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.

(9.45 am)

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

Submissions by MS MOUNTFIELD (continued)

THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Indeed in the Tin Council case, which Lord Pannick

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

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

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

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

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

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

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

But what I say is that the European Communities Act

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

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

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

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

constitutional principles.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: 29?

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

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

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

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

Then a little further down that paragraph:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS MOUNTFIELD: Yes. My Lord~--

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: You have one final point.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Submissions by MR GREEN

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

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

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

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

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

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

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

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

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

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

LORD JUSTICE SALES: Annex 1.

MR GREEN: I do apologise, annex 1.

LORD JUSTICE SALES: Yes.

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

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

THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

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

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

LORD JUSTICE SALES: Yes, I am missing it.

MR GREEN: Paragraph 70, my Lord.

THE LORD CHIEF JUSTICE: 70?

MR GREEN: Yes.

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

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

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

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

THE LORD CHIEF JUSTICE: Can that be rectified?

MR GREEN: That can be rectified.

THE LORD CHIEF JUSTICE: Let's carry on.

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

THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: Okay.

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

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

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

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

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

THE LORD CHIEF JUSTICE: I follow.

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: Yes.

MR GREEN: The relevant sections for the court are sections

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

My Lords, I don't know that this has found its way into your Lordships' bundles. It is in all of ours. The end of Article 48 is in the bundle at bundle A.

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

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

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

MR GREEN: If that would be all right.

THE LORD CHIEF JUSTICE: Yes.

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

THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

institutions and to do that without authorisation by Parliament.

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

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

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

MR GREEN: My Lord, yes.

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

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

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

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

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

MR GREEN: My Lord, yes.

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

MR GREEN: Absolutely. My Lord, I basically take it three ways, three points. First, the 1972 Act simplicita.

THE MASTER OF THE ROLLS: Yes.

MR GREEN: When you look both at the conferral of rights and the conferral of power. Second, when you look at the legislation as a piece, and include the 2011 Act, and you see a consistent practice, I think it was my learned friend Ms Simor who may have produced the tab E22, which analyses the ratification process, legislative process, in each case. So it is absolutely consistent, and it would be right for the court to approach the task of statutory construction with regards to what follows.

Then the third point is the point which your Lordship put to me, I think, which is am I asserting a freestanding argument on the 2011 Act; and the answer is positively yes.

THE MASTER OF THE ROLLS: I see.

MR GREEN: I say it is not dependent on the 1972 Act, it is a freestanding argument, and in our respectful submission, it is dispositive.

THE MASTER OF THE ROLLS: Thank you.

MR GREEN: My Lords, unless I can help your Lordships further.

MS MOUNTFIELD: My Lord, just before Mr Gill stands up, and in answer to the Master of the Rolls' first question, we

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

THE MASTER OF THE ROLLS: Thank you very much.

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

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

Submissions by MR GILL

MR GILL: My Lords.

THE LORD CHIEF JUSTICE: Yes.

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

THE LORD CHIEF JUSTICE: We do.

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

THE LORD CHIEF JUSTICE: I am afraid that --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: Yes.

MR GILL: My Lord.

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

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

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: Good, yes.

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

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

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

THE LORD CHIEF JUSTICE: Yes.

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

THE LORD CHIEF JUSTICE: Yes.

MR GILL: Where certain arguments, it says:

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

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

THE LORD CHIEF JUSTICE: Yes.

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

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

62:

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

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

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

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

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

THE LORD CHIEF JUSTICE: Yes.

MR GILL: My Lord, this point, therefore, is there. Paragraph 14. I would invite you in due course to look at the case of Munir, and you have the references there, which indicates that where matters of leave are concerned, immigration leave and so on, because this class of persons will require leave, that is something which is purely within the purview of Parliament, not the executive.

THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

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

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

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

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

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

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

(11.20 am)

(A short break)

(11.30 am)

THE LORD CHIEF JUSTICE: Mr Attorney.

Submissions by THE ATTORNEY-GENERAL

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

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

The first point is that the former Prime Minister,

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

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

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

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

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

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

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

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

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

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

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

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

expectation of Parliament.

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

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

THE LORD CHIEF JUSTICE: Fine.

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

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

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

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

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

subsequently saying, ratifying it --

THE ATTORNEY-GENERAL: I do accept that, my Lord, I apologise, I should have made that clear. It is of course our case that Parliament's consent in the form of an act of Parliament is not required.

THE LORD CHIEF JUSTICE: No, but you cannot give a conditional notice is the question I asked.

THE ATTORNEY-GENERAL: Indeed, we accept that.

THE LORD CHIEF JUSTICE: Mm-hm.

THE ATTORNEY-GENERAL: My Lord, the first submission that I want to make is that it has been long established that the royal prerogative provides a source of power to the Crown to make and to unmake international treaties. That is a fundamental point and as I understand it, my Lords, it is undisputed. We do accept, of course, that there is precedent for the prerogative being constrained by Parliament when it comes to ratifying treaties, and I will come in more detail to look at how and when that is done. But we submit there is no precedent for the ruling the claimants ask this court to make, that the court must seek the authorisation of Parliament by primary legislation to commence the process of withdrawal from a treaty. This, of course, is not the first time that the United Kingdom has withdrawn from a treaty.

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

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

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

We say, then, that the natural inference from the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

May I make two points on that.

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

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

avoidance of doubt --

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

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

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

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

THE LORD CHIEF JUSTICE: Good, on be.

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

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

THE LORD CHIEF JUSTICE: No.

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

THE LORD CHIEF JUSTICE: The pre-existing one.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He goes on to say:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

statutory powers apply.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"As the Secretary of State submits, it would be

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LORD JUSTICE SALES: You say that is international law? I think that that was in dispute in light of Article 56 and 62, I think it was, of the Vienna Convention.

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

LORD JUSTICE SALES: And the authority for that is?

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

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

on customary international law, we can then indicate it.

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

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

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

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

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

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

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

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

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

THE ATTORNEY-GENERAL: Yes.

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

THE ATTORNEY-GENERAL: Yes.

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

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

that takes the prerogative away from the Crown.

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

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

THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: Sorry, C?

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

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

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

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

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

prerogative powers.

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

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

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

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: Thank you.

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

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

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

THE ATTORNEY-GENERAL: We will certainly come back to that. I suppose the short point I could make --

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

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

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

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

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

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

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

The prerogative remains available, we say, for the

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

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

THE LORD CHIEF JUSTICE: Mr Attorney, thank you very much. That has been extremely helpful to go through all of the legislation. Thank you very much.

THE ATTORNEY-GENERAL: I am grateful.

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

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

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

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

Submissions by MR EADIE

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

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

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

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

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

My submission in summary on that primary argument,

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

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

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

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

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

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

accrued under domestic law?

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

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

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

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

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

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

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

MR EADIE: It is possible.

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: It is a good advocate's point. Shall we stop there and carry on at 2 o'clock.

MR EADIE: My Lord.

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

(1.02 pm)

(the luncheon adjournment)

(2.00 pm)

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

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

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

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

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

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

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

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

LORD JUSTICE SALES: Thank you very much.

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

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

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

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

As you will appreciate, it is extremely difficult to

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

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

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

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

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

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

But one of the bases on which the creditors sued the

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: Okay.

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

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

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

THE LORD CHIEF JUSTICE: All of that, yes.

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: But it is irrelevant.

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

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

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

my Lord, Lord Justice Sales was interested in that, having seen --

LORD JUSTICE SALES: Only in that Lord Justice Lawton, I think it was, in Laker Airways referred to Walker v Baird in a passage which Lord Pannick seemed to be relying upon for some wider principle than that of implied abrogation.

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

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

MR EADIE: Were you?

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

MR EADIE: Everything seems to go into bundle E. I can't remember what number we have got up to in bundle E, I am afraid. Late 20s.

THE LORD CHIEF JUSTICE: If you put it in bundle E at the end and give it a number. So it will be number 31.

MR EADIE: 31? I am grateful.

Before coming to the judgment, if you have that there, you will remember what Lord Justice Lawton said in the Laker case about this:

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

Our submissions, just before coming to the facts of Walker v Baird, can I give you the submissions first.

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

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

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

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

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

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

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

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

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

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

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

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

MR EADIE: My Lord, yes.
THE MASTER OF THE ROLLS: He is not dealing with the more general issue.
MR EADIE: He is not.
THE MASTER OF THE ROLLS: No, but the more general issue, it may be said, is that in the first sentence of the paragraph you just read out, which wasn't in dispute. What was in dispute was the effect of a treaty aimed at terminating a war.
MR EADIE: Yes, it was conceded -- the point about 'self-execution was conceded. We respectfully submit it doesn't establish a broader proposition that says in some way, shape or form, either the Crown could never be left with a power by Parliament, the exercise of which might have an impact on rights, nor does the case establish any departure from the De Keyser line of principles and the right test, which is: whether or not Parliament has done so is to be judged by asking whether it has done so expressly or by necessary implication. It simply doesn't advance this.
THE LORD CHIEF JUSTICE: If one looks at the argument at page 492, where it would appear that the Attorney-General in those days could appear for private litigants, it is quite clear that the answer given by Mr Webster, that it is a very narrow point. It is the

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

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

THE LORD CHIEF JUSTICE: Okay.

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

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

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

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

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

LORD JUSTICE SALES: Thank you.

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

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

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

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

LORD JUSTICE SALES: Yes, thank you.

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

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

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

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

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

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

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

(Pause)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR EADIE: Yes.
THE MASTER OF THE ROLLS: I just want to understand you how say that a double taxation agreement would serve to support the general argument that you are advancing.
MR EADIE: My Lord, I think the answer to that is that the double taxation treaties do indeed involve -- I think they involve a bespoke process by which you do have to go back to Parliament, but afterwards. Much of this -- there is therefore a sequencing involved. What happens in terms of sequencing is that the double taxation treaty is renegotiated or different provisions are arrived at. Then, as my Lord says, there is interposition into domestic law and Parliament reacts.

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

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

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

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

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

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

THE MASTER OF THE ROLLS: Yes.

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

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

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

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

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

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

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

way unlawful.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR EADIE: Another copy of the explanatory note?

THE LORD CHIEF JUSTICE: Of the explanatory memorandum.

MR EADIE: Sure.

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

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

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

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

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

an exchange of academic articles?

MR EADIE: I am sure you are. But we were rather preempting Lord Mance and the Supreme Court.

THE LORD CHIEF JUSTICE: The last time we had an exchange of articles, I think it was in relation to bits of international law. We had volumes of it, and I don't know if there are volumes on this~--

MR EADIE: Sometimes on international law you do need that, because you have to do it for the purposes of the customary international law arguments. We have tried to restrict it entirely randomly and unselectively on the basis that these two help us most.

THE LORD CHIEF JUSTICE: Very good.

MR EADIE: They are from respected academics, I should say. One is Paul Craig and the other one is Gavin Phillips who is a professor of law at Durham.

THE LORD CHIEF JUSTICE: Okay.

MR EADIE: They are of interest, because they are at least a discussion of some of the issues with which the court has been troubled over the last it few days.

THE MASTER OF THE ROLLS: Are they going to the back of bundle E?

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

THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

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

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

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

MR EADIE: Sorry?

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

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

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

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

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

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

LORD JUSTICE SALES: Right.

MR EADIE: -- this.

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

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

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

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

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

MR EADIE: My Lord, yes.

THE LORD CHIEF JUSTICE: It is relevant to that, as well.
MR EADIE: It is.
THE LORD CHIEF JUSTICE: Okay.
MR EADIE: It is. As I said, you will appreciate, to pick up a point that was made by Mr Green this morning, that we don't accept the suggestion that in some way, shape or form there is delegated authority, as it were, by Parliament in the formal and express sense. But that is in essence the thrust of the point that was being made by the Attorney this morning; namely, there is the prerogative, it is pre-existing, has Parliament abrogated it, applied the De Keyser principles; answer, no. So you have Parliamentary permission to continue to do those things which Parliament has decided it doesn't want and it has done quite a lot of calling back to itself, this is not one of them.
THE LORD CHIEF JUSTICE: Okay, yes.
MR EADIE: That is the only reason for showing you the explanatory note. This point about Article 50 having introduced these specific matters did not pass unnoticed by Parliament. It was specifically drawn to their attention in the explanatory notes and they nevertheless decided not, despite doing other things for call, they decided that this was not one of those things that they wanted.

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

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

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

MR EADIE: Yes, I will certainly --

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

MR EADIE: No.

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

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

THE LORD CHIEF JUSTICE: Of course.

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

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

MR EADIE: No.

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

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

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

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

THE LORD CHIEF JUSTICE: Mm-hm.

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

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

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

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

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

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

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

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

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

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

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

the Article 50, or even the withdrawal of the UK from the EU, do not themselves remove immigration rights, which are currently implemented by domestic legislation.

THE LORD CHIEF JUSTICE: That is an example, you would say, of rights that are within the control or disposition of the United Kingdom Parliament.

MR EADIE: Exactly so.

THE LORD CHIEF JUSTICE: That is why I asked the question of the rights that weren't within the control.

MR EADIE: Of course.

THE LORD CHIEF JUSTICE: You will come to?

MR EADIE: I am going to come to that.

THE LORD CHIEF JUSTICE: I don't want to push you any further.

MR EADIE: I am just on immigration at the moment.

THE LORD CHIEF JUSTICE: No, you stay there.

MR EADIE: If I stay the wrong thing on immigration I will be hanged by the Home Office.

THE LORD CHIEF JUSTICE: We would not want that fate to befall you, Mr Eadie.

MR EADIE: That is the domestic side of immigration. The flip side of that, the side of the other member states, the rights of UK citizens to reside in other EU member states, it must be appreciated, are not conferred by the ECA or by any other domestic legislation. They are

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

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

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

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

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

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

how long you would like us to sit tonight and a rough idea about tomorrow.

MR EADIE: We will.

(3.20 pm)

(A short break)

(3.30 pm)

MR EADIE: My Lord, the fifth feature is that it is inevitable that Parliament will be intimately involved in the process. Notification is the necessary first step in the process. But that process will have to end up being considered by Parliament. It doesn't preempt decisions by Parliament about rights at withdrawal. At the intensely practical level, Parliament's decision-making at withdrawal will concern not the theoretical myriad of possible negotiation outcomes, which is what would have to happen now if one couldn't go with the concluded position now, or a proposal for Parliament, as it were; but the position as it then is after the negotiations have borne fruit or not.

There are, of course, as you will be well aware, myriad ways under the processes and procedures of Parliament in which they can be involved. They may need to be involved, they will need to be involved, sooner or later in the repeal of the 1972 Act. They will necessarily have to legislate in relation to all EU

sourced rights which are currently enshrined in domestic legislation.

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

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

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

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

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

MR EADIE: Yes, you are.

LORD JUSTICE SALES: Yes, thank you.

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

LORD JUSTICE SALES: Yes.

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

LORD JUSTICE SALES: Thank you.

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

LORD JUSTICE SALES: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR EADIE: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE LORD CHIEF JUSTICE: No, okay.

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

to my learned friend is because they are --

THE LORD CHIEF JUSTICE: Inevitable.

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

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

THE LORD CHIEF JUSTICE: Okay.

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

THE LORD CHIEF JUSTICE: Mm-hm.

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

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

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

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

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

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

principles.

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

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

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

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

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

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

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

clarity.

THE MASTER OF THE ROLLS: Yes, I understand.

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

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

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

a withdrawal, bearing in mind the wording of that Act. In my respectful submission the position is that withdrawal is not touched at all by that legislative scheme, despite Article 50 being brought in by Lisbon, despite the explanatory notes of the 2008 Act and all of that.

So we do respectfully submit that there is a clear indication that the withdrawal was not touched, however much amendment might be. So the answer that is given to that by my learned friend which, I think perhaps underpins my Lord, the Master of the Rolls' question is: well, how does that make sense? You are legislating for the lesser beast and you are legislating for the least dangerous animal in the jungle and you are prepared to let the tiger roam free. That is the point being put against me.

But my respectful answer to that is that that assumes, as it were, that degree of coherence in the way in which Parliament has exercised the choices it has about calling back in. Much of the -- on the searching for, which we respectfully submit you don't need to, but you are searching for a principled basis which joins together all of the call back in powers. It is as convincing, if not more convincing, to assert that the logical thing and principal thing that joins them all

together is a concern that the reach and scope of EU law should not be expanded without Parliamentary authority.

The reason that that is the more powerful explanation if one was looking for coherence between that group of statutory provisions is because, as we all know, at the heart of the European debate at the political level is the question of the extent to which there is increasing encroachment upon the sovereignty of Parliament to make and decide laws as the ultimate arbiter of that.

So we respectfully submit, as I say, that the answer is in two parts, I think, my Lord. We don't need to establish, as it were, a coherence between the group that is called in, because withdrawal is not for good or ill. But if you were looking for coherence between those, it isn't on the basis of lesser beast/greater beast; it is on the basis of Parliamentary concern being evidenced of an increasing expansion of the reach of EU law and therefore an increasing encroachment upon Parliamentary sovereignty.

THE LORD CHIEF JUSTICE: That we know. Do we interpret that against the background of our political knowledge, or because the legislation is framed in terms of amendment up or down, and why should we? You may say: well, Parliament has provided for supervision over amendment

to take away the powers or transfer them to Brussels, increasing the power of the union. This is also legislated the other way. Why don't we approach it by looking at the language? Why should we look at what might or might not have been the political motivation behind it?

MR EADIE: I am not inviting you positively to do that; I am saying beware of the idea that one can, as it were, infer a logical coherence, in relation to the called back group based upon the interference with rights. It goes up and down.

THE LORD CHIEF JUSTICE: What you are saying is they have legislated for amendment, they have legislated for change, but they didn't legislate for withdrawal, therefore withdrawal is outside of the scope; it is that simple, I think.

MR EADIE: Yes, they didn't legislate for withdrawal, and of course it goes up and down; an amendment can go either way.

THE LORD CHIEF JUSTICE: Either way.

MR EADIE: Either way, as you say. No one is disputing that proposition. But in some way there is a problem with my learned friend's submission, which is that the more you say: well, the consequence of issuing the Article 50 notification will inevitably be this ghastly consequence

of all of these rights, and therefore Parliament must be compelled to set its face against it by necessary implication; the more surprising it becomes that Article 50 is not covered.

THE LORD CHIEF JUSTICE: But it may take you to the logical position that if Article 50 isn't covered, then it does take you probably -- at the moment, I don't see why it doesn't -- to the fact that the Crown can agree the entirety of the withdrawal arrangements without any Parliamentary approval at all.

MR EADIE: They can. But that carries with it, as it were, the implicit if only implicit stigma that says: well, there is a constitutional deficit in that.

THE LORD CHIEF JUSTICE: No, no, that is the logic of the scheme that you put forward. But I think it is -- I mean, I can see the neat logic of it; Parliament said: if you want to increase the rights of the European Union or diminish it and that affects domestic laws, it has to be ratified by us; if you want to withdraw together, they didn't legislate for Article 50 and therefore anything you do under Article 50 is impliedly within the royal prerogative and the ministers of the Crown can agree anything in relation to that, with effect on domestic law implicit in Article 50 being sufficient to authorise that.

MR EADIE: Yes, subject to, which is why I went through the categorisation and all of the other points.

THE LORD CHIEF JUSTICE: Yes, yes.

MR EADIE: Trying to get the nuances of how the rights will actually be affected, when they will be affected and how. Subject to all of those nuances. Because in truth when one does that analysis, other than pretending it doesn't exist, the only ones that will inevitably be hollowed out are those that relate to electing the membership of the club, the governing committee of the club. So in other words, they are the only ones that can sensibly be said, which is why my learned friend has placed his argument centrally around those; the problem with those, as I say, is that you come back to that being precisely what the 2015 Act was doing.

THE LORD CHIEF JUSTICE: Do come back to the Article 50 point tomorrow, if you want.

MR EADIE: Can I just pick up on a point my Lord, the Master of the Rolls put to me; I think it may be worth going back, to make sure I haven't misunderstood the point, to Rees-Mogg.

THE LORD CHIEF JUSTICE: Yes.

MR EADIE: Could we go back to that. It is in bundle A, tab 12. I said it was the paragraph at the bottom of the page. It is 567. It is worth -- I am not going to

read it all out now, but it is quite important before you get to that paragraph that you see the nature of the argument that my Lord, Lord Pannick was running in that case, which starts just below the letter D.

I think I am entitled to say, my Lord, in answer to the point that you were putting to me, that if you look at that first and second sentence of the final paragraph on that page, when Parliament wishes to fetter the Crown's treaty-making power in relation to Community law it does so in express terms. That is, it fetters the Crown's treaty-making power in express terms, such as one finds in section 6 of the 1978 Act to which the Attorney took you.

LORD JUSTICE SALES: That seems to be talking about treaty-making power operational only on the international plane, because at the top of page 568, the court is careful to point out that this particular protocol wouldn't have any implications for domestic law. So it seems -- to put it to one side the case where you are dealing with treaty change, which does have an effect on domestic law, and it is saying: well, if you are just dealing with a treaty that is only operational on the international plane, then in effect you are in the grip of your constitutional principle that the Crown ordinarily has the power by the

prerogative to do that; and there is no reason to take that away; and that is so strong that you need express words.

MR EADIE: My Lord, you are right to point that out, of course, and I am trying to avoid the paragraphs that follow, as it were, and they do indeed reach the conclusion that my Lord points to. If one goes back to the final paragraph on that page, the logic and reasoning internal to it, they have reached the position that it fetters the Crown's treaty-making power in the context of Community law in express terms, on the basis of two things.

One is that you have exactly that going on in section 6 of the 1978 Act and the second of them is that section 6 would have been unnecessary if it was impliedly excluded otherwise. That reasoning doesn't depend upon it being non-domestic, or not having an immediate effect for the reasons my Lord pointed to.

THE MASTER OF THE ROLLS: But I thought you accepted that the abrogation or the curtailment of the royal prerogative could be by express terms or by necessary implication. Necessary implication indicates something other than an express exclusion, saying it is hereby abrogated.

MR EADIE: My Lord, I am sorry, but I don't think we have

accepted that. Indeed, the submissions that the Attorney made, and the submission we made in our skeleton argument is one, express words only will do, see Rees-Mogg; two, if not, necessary implication.

THE MASTER OF THE ROLLS: I see.

THE LORD CHIEF JUSTICE: You say the EU is the exception to the general rule in De Keyser.

LORD JUSTICE SALES: I am not sure you or the Attorney confines it to the EU; it is the treaty-making power I thought was the exception, that you need express words to override the ordinary presumption~--

MR EADIE: I think it was based on Rees-Mogg, so it was based on that paragraph.

THE LORD CHIEF JUSTICE: I think it is the treaty-making power, that paragraph, and as I understand it in his argument, it is to the effect that if you look at the whole corpus of the restriction~--

MR EADIE: When they have wanted to do it, they have done it expressly.

THE LORD CHIEF JUSTICE: Yes. I think that is -- as I understood his argument, it was that twin basis upon which~--

MR EADIE: It was, and so we are content to confine it to the EU. As I said, I don't want to get too hung up on it, because one has pretty much exactly the same species

of reasoning in the royal prerogative case, in the sense that if Parliament does choose to intervene in a particular area, or if for some other reason, one would expect them to say very clearly they were abrogating the prerogative, then you need a high standard of clarity; we submit that Rees-Mogg is authority for the proposition that only express will do. I am content to limit that to the Community law point, but if not, alternatively necessary implication.

THE LORD CHIEF JUSTICE: Okay.

MR EADIE: Some reference has been made to constitutional conventions, particularly in the context of the sequencing point. In other words, the Crown exercising the prerogative power on the international plane and then there being legislative considerations or Parliamentary consideration thereafter. I can take that very shortly, because the constitutional convention as it were, has been, if I can put it this way, dangled by the court in front of a number of those who represent the claimants. The answer that comes back seemed to be pretty uniform, which was yes, yes, yes, constitutional convention, but no, we don't quite put our case on that basis when probed.

The first answer is no one has ever put this case on the basis that there is a constitutional convention that

there would be prior authorisation for this sort of process. Were they to do so, no doubt interesting issues of legal principle would arise around whether or not it was appropriate for the courts to start seeking to enforce the constitutional conventions of that kind, and it might be thought that there would be pretty serious arguments based on article 9 and Parliamentary process and so on if one was trying to build that sort of argument.

But I think the first and shorter answer is that the case has not been advanced in any shape or form on the basis of a constitutional convention, and indeed if it is asserted, perhaps the second answer, that there is some practice or convention that legislation should be done before ratification, then it might be thought -- to some extent it is a point that was made by Lord Justice Lloyd in Rees-Mogg in the paragraph we keep going back to, in the context of the argument that was there made -- what then is the point of section 6 of the 1978 Act and indeed what then is the point of some of the other broader controls such as the ratification such that exist in CRAG. So we respectfully submit that that doesn't take matters any further.

I wasn't proposing to do anything further on other international obligations and UN Convention on the

Rights of the Child. And I was proposing to turn if I may to non-justiciability and remedy. If I can take those tolerably quickly.

My Lord, on timing, we have spoken about that and if it would be acceptable to the court, the proposal from our side at least is that I should finish, and I will try and do it well within the extended time you are prepared to sit a bit longer this afternoon, I will try to finish this afternoon then Mr Coppel will start on his bit tomorrow morning. I think he anticipates being tolerably short, probably about half an hour, no more than that. There is then going to need to be time for replies. I don't know how long everyone is going to need in reply, but the only question to which the length of replies will go is whether or not you want to sit earlier than 10.30 tomorrow morning, which I am sure we are all in the court's hands.

THE LORD CHIEF JUSTICE: We don't think it will be necessary. We will just sit at long as need be.

MR EADIE: Tomorrow?

THE LORD CHIEF JUSTICE: Yes.

MR EADIE: I am grateful.

THE LORD CHIEF JUSTICE: I think there becomes a limit to long days.

MR EADIE: Yes. I think the expectation, if I can --

THE LORD CHIEF JUSTICE: I am sorry it put it that way.
MR EADIE: I think the expectation is that we will be done by lunchtime, or pretty close to.
THE LORD CHIEF JUSTICE: And Mr Coppel will be able, he will be here tomorrow. Will you be here too?
MR EADIE: That is the subject of some discussions.
THE LORD CHIEF JUSTICE: We don't want to probe into that, but obviously there are some difficult questions we have not yet grappled with and we need to come back to.
MR EADIE: Yes, and one of them I know is the meat of Article 50 and all of that and what will be required under CRAG. And there are issues around that on which I would like to take on some instructions before giving the court a final answer overnight. That, you can imagine --
THE LORD CHIEF JUSTICE: They are quite difficult.
MR EADIE: Part of a political debate.
LORD JUSTICE SALES: And when you say required under CRAG, does that cover the 2011 Act as well or do you mean just CRAG?
MR EADIE: I mean just CRAG at the moment.
LORD JUSTICE SALES: Right.
THE LORD CHIEF JUSTICE: We will want to go back to the 2011 Act, as well.
MR EADIE: Okay. Then I may have to be here tomorrow

morning, if only briefly.

THE LORD CHIEF JUSTICE: Yes, let's carry on.

MR EADIE: Non-justiciability and remedy I was going to deal with.

THE LORD CHIEF JUSTICE: Yes.

MR EADIE: Both of those, both of the points we make, in other words the non-justiciability and the remedy point, each requires focus we submit on the substance of the challenges, as well as the form in which they are presented. And, as the Attorney has pointed out, although it is dressed up in different ways, it is now clear that each of the claimant parties challenges the government's decision that the UK should withdraw from the EU and not merely just the proposed notification of that decision. They therefore seek, we submit, to challenge a decision of a type which is, according to the case law at least, classically non-justiciable, a decision pursuant to the foreign affairs prerogative to withdraw from international treaties.

THE LORD CHIEF JUSTICE: If that challenge was merely to the question of whether the prerogative power permitted you to do it, is that, do you say that is non-justiciable?

MR EADIE: Well my Lord, if I may develop the submission. The short answer to my Lord's question is no we don't make that assertion. Of course, the court can rule on

the existence or otherwise of the prerogative. It is a creature of the common law and the court is competent to rule upon it, or require you to consider whether or not the prerogative has been abrogated by the legislative schemes that we have all been discussing. That is why I emphasised at the beginning the point about withdrawing from the treaty.

You probably won't need me to take you to, and I wasn't proposing to unless you want me to, the series of cases that establish the basic proposition. The prerogative power and its non-justiciability covers not just the making of a treaty, but also the performance of or acts under the treaties. And the earliest case in relation to that is Rustemgee (?), in bundle B tab 3 and again I don't invite you to turn it. I am sure we have quoted it in our skeleton somewhere. But it concerned a treaty between the Crown and the Emperor of China, under which the Crown received a large sum in respect of debts owed by British subjects, there were some other examples earlier on. And the relevant passage is the passage in the judgment of Lord Coleridge, Chief Justice at 74, where he held, and I quote:

"The Crown acted throughout the making of ...(reading to the words)... stipulations in her sovereign character by her own inherent authority and as

in making the treaty so in performing the treaty she is beyond the control of municipal law and her acts are not to be examined in her own courts."

That principle has been specifically recognised in the case of EU treaties, so for that purpose Blackburn, bundle A tab 9, where Lord Denning disposed of the case on non-justiciability grounds. As he put it at 1040, even a treaty of such paramount importance as this one and its being consistently recognised thereafter as the paradigm example, or a paradigm example of non-justiciable decision making. Again, without wishing to go back to all of the cases, CCSU in the House of Lords, bundle B1 tab 17 at page 418 between A and C in the speech of Lord Roskill, identifying that no go areas included the making of treaties. Again, the case law has left us with other references of that kind.

You need to exercise a little caution, if I may respectfully say so, with Lord Pannick's submission that you don't need to bother about this point because Lord Denning disposed of it in Laker in the terms that he did. And true it is that Lord Denning in Laker, A tab 10 at page 705 G, said that the issue is justiciable because, and he put it in very broad terms:

"The prerogative is a discretionary power to be exercised for the public's good and it can be examined

by the courts just as any other power can be."

And the note of caution is (1) that lord Justices Roskill and Lawton is not put the non-justiciability point in that way and the references are 718 G, 719 E and 728 C to D within Laker.

Sorry, I said I wouldn't go to CCSU, but could I just invite you very quickly to go there. B1, tab 17-page 416 on the internal numbering between G and H. Starting at the beginning of that paragraph, if you would. But between G and H he addresses directly Lord Denning, the passage from Lord Denning on non-justiciability that my learned friend Lord Pannick said represented the ratio of the case on non-justiciability.

THE LORD CHIEF JUSTICE: Yes, I think what is under challenge here is simply the existence of the power, not how it is being exercised. I don't think Lord Pannick, you are not challenging whether it is a good or a bad exercise of the power, are you, you are just challenging --

LORD PANNICK: Indeed not. I said on Thursday I am not questioning justification.

THE LORD CHIEF JUSTICE: If the narrow question is does the Crown have this power if you accept that is justiciable.

MR EADIE: Yes, I hope I did that at the beginning of this argument.

THE LORD CHIEF JUSTICE: You did.

MR EADIE: And the only reason we are spending any time on this at all is because some of the other parties do indeed mount a series of, as it were, public law challenges, legitimate expectation, not taking things into account and all of that which aren't restricted to the legal power.

THE LORD CHIEF JUSTICE: There was the request for the decision today, so yes you are right to raise that issue.

MR EADIE: I raise it in relation to those, and I hope not unrealistically.

THE LORD CHIEF JUSTICE: No.

MR EADIE: If it is a question of pure law and if it is a question of does the prerogative exist, of course that is a matter that the court can control because that is its right.

THE LORD CHIEF JUSTICE: Okay.

MR EADIE: As far as relief is concerned, again this is a substance over form question. If granted, the relief sought by the claimant would have the effect that the Secretary of State would have to introduce on their case a bill into Parliament in order to give effect to the

decision to withdraw from the EU. The claimants have made clear that nothing short of that will do and there is a real concern about the reality of that and the relief that the court can grant in relation to that.

THE LORD CHIEF JUSTICE: But there must be a difficulty -- well, if we can say that the Crown has no power to give, just very baldly, to give notice under Article 50, period, we must be able to say that once you accept that we have the power, that we have a power to define the limit of the royal prerogative.

MR EADIE: Well, my Lord, the difficulty that perhaps flows is that there is at least some of the case law in this area indicating that there may be a freestanding problem in relation to that sort of relief, formal declaratory relief in any event.

THE LORD CHIEF JUSTICE: What do we do? We could deal with it this way: if we were to reach that conclusion -- entirely hypothetically -- and come to the view that the royal prerogative does not extend to giving notice under Article 50 or whatever, that would be enough, wouldn't it?

MR EADIE: Well, it is a relief point rather than a what you put in. I don't want to make it too formal, but there is a line of case law, two of them involving Mr Wheeler, in which the consequence of the argument that was being

run would have been to require the government to introduce bills into Parliament and the courts have held that that isn't an appropriate thing for the courts to do, because it drags the courts into the political arena.

THE LORD CHIEF JUSTICE: But what would we do? In that hypothetical situation what would we do?

MR EADIE: My Lord, as I say, I have accepted that it is part of the court's function to grapple with the question of pure legal power. But the concern that we have is that this whole exercise, as it were, does drag the court into that arena. Because the consequence is it wasn't --

THE LORD CHIEF JUSTICE: There are many arenas into which we do not wish to be dragged. We have a duty. The challenge is, at least on Lord Pannick's case, the scope of the royal prerogative. If we were to reach the conclusion that whatever it is isn't within the scope of the prerogative, sorry to press you, but what is it that we do? We might say well, we have reached that conclusion but it is irrelevant. What would we do? Maybe you would like to come back to us about it.

MR EADIE: My Lord, can I simply show you the high point and then I will think about the question.

THE LORD CHIEF JUSTICE: Yes. You can show us the high

point, but then we would like to know what to do.
MR EADIE: Not grant the relief is the short answer.
THE LORD CHIEF JUSTICE: But why does that matter?
MR EADIE: Well, my Lord, can I just show you Wheeler number 2 and then I will stop on this point.
LORD JUSTICE SALES: Which bundle, Mr Eadie?
MR EADIE: It is in bundle A tab 18.
LORD JUSTICE SALES: Thank you.
MR EADIE: And the relevant paragraph for our purposes is paragraph 46.
THE LORD CHIEF JUSTICE: The relief claim there would have been the direct conclusion of the work of Parliament.
MR EADIE: Well, more or less direct.
THE LORD CHIEF JUSTICE: I mean, telling them there must be a vote in the House of Commons is pretty direct.
MR EADIE: Yes, but it didn't -- the claim in substance would have required one, and if the claim in substance would have required it, then --
THE LORD CHIEF JUSTICE: Assuming (inaudible) for you to hold that there isn't a power, then that is for the government to decide what to do.
MR EADIE: Well that isn't quite enough on my learned friend's case, as I understand it. He says only primary legislation would do it. It isn't a question of what the government would have to do. They couldn't do

anything, on his case, unless they were to introduce primary legislation for the purposes of seeking a prior authority. One may say well, once you see the force of that one accepts it is justiciable and what can you do.

THE MASTER OF THE ROLLS: That is the point, isn't it, once you accept that something is justiciable there must be a remedy.

MR EADIE: Well, yes.

THE MASTER OF THE ROLLS: That is the other side of the coin.

THE LORD CHIEF JUSTICE: But I do appreciate these are very difficult issues. Maybe it is not sensible to carry this argument further on this point at this hour of the afternoon. I mean, of course obviously you can reflect.

MR EADIE: My Lord, can we mull, and can we mull that and the other issues you want us to think about? I suspect I will have to be here for a short while tomorrow.

THE LORD CHIEF JUSTICE: Subject to checking what we are doing in the morning, would it assist you if we sat earlier?

MR EADIE: No, don't go out of the court's way to do that.

THE LORD CHIEF JUSTICE: I am just very concerned people have been sat here all day. They will want to think about what they have to say in reply. And I am also thinking of ourselves. The less time you give people to

think about a reply, the longer the reply tends to be.

MR EADIE: Yes, on that note I will be very short and go to my other place.

THE LORD CHIEF JUSTICE: Does Mr Coppel want to deal with his points?

MR EADIE: Can I suggest we stop now and come back and deal with it?

THE LORD CHIEF JUSTICE: Yes. Thank you very much for the assistance received from you and from all other counsel. I am sorry we did keep you all to your time limit, but you did agree to it. Thank you all very much.

(4.30 pm)

(the hearing adjourned until 10.30 am on Tuesday 18 October 2016)