORD PANNICK: If there are other questions, I am of course

1 very happy to try to answer them, but those are the
2 topics I need to still deal with.

3 THE LORD CHIEF JUSTICE: What I would personally find
4 helpful is really what is said in the skeleton argument
5 of the defendants at paragraph 21 and paragraphs 31
6 through 33.

7 LORD PANNICK: Sorry, paragraphs 21 and?

8 THE LORD CHIEF JUSTICE: 31 through 33.

9 LORD PANNICK: 31 to 33. Thank you, my Lord.

10 THE LORD CHIEF JUSTICE: If we sit at 2, would that be
11 inconvenient?

12 LORD PANNICK: Certainly, my Lord.

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

14 (1.00pm)

15 (The luncheon adjournment)

16 THE LORD CHIEF JUSTICE: So, two purely administrative
17 matters. First of all, in fairness to the transcribers,
18 we will take five minutes mid-afternoon.

19 LORD PANNICK: Thank you very much.

20 THE LORD CHIEF JUSTICE: And the second is that the
21 transcript of this morning's argument is now available
22 on the website.

23 LORD PANNICK: Thank you very much, my Lord.

24 THE LORD CHIEF JUSTICE: And it will be available half
25 an hour after the conclusion of the proceedings this

1 afternoon. So this morning's is already there. Thank
2 you.

3 LORD JUSTICE SALES: And Lord Pannick, just going back to
4 the exchanges we were having just before the short
5 adjournment.

6 LORD PANNICK: Yes, my Lord.

7 LORD JUSTICE SALES: I was looking at section 1 of the 1972
8 Act. You will recall that we had a debate and I think
9 it was my suggestion to you that if there had been
10 an amendment of the treatise early in 1973, that the
11 primary legislation would have been required to change
12 the effect of EU law under section 2(1). But I was
13 looking at section 1(3) and I just wanted to get your
14 confirmation of this. It seems that under section 1(3),
15 the list of recognised treatise can be added to, but by
16 ordering --

17 LORD PANNICK: It can be, my Lord.

18 LORD JUSTICE SALES: -- counsel, which has to be approved by
19 both houses of Parliament; is that right?

20 LORD PANNICK: Your Lordship is correct. What that
21 demonstrates is that the 1972 Act recognised that there
22 was a parliamentary procedure for any such amendment to
23 take place. What was not envisaged and what would be
24 entirely inconsistent with that, would be some executive
25 Act to amend the treatise. But your Lordship is

1 correct.

2 My Lord, the Lord Chief Justice, asked me to address
3 certain parts of the defendant's skeleton argument. Can
4 I go through them? The first of them was paragraph 21,
5 where the point is made that what the defendant says
6 doesn't prejudice Parliament's role in the process of
7 the United Kingdom withdrawing from the EU. That, of
8 course, is true. But it doesn't meet the point. If we
9 are otherwise correct, that notification defeats
10 statutory rights, it preempts Parliament's consideration
11 of whether to maintain those statutory provisions, and
12 therefore, only an Act of Parliament can lawfully
13 authorise notification. It is nothing to the point, in
14 my submission, that Parliament could also do various
15 other things. Any more than in Laker, Fire Brigades
16 Union, or indeed, Lord Cook's case. Parliament, of
17 course, could do whatever it wished to do. But that
18 isn't the point.

19 THE LORD CHIEF JUSTICE: I am sorry, I thought your point
20 was it says "Parliament to have to implement any
21 ...(reading to the words)... implementation in domestic
22 law." As I understand your argument, it will be too
23 late in respect of various aspects, because I forget
24 what analogy you put, but the die would have already
25 been cast.

1 LORD PANNICK: Yes, the bullet has already been fired, it
2 hasn't reached the target but it will reach the target
3 and nothing that can be done will bring the bullet back
4 to the firing gun.

5 THE LORD CHIEF JUSTICE: Thank you.

6 LORD PANNICK: That is precisely the point. Paragraph 31,
7 your Lordship asked for my --

8 THE LORD CHIEF JUSTICE: 31 through 33.

9 LORD PANNICK: 31 through 33, but 31 first of all. This is
10 the temporal point. And I have already addressed my
11 submissions on the phrase "from time to time". What it
12 contemplates is the development of rights in EU law.
13 What it does not contemplate are treaty changes, which
14 require amendment to section 1. Far less does
15 section 2(1) contemplate action by the executive which
16 removes all rights under the treaty and inevitably so,
17 without any parliamentary approval. My Lord,
18 Lord Justice Sales asked this morning, the question
19 about what the position was prior to the Lisbon Treaty.
20 Was there a power on the 1 January 1973 to withdraw from
21 the EU? There was, of course, no express power in the
22 EU treatise for a member state to withdraw. Whether
23 there was an implied power was an issue on which
24 commentators had expressed different views. The
25 international law position is set out in the Vienna

1 Convention. Your Lordships have the relevant provisions
2 at volume C, tab 34. Could I take your Lordships
3 briefly to that. C34. And there are two relevant
4 provisions. The first of them is Article 54, which
5 appears on page 272. Article 54 is headed:

6 "Termination of or withdrawal from a treaty under
7 its provisions or by consent of the parties.

8 "The termination of a treaty or the withdrawal of
9 a party may take place (a) in conformity with the
10 provisions of the treaty [well there were no provisions]
11 or (b) at any time, by consent of all the parties after
12 consultation with the other contracting parties."

13 And I, of course, would accept that it must be
14 implicit in the EU treatise that if all of the
15 contracting states so agreed, then of course,
16 consistently with the EEC treaty, it would have been
17 lawful in international law terms, for the
18 United Kingdom to withdraw. More difficult is whether
19 withdrawal would have been lawful in international law
20 without such agreement. And the relevant provision is
21 Article 62 on page -- using the bottom numbering, 275.
22 Article 62 is headed:

23 "Fundamental change of circumstances.

24 "A fundamental change of circumstances which has
25 occurred with regard to those existing at the time of

1 the conclusion of a treaty which was not foreseen, may
2 not be invoked as a ground for terminating or
3 withdrawing, unless the existence of those circumstances
4 constituted an essential basis of the consent of the
5 parties to be bound or the effect of the change is
6 radically to transform the extent of obligations still
7 to be performed under the treaty ..."

8 Et cetera, et cetera. Now, there would have been,
9 prior to Lisbon, a question of whether that applied at
10 all, given the otherwise comprehensive nature of the EEC
11 treatise. But I do submit that insofar as this question
12 is relevant in the present proceedings, and I understand
13 my Lord's point as to why it may be relevant to the
14 proper interpretation of section 2(1), it cannot, in my
15 submission, have been the intention of Parliament, when
16 it enacted section 2(1), that it was taking note of, at
17 best, a doubtful right in international law of the
18 United Kingdom to withdraw from the treatise without the
19 consent of the other contracting parties. In any event,
20 my submission is that the Act, see the preamble, see the
21 language of section 2(1), and see also -- and I didn't
22 make this point in opening, but see also the heading,
23 originally the side notes to section 2, "General
24 implementation of treatise." Parliament, I say, was
25 plainly dealing with the consequences of membership in

1 section 2(1). It wasn't dealing with the possibility of
2 ending membership. And had one asked Parliament in
3 1972, it would have said, in my submission, by reference
4 to all of this legal material: of course any question of
5 removing these rights under section 2, depends upon the
6 authorisation of Parliament, just as entering into
7 section 2(1) and creating the rights, also required the
8 authorisation of Parliament.

9 In this respect the defendant refers, in
10 paragraph 31 of his skeleton argument, to the Shindler
11 case. And I ought just to take your Lordship to that.
12 It is volume A of the authorities, tab 20, my Lords.
13 And the passage that my friend relies upon is
14 paragraph 58 of the judgment of Lord Justice Elias,
15 which needs to be read with 59. And of course, what the
16 Court of Appeal were there dealing with was the question
17 of whether a decision to leave the EU is a matter of EU
18 law. That was the issue. And at paragraph 58, tab 20,
19 Lord Justice Elias, the third line:

20 "The effect of section 2(1) is to bind the UK to the
21 rules of the club while it remains a member. I do not
22 think it can have been intended to bind the UK to those
23 rules, when the very question is whether it should be
24 bound by those rules. Parliament agreed to join the EU
25 by exercising sovereign powers, untrammelled by EU law.

1 I think it would expect to be able to leave the EU in
2 the exercise of the same untrammelled sovereign power,
3 whether the later legislation expressly disapplies
4 section 2(1) or not. It is not, [in his Lordship's
5 view] a question of implied repeal, a question of the
6 scope of section 2(1). Parliament would not have
7 intended the UK should give precedence to EU law, when
8 the very question to be decided is whether the UK should
9 continue to give precedence to EU law."

10 He then refers to the German constitutional court
11 and about ten lines down, there is the sentence:

12 "It seems to me that the logic of this approach is
13 that section 2(1) should not be read as extending to the
14 very question of withdrawal itself. Parliament would
15 not have granted that competence to the EU."

16 So that is the issue. His Lordship is simply saying
17 that one cannot derive from section 2(1), and its
18 reference to rights and duties in EU law, that the very
19 question should we leave, should the United Kingdom
20 leave the EU, is itself a question of EU law. That was
21 the issue in the case and it was the only issue.
22 Lord Justice Elias is not addressing the distinct
23 question of whether a decision to notify that the UK
24 wishes to leave, requires parliamentary authority,
25 because it strips away the substance of sections 2 and 3

1 of the Act, as a matter of domestic law. The court was
2 concerned, the Court of Appeal was concerned, and
3 concerned only, with whether withdrawal is a matter of
4 EU law or not.

5 Paragraph 32 of the defendant's skeleton argument
6 asserts that there is no conflict with the terms of
7 section 2(1) as we contend, because there would simply
8 be no rights on which section 2(1) would bite. Well,
9 the answer to that contention is that the reason why
10 there will be no rights left on which section 2(1) and,
11 indeed, 3(1) can bite, is because the action of the
12 defendant will have caused them all to be rendered as of
13 nought; to be frustrated. And that is our precise
14 point. The defendant will, by his action on the
15 international plane, have removed the substance, the
16 entire substance, of section 2(1) and 3(1), frustrated
17 Parliament's intention as expressed in 1972 and, for
18 good measure, preempted consideration by Parliament of
19 whether to retain all of these rights. Indeed, the
20 argument in paragraph 32 suffers from precisely the
21 defect that was deprecated in *ex parte Fire Brigades*
22 *Union* by Lord Nicholls, page 578B, that the argument for
23 the Secretary of State in that case was detached, as he
24 put it, from reality. The argument, in my submission,
25 ignores the substance of sections 2 and 3.

1 And finally on this part of the argument, paragraph
2 33 of the defendant's skeleton argument contends that it
3 is not the notification which has the effect, it is only
4 the actual withdrawal. And it is a matter for
5 negotiation, which rights are retained. I have sought
6 to give my answers to that already, my Lords. I say
7 that the notification, the triggering of the process, it
8 is the firing of the bullet which inevitably causes us
9 to leave, which strips away the substance of sections 2
10 and 3. As for the second part of the argument, that
11 there will be negotiations, Parliament may decide what
12 to do. I have submitted, in answer to that contention,
13 that it is, as a matter of principle, no answer, given
14 that the defendant is taking action which will remove
15 all of the section 2 and 3 rights and the rights under
16 the Parliamentary Elections Act and various other
17 statutes. It is no answer that Parliament may decide to
18 maintain some of these rights. The defendant is
19 committing the United Kingdom in the first place, to
20 their removal. But secondly, I have pointed out that
21 there are some rights which Parliament will simply be
22 unable to restore, and I gave examples, such as the
23 right to vote, the right to stand for election, the
24 right to refer one's case to, or have one's case
25 referred to the Court of Justice in Luxembourg, and the

1 unreality, to use Lord Nicholls' phrase, of the
2 suggestion that the rights enjoyed by Mrs Miller, such
3 as free movement, freedom of services across Europe,
4 will simply be able to be restored by Parliament itself.
5 Parliament will lose the ability, unilaterally, to make
6 decisions in this context. So those are my answers to
7 those paragraphs that my Lord asked me to comment on.

8 THE MASTER OF THE ROLLS: Thank you. Lord Pannick, before
9 you move on, I just want to make sure that I have fully
10 grasped the significance that you place on section 1(3)
11 of the 1972 Act, relating to section 2(2) which you have
12 spent some time on. Now, at one point it was put to you
13 that, really, this should be seen as an implication in
14 the Act, your contention, as an implied term. Because
15 in your skeleton argument, you put it not in that way,
16 but on the basis of a broad principle, which is that
17 where fundamental rights are granted by Parliament, only
18 Parliament itself can abrogate them. What I want to
19 understand is as a result of exchanges between you and
20 the bench, you are now putting forward either
21 an extension or an alternative argument that the terms
22 of the 1972 Act itself, particularly in relation to
23 section 1(3), for example, irrespective, even if you are
24 wrong on this first point, that the terms of the Act
25 itself indicate that because there can be no alteration

1 of treatise without parliamentary involvement, the more
2 extensive abrogation, equally, could not have been
3 envisaged as being done without parliamentary authority.
4 Is that where you have got to now?

5 LORD PANNICK: The answer to your Lordship's question is
6 I am making both arguments. The first argument I am
7 making by reference to section 1(3) is in order to seek
8 to respond to the point put to me by the Lord Chief
9 Justice, look at section 2(1). It recognises rights
10 from time to time. Is it the case that consistently
11 with section 21 and a parliamentary process, it is open
12 to the Secretary of State to go and negotiate in Europe
13 and remove fundamental rights? And my answer was: well,
14 that would be inconsistent, and couldn't happen, because
15 the whole scheme of the 1972 Act itself requires that
16 treaty rights are defined by reference to section 1.
17 The treatise are listed in section 1(2). So you need
18 a parliamentary process. That is the first argument.
19 But there is, as your Lordship puts to me, a broader
20 argument. Because if I am wrong on the assertion that
21 what the Secretary of State is here doing is to remove,
22 to take steps which inevitably result in the removal of
23 rights under section 2 and section 3, it is then put to
24 me, particularly by my Lord, Lord Justice Sales: well,
25 isn't it the case that the cases, the modern cases, in

1 particular, Laker and Fire Brigades Union, suggest that
2 if you are going to make this type of argument, it's not
3 enough to show that statutory rights are removed, you
4 also have to show that what is being done is a breach of
5 implied limitations contained in the very Act which
6 established those rights. That is, I think, the way
7 that it is being put to me.

8 LORD JUSTICE SALES: Yes.

9 LORD PANNICK: And I say I don't need to go that far for the
10 first argument. But if I do, I say that is indeed the
11 case here. That if one looks at the whole of the 1972
12 Act, the scheme is very clear that rights are created,
13 they are created by sections 2 and 3. There is
14 a recognition that yes, rights can be amended, but it is
15 a process that requires not merely action on the
16 international plane, it requires a step to be taken in
17 domestic law to amend the treatise, see section 1(2) and
18 section 1(3). And I therefore say that if the Secretary
19 of State is going to take action, as he proposes, on the
20 international plane, which commits the United Kingdom to
21 removing all of these rights, that is a frustration of
22 what are the implied limitations in the 1972 Act itself.

23 LORD JUSTICE SALES: Could I just ask you this supplementary
24 question. What relevance to either of these arguments
25 has the 2011 European Union Act had?

1 LORD PANNICK: None, in my submission. In my submission, if
2 I am right as to these limitations, which are well
3 established, I say, in the case law, Lord Oliver's
4 statement, Lord Cook's statement, the principles behind
5 Laker and Fire Brigades Union, I say it is nothing to
6 the point that Parliament has decided in specific
7 contexts, for specific reasons, to impose additional
8 restrictions on the exercise of prerogative power. And
9 it is of no moment, because those express statutory
10 restrictions cannot be understood as intended to remove,
11 or undermine, the common law restrictions that exist, in
12 statutes that do not address such topics. That is the
13 way I respectfully seek to put the matter.

14 Then I turn, my Lords, to the question of
15 justiciability. And in relation to that, my submission
16 is very simple indeed. We are arguing here, a question
17 of law. And it is a question of law of absolutely
18 fundamental importance. What are the legal limits of
19 the powers of the minister, of the executive? And we
20 are either right or we are wrong. But if we are right,
21 the idea that the court has no power to state those
22 legal limits on the power of the executive would be very
23 surprising indeed. And there are many, many statements
24 of authority, not least in Laker and in *ex parte* Fire
25 Brigades Union, which make absolutely clear that in

1 a context such as this, it is the role of the court,
2 I would respectfully submit, the duty of the court, to
3 state what are the legal limits on the powers of the
4 executive. And it is again nothing to the point that
5 the issue of law arises in the context of what the
6 defendant describes, and he may well be right, at
7 paragraph 55 of his skeleton argument as "a matter of
8 high, if not the highest policy". That is how he puts
9 it. The height of the policy does not alter the fact
10 that there is a legal issue for the court to determine.
11 And I emphasise again, and it is not necessary for me to
12 do so, but I emphasise again, this court is not being
13 asked to address any question of policy, high or low.
14 This is a legal question. And the court, I respectfully
15 submit, must have, does have, jurisdiction to deal with
16 it.

17 Then, the defendant contends, and it is paragraphs
18 60 to 64 of his skeleton argument, that the declaratory
19 relief claimed by my client is, I quote from the heading
20 to paragraph 60 of the defendant's skeleton argument:

21 "Constitutionally impermissible."

22 And it is said to be constitutionally impermissible,
23 because it trespasses, it is said, on the role of
24 Parliament. My Lords, in my submission this is a re-run
25 of the substantive argument. If we are correct in our

1 substantive submissions, the court will have accepted
2 that the minister has no prerogative power to deprive
3 people of the rights conferred by the 1972 Act, and the
4 other legislation, and therefore notification may not be
5 given under prerogative power.

6 It may be that the defendant's sensitivity to this
7 point is caused by the reference in the draft
8 declaration in the claim form to Parliament. I don't
9 know whether your Lordships would just like to look at
10 the declaration that we have claimed. It is in the
11 agreed bundle. and if I can take your Lordships to that.
12 It is tab number 3 of the agreed bundle.

13 THE LORD CHIEF JUSTICE: Yes. Paragraph?

14 LORD PANNICK: It is page number 25, my Lord. Page 25. In
15 the middle of the page, section 7, "Details of remedy":

16 "A declaration that it would be unlawful -- "

17 Page 25, middle of the page. Section 7, tab 3.

18 Section 7, "Details of remedy":

19 "A declaration. It would be unlawful for the
20 defendant or the Prime Minister, on behalf of her
21 Majesty's government, to issue a notification under
22 Article 50, to withdraw the United Kingdom from the
23 European Union without an Act of Parliament authorising
24 such notification."

25 Well, my Lords, if we succeed on the substance of

1 this case, and if the concern is the reference to an Act
2 of Parliament, then of course I would be more than
3 happy. It would suffice for our purposes, for the court
4 simply to declare that the defendant has no lawful power
5 to give notification under Article 50(2). Full stop.

6 THE LORD CHIEF JUSTICE: At the present time.

7 LORD PANNICK: At the present time, yes. And if that is the
8 concern, then it is a point that, with respect, doesn't
9 go anywhere. I am quite happy to confine any
10 declaration --

11 THE LORD CHIEF JUSTICE: That is really a point, just of
12 wording.

13 LORD PANNICK: Yes.

14 THE LORD CHIEF JUSTICE: If it's a more substantial point,
15 then, obviously, the wording won't cure it.

16 LORD PANNICK: Indeed. I don't accept, with respect, that
17 it could be a more substantive point. The defendant
18 refers to three cases. The first of them is the Wheeler
19 case. And my friend, Mr Chambers, has very kindly said
20 I could take a few more minutes just to finish this
21 matter.

22 THE LORD CHIEF JUSTICE: Yes.

23 LORD PANNICK: Paragraph 62 of the defendant's skeleton
24 argument refers to the first Wheeler case. If your
25 Lordships want to look at it, but I don't think it is

1 necessary, it is volume A, tab 16. The claimant there
2 said he had a legitimate expectation that the government
3 would legislate to provide for a referendum on the
4 Lisbon Treaty. In other words, he said there was
5 a positive duty to bring a bill before Parliament. And
6 no such contention is made in these proceedings,
7 plainly. One can understand why any such declaration
8 would be constitutionally inappropriate.

9 Similarly, the Unison case, which is paragraph 63 of
10 my friend's skeleton argument. There, the claimant said
11 that it had a right to be consulted before a bill was
12 introduced into Parliament. And Mr Justice Mitting --
13 it is paragraph 10, B3, tab 38, paragraph 10,
14 Mr Justice Mitting said that the courts cannot forbid
15 a member of Parliament from introducing a bill. And
16 again, I entirely understand that, accept it. Of course
17 a court cannot forbid a member of Parliament from
18 bringing a bill before Parliament. But in our case, we
19 are not suggesting that the defendant has to take any
20 action whatsoever. The case is simply concerned with
21 whether he has at the present time, a power to notify
22 under Article 50(2).

23 THE LORD CHIEF JUSTICE: Maybe it would be helpful if one of
24 your team could just produce a revised declaration.

25 LORD PANNICK: Yes.

1 THE LORD CHIEF JUSTICE: And then the attorney will have
2 an opportunity to consider it and see what the point is
3 that is maintained.

4 LORD PANNICK: Yes. Shall I leave the point at that? Would
5 it be convenient, and return to it in reply, if the
6 court would be assisted by that, by further submissions?

7 THE LORD CHIEF JUSTICE: I know what the point is. Whether
8 what you are conceding -- obviously, it wouldn't be
9 right to ask the attorney to reply now, but if he could
10 see what you are prepared to offer --

11 LORD PANNICK: Of course.

12 THE LORD CHIEF JUSTICE: -- and whether that meets the
13 point.

14 LORD PANNICK: We will prepare that overnight and supply it
15 to the attorney and his team. It may meet the
16 objection. It may not.

17 One other point, my Lord. I mentioned the practice
18 in relation to amendments to EU treatise. There is
19 a helpful document which your Lordships will find at
20 volume D1, behind tab number 2. And it is a memorandum
21 by the Foreign and Commonwealth Office. What it does,
22 it relates to the Ponsonby rule, which of course was the
23 convention that applied prior to the 2010 Act, relating
24 to ratification of treatise, generally. And if your
25 Lordships have that, D1, tab 2, there is a helpful

1 passage. This is the memorandum by the Foreign and
2 Commonwealth Office, presented to a parliamentary
3 committee, but at paragraph 21 of that -- it is page 52,
4 D1, tab 2. Page 52, paragraph 21, this is the Foreign
5 Office speaking -- they say:

6 "Moreover, many agreements concluded in the EU
7 context require legislation for their implementation in
8 the UK and thus, some form of parliamentary process.
9 Primary legislation is required for amendments or
10 additions to the corpus of basic community treatise.
11 Most recently, the Treaty of Amsterdam and subordinate
12 legislation is often required for mixed agreements,
13 orders under section 1(3) of the European Communities
14 Act. Some third pillar conventions also require UK
15 legislation for their implementation."

16 Precisely so. There was no doubt, there is no
17 doubt, as to the principle. It is not good enough just
18 to reach agreement on the international level in
19 relation to EU treatise, and that is because of the
20 inextricable link between what is done at international
21 level and what is done at national level under the 1972
22 Act.

23 LORD JUSTICE SALES: Sorry, Lord Pannick, it is a small
24 point. Are they strictly right in saying primary
25 legislation is required for amendments or additions to

1 the corpus of basic --

2 LORD PANNICK: Some legislative procedure is required.

3 LORD JUSTICE SALES: I thought when we looked at

4 section 1(3), you could do that using the section 1(3)

5 process? Have I misunderstood?

6 LORD PANNICK: Yes, my understanding is that is right, but

7 it is still within the scope of the 1972 Act.

8 LORD JUSTICE SALES: That I don't dispute, I was just

9 perplexed by the Foreign Office seeming to think that

10 you actually need primary legislation.

11 LORD PANNICK: My understanding is that a subordinate

12 legislation would suffice, but what is required is that

13 the new treaty, as your Lordship appreciates, is added

14 to the list in section 1.

15 LORD JUSTICE SALES: Yes, it is a small point, I appreciate.

16 LORD PANNICK: Your Lordship is right, your Lordship is

17 right.

18 My Lords, two final points, if I may. The defendant

19 says -- it is paragraph 7 of --

20 THE LORD CHIEF JUSTICE: Sorry, Lord Pannick, before you go

21 there, I mean, because of section 1(3) only recently

22 having been raised before us, it might be helpful if

23 someone was to write on your side, just a very short

24 note about this paragraph. Because I would be surprised

25 if the Foreign Office had got it wrong. And they do

1 distinguish between the Treaty of Amsterdam, which
2 requires primary legislation, and what are mixed
3 agreements.

4 LORD PANNICK: Yes.

5 THE LORD CHIEF JUSTICE: Please don't try and answer it now,
6 but someone will no doubt --

7 LORD PANNICK: Would your Lordship be assisted?

8 THE LORD CHIEF JUSTICE: I think if someone could explain
9 that, it might be helpful.

10 LORD JUSTICE SALES: It may be that they are referring to
11 convention, which one understands. Even if there was
12 the legal power under section 1(3), something like the
13 Treaty of Maastricht, or the Treaty of an Amsterdam is
14 so profound that it is thought right to do it by primary
15 legislation, even if not strictly legally required,
16 I don't know.

17 LORD PANNICK: At the very least they are recognising that
18 there is a convention that primary legislation is
19 required. I say in any event, what it shows is that any
20 substantial amendment to the treatise requires
21 a parliamentary process. What cannot be done is mere
22 executive action. That is the --

23 THE LORD CHIEF JUSTICE: I would like, technically, to get
24 this right.

25 LORD PANNICK: Of course, my Lord, of course.

1 THE LORD CHIEF JUSTICE: Thank you very much.

2 LORD PANNICK: And we will supply a note, I hope, by,
3 certainly 4.15 tomorrow. But I hope we will do better
4 than that.

5 Two final points, my Lord. Paragraph 7 of the
6 defendant's skeleton argument at the top of page 4,
7 asserts that Mrs Miller's case, this is the first line
8 on page 4, rests on a narrow proposition about the need
9 for parliamentary authority. We would respectfully
10 submit, for all of the reasons I have given, there is
11 nothing narrow about the issue in terms of its
12 significance. It goes to the heart of the legal limits
13 on executive power in a constitution which recognises
14 parliamentary sovereignty. And at paragraph 22 of the
15 defendant's skeleton argument, it's page 9, there is
16 a reference three lines from the end of paragraph 22 to
17 what is described as "the UK's flexible constitution".
18 To which we say not so flexible that basic principles of
19 constitutional law concerning the legal limits on the
20 power of the executive can be ignored.

21 THE LORD CHIEF JUSTICE: Well, we can't get into the
22 question, it is not for us, as to what the will of the
23 people was. That must be for politicians to decide.

24 LORD PANNICK: I respectfully agree, and that was the
25 substance of the submission that I sought to make this

1 morning about the Referendum Act and it is not for your
2 Lordships, in my respectful submission, to try to
3 ascertain and act on any such questions.

4 THE LORD CHIEF JUSTICE: Ours is a much narrower -- a very,
5 very narrow inquiry.

6 LORD PANNICK: Yes. And I hope, if I have achieved nothing
7 else, I have emphasised to your Lordships that that is
8 the point I am seeking to make.

9 THE LORD CHIEF JUSTICE: Yes, we fully understand.

10 LORD PANNICK: Unless there are other matters, and I am very
11 grateful for your Lordship's patience.

12 THE LORD CHIEF JUSTICE: Not at all. Subject to you being
13 asked to make another point, thank you.

14 LORD PANNICK: Yes, those are my points, my Lord, thank you
15 very much.

16 I am sorry, my Lord, there is an important point and
17 it is this: your Lordships may have seen that in the
18 hearing before Lord Justice Leveson, there was
19 a reference to the abuse by way of emails and other
20 matters, of claimants who were bringing this case.
21 Regrettably, I am informed that my client is getting
22 further abuse, and threats, and insults. I don't know
23 whether your Lordship would think it appropriate to
24 repeat the comment made by Lord Justice Leveson, that
25 such comments are entirely inappropriate, and in extreme

1 cases, the court has ample powers to deal with it.
2 THE LORD CHIEF JUSTICE: We do indeed. This is a point of
3 law that is being taken. It is not a point that has --
4 although it may have political significance, the point
5 is not a political one.

6 LORD PANNICK: I am very much obliged, my Lord, thank you.

7 Submissions by MR CHAMBERS

8 MR CHAMBERS: My Lords, I appear on behalf of the other
9 claimant in this matter, Mr Santos. I gratefully adopt
10 the submissions of my learned friend, Lord Pannick.

11 THE LORD CHIEF JUSTICE: Yes.

12 MR CHAMBERS: Our submissions go to the parliamentary
13 sovereignty argument. We say that this case can be
14 resolved by a direct application of the most fundamental
15 legal doctrine of the British constitution, and that is
16 parliamentary sovereignty. And approaching it on that
17 first principles basis reveals, we submit, most clearly
18 and most compellingly, the correct answer. And it is
19 an answer which the defendant simply cannot respond to.
20 Now, we make three submissions, which I will summarise
21 first, and then develop.

22 Our first submission is that under the doctrine of
23 parliamentary sovereignty, no person or body is
24 recognised by the law as having the right to override or
25 set aside the legislation of Parliament. What

1 Parliament has enacted, only Parliament can take away.

2 Second, a decision to withdraw from the EU under
3 Article 50(1), combined with a notification of that
4 decision under 50(2), will definitely, when the
5 withdrawal takes effect, lead to a loss of rights
6 granted by Parliament under domestic legislation. Most
7 notable are the rights under the 1972 Act and, of
8 course, the Parliamentary Elections Act 2002. And it
9 follows from this loss of domestic law rights that under
10 the doctrine of parliamentary sovereignty, only
11 Parliament has the competence to take or authorise the
12 decision that the UK withdraw from the EU and to notify
13 that decision. Only Parliament can sanction the impact
14 on primary legislation of the decision to withdraw.

15 My third submission is that Parliament has not given
16 this sanction. Parliament did not surrender its
17 sovereignty to the people through the EU referendum.
18 The UK is, of course, a representative parliamentary
19 democracy. It is not a direct people's democracy. And
20 the referendum did not replace the UK's system of
21 representative parliamentary democracy.

22 This was Parliament's choice when it enacted the
23 Referendum Act of 2015. The referendum was, at most,
24 a supplemental constitutional requirement for the
25 purposes of Article 50.1. So the referendum changed

1 nothing, as far as the doctrine of parliamentary
2 sovereignty is concerned.

3 Now, the defendant's response to all of this is
4 quite hard to pin down. But it appears that what they
5 are saying is, first, that parliamentary sanction has
6 already been given by the referendum, or they are saying
7 that parliamentary sanction is not needed, because the
8 decision and the notification does not, of itself, cause
9 an alteration to the UK's laws. That might be called
10 the form over substance argument. Now, the defendant's
11 first argument is wrong, for the reasons that I have
12 given. The Referendum Act does not give the necessary
13 sanction.

14 The second, which is the form over substance
15 argument, is, with respect, hopeless. The process, once
16 set in train, leads to the inevitable withdrawal of the
17 UK from the EU, at which point the rights and
18 obligations enshrined in the 1972 and other acts will
19 have to go. It is the decision to withdraw, once
20 notified, that is the critical trigger for these
21 consequences. It is a de facto legislative step, the
22 effect of which is to override a whole host of statutes.
23 Accordingly, in our submission, only Parliament can take
24 that step. And the contrary would be a triumph of form
25 over substance.

1 So turning to my first submission, which is the
2 doctrine of parliamentary sovereignty. The aspect of
3 parliamentary sovereignty with which we are concerned,
4 namely that no person or body may override or set aside
5 the legislation of Parliament, has been the central
6 pillar of the UK constitution since at least the
7 glorious revolution, certainly the Bill of Rights of
8 1688. And I just want to take your Lordships quickly to
9 the Bill of Rights, which your Lordships will find in
10 bundle C, tab 1, page 1.

11 THE LORD CHIEF JUSTICE: C, tab 1?

12 MR CHAMBERS: C, tab 1, and it is page 1. My Lords, this is
13 the Bill of Rights of 1688. There is the preamble on
14 the first page, and if your Lordships turn to numbered
15 page 3 on the bottom right-hand corner, article 1,
16 "Suspending power":

17 "The pretended power of suspending of laws, or the
18 execution of laws by a legal authority without consent
19 of Parliament, is illegal."

20 And the next item:

21 "Late dispensing power. That the pretended power of
22 dispensing with laws or the execution of laws by regal
23 authority, as it hath been assumed and exercised of
24 late, is illegal."

25 And then if I could ask your Lordships, please, to

1 turn over to page 7 of this bundle, your Lordships will
2 see part 2 of the Bill of Rights:

3 "Non-obstante made void. No dispensation by
4 non-obstante of or to any statute or any part thereof
5 shall be allowed, but the same shall be held void and of
6 no effect, except a dispensation would be allowed of in
7 such a statute."

8 So that is the foundation for this aspect of the
9 doctrine of parliamentary sovereignty and we submit that
10 those provisions could not be clearer.

11 LORD JUSTICE SALES: Non-obstante was what?

12 MR CHAMBERS: It was an ancient power whereby the Crown
13 could basically do what it wanted, for want of a better
14 word, no matter what the law was. There is a definition
15 in Jowitt's legal dictionary, which I don't have here,
16 but it was basically the power of the Crown to do what
17 it wanted.

18 If I could ask your Lordship to put that away and
19 pick up bundle D1 at tab 1. We are going to Dicey,
20 "Introduction to the study of the law of the
21 constitution."

22 THE LORD CHIEF JUSTICE: Yes.

23 MR CHAMBERS: And we are in the eighth edition, 1915. And
24 if I could ask your Lordships to turn, first of all, to
25 numbered page 2, which is chapter 1, "The nature of

1 parliamentary sovereignty":

2 "The sovereignty of Parliament is, from a legal
3 point of view, the dominant characteristic of our
4 political institutions."

5 And then slipping down three quarters of the way,
6 under A:

7 "The nature of parliamentary sovereignty.
8 Parliament means in the mouth of a lawyer, although the
9 word often has a different sense in ordinary
10 conversation, the King, the House of Lords and the House
11 of Commons. These three bodies acting together may be
12 aptly described as the King in Parliament and constitute
13 Parliament. The principle of parliamentary sovereignty
14 means neither more nor less than this, namely that
15 Parliament thus defined, has, under the English
16 constitution, the right to make or unmake any law
17 whatever and further, that no person or body is
18 recognised by the law of England as having a right to
19 override or set aside the legislation of Parliament.
20 A law may, for our present purpose, be defined as any
21 rule which would be enforced by the courts. The
22 principle, then, of parliamentary sovereignty may,
23 looked at from its positive side, be thus described.
24 Any Act of Parliament or any part of an Act of
25 Parliament which makes a new law or repeals or modifies

1 an existing law, will be obeyed by the courts. The same
2 principle looked at from its negative side may be thus
3 stated: there is no person or body of persons who can,
4 under the English constitution, make rules which
5 override or derogate from an Act of Parliament or which,
6 to express the same thing in other words, will be
7 enforced by the courts in contravention of an Act of
8 Parliament."

9 So that is the rule. And if I could ask your
10 Lordship to --

11 LORD JUSTICE SALES: Can I just check, we are in the eighth
12 edition rather than the tenth because that is the last
13 one Dicey --

14 MR CHAMBERS: That is the last one Dicey edited. It is the
15 one that the courts normally refer to. I believe it was
16 the eighth edition referred to in the Interfact case.

17 LORD JUSTICE SALES: Thank you very much.

18 MR CHAMBERS: If I could ask your Lordships to move on to
19 page 18 in this bundle. We are now under the heading,
20 half way down, under item 2, "The absence of any
21 competing legislative power":

22 "The King, each House of Parliament, the
23 constituencies ... "

24 And stopping there, we will see in a moment the
25 constituencies is defined as the electors, the people.

1 "... and the law courts, either have or at one time
2 claimed or might appear to claim, independent
3 legislative power. It will be found, however, on
4 examination, that the claim can, in none of these cases,
5 be made good."

6 And then if we move to page 22 and this is relevant
7 to the referendum point, but I am dealing with it now as
8 we are here. Page 22, under item 3, "The vote of
9 parliamentary electors":

10 "Expressions are constantly used in the course of
11 political discussions which imply that the body of
12 persons entitled to choose members of Parliament
13 possess, under the English constitution, some kind of
14 legislative authority. Such language is, as we shall
15 see, not without real meaning. It points to the
16 important consideration that the wishes of the
17 constituencies influence the action of Parliament. But
18 any expressions which attribute to parliamentary
19 electors, a legal part in the process of law making, are
20 quite inconsistent with the view taken by the law of the
21 position of an elector. The sole legal right of
22 electors under the English constitution is to elect
23 a member of Parliament. Electors have no legal means of
24 initiating or sanctioning or repealing the legislation
25 of Parliament. No court will consider, for a moment,

1 the argument that a law is invalid as being opposed to
2 the opinion of electorate. Their opinion can be legally
3 expressed through Parliament and through Parliament
4 alone."

5 And then if we move on to page 31:

6 "Parliamentary sovereignty is therefore an undoubted
7 legal fact. It is complete both on its positive and on
8 its negative side. Parliament can legally legislate on
9 any topic whatever, which in the judgment of Parliament,
10 is a fit subject for legislation. There is no power
11 which under the English constitution can come into
12 rivalry with the alleged sovereignty of Parliament."

13 And then the next paragraph but one:

14 "This doctrine of the legislative supremacy of
15 Parliament is the very keystone of the law of the
16 constitution."

17 And then if we go to page 35 -- this is the last
18 section I want to show your Lordships. Page 35. Half
19 way down:

20 "It should, however, be carefully noted that the
21 term 'sovereignty', as long as it is accurately employed
22 in the sense in which Austin sometimes uses it, is
23 merely a legal conception and means simply the power of
24 law making, unrestricted by any legal limit. If the
25 term sovereignty be thus used, the sovereign power under

1 the English constitution, is clearly Parliament. But
2 the word sovereignty is sometimes employed in
3 a political rather than in a strictly legal sense. That
4 body is politically sovereign or supreme in a state, the
5 will of which is ultimately obeyed by the citizens of
6 a state. In this sense of the word, the electors of
7 Great Britain may be said to be, together with the Crown
8 and the Lords, or perhaps in strict accuracy,
9 independently of the King and peers, the body in which
10 sovereign power is vested. Where as things now stand,
11 the will of the electorate and certainly the electorate
12 and the combination of the Lords and the Crown is sure,
13 ultimately, to prevail on all subjects to be determined
14 by the British government. The matter, indeed, may be
15 carried a little further and we may assert that the
16 arrangements for the constitution are now such as to
17 ensure that the will of the elector shall, by regular
18 and constitutional means, always in the end, assert
19 itself as the predominant influence in the country. But
20 this is a political, not a legal fact. The electors
21 can, in the long run, always enforce their will. But
22 the courts will take no notice of the will of the
23 electors. The judges know thing about any of the will
24 of the people, except insofar as that will is expressed
25 by an Act of Parliament and would never suffer the

1 validity of a statute to be questioned on the ground of
2 its having been passed or been kept alive, in opposition
3 to the wishes of the electors. The political sense of
4 the word sovereignty is, it is true, fully as important
5 as the legal sense, or more so, but the two
6 significations, though intimately connected together,
7 are essentially different and in some part of his work,
8 Austin has apparently confused the one sense with the
9 other."

10 And then finally, just over the page at page 38,
11 about eight lines in:

12 "Nothing is more certain than that no English judge
13 ever conceded or under the present constitution, can
14 concede that Parliament is in any sense a trustee for
15 the electors, of such a famed trust that the courts know
16 nothing. The plain truth is that as a matter of law,
17 Parliament is the sovereign power in the state. And
18 that the supposition treated by Austin as inaccurate is
19 the correct statement of the legal fact which forms the
20 basis of our whole legislative and judicial system. It
21 is, however, equally true that in a political sense, the
22 electors are the most important part of, we may even say
23 are actually the sovereign power, since their will is,
24 under the present constitution, sure to contain ultimate
25 obedience. The language, therefore, of Austin is as

1 correct in regard to political sovereignty as it is
2 erroneous in regard to what may be termed legal
3 sovereignty. The electors are part of and a predominant
4 part of the politically sovereign power but the legally
5 sovereign power is assuredly, as maintained by all the
6 best writers on the constitution, nothing but
7 Parliament."

8 Now, the principle of parliamentary sovereignty in
9 the sense we are considering, is absolute. The
10 executive cannot, without the consent of Parliament,
11 override or take away domestic law rights which have
12 been granted by Parliament. And the doctrine of
13 parliamentary sovereignty is a legal doctrine. And it
14 was described by Lord Bingham in R(Jackson) v The
15 Attorney General, one of the fox hunting cases, as the
16 bedrock of the constitution. And it may just be worth
17 taking your Lordship to that at B2, tab 33, and I can
18 just take your Lordships directly to Lord Bingham, which
19 is at page 1203, using the pagination in the bundle and
20 it is paragraph 9 of his speech:

21 "The bedrock of the British constitution is, and in
22 1911 was, the supremacy of the Crown in Parliament. It
23 is, as Lord Justice Maurice Kay observed in paragraph 3
24 of his judgment, unnecessary for present purposes to
25 touch on the difference, if any, made by our membership

1 of the European Union. Then, as now, the Crown in
2 Parliament was unconstrained by any entrenched or
3 codified constitution. It could make or unmake any law
4 it wished. Statutes formally enacted as acts of
5 Parliament, properly interpreted, enjoy the highest
6 legal authority."

7 So my Lords, that is the doctrine of parliamentary
8 sovereignty, and I want to move now to my second
9 submission, which is the interrelation between
10 Article 50(1) and 50(2) and how the doctrine of
11 parliamentary sovereignty impacts on that. Now, the
12 whole purpose of taking a decision under Article 50(1)
13 to withdraw from the EU is to notify that decision to
14 the European Council under 50(2) So 50.1 and 50.2 go
15 hand in hand. And we submit that it is unreal and
16 wholly artificial to divorce 50.1 and 50.2, as the
17 defendant seeks to do. A decision taken under 50.1 must
18 be a decision which is capable of being notified under
19 50(2) In other words, in order to be capable of
20 notification, the decision to withdraw under 50.1 must
21 satisfy all of the UK's constitutional requirements for
22 such a decision. Now, that is a requirement of our
23 domestic law, as well as being mandated by Article 50.1
24 itself. Now, the consequence of that is that under the
25 doctrine of parliamentary sovereignty, Parliament is the

1 only body which, under the UK's constitutional
2 requirements, can take or authorise the decision to
3 withdraw and notify under Article 50. Because
4 a necessary consequence of the decision to withdraw
5 under 50.1 is to notify under 50(2) Notification under
6 50.2 triggers the process which domestic law rights
7 granted by Parliament will inevitably be lost. So it is
8 a constitutional requirement that parliamentary sanction
9 be obtained for that loss of rights. In substance, what
10 that means is that Parliament must take a decision that
11 the UK should leave the EU.

12 Now, that is how we submit matters are best
13 conceptualised, but ultimately, for practical purposes,
14 it doesn't matter, because the key point is before
15 notification is actually made, Parliament must sanction
16 the consequential impact on primary legislation.

17 Now, I am going to come on to loss of rights in
18 a moment, but I want to look at the method by which, and
19 the circumstances in which, Parliament must take or
20 authorise the decision to withdraw. Now, the method of
21 parliamentary authorisation is, we submit,
22 straightforward. Parliamentary authorisation must be
23 given by way of primary legislation. Because under the
24 doctrine of parliamentary sovereignty, nothing else will
25 do. Rights granted by an Act of Parliament can only be

1 taken away by another Act of Parliament.

2 Now, as to the circumstances of authorisation,
3 Parliament's authorisation of the Article 50(1) decision
4 can, we submit, occur in one of three circumstances.
5 The first circumstance is that Parliament itself could,
6 without more, take the decision under Article 50(1) to
7 withdraw. Now, that would plainly satisfy the UK's
8 constitutional requirements; if Parliament itself took
9 the decision under 50.1 without anything else.

10 The second circumstance is that prior to any
11 Article 50.2 notification, Parliament could approve
12 a previous decision taken by the executive, or by the
13 people in a referendum, to withdraw. So in this
14 scenario, a decision of the people in a referendum to
15 withdraw and the decision of the executive to implement
16 the referendum result, are just the first two steps of
17 a valid decision to withdraw.

18 The third step is the approval of that decision by
19 Parliament and approval by Parliament in those
20 circumstances, would amount to a ratification by
21 Parliament of the decision of the people and the
22 executive. So this parliamentary ratification would be
23 the third and final step in the decision process under
24 50.1. The decision to withdraw would only be complete
25 and would only satisfy the UK's constitutional

1 requirements under domestic law, once Parliament had
2 ratified the previous decision to withdraw. So that is
3 the second circumstance.

4 The third circumstance is that Parliament could
5 directly authorise a notification under Article .2,
6 before that notification is given. Now, this would, in
7 practice, amount to a ratification by Parliament of
8 a previous decision by the executive, or the people in
9 a referendum to withdraw. Like my circumstance two, it
10 would complete the decision making process under
11 domestic law and so under Article 50(1). So
12 parliamentary authorisation to notify under 50.2 would
13 be the final step in the 50.1 decision process. Or put
14 another way, parliamentary approval is essential to
15 perfect a decision under 50.1.

16 But the vital point is that parliamentary approval
17 must be given before any Article 50.2 notification is
18 given to the European Council, and that is because of
19 the inevitable loss of domestic law rights. And that is
20 what I am going to turn to next.

21 Now, the rights we are looking at here amount to
22 a whole corpus of rights made by the UK Parliament in
23 this country, mostly, although not exclusively, through
24 the 1972 Act. Now, no matter what these rights may or
25 may not be replaced with in due course, they will all

1 have to go on the UK's actual withdrawal. Now, it is
2 axiomatic, in our submission, that only Parliament can
3 bring that about. The step that brings it about is the
4 decision to notify, and the notification. Parliament
5 must bring about that step. Now, this applies to all EU
6 law rights, which are currently enshrined in statute.
7 But in light of some of the arguments which the
8 defendant has made, it might be helpful to consider
9 these domestic law rights in three separate categories.
10 And it may help -- my Lord, the Lord Chief Justice, this
11 morning, when your Lordship asked about different
12 rights. We have categorised them as follows: category 1
13 rights are those rights which Parliament would be able
14 to replace or replicate if it wished to do so, after the
15 UK's actual withdrawal from the EU. Examples there
16 include employment law rights and equality rights.

17 Category 2 rights are rights which may be replaced
18 or replicated by Parliament, depending on what deal, if
19 any, emerges from the withdrawal negotiations. These
20 rights are not in Parliament's unilateral gift, because
21 they depend upon what the remaining 27 member states
22 will agree to. Examples there include freedom of
23 movement, the right to work in another EU state.

24 And category 3 rights are rights which, by their
25 very nature, will be lost irreplaceably, when the UK

1 withdraws from the EU. And the most obvious example
2 there are the rights of UK citizens to stand for
3 election to the European Parliament and to vote in
4 elections to the EU Parliament. And I am going to look
5 at these three categories in reverse order, so starting
6 with what I call category 3, the European Parliament
7 rights. My learned friend, Lord Pannick, has already
8 taken your Lordship to the 2002 Act. But these rights
9 are the most fundamental European Parliament rights,
10 because they go to the very heart of the UK's membership
11 of the EU. They transcend all aspects of life in the
12 EU. But these rights were domestic law rights which
13 were conferred on all citizens, by Parliament, under the
14 2002 Act. Now, under the doctrine of parliamentary
15 sovereignty, because these rights were conferred by
16 Parliament, they can only be taken away by Parliament.
17 These rights will inevitably and irretrievably be lost
18 when the UK's withdrawal takes effect. But these rights
19 can't be taken away by the executive, by dint of
20 a decision under 50.1, and a notification under 50.2, in
21 which Parliament was not involved. A doctrine of
22 parliamentary sovereignty absolutely prohibits that. It
23 prohibits anyone, including the executive, from acting
24 in a way such as to cause the loss of these rights.

25 My Lords, turning to category 2 rights, these are

1 the rights which are not in the unilateral gift of
2 Parliament, because they depend on what happens in the
3 withdrawal negotiations. But whether they are
4 replicated or replaced, the current rights will have
5 gone. Now, that is the key point. Because even if
6 these rights are replaced or replicated, they will be
7 replicated or replaced under different arguments and
8 under a different legal basis to the present. They will
9 no longer have as their source, the 1972 Act.

10 Now, in his skeleton argument, the defendant says,
11 it is paragraph 49, there is no need to turn it up, but
12 the defendant says that our submission in this
13 particular respect is "a purely formal objection". But
14 this, with respect, betrays a misunderstanding of the
15 doctrine of parliamentary sovereignty. Because
16 parliamentary sovereignty means, in this context, that
17 the executive cannot override legislation enacted by
18 Parliament. Parliamentary sovereignty does not permit
19 the executive to override one statute on the basis that
20 some of its contents might be replicated in another
21 statute in due course. Or even on the basis that all of
22 the content will be replaced by another statute in due
23 course. It is only Parliament that can do that. Only
24 Parliament can choose to interfere with or alter the
25 legal basis for these rights. Now, that is fundamental,

1 because by making an Article 50.2 notification without
2 the prior authorisation of Parliament, the executive is
3 denying Parliament the choice whether or not to
4 interfere with these legal rights and the doctrine of
5 parliamentary sovereignty, we submit, simply does not
6 permit that.

7 THE MASTER OF THE ROLLS: Also it is not simply a case of
8 replacing the right by name, say property rights, but
9 the determination of the extent and content of that
10 right will be determined by a different body.

11 MR CHAMBERS: My Lord, that is absolutely correct. It is
12 not just the legal basis. One doesn't know what we will
13 end up with, and it may be something very different to
14 that which we are currently used to. And it may be that
15 at the end of the negotiation process, the deal that is
16 eventually secured does not secure any of these rights.
17 That means these rights will simply ceased to have
18 exist. And they will have ceased to exist without
19 Parliament's consent. And we submit that is also
20 contrary to the doctrine of parliamentary sovereignty.

21 My Lords, then there are the rights which fall under
22 category 1, namely those rights which Parliament could
23 choose to replicate or replace after withdrawal, if
24 Parliament was minded to do so. Now, this is where we
25 get into the territory of the so-called great repeal

1 bill, which the government has recently mooted. Now,
2 under this proposed bill, on the UK's withdrawal from
3 the EU, the 1972 Act will be repealed and the current EU
4 law will be transposed wholesale into domestic law, to
5 be chewed over at leisure by Parliament in the months
6 and years ahead. That is the proposal. But in our
7 submission, that is topsy turvy. What it amounts to is
8 the executive setting itself up as a de facto
9 legislature at the Article 50.2 notification stage. The
10 executive will be saying to Parliament at the
11 notification stage "We have, without consulting you, set
12 in train an unstoppable process of withdrawal from the
13 EU and it is up to you, Parliament, to sort out the
14 consequences in two years' time, when the withdrawal
15 takes effect". That, in our submission, is what in
16 reality is happening here and we say that is not
17 permitted under the doctrine of parliamentary
18 sovereignty, because it presents Parliament with a fait
19 accompli. And it deprives Parliament of the choice of
20 whether or not its enacted legislation should be
21 repealed because in those circumstances, Parliament will
22 have no choice either to repeal its enacted legislation
23 or it will simply just fall by the wayside. Either way,
24 the rights will have been lost.

25 Now, we submit that Parliament cannot lawfully be

1 example, the circumstances which arose in Fire Brigades
2 Union and in Laker, our case concerns the absolutely
3 straightforward application of the doctrine of
4 parliamentary sovereignty. Now, the government seeks to
5 interpret Fire Brigades Union and Laker in the narrowest
6 possible terms, but that approach fails, in our
7 submission, to understand that those cases are simply
8 specific examples of a much broader doctrine. It is the
9 doctrine of parliamentary sovereignty which underpins
10 the prerogative argument advanced by my learned friend,
11 Lord Pannick, on behalf of Miss Miller. It is because
12 of parliamentary sovereignty that the prerogative is
13 ousted, because the exercise of prerogative powers would
14 undermine statute law. It is parliamentary sovereignty
15 which is the building block for all parts of this case.
16 Once that is understood, and once one considers the
17 application of the doctrine of parliamentary sovereignty
18 to Article 50, then the government's answer, by
19 reference to the supposed existence and the scope of the
20 prerogative and the prerogative cases it relies upon,
21 simply melts away.

22 So my Lords, those are my submissions on part 2,
23 which is Article 50.

24 THE LORD CHIEF JUSTICE: Yes.

25 MR CHAMBERS: Part 3 is the referendum.

1 THE LORD CHIEF JUSTICE: Yes.

2 MR CHAMBERS: And in the UK's representative parliamentary
3 democracy, the referendum result is not legally binding
4 on Parliament and neither is the referendum a substitute
5 for our system of representative parliamentary
6 democracy, which has been in place for over 350 years.
7 Now, the point is most succinctly put by Professor
8 Bogdanor in his book "The New British Constitution."
9 And your Lordships have the relevant extract in bundle E
10 at tab 19 and I hope your Lordship will find at the
11 front of tab 19, the title page. If not, for some
12 reason it may be at the very back of tab 19. Oh, it is
13 in the front, I am told. So it is bundle E, tab 19.
14 And the extract we have is from chapter 7, entitled "The
15 referendum". And your Lordships, I am sure, know that
16 Professor Bogdanor was a member of the commission on the
17 conduct of referendums which reported in 1996 and he
18 also gave evidence to the House of Lords Select
19 Committee on the constitution.

20 THE LORD CHIEF JUSTICE: He is a well known authority on the
21 constitution, yes, okay, fine.

22 MR CHAMBERS: My Lord, if we can start at page 577 of the
23 bundle, it is the first page, "The referendum":

24 "Until 1975, when Britain held her first and so far,
25 only national referendum, the British constitution knew

1 nothing of the people. The sovereignty of Parliament
2 was seen as being incompatible with that of the people.
3 Democracy in Britain was understood as being exclusively
4 representative democracy."

5 If your Lordships turn over to 578, the next page,
6 halfway down the paragraph that starts:

7 "The experience of other democracies shows that
8 contrary to what many in Britain feared in the 1970s,
9 the referendum is not addictive, leading inevitably to
10 the subversion of parliamentary government. The holding
11 of a single referendum does not make it likely that
12 a country will follow Switzerland, in referring a large
13 range of issues to the people. The norm for referendums
14 is not Switzerland but rather countries such as Austria
15 or Norway, which hold them very infrequently. The
16 referendum serves not to replace the machinery of
17 representative government, but only to supplement it.
18 The machinery of representative government remains, but
19 certain issues, either before or after they are
20 scrutinised by the legislature, are put to the people
21 for their approval. A measure still requires scrutiny
22 by the legislature before it can become law, but where
23 there is a provision for the referendum, the measure
24 undergoes an extra measure of scrutiny before it reaches
25 the statute book. The dichotomy between representative

1 and direct democracy is therefore a highly misleading
2 one. Use of instruments of direct democracy is intended
3 not as an alternative to the mechanisms of the
4 representative system, but as a complement to them.
5 Referendums, it has been said, are intricately
6 intertwined with the institutions and agents of
7 representative democracy. That is true, even of
8 Switzerland, the supposed home of direct democracy.
9 Seen in this light, the people acting through referendum
10 take on the function of a third chamber of the
11 legislature, in addition to the lower and upper houses,
12 and, as with an upper house, the effect of a referendum
13 must, as a matter of logic, be conservative, in the
14 sense that the people can only veto legislation, but not
15 initiative it. Thus, legislation, if it is to reach the
16 statute book, needs to surmount three hurdles, not two;
17 the lower house, the upper house, and the people. The
18 referendum, then, is as a matter of logic,
19 a conservative weapon."

20 Your Lordships then move on to 594 in the same
21 extract. At the very bottom of 594, the last paragraph
22 on the page:

23 "In countries with codified constitutions, the
24 outcome of a referendum generally binds both Parliament
25 and government. In Britain, however, with an uncodified

1 constitution, the position is much less clear. Although
2 neither Parliament nor government can be legally bound,
3 the government could agree in advance that it would
4 respect the result, while a clear majority on
5 a reasonably high turn out, would leave Parliament with
6 little option, in practice, other than to endorse the
7 decision of the people. Shortly before the European
8 community referendum in 1975, Edward Short, then leader
9 of the House of Commons, insisting to the house that
10 'This referendum is wholly consistent with parliamentary
11 sovereignty. The government will be bound by its result
12 but Parliament, of course, cannot be bound'."

13 My Lords, just stopping there, the reference to the
14 1975 referendum and the government being bound by the
15 result is a reference to the white paper which the
16 government issued before the 1975 referendum, where it
17 said in paragraph 2.2 of that white paper that the
18 government would be bound by the verdict of the people
19 as expressed in the referendum result. If your
20 Lordships are interested in looking at it, it is in
21 tab 18, the previous tab, at page 533. Your Lordships
22 will see the extract from the white paper in the
23 previous tab at page 533, where, under item 2.2:

24 "The government have agreed to be bound by the
25 verdict of the British people, as expressed in the

1 referendum result."

2 And then if we go back to Professor Bogdanor, he
3 goes on, he then added:

4 "Although one would not expect honourable members to
5 go against the wishes of the people, they will remain
6 free to do so."

7 And there is a reference there to footnote 19, where
8 there is the extract from the House of Commons debates,
9 where Edward Short said that, and it is probably just
10 worth having a quick look at that. It is in bundle D2
11 at tab 27. And it is page 592.1 in tab 27. And this is
12 an extract from the 11 March 1975, and we can probably
13 take it straight by going to the next page, the top of
14 592.2, just above where it says 293:

15 "This referendum is wholly consistent with
16 parliamentary sovereignty. The government will be bound
17 by its result. But Parliament, of course, cannot be
18 bound by it. Although one would not expect honourable
19 members to go against the wishes of the people, they
20 will remain free to do so. One of the characteristics
21 of this Parliament is that it can never divest itself of
22 its sovereignty. The referendum itself cannot be held
23 without parliamentary approval of the necessary
24 legislation. Nor, if the decision is to come out of the
25 Community, could that decision be made effective without

1 further legislation. I do not, therefore, accept the
2 sovereignty of Parliament is affected in any way by the
3 referendum."

4 And that is a statement there. If we go back to
5 Professor Bogdanor at the top of page 191, which we were
6 looking at after footnote 19, he goes on to say:

7 "That was an accurate statement of the
8 constitutional position, only on the assumption that
9 Short meant that the government would be morally bound.
10 It could not be legally bound, or in the purely formal
11 sense, it was still the case that the British
12 constitution knew nothing of the people."

13 Now, in this context, it is worth noting that the
14 2015 EU Referendum Act is in materially identical terms
15 to the 1975 Referendum Act, which made provision for the
16 1975 referendum. Both the 1975 Act and the 2015 Act
17 provided by section 1 of each Act, that "a referendum
18 shall be held on the question of whether the UK is to
19 remain a member of", and in 1975, it was the Community
20 and in 2015, of course, it was the EU. For your
21 Lordships' reference, the 1975 Act is in bundle C at
22 tab 6, page 47. So that is bundle C, tab 6, page 47.
23 And your Lordships will see that at page 47 there is
24 section 1 of the 1975 Act, "a referendum shall be held
25 on the question whether the United Kingdom is to remain

1 a member of the European Economic Community." And just
2 for your Lordship's note, the equivalent to section 1 of
3 the 2015 Act is at bundle A, tab 5, page 130.

4 Now, in our submission, just as Parliament could not
5 be bound by the result of the 1975 referendum,
6 similarly, Parliament could not be bound by the result
7 of the 2016 referendum. And if we finally go back to
8 Professor Bogdanor on page 191, he says there: "It is
9 worth asking, however, whether the authority of the
10 people can be recognised under our constitution, which
11 amounts to asking whether a referendum result could be
12 mandatory rather than advisory, or whether the people
13 must be held to have irretrievably delegated the
14 authority to a legislature, elected representatives in
15 the House of Commons. In 1653, Oliver Cromwell's
16 instrumental government declared that legislative power
17 resided in the person of the Lord Protector and the
18 people. Such a doctrine, however, does not seem to have
19 survived the fall of Cromwell. At the beginning of the
20 20th century, a leading constitutional theorist, Sir,
21 Frederick Pollock, remarked that an identical resolution
22 passed by the electors of every constituency would have
23 no legal force, and no court would pay attention to it.
24 Can a similar claim be made concerning the referendum?
25 Clearly no court would take any notice of a claim that

1 Parliament had legislated on some issue without calling
2 a referendum, nor would it take any notice of a claim
3 that Parliament was ignoring a referendum result. In
4 form, therefore, the legal doctrine of the sovereignty
5 of Parliament seems, so far, to have been preserved,
6 just as it was preserved in the European Communities Act
7 providing for Britain's entry into the Community, in the
8 devolution legislation under the Human Rights Act. In
9 substance, however, as with these other measures, the
10 sovereignty of Parliament is not what it was before
11 1975. There seems no reason, in principle, despite the
12 doctrine of the sovereignty of Parliament, why
13 a referendum result should not be mandatory, in the
14 sense that legislation passed by Parliament would
15 automatically come into effect if there were a vote in
16 favour, and automatically be rejected, if there were
17 a vote against. There is indeed a precedent which may
18 well not be binding for a mandatory referendum. That is
19 a referendum which, with a no result, would not come
20 back to Parliament at all. When in February 1977, the
21 Callaghan government produced its referendum amendment
22 to the Scotland and Wales Bill, new clause 40, this
23 clause did originally provide for a mandatory
24 referendum. The clause originally declared this if the
25 decision in the referendum are of no effect is to be

1 given to the provisions of this Act, this Act shall not
2 take effect. Conversely, were the referendum outcome to
3 be favourable, the government would have been under
4 a legal duty to bring forward a commencement order, so
5 that the devolved bodies could be established.
6 Parliament would, of course, have the purely theoretical
7 right to reject the commencement order. The government,
8 however, changed its view during the course of the
9 debate and provided the referendum be advisory and not
10 mandatory. Nevertheless, it seems that it might be
11 perfectly possible to frame a referendum provision by
12 which legislation was required to come into effect with
13 a yes vote and required to be repealed with a no vote,
14 in other words, a mandatory referendum."

15 Now, Professor Bogdanor was writing that in 2009,
16 before the AV referendum in 2011. And, of course, the
17 device that he has just put forward there was in fact
18 used for the AV referendum, because that of course,
19 contained the legislation which would have been
20 implemented, had there been a yes response to the AV
21 referendum.

22 Then the only other thing to happen before the 2015
23 Referendum Act was the report of the House of Lords
24 Constitution Committee, which reported in relation to
25 referendums in the United Kingdom, and your Lordships

1 will find that in bundle D2 at tab 31. At page 744.
2 And this is the 12th report, dated 7 April 2010.
3 Page 745, your Lordships will see the current
4 membership, the then current membership, which speaks
5 for itself, at 745. The lawyers, of course,
6 outnumbering the non-lawyers, and of course, my learned
7 friend, Lord Pannick, was a member of that committee.
8 At page 787, the committee considered the question of
9 advisory or binding referendums, and your Lordships will
10 see at 190, 191 and 192, they set out the views of the
11 witnesses. And at 193:

12 "Despite referendums in the UK being legally
13 advisory, a number of witnesses pointed out that, in
14 reality, referendums might be judged to be politically
15 binding."

16 And then there is reference to Dr Satala, Dr Blick
17 and of course, Professor Bogdanor. And then at 194:

18 "In practice, however, the UK Parliament can square
19 the circle by passing legislation which does not come
20 into effect until a referendum is held or by agreeing to
21 be bound by the result in enabling legislation.

22 Professor Bogdanor thought it would be possible in the
23 UK to frame a referendum provision by which legislation
24 was required to come into effect with a yes vote and
25 required to be repealed with a no vote, in other words,

1 a mandatory referendum."

2 The recommendation is over the page at
3 paragraph 197:

4 "We recognise that because of the sovereignty of
5 Parliament, referendums cannot be legally binding in the
6 UK and are therefore advisory. However, it would be
7 difficult for Parliament to ignore if the (inaudible)
8 expression of public opinion."

9 And if your Lordships go, please, to the evidence at
10 page 894 of this bundle, your Lordships will see the
11 evidence given to the Constitution Committee for that
12 report. This is a memorandum by the government, which
13 starts at 894. The relevant passage is at 896 halfway
14 down 896, where the government says:

15 "We do not believe that a referendum result should
16 bind a Parliament, unless that Parliament has previously
17 agreed that it will. Were it do so, we consider that
18 that would undermine the principle of representative
19 democracy. Nevertheless, we would expect that the
20 outcome of a referendum would have a significant
21 influence on subsequent parliamentary consideration of
22 an issue."

23 If your Lordships then go on to page 954, the House
24 of Lords published the responses, which they received
25 from the government, to the report we have just been

1 looking at. And the response takes the form of another
2 Select Committee report at 954. But the response itself
3 is an appendix at 957, which is a letter from
4 Mark Harper MP. And this is at a time when the AV
5 enabling legislation was actually going through
6 Parliament. And the relevant passage for your Lordships
7 is at 964, where what Mr Harper does, or what the
8 government does, I should say more accurately, is sets
9 out each recommendation and then the government's
10 response, and at 964, your Lordships will see in the
11 third box down, there is the recommendation which I have
12 just read out, and then to the right is the government's
13 response:

14 "The government agrees with this recommendation.
15 Under the UK's constitutional arrangements, Parliament
16 must be responsible for deciding whether or not to take
17 action in response to a referendum result."

18 So my Lords, it is against that background that the
19 2015 Act was passed, the Referendum Act. And the
20 briefing paper for the bill expressly set out the
21 position, the legal position, as it then was. And if
22 I can ask your Lordships to look at that, it is at
23 bundle D2 at tab 34. So it is in the same bundle as we
24 have just been looking at. It starts at page 968 and
25 this is a briefing paper, 3 June 2015, for the

1 European Union Referendum Bill. And the relevant
2 passage, or I had better just take your Lordship to 970
3 which starts off under "Summary":

4 "The bill was introduced in the House of Commons on
5 28 May 2015. It requires the holding of a referendum on
6 the UK's continued membership of the Union before the
7 end of 2017. This paper has been prepared as a guide in
8 advance of the second reading debate on 9 June."

9 If your Lordships then go to 992 under section 5,
10 "Types of referendum". What is said there is:

11 "This bill requires a referendum to be held on the
12 question of the UK's continued membership before the end
13 of 2017. It does not contain any requirement for the UK
14 government to implement the results of the referendum,
15 nor set a time limit by which a vote to leave the EU
16 should be implemented. Instead, this is a type of
17 referendum known as a pre-legislative or consultative,
18 which enables the electorate to voice an opinion which
19 then influences the government in its policy decisions."

20 And then there is a reference to the referendums in
21 Scotland and Wales and in the next paragraph:

22 "In contrast, the legislation which provided for the
23 referendum held on AV in May 2011 would have implemented
24 the new system of voting without further legislation."

25 And there was an extra proviso about boundary

1 changes. So given that background, in my submission it
2 is clear that when the 2015 Act was passed, Parliament
3 made the informed decision that the result of the
4 referendum would not be legally binding. So in
5 parliamentary sovereignty terms, Parliament chose to
6 retain its sovereignty, to decide for itself whether or
7 not the UK should withdraw from the EU. But even
8 without that background, the meaning of the Act is, in
9 our submission, very clear. Parliament did not express
10 in that Act, the wish that the referendum result should
11 be binding, and without that, it is simply not
12 permissible, we submit, to try and spell out of the 2015
13 Act, some implied repeal or statutory repeal of the 1972
14 Act.

15 Now, the defendant, in his skeleton, says that the
16 2015 Referendum Act neither expressly nor implicitly
17 required that further parliamentary authority would be
18 needed, before an Article 50(2) notification could be
19 given to commence the process of implementing the
20 referendum result. That is paragraph 8(1) of the
21 defendant's skeleton. But in our submission, that is
22 the wrong way to look at the issue. It is not
23 a question of looking at the 2015 Act to confirm that
24 there are no restrictions in it which prevents the
25 executive from implementing the referendum result as it

1 wishes, rather, what the executive needs to do is to
2 find something in the 2015 Act which alters the position
3 under the doctrine of parliamentary sovereignty. In
4 other words, the defendant needs to find something in
5 the 2015 Act which empowers someone other than
6 Parliament to take the decision to withdraw and there is
7 no such provision.

8 Now, the defendant also says that the government's
9 consistent statements that it would and will implement
10 the result of the referendum, is enough to satisfy the
11 UK's constitutional requirements. But in our submission
12 it is not. The defendant's position on this confuses
13 government policy with the will of Parliament. And the
14 will of Parliament is expressed in the 2015 Referendum
15 Act. In the way in which it chose to express its will
16 in the 2015 Act, Parliament made no provision as to what
17 should follow on from the referendum. So we don't know
18 whether Parliament approved or not of the government's
19 stated policy to implement the result. But it certainly
20 didn't make it law. And the Labour government's policy
21 in 1975 of implementing the 1975 result, if they had
22 been for leave, would not in 1975, have satisfied the
23 UK's constitutional requirements. It would have
24 required the approval of Parliament. And just as it
25 would have required the approval of Parliament in 1975,

1 so it does in 2016. There was no difference between the
2 two. Now, we have tried to get a clearer statement from
3 the defendant about when the decision was taken to
4 withdraw and by whom the decision was taken. It appears
5 to be a combination of government statements and the
6 referendum. It is, if you like, an amalgam of events as
7 constituting a legally valid decision to withdraw. But
8 this amalgam of events is something which is unknown to
9 English constitutional law because it purports to
10 override primary legislation passed by Parliament, and
11 it purports to do it without parliamentary approval.
12 Because the only involvement of Parliament in the events
13 which are relied upon by the defendants for this
14 amalgam, is the passing of the 2015 Referendum Act.
15 There is no other involvement of Parliament which is
16 relied upon at all. But the 2015 Act does not do the
17 job. So again, looked at in terms of parliamentary
18 sovereignty, the legal doctrine of parliamentary
19 sovereignty is the ultimate legal fact on which the UK's
20 constitution and system of laws is based. The power of
21 the people, expressed through Parliament, is the
22 ultimate political fact on which the UK's constitution
23 and system of government is based. So it all goes back
24 to the distinction made by Dicey between political
25 sovereignty and legal sovereignty. Sovereignty in the

1 political sense, resides in the people and sovereignty
2 in the legal sense, resides in Parliament. And this is
3 a case which is about what is legally required, not what
4 is politically expedient.

5 So in our submission, my Lords, by way of
6 conclusion, as my time is nearly up, the central issue
7 in the case comes down to the question of who can
8 lawfully take the decision that the UK is to withdraw
9 from the EU. Is it the executive, is it the people or
10 is it Parliament? And under the doctrine of
11 parliamentary sovereignty, we submit the only answer is
12 Parliament. From the moment that EU law rights became
13 enforceable as a matter of domestic law, only Parliament
14 had and has the competence to decide those on whom
15 rights have been conferred, 'only Parliament can decide
16 that those rights should be taken away.

17 THE LORD CHIEF JUSTICE: Thank you very much indeed. Thank
18 you very much indeed, that was very helpful.

19 Miss Mountfield.

20 MISS MOUNTFIELD: My Lord, I am going to take a moment to
21 rescue the papers.

22 Submissions by MISS MOUNTFIELD

23 THE LORD CHIEF JUSTICE: Yes.

24 MISS MOUNTFIELD: My Lords, I represent a group of
25 interested parties who have styled themselves the

1 People's Challenge. My clients are an Englishman of
2 Bangladeshi origin, an Irishman, two Scotsmen resident
3 in France, a Welshman and a Gibraltarian, whose wife is
4 Spanish, with family resident in Spain. And I make that
5 opening observation not as a start to a poor joke, but
6 because that illustrates the nature of the EU
7 citizenship rights which they enjoy and they seek to
8 enjoy, which include, for example, the right, if one
9 resides abroad within the EU, to be accompanied by third
10 country nationals, exercising derived rights out of the
11 citizen's directive. So they are all beneficiaries of
12 the EU citizenship rights. And they are all concerned
13 to ensure that there is proper democratic authority for
14 and scrutiny of, Britain's future relationship with
15 Europe and they have been funded by over 4,400 people,
16 who have supported them through a crowd funding
17 initiative. These interested parties support the
18 interpretation of the European Communities Act, advanced
19 by the claimants, and their submissions on the extent of
20 the prerogative, the justiciability of that issue and
21 the suitability of the relief sought. The constitution
22 of our parliamentary democracy, underwritten as it is,
23 is predicated upon the sovereignty of Parliament as the
24 ultimate legislative body and the role of the courts as
25 the ultimate arbiters of the existence, extent and

1 lawful exercise of public power. And the ambit of the
2 prerogative must be interpreted in the context of these
3 constitutional fundamentals. To the extent that the
4 defendant suggests a division between the parties on
5 whether the -- the claimant parties, that is -- on
6 whether the focus of this challenge is a decision to
7 withdraw from the EU, which it says has already been
8 taken, or who has the authority to notify the EU of such
9 a decision, we submit that that is a distinction without
10 a difference. The issue for this court is which
11 constitutional actor, Parliament, or a minister of the
12 Crown, has constitutional authority to notify the
13 European Council of a binding decision to withdraw from
14 the EU. And that is the question that matters, because
15 it is the notification of the withdrawal which
16 inevitably leads to the removal from UK citizens of
17 their fundamental rights as citizens of the EU,
18 following the expiry of the notification period,
19 whatever that may be.

20 These are constitutional rights as a matter of UK
21 law, because they are cornerstones of an overall edifice
22 of the legal structure which governs the relationship
23 between the citizen state and between citizens
24 themselves. But I must emphasise that it is no part of
25 my case that this structure cannot be remodelled or that

1 these rights cannot or should not be withdrawn. That
2 would be a political case and I am not making
3 a political case, I am making a legal case and the
4 submissions which I put before the court go to the pure
5 question of constitutional law, which is, with whom does
6 authority to remodel this structure, if that is what is
7 to be done, lie? And on this question, I invite the
8 court to adopt the whole of my written submission and
9 I hope that at tab 3 of the skeletons bundle, you'll
10 have a replacement version of that which has been
11 referenced up with references to every bundle that
12 I think -- except I think, bundle E which wasn't
13 available, so I apologise for that.

14 THE LORD CHIEF JUSTICE: Yes, that is all right.

15 MISS MOUNTFIELD: And a clarificatory note which was at the
16 back of the first version and I hope hasn't been
17 discarded.

18 THE LORD CHIEF JUSTICE: No, I certainly have it.

19 MISS MOUNTFIELD: I adopt all of that. To avoid as far as
20 possible, and I can't promise not to do it at all, but
21 I will try, to avoid as far as possible, duplication in
22 oral submissions, I have agreed with Lord Pannick that I
23 will focus on those aspects of my submission which
24 relate to Bill of Rights 1668, the unique and
25 constitutional nature of fundamental EU law rights of

1 citizenship, the Act of Union with Scotland and the
2 devolution statutes.

3 Before I outline my submission as to what I invite
4 you to decide, may I respectfully urge a note of caution
5 on an issue which you are not asked to decide, and which
6 I invite you to rely upon in this context on an assumed
7 basis. And that is on the issue of reversibility of
8 Article 50. Our position on this is set out in our
9 skeleton argument between paragraphs 16 and 20. And the
10 short point is that there is no authority, of course,
11 because it has never been triggered before, on the
12 reversibility of Article 50. That is a question of
13 interpretation of the EU treatise. It is a question of
14 EU law, on which ultimately, if it were challenged, the
15 Court of Justice of the EU would be the arbiter --

16 THE LORD CHIEF JUSTICE: But isn't it central to the
17 arguments, because otherwise to take the analogy, the
18 bullet can be stopped, you put the wall up and therefore
19 the Crown would immediately say, Miss Mountfield: well,
20 you know, this is nothing, Parliament could at some
21 future time intervene. They can give the notice.

22 MISS MOUNTFIELD: Yes, and my Lord, I invite you to assume,
23 without deciding, the approach that Lord Pannick took.
24 It is the better view. There are a number of opinions
25 on this and the weight of opinion is that Article 50 is

1 a one way trigger, or a trigger to Article 50 triggers
2 the bullet and it can't be stopped. That appears to be
3 the case on the text. It is the sense of Article 50,
4 because as Lord Pannick said, the other 27 members of
5 the EU need to know where they stand. They can't have
6 people triggering and pulling back and triggering and
7 pulling back, but the reason I invite you to treat this
8 on an assumed basis is because no party has put forward
9 the arguments of international law which goes both ways
10 on that issue and it may be it is raised in another case
11 where it is argued.

12 THE LORD CHIEF JUSTICE: How would it arise? Once the
13 notice has been given -- but if, and I put it very
14 squarely to Lord Pannick and he says, very, very
15 clearly, we are not arguing.

16 MISS MOUNTFIELD: No.

17 THE LORD CHIEF JUSTICE: You want to reserve the position?

18 MISS MOUNTFIELD: We are not arguing it, precisely.

19 THE LORD CHIEF JUSTICE: We are not arguing, we proceed,
20 therefore, on the assumption that everyone present in
21 court, we haven't heard from the attorney yet, but it is
22 fundamental assumption to your case and it's difficult
23 to see why we can't say that it is a fundamental
24 assumption which must be right.

25 MISS MOUNTFIELD: Yes, my Lord.

1 THE LORD CHIEF JUSTICE: Because I don't see how this
2 argument -- it blows the case out of the water. You
3 can't have your cake and eat it, I don't think. Think
4 about it. You have until Monday.

5 MISS MOUNTFIELD: My Lord, my cake is to assume that
6 Article 50 can't be reversed, but nobody is arguing the
7 other position in court. Somebody might in another case
8 and I simply ask you to treat it on an assumed basis.

9 THE LORD CHIEF JUSTICE: From our perspective, and you can
10 think about this, but it seems to me absolutely
11 essential for us to decide that it is irrevocable, and
12 you might want to argue on a subsequent basis that
13 decision was per incuriam or no argument was addressed,
14 but I don't see how we can proceed on an assumption it
15 is absolutely fundamental. But can you discuss this
16 amongst yourselves and we'll hear what Lord Pannick has
17 to say.

18 MISS MOUNTFIELD: My Lord, I invite you to assume that fact
19 because the defendant doesn't dispute it, but nobody is
20 arguing about it in this case, but somebody might in
21 a later case. Not my client, somebody else.

22 LORD JUSTICE SALES: I have to say, speaking for myself, I
23 didn't understand Lord Pannick's position to be assumed
24 without the siding, it seemed to be the sheet anchor,
25 an important part of his submissions that that was the

1 correct view of Article 50. Surely, I agree with
2 my Lord, surely we have to proceed, subject to someone
3 persuading us that positively that is not the correct
4 view, that that is the correct view of how Article 50
5 works and then we look at the United Kingdom domestic
6 constitutional rules in the light of that.

7 MISS MOUNTFIELD: Yes, please do assume that. Just notice
8 nobody has argued it the other way.

9 THE LORD CHIEF JUSTICE: We are not assuming,
10 Miss Mountfield, come back to it on Monday.

11 LORD PANNICK: My Lord, can I make my position clear. I am
12 not inviting your Lordship to make an assumption. I am
13 asserting that there is no power to revoke
14 a notification. What I said to your Lordship is if the
15 defendants wished to argue to the contrary, they haven't
16 argued to the contrary in their skeleton argument.
17 I will seek to deal with their arguments in reply. But
18 my position is not an assumption, it is an assertion of
19 law.

20 THE LORD CHIEF JUSTICE: Yes, and we will proceed to decide
21 if there is no argument to the contrary, and when we've
22 reviewed it, we think it is correct. I can't see this
23 case can proceed on an assumption. But come back to it
24 on Monday. You are one of those with the fortune of
25 having a good number of hours to reflect on the point.

1 MISS MOUNTFIELD: Can I then set out my stall as to the
2 shape of the submissions, which I do intend to develop?

3 THE LORD CHIEF JUSTICE: Yes.

4 MISS MOUNTFIELD: The primary submission which Lord Pannick
5 makes and which we endorse, is that the existence or
6 execution of a statute cannot be reversed or effectively
7 hollowed by use of the prerogative power and we say that
8 that is a constitutional principle which is clear from
9 the Bill of Rights, and it applies irrespective of the
10 nature of the rights conferred by EU law.

11 The rest of my submission does depend on noting that
12 all of the statutes upon which I rely are constitutional
13 statutes and Lord Pannick took you to the definition of
14 a constitutional statute given by Lord Justice Laws in
15 Thorburn and Sutherland, although I don't think he
16 actually took you to the case itself. Perhaps we could
17 turn it up. It is at bundle A, tab 15, page 178. It is
18 page 539, paragraph 62 and paragraph 63. And just below
19 letter E, Lord Justice Laws said:

20 "We should recognise a hierarchy of acts of
21 Parliaments, as it were ordinary statutes and
22 constitutional statutes. The two categories must be
23 distinguished on a principled basis. In my opinion
24 a constitutional statute is one which (a) conditions the
25 legal relationship between citizens and citizen state in

1 some general and overarching manner and (b) enlarges or
2 diminishes the scope of what we would now regard as
3 fundamental constitutional rights.

4 "(a) and (b) are of necessity closely related. It
5 is difficult to think of an instance of (a) that is not
6 also an instance of (b). The special status of
7 constitutional statutes follows the special status of
8 constitutional rights. Examples are Magna Carta. The
9 Bill of Rights. The Union with Scotland Act. The
10 formats (?). The Human Rights Act. The Scotland Act.
11 The Government of Wales Act. The 1972 Act clearly
12 belongs in this family. It incorporated the whole
13 purpose of the substantive community rights and
14 obligations and gave overriding domestic effect to the
15 judicial and administrative machinery of community law.
16 It may be that there never has been a statute having
17 such profound effects on so many dimensions of our daily
18 lives. The 1972 act is, by force of common law,
19 a constitutional statute."

20 And then he goes on to make the observation,
21 a similar (?) observation, that:

22 "Ordinary statutes may be impliedly repealed, but
23 constitutional statutes may not. But the repeal of
24 a constitutional statute, or the abrogation of a
25 fundamental right to be affected by statute, [and

1 I emphasise those words] the abrogation of the right to
2 be affected by statute not just the statute itself, the
3 court would apply this test. Is it shown that the
4 legislature's actual, not imputed, constructed or
5 presumed intention, was to effect a repeal or
6 abrogation, I think the test could only be met by
7 express words in the latest (?) statute or by words so
8 specific that the inference of an actual determination
9 to effect the result contended for was irresistible.
10 The ordinary rule of implied repeal does not satisfy
11 this test. Accordingly it has no application to
12 constitutional statutes."

13 I don't perhaps need to turn it up, but the same
14 observations were made by the Supreme Court in the HS2
15 case, which for your Lordship's note is at bundle B
16 3-tab 51.

17 THE MASTER OF THE ROLLS: I didn't catch that, could you
18 give the reference again.

19 MISS MOUNTFIELD: The HS2 reference is bundle B3, tab 51
20 page 2033 paragraph 207.

21 THE MASTER OF THE ROLLS: Thank you.

22 MISS MOUNTFIELD: So if one is talking about
23 a constitutional statute or a constitutional right or
24 a constitutional right or a fundamental right, it isn't
25 making a free flowing abstract judgment about something

1 being worthwhile in the opinion of the judiciary, that
2 would be undemocratic, I am saying that this is a right
3 or a statute which conditions the legal relationship
4 between the citizen and the state with some general
5 overarching manner, or which enlarges or diminishes the
6 scope of what we now think of as constitutional rights.
7 And the rationale for affording special protection to
8 rights contained in constitutional statutes is their
9 place in maintaining our system of law and the rule of
10 law, because they provide a set of underlying
11 assumptions upon which Parliament can be presumed to
12 have legislated because they are so widely shared at the
13 base of the legal system, and therefore they ensure
14 a legal system which is stable and predictable in its
15 operation, which is fundamental to the rule of law.

16 That is why, in my submission, it has been held that
17 the prerogative cannot be used to deny fundamental
18 common law rights like the right of access to a court in
19 the Whittam case, because we all act on the assumption
20 that in the end it is the court that will decide a point
21 and if there is no access to a court, if that is denied,
22 then by a side wind or inferentially, something, some
23 underpinning assumption has been removed.

24 And it is also why, in cases like Pearson and Simms,
25 to which Lord Pannick took you, it has been said that

1 although constitutional rights can be changed by
2 Parliament, they are not amenable to implied repeal
3 because the legislature must say clearly what it is
4 doing, and face the political consequences of doing it.
5 And it is necessary in the interests of stability and
6 predictability that a Parliament which chooses to remove
7 one of the established pillars of the overarching legal
8 system, indeed possibly the effects of the statute with
9 the most profound effect in English law ever, as
10 Lord Justice Laws said in *Thorburn*, does that in
11 an express and overt manner, and recognises and clearly
12 signposts that that is what it is doing?

13 But the defendant suggests in their skeleton
14 argument that this principle of legality is nothing do
15 with the prerogative, it concerns only the scope of
16 statutory powers of implied repeal. And nothing to do
17 with the scope of a prerogative power to achieve
18 an identical result. And I submit that that is
19 a curious submission for the government to make, because
20 they accept that there is no prerogative power to deny
21 common law rights, as in *Whittam*, and they accept that
22 there it is no implied statutory power to deny common
23 law rights or prior statutory rights contained in
24 a statute of a constitutional character.

25 But they claim a prerogative power to remove the

1 rights in such statutes. And I submit that that
2 argument ignores the rationale, the underlying rationale
3 of the legality principle which is the stability of the
4 constitution. And the special place of the rights of EU
5 citizens in the current constitution of the UK should
6 inform not only the clarity of any statutory power which
7 would be required to amend the constitutional statutes
8 that would protect them, but also the analysis of
9 whether in a parliamentary democracy, which is what we
10 are, there can be any non-statutory authority to remove
11 them at all. And in other words what I am saying is
12 that the special character of the EU rights which arise
13 from the status of EU citizenship must inform the
14 court's analysis of the existence, extent and any lawful
15 exercise of a prerogative power to act in a way which
16 cuts across the intention and terms of the European
17 Communities Act and indeed the European Union Act.

18 And in terms of the European Union Act, if I can
19 maybe just add to what Lord Pannick said on that, we
20 submit that it adds buttresses to the argument that he
21 made on the basis of the European Communities Act 1972,
22 and you see what we say on it in our skeleton argument,
23 especially between paragraphs 37 and 41. Section 2 of
24 the European Union Act, which is the provision that says
25 that there must be a complicated structure of referendum

1 and statute before any treaty replacing or amending any
2 of the existing EU treaties, in effect removes any
3 conceivable argument that there may have been that there
4 was a prerogative power to undertake that sort of
5 amendment. Whether or not there was any such power
6 before 2011, it is quite clear that there cannot be one
7 after 2011.

8 So coming back to what we say is the special
9 protection afforded to constitutional statutes and
10 constitutional rights, we say that even if, contrary to
11 Lord Pannick's broad principled submissions and
12 Mr Chambers' principled submissions, which we support,
13 about the place for a statutory right in any statute,
14 if, contrary to that there could be a prerogative power
15 to act in a way which has the effect of altering the
16 effective content or execution of some statutes, or of
17 some rights, there can be no prerogative power to alter
18 the effective content or execution of a constitutional
19 statute, or of constitutional rights.

20 And on Monday I will develop the following seven
21 core propositions, which, so that you can have them
22 before that, I have put on to two sides of paper.

23 THE LORD CHIEF JUSTICE: That is very helpful.

24 MISS MOUNTFIELD: So perhaps I can just wait for those to be
25 handed up and handed round.

1 Perhaps I can just tell you what the propositions
2 are and I can hand them out to people and to you so you
3 don't have to take a note of them. They are not very
4 long, my Lords.

5 THE LORD CHIEF JUSTICE: They will be transcribed any way.

6 MISS MOUNTFIELD: Yes. They will be handed up and around.

7 The first one is that notification to the European
8 Council of a binding decision to leave the EU will
9 remove the directly applicable or effective EU
10 citizenship rights of UK citizens after the expiry of
11 the notification period and I don't think I need to
12 develop that, I think it is a point that has been
13 developed by Lord Pannick and Mr Chambers.

14 The second core proposition is that once such
15 a binding decision to leave the EU has been notified,
16 the status of EU citizenship cannot be preserved or
17 retained by Parliament, or indeed by any other British
18 constitutional actor.

19 The third proposition is that directly applicable or
20 effective EU citizenship rights have a fundamental
21 constitutional character, because they confer wide
22 ranging directly enforceable rights and remedies on EU
23 citizens as subjects of the EU legal order. And they
24 inform the content of the common law and the
25 interpretation of statutes.

1 The fourth proposition is that the availability of
2 such individual citizen's rights in the UK is recognised
3 by this court because it is mandated by legislation.

4 And then three consequential submissions are that
5 consequently for a minister of the Crown to take a step
6 that will make these rights unavailable without prior
7 parliamentary authority dispenses with the law or the
8 execution of the law and is contrary to the Bill of
9 Rights 1688, and I will show you two authorities on that
10 proposition. In the same way it is contrary to the Acts
11 of Union with Scotland, because, and those acts provide
12 that the law of Scotland shall remain the same after
13 union, except that Parliament may alter the law, public
14 law rights in general, and private law rights if it is
15 for the evident utility for the citizens of Scotland.

16 I am not interested in arguing about evident
17 utility, which is beyond the scope of this court, but
18 I submit that to withdraw from the EU does alter the
19 public and private law rights of those subject to Scots
20 law which arise from their EU citizenship without
21 parliamentary authority, so it is ultra vires, that act.

22 And A slightly different submission in relation to
23 the devolution statutes, which is even if, contrary to
24 all of these submissions, there is some prerogative
25 power to withdraw from the EU, the prerogative powers of

1 the Crown, even if they exist in theory, cannot be
2 lawfully and properly used to remove rights which
3 underpin the devolution statute, because those, too, are
4 constitutional statutes and to do so would remove
5 limitation on the powers of the devolved legislatures
6 and assemblies the powers to intrude on the public
7 private law rights of EU citizens, and those limitations
8 underpin the constitutional settlement between the
9 nations of the United Kingdom and the understanding of
10 Parliament when it passed that devolution legislation.
11 So those are the points which, in the short time
12 available to me on Monday morning, I will develop.

13 THE LORD CHIEF JUSTICE: Yes. We there is quite a lot to
14 get through in 25 minutes.

15 MISS MOUNTFIELD: There is. My Lord, the other point is
16 I have seen one of the skeleton arguments from the
17 Northern Irish litigation. I haven't got a full view of
18 what was argued there argued there. I don't think it
19 crosses with what I was saying.

20 THE LORD CHIEF JUSTICE: No, but we have to be aware of it,
21 because I am not certain about the appellate route in
22 Ireland and the speed with which it can go. But it
23 would be helpful if you could let us have a note on
24 that, because obviously special arrangements have been
25 made for this case; if anyone wants to appeal it can go

1 direct to the Supreme Court. Whether that is possible
2 in Ireland, I don't know.

3 The second question I wanted to ask you is this:
4 when we talk about rights operating domestically, or
5 a similar phrase that is used, you refer, presumably, to
6 rights that qua British citizen you have, including
7 rights under EU law to reside overseas --

8 MISS MOUNTFIELD: Yes.

9 THE LORD CHIEF JUSTICE: -- in the Union. What is the
10 position as regards union citizens in this country?

11 MISS MOUNTFIELD: Yes.

12 THE LORD CHIEF JUSTICE: Can you deal with that on --

13 I don't want an answer now, but when you are talking
14 about rights domestically you are talking, I assume,
15 about the right of someone who is a citizen of the
16 United Kingdom, and has a right under UK domestic law
17 via the route of incorporation to go to France. Is that
18 what you mean?

19 MISS MOUNTFIELD: Yes, and it is an aspect, I suppose, of
20 pooled sovereignty.

21 THE LORD CHIEF JUSTICE: It would be very helpful if you
22 could write, and if you want to add a supplementary note
23 we would be very happy to have it on both of those
24 subjects, because I think it is quite important to know
25 what we mean by the operation of the domestic law.

1 MISS MOUNTFIELD: Yes.

2 MR GILL: My Lords, I will be dealing with the rights of EEA
3 nationals in this country.

4 THE LORD CHIEF JUSTICE: Can you liaise then? Thank you
5 very much, indeed. We will sit, then, on Monday
6 morning. If we can adjust the timetable to sit a little
7 later in case anything goes wrong. But could you advise
8 us now in the light of today -- we have kept pretty much
9 to time -- if there is a problem. I am sorry we can't
10 sit later, even if you weren't all probably exhausted.
11 But if you would like help on Monday, please let us
12 know. Thank you all very much indeed. And can we thank
13 our transcriber in particular.

14 (4.20pm)

15 (the hearing adjourned until 9.45 am on Monday

16 17 October 2016)

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19 Submissions by LORD PANNICK2

20 Submissions by MR CHAMBERS148

21 Submissions by MISS MOUNTFIELD187

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