Monday, 17 October 2016

(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.

heading 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 sp 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 name Fobon, 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 name Fam, 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 right name? 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 name 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 name 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 name 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 sp 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 name Bancu, 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 rest of sentence 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. quote? The pretended power of dispensing with laws or the execution of laws by word 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 name 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 name 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 word regal authority, which name 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 name 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 sp for

that void."

"sp for", and I will now translate in these post name 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 phrase 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 name 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 name 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

word 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 right name? Lord Bingham observed in name Priti, the director has no power to give a phrase 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 phrase it was opposed be given by the defendant, is a word 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 -- phrase 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 name 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 name 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 name Mr Coppell 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 word 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.

heading 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 caps? 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 style 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 name 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 caps? 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 name TEU or name 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.any headings?

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 MASTER OF THE ROLLS: 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 sp 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.

heading 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 fig 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 name 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 name Semprano 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 Semprano 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 Semprano 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 Semprano 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 name Nulla, 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 name 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 name 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: right name? Mr Wright.

heading 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. sentence 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 rest of sentence 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 style Article 50(1) of the treaty on European Union. And in accordance with style 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

Coppel? Mr Coppell will then deal briefly with the additional points made by name 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, name Baroness Ainley, 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 name 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 name Attorney General v Decasa 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 name Decasa, 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 name Lord Parmore. 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 Parmore 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 phrase Bakins 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 name 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 name 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 name 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 name Decasa 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 name Decasa were applied in the case of name 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 name 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 name Attorney General v Decasa Royal Hotel."

He also says at page 352 of the bundle, having set out the principles drawn from the speeches in the Decasa 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 Decasa, 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 name 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 Decasa 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 Decasa, 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 Decasa 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 name 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 name Crown v the Secretary of State for the Home Department ex parte Fire Brigades Union, which again, the Decasa principles were applied. Your Lordships will find this at tab 13 of the bundle A. In the name 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 name Attorney General v Decasa 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 Decasa, 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 name 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 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 Decasa 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 Decasa 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 Decasa, 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 Decasa, Laker Airways or the Fire Brigade's Union cases. Indeed, we submit that Parliament has conspicuously reobtained from 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 befor 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. to here 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: C 29. 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 different and focused controls that Parliament chose to impose on the control of the (inaudible) treaties T did so against a backdrop of concern about Parliamentary sovereignty in a European context and of course against the backdrop of 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 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 there 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 is not of course the weakening or removing of those rights. And them in section 8, that particular section restricts ministers' freedom to vote at EU level. To pursue objectives of the treaties without either an Act of Parliament or motions passed by apartments.

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

And finally on page 118, section 10, it sets out further decisions you 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 whys are 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 name Decasa, 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 Mr 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.

heading 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, name Decasa, 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 name 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.editedtohere

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, 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 device a constitution in which all ^ political contingency 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 which the could House of Lords may delay legislation. But matters of potentially great importance are left to the judgment of either political leaders, whether and when to so a he can a disillusion, for instance, ^, or even to a diminished extent to the Crown, whether to a grant a dissolution, when...(reading to the words)... flexible response to differing and unpredictable events in a which which the application of strict rules would preclude."

And the 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 tolerablely 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 sovereignty 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 do.

MR EADIE: That is precisely the import of the Decasa line of authorities, exactly the point my Lord put to me. If there as bespoke set of principles that govern the principle that Parliament can be taken to have intervene so as to control, 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 at all in that. Do you accept that 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 has 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 domestic law that exist as a matter of ^ common law, then the Crown can exercise that right 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 Decasa 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. Thank 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 govern 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 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 night not the inference of Parliament's intents be rather different depending on the two contexts my Lord put to you.

MR EADIE: It is possible.

LORD JUSTICE SALES: It might not be surprising that Parliament seeks to control 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 affects 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 do ignore it expressly, Parliament can do that even if the effect of that prerogative is it would have a direct and immediate effect on ^.

LORD JUSTICE SALES: You see it might be said that both your argument and Lord Pannick's argument both refer back to back ground 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 so 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 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 in repeated cases in the Court of Appeal thereafter from Decasa, 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.

(1.02pm).

(the luncheon adjournment)