

1 Tuesday, 18 October 2016
2 (10.30 am)
3 heading Submissions by MR EADIE (continued)
4 MR EADIE: My Lords, good morning.
5 THE LORD CHIEF JUSTICE: Good morning.
6 MR EADIE: My Lords, the Lord Chief Justice asked on
7 a number of occasions yesterday about the details of
8 Parliamentary supervision of the stages of the
9 process --
10 THE LORD CHIEF JUSTICE: Yes.
11 MR EADIE: -- laid down in Article 50(2), which are intended
12 as you know to culminate in a withdrawal from the EU,
13 concluded between the UK and the EU, represented by the
14 Council, acting by qualified majority with the consent
15 of the European Parliament; that is the phraseology.
16 THE LORD CHIEF JUSTICE: Yes.
17 MR EADIE: I think the question posed on a number of
18 occasions is can we work through how that process might
19 work. That is the only topic on which I am going to
20 return to this morning and then I am going to hand over
21 to Mr Coppel if that is acceptable.
22 THE LORD CHIEF JUSTICE: Yes.
23 MR EADIE: Before getting into the detail of how that
24 process might work, can I simply reiterate, as you are
25 aware and -- the submissions I made yesterday, there has

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

7 THE LORD CHIEF JUSTICE: Mm-hm.

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

17 THE LORD CHIEF JUSTICE: Yes.

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

21 THE LORD CHIEF JUSTICE: Yes.

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

25 THE LORD CHIEF JUSTICE: Yes.

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

2 THE LORD CHIEF JUSTICE: Yes.

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

4 MR EADIE: Can I answer --

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

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

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

8 I will come.

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

10 MR EADIE: But they are mutually --

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

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

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

14 that.

15 THE LORD CHIEF JUSTICE: Yes.

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

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

18 within CRAG, because CRAG, like the Ponsonby memorandum

19 which it sought to embody, and the Ponsonby memorandum

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

21 THE LORD CHIEF JUSTICE: Yes.

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

23 only applies to treaties which are subject to a formal

24 process of ratification. See, amongst other things,

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

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

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

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

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

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

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

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

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

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

1 possibility might exist they would say no.

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

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

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

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

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

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

16 THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

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

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

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

15 MR EADIE: Yes.

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

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

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

21 MR EADIE: They could, yes.

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

24 MR EADIE: You might.

25 LORD JUSTICE SALES: Conceivably, the European Union

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

7 MR EADIE: It is possible.

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

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

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

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

20 MR EADIE: Necessarily.

21 LORD JUSTICE SALES: They both have to agree.

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

1 LORD JUSTICE SALES: Yes.

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

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

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

10 THE MASTER OF THE ROLLS: speaker - Eadie? That is the
11 position in relation to the Crown, therefore.

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

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

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

21 MR EADIE: That is CRAG.

22 THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

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

14 THE LORD CHIEF JUSTICE: Mm-hm.

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

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

1 MR EADIE: I am not suggesting you should. Names are
2 sourced in a variety of different -- explorations.

3 THE LORD CHIEF JUSTICE: Correct.

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

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

15 THE LORD CHIEF JUSTICE: Yes.

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

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

1 through the cracks as a result of both current domestic
2 legislative implementation, and also the great repeal
3 bill adding to that swathe of rights, one needs to be
4 realistic about how Parliamentary processes are actually
5 going to work.

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

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

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

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

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

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

1 made by the executive?

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

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

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

22 THE LORD CHIEF JUSTICE: Yes.

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

25 THE LORD CHIEF JUSTICE: Yes.

1 MR EADIE: But frankly, once it is before Parliament, the
2 legal and practical reality is a yes to my Lord's
3 question.

4 THE LORD CHIEF JUSTICE: Okay.

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

13 MR EADIE: Yes, my Lord --

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

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

1 Court took into account the later legislation, because
2 it formed part of the overall statutory scheme that
3 existed as of today.

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

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

13 MR EADIE: Yes.

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

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

17 LORD JUSTICE SALES: Right.

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

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

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

1 LORD JUSTICE SALES: No, it is not on the premise that you
2 are wrong.

3 MR EADIE: Does it inform that question.

4 LORD JUSTICE SALES: It is that one of the primary arguments
5 you face is that the change was effected by the 1972
6 Act, as a matter of interpretation of the Act, or on
7 some wider principle.

8 MR EADIE: Yes.

9 LORD JUSTICE SALES: I just wanted your submission as to
10 whether, and if so, how, you say this later information
11 is relevant to that question.

12 MR EADIE: Well, if necessary, I make the submission that it
13 can be relevant to the interpretation of the earlier
14 piece of legislation. But I can't develop that
15 submission because we haven't got JB Jamaica in court.

16 LORD JUSTICE SALES: Right.

17 MR EADIE: But we can certainly provide it and provide
18 a note or do whatever on that. Apologies, it is
19 difficult to predict all of the possible ways in which
20 arguments might run.

21 LORD JUSTICE SALES: Of course.

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

23 MR EADIE: There is nothing else on CRAG. Shall we go to
24 the 2011 Act?

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

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

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

4 THE LORD CHIEF JUSTICE: Yes.

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

8 LORD JUSTICE SALES: You did, yes.

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

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

11 THE LORD CHIEF JUSTICE: Yes.

12 MR EADIE: Yes.

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

16 MR EADIE: Yes.

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

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

24 LORD JUSTICE SALES: Right, thank you.

25 THE LORD CHIEF JUSTICE: I think I see how this works now.

1 Let's wait until we get to the 2011 Act.

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

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

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

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

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

16 THE LORD CHIEF JUSTICE: Yes.

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

21 THE LORD CHIEF JUSTICE: Mm-hm.

22 MR EADIE: Of course, if it did, there might be all sorts of
23 other inconveniences and difficulties potentially, but
24 it would provide, as it were, a silver bullet on behalf
25 of government, because we would then say: well, there is

1 the Act of Parliament, what are you worrying about? But
2 we respectfully submit that that is not the correct
3 reading of section 2(1). That agreement would not be
4 an agreement amending or replacing the TFEU on the
5 proper interpretation of that piece of legislation.

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

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

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

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

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

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

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

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

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

1 because we are worried about further encroachments on
2 Parliamentary sovereignty and everything else. That is
3 why you have the referendum conditions.

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

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

17 MR EADIE: It is a different beast.

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

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

1 agreement, as I say, with America.

2 THE LORD CHIEF JUSTICE: But does that then tie to the
3 argument made by you and by the Attorney yesterday that
4 the way in which the 2011 Act was enacted expressly
5 didn't deal with Article 50 at all. The point, I think,
6 as I understood the Attorney, yours and the Attorney's
7 argument yesterday, that if one reads the 2011 Act, it
8 doesn't deal at all with Article 50 being subject to the
9 2011 Act. The argument, I think, was made that as it
10 doesn't, therefore there is no requirement for the
11 notice to be given under Article 50, to be subject to
12 Parliamentary approval, and I assume therefore by
13 extension you say that therefore there is no reason for
14 the agreement to be made, any agreement made under
15 Article 50(2) to be subject to the 2011 Act, but it is
16 subject to the 2010 Act. Is that how it locks together?

17 MR EADIE: Yes, exactly that way, in exactly that way. But
18 there is a prior question here, which is whether or not,
19 and for the purposes of this argument, as I say, it
20 might have all sorts of other inconveniences, but for
21 the purposes of this argument, the temptation, as you
22 will appreciate, was great, because it would provide the
23 Act of Parliament in which you are interested. But we
24 respectfully submit that that would not be the correct
25 reading.

1 THE LORD CHIEF JUSTICE: No, but that is how it works.

2 MR EADIE: That is how it works.

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

4 MR EADIE: My Lord, exactly.

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

9 MR EADIE: Exactly so.

10 THE LORD CHIEF JUSTICE: Okay.

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

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

25 THE LORD CHIEF JUSTICE: Yes.

1 MR EADIE: But even if they would, this is dealing with
2 a later point in time and assumes the making of a
3 treaty. This is nothing to do with taking the step that
4 starts the negotiating process.

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

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

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

25 MR EADIE: Yes.

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

2 MR EADIE: Assuming continuing membership, therefore.

3 LORD JUSTICE SALES: Yes, thank you.

4 MR EADIE: Yes.

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

13 MR EADIE: If no agreement.

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

15 MR EADIE: And assuming no agreement.

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

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

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

25 MR EADIE: Yes, I have used the words I have used

1 deliberately, in terms of likelihood, but for the reason
2 I have explained. I don't want to keep coming back to
3 that point.

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

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

9 THE LORD CHIEF JUSTICE: Yes.

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

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

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

20 MR EADIE: Section 22.

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

23 MR EADIE: If there are exceptional circumstances.

24 LORD JUSTICE SALES: -- from the ratification.

25 MR EADIE: No doubt subject to both legal and Parliamentary

1 control. No one is envisaging that outcome at the
2 moment.

3 THE LORD CHIEF JUSTICE: Yes, okay.

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

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

11 MR EADIE: I am extremely grateful.

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

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

17 THE LORD CHIEF JUSTICE: Yes.

18 heading Submissions by MR COPPEL

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

1 the argument.

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

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

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

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

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

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

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

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

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

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

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

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

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

20 THE LORD CHIEF JUSTICE: Yes.

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

23 THE LORD CHIEF JUSTICE: What I don't quite follow is
24 I had -- you know, we may need to look at the European
25 case law on this subject, but surely they are rights

1 arising out of, as the ECJ would see it, the citizenship
2 of the Union.

3 MR COPPEL: Yes they are. Yes.

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

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

8 THE LORD CHIEF JUSTICE: Oh.

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

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

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

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

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

14 LORD JUSTICE SALES: Sorry.

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

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

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

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

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

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

20 MR COPPEL: Yes.

21 THE LORD CHIEF JUSTICE: Which is distinct from French and
22 British citizenship.

23 MR COPPEL: Yes.

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

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

3 THE LORD CHIEF JUSTICE: Yes.

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

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

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

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

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

22 THE LORD CHIEF JUSTICE: Yes.

23 MR COPPEL: Which implement in the UK the Citizenship
24 Residence Directive, which you also have in the bundles.
25 He made submissions as to the effect on those

1 regulations of withdrawal, which I will come to. But
2 those govern the position in the UK. There will be
3 equivalent legislation in France and in each of the
4 other member states of the EU which confers the
5 equivalent rights. One does not, and I will stop
6 repeating myself in a moment, get the right to live in
7 France from that domestic legislation or any other
8 domestic legislation.

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

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

22 MR COPPEL: Well, my Lord, I think you will have been told
23 already, in 1972 we don't accept that it was a condition
24 of the ratification of the treaties that Parliament did
25 have to pass legislation. The legislation complies, and

1 was passed so as to ensure, compliance with the UK's
2 obligations under the treaties, but a legislative
3 control that required Parliamentary assent before
4 ratification only came in in 1978 and only in relation
5 to treaties which extended the role of the European
6 Parliament.

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

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

1 Those are two different matters.

2 LORD JUSTICE SALES: Thank you.

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

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

8 LORD JUSTICE SALES: Thank you.

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

17 THE LORD CHIEF JUSTICE: Mm-hm.

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

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

1 actual right to live in France, et cetera, that is for
2 France.

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

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

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

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

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

23 MR COPPEL: My Lord, I am sorry, but plainly Parliament has
24 control over these rights in the sense that EU citizens
25 living in this country can enjoy these rights in this

1 country, and Parliament must ensure that that takes
2 place.

3 THE LORD CHIEF JUSTICE: Yes

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

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

9 MR COPPEL: Yes.

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

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

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

16 MR COPPEL: I am sorry, yes.

17 THE LORD CHIEF JUSTICE: Right.

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

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

23 MR COPPEL: Yes. Well, my Lord, in part they are. But the
24 case against us is that the act of notification, the
25 withdrawal of the UK from the European Union will bring

1 rights to an end which are conferred by domestic law
2 through the European Communities Act. That is the case
3 against us.

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

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

1 a British citizen from voting in Romanian local
2 elections, their cause of action is not under the
3 European Communities Act, it is under Romanian law,
4 which Romania has implemented as a result of its
5 international obligations under the treaties.

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

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

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

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

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

24 MR COPPEL: Yes, indeed.

25 THE MASTER OF THE ROLLS: But it doesn't deal with my Lord's

1 point, which is the wider point, the secondary point
2 about the implication arising from control over
3 amendment of statutes.

4 MR COPPEL: Yes.

5 THE MASTER OF THE ROLLS: This goes to the broader first
6 point.

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

11 THE MASTER OF THE ROLLS: Yes.

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

23 Similarly, article 24, the right to approach, to
24 petition the European Parliament. That is conferred by
25 rules made by the European Parliament. It is not

1 a directly affected right conferred by the European
2 Communities Act to be enjoyed against the UK government
3 or otherwise in the UK. Same sort of point arises.

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

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

1 My Lords, if you look at Mr Pigney's skeleton
2 argument, paragraph 72, there is a whole series of
3 rights which are set out, including the ones that I have
4 mentioned. So it is Ms Mountfield's skeleton argument
5 at paragraph 72.

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

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

8 Five minutes.

9 (11.34 am)

10 (A short break)

11 (11.40 am)

12 THE LORD CHIEF JUSTICE: Yes.

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

14 Ms Mountfield's skeleton.

15 THE LORD CHIEF JUSTICE: Yes.

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

1 enforceable against other states under their legislation
2 in due course. C, dealt with.

3 THE LORD CHIEF JUSTICE: Yes.

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

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

17 MR COPPEL: Yes, yes.

18 LORD JUSTICE SALES: Right.

19 MR COPPEL: Indeed. These are express inaud as the
20 rights of UK citizens which would be lost. As far as
21 the French citizen is concerned in the UK, they have at
22 the moment rights under UK domestic legislation in the
23 Equality Act not to be discriminated against on grounds
24 of nationality. As a matter of law, the act of
25 notification and even the UK's withdrawal from the EU

1 doesn't change that. As a matter of law, that
2 continues. They will continue to have a right not to be
3 discriminated against on grounds of nationality. So
4 nothing is lost.

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

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

23 Then you have the rights under the charter, and
24 would have to go through it right by right, which I am
25 not going to do. Some of these rights are only

1 enjoyable against other member states, some are the same
2 as the Convention on Human Rights which we already have,
3 some are implemented under UK legislation. There isn't
4 really anything different in the analysis.

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

17 THE LORD CHIEF JUSTICE: Mm-hm.

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

22 Lord Pannick sets out a series of rights in his note
23 from Friday. He includes the right to sell medicinal
24 products in other member states of the EU, the rights to
25 perform services as a medical practitioner in other

1 states of the EU. Again, the same analysis, there are
2 certain rights which are enjoyed by EU nationals in the
3 UK which may continue after withdrawal. But the
4 substance of the right is a right to be enjoyed against
5 other member states; it is not conferred by section 2(1)
6 of the European Communities Act.

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

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

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

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

2 THE LORD CHIEF JUSTICE: How did the British citizen acquire
3 the right of free movement?

4 MR COPPEL: How does the?

5 THE LORD CHIEF JUSTICE: How has the British citizen
6 acquired the right of free movement?

7 MR COPPEL: Well, that is as a result of the international
8 obligations which the UK has entered into with the other
9 member states of the EU at a high level. What does the
10 right of free movement mean, one has to ask what that
11 means.

12 THE LORD CHIEF JUSTICE: No, no --

13 MR COPPEL: On the ground, when you move to France, Spain or
14 whichever country, the UK citizen has a right of free
15 movement either as a result of their domestic
16 legislation, or if they haven't got domestic
17 legislation, he can rely directly upon the treaty
18 against that country.

19 THE LORD CHIEF JUSTICE: And his right to Union citizenship,
20 similarly, comes from the treaty?

21 MR COPPEL: Yes, his status as an EU citizen with the rights
22 which come with that, comes from the treaty.

23 THE LORD CHIEF JUSTICE: Okay.

24 MR COPPEL: If he is in France and he is not being treated
25 as an EU citizen should be treated, then he has a cause

1 of action against the French authorities, and he may
2 rely on his directly affected rights under the treaty
3 against them. He doesn't rely on the European
4 Communities Act.

5 THE LORD CHIEF JUSTICE: Yes.

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

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

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

1 of the club.

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

3 MR COPPEL: Certainly there are current EU law rights in the

4 treaty in directly enforceable regulations which are not

5 correctly reflected in domestic legislation but could

6 be.

7 THE MASTER OF THE ROLLS: Here or elsewhere. For example

8 you have been describing categories. You have been

9 describing those circumstances where the rights have not

10 been granted, as it were, by the 1972 Act, but which are

11 nonetheless are enjoyed directly by UK citizens by

12 virtue of the membership of the EU in all of the other

13 member countries.

14 MR COPPEL: Yes.

15 THE MASTER OF THE ROLLS: Well, category three in a sense

16 covers all of those where not given effect in primary

17 legislation either here or in any of those countries.

18 MR COPPEL: As I understood the categorisation, those rights

19 that are not within the gift of Parliament, rights, were

20 in category two.

21 THE MASTER OF THE ROLLS: I see.

22 MR COPPEL: The position is that much depends upon the

23 content and outcome of the negotiations.

24 THE MASTER OF THE ROLLS: Yes.

25 MR COPPEL: Certainly they aren't within the gift of

1 Parliament.

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

9 MR COPPEL: That's right.

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

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

18 But my Lord, the critical point is that the argument
19 against us is all about impact on rights conferred by
20 domestic law. Now, the point of my submission, which
21 I will finish in a moment, which I have been making, is
22 that the category of domestic law rights which will
23 inevitably be affected by notification is very small,
24 and really is principally within that category of rights
25 to use the institutions of the club, which you have

1 heard about from Mr Eadie. That does impact, we say,
2 upon what implications should be drawn from the
3 statutory scheme.

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

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

1 law as it stands after the withdrawal.

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

9 THE LORD CHIEF JUSTICE: Yes.

10 MR COPPEL: Section 29 of the Scotland Act, legislative
11 competence:

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

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

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

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

21 Similar wording as one finds in the European
22 Communities Act. My submission, quite simply, is that
23 the submission on the other side is on the 1972 Act is
24 what it is; it doesn't get any better when one looks at
25 different manifestations of the 1972 Act in different

1 legislation. The same arguments apply, we say, it
2 assumes and doesn't require membership. The other side
3 say what they say, but it is the same point. This exact
4 point in the context of the devolution legislation is
5 going to be decided in the context of the
6 Northern Ireland Act, which has similar provisions by
7 name Mr Justice Maguire as a result of the hearing in
8 Belfast the week before last.

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

23 So my Lords, those are my submissions. Unless I can
24 assist further.

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

1 Yes, Lord Pannick.

2 heading Reply submissions by LORD PANNICK

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

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

23 The third point is that we say notification will
24 inevitably cause some statutory rights enacted by
25 Parliament to be destroyed. It will take the

1 preservation of other statutory rights out of the hands
2 of Parliament. There are two categories.

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

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

24 The second right that is inevitably destroyed is
25 Mrs Miller's right to seek to have her case referred,

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

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

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

24 Mr Eadie said, and I quote:

25 "These are rights which are incidents of membership

1 of the club."

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

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

1 may wish, may wish, to preserve the right to freedom of
2 services. But it cannot do so of its own volition.
3 That is the point. And there are many such rights.

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

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

22 LORD PANNICK: If there was an agreement.

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

1 within the procedures under the 2011 Act.

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

3 LORD JUSTICE SALES: I just wanted to check.

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

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

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

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

5 Mr Coppel had an argument earlier this morning --

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

7 LORD PANNICK: Yes, of course.

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

18 LORD PANNICK: Yes.

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

22 LORD PANNICK: I am not seeking to persuade your Lordships
23 other than the basic core fundamental proposition that
24 the consequence of notification is to destroy rights and
25 to take the preservation of other rights out of the

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

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

17 LORD PANNICK: Yes.

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

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

1 citizenship, Article 20 of the TFEU that your Lordships
2 saw this morning. It is both. But it suffices for my
3 purposes that there is a statutory right under the 2002
4 Act. That was the case I presented in opening. And it
5 remains my case. My case is the same, whether the right
6 arises under the 1972 Act or some other primary
7 legislation. There is no doubt there is such a right
8 expressly recognised by Parliament. The consequence of
9 notification is that that right is frustrated. It is
10 stripped away. It is nugatory.

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

13 LORD PANNICK: The second one, the right to seek a reference
14 from the European court is under the 1972 Act. It is
15 a right recognised under section 3(1). Section 3(1) of
16 the 1972 Act, which your Lordships saw in opening, deals
17 with judicial procedures. So it is a right under the
18 1972 Act. Does your Lordship want to go back to it?

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

1 LORD PANNICK: Absolutely.

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

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

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

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

25 THE LORD CHIEF JUSTICE: That competition regime operates in

1 parallel to our own competition regime.

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

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

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

1 Also, I don't need to go this far, but in relation
2 to other rights, the right to free movement within
3 Europe, freedom of services, many other examples, I do
4 say those are rights across Europe recognised by
5 section 2(1). They are rights consequent upon EU
6 citizenship. What Parliament has done by section 2(1)
7 is to recognise the whole panoply of EU law rights.
8 Parliament has entered into a legal system in which
9 British citizens enjoy all of the rights under EU law
10 including EU citizenship, including free movement,
11 freedom of services. These are valuable rights
12 recognised by Parliament.

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

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

1 There is no extension, because the EU states don't agree
2 to an extension, let's assume. The 2010 Act therefore
3 doesn't apply. On my friend's case, it is open to the
4 minister to secure the removal of all the rights
5 currently enjoyed under section 2(1) and 3(1) and the
6 European Parliamentary Elections Act without going back
7 to Parliament as a matter of constitutional principle.
8 That is and has to be his case. And the enormity of
9 that proposition as a matter of --

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

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

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

23 LORD PANNICK: It is the same point.

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

25 LORD PANNICK: That we are out. We leave the EU as a result

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

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

12 LORD PANNICK: Yes. Yes.

13 LORD JUSTICE SALES: Right.

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

19 LORD JUSTICE SALES: Right.

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

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

25 LORD PANNICK: Yes, by this country. One or the other. It

1 is possible that there will be no agreement, and the
2 point I am making is that the argument advanced by the
3 defendant has to be as a matter of logic that it would
4 be open to the defendant, because all of this is done on
5 the international plane, not to go back to Parliament at
6 all. I am not suggesting that that is what is going to
7 happen, but it is the logical legal proposition for
8 which they are contending.

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

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

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

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

24 Lord Oliver, as your Lordships recall, he is
25 speaking for the Appellate Committee and the first point

1 he makes begins at 499 H, and this is all about the
2 validity of treaties can't be challenged in municipal
3 law. Then at 500 B, he turns to the second of the
4 underlying principles. The second is that as a matter
5 of the constitutional law of the UK, the prerogative,
6 whilst it embraces the making of treaties, does not
7 extend to altering the law or conferring rights upon
8 individuals or depriving individuals of rights which
9 they enjoy in domestic law without the intervention of
10 Parliament.

11 Then this:

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

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

1 prerogative power, but the reason he has a broad
2 prerogative power is because what he does on the
3 international dimension cannot either create rights or
4 remove rights already recognised in domestic law.

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

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

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

1 rights, their preservation is taken out of the hands of
2 Parliament.

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

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

22 My Lords, in this context my friend Mr Eadie
23 referred to double taxation agreements, and my Lord, the
24 Master of the Rolls asked for clarification in relation
25 to this. In fact, in the double taxation context,

1 changes agreed at international level only take effect
2 with the approval of the House of Commons. There is
3 a statute that deals with this, and can I invite your
4 Lordships' attention, please, to volume C at tab number
5 28.

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

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

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

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

1 of Commons."

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

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

5 LORD PANNICK: Yes.

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

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

16 We also have, if your Lordships want to look at it,
17 the previous provision, which was very similar,
18 section 788 of the Income and Corporation Taxes Act
19 1988. That was at E4. But it is in very similar terms.

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

1 whether your Lordships will, but if your Lordships do
2 want the detail, it is given on page 29 of our skeleton
3 argument at footnote number 6.

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

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

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

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

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

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

1 if it destroys statutory rights unless, unless,
2 Parliament has stated in the statute itself that the
3 prerogative power is removed. That is his case.

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

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

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

23 The argument is also supported, I say, by the Privy
24 Council case of Walker v Baird which your Lordships will
25 recall was referred to by name Lord Justice Roskill

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

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

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

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

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

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

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

19 THE LORD CHIEF JUSTICE: Yes.

20 LORD PANNICK: What Lord Justice Lawton must have had in
21 mind, in my submission, because there is no other
22 finding in the case, is the concession by the
23 Attorney-General which is accepted by the board. It is
24 497:

25 "The learned Attorney-General [first new paragraph,

1 497] who argued the case before their Lordships on
2 behalf of the appellant conceded that he could not
3 maintain the proposition that the Crown could sanction
4 an invasion by its officers of the rights of private
5 individuals whenever it was necessary in order to compel
6 obedience to the provisions of a treaty."

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

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

1 be permitted unless by the joint consent of the
2 commanders of the British and French naval stations."

3 Then halfway down page 496:

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

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

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

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

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

25 LORD PANNICK: Yes.

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

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

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

20 We say precisely so.

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

23 LORD PANNICK: No.

24 LORD JUSTICE SALES: Because the court looked at the
25 submission that was made by the Attorney-General which

1 was that there was a special power, if there was a peace
2 treaty, and they say even if there is, you are not
3 within it.

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

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

25 Can I take your Lordships back to name Simms,

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

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

1 power of the legislature is expressly limited by
2 a constitutional document."

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

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

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

22 The context here is that the Lord Chancellor
23 introduced delegated legislation which would have
24 prevented the applicant from being able to bring his
25 case for defamation in court, because the regulations

1 made him no longer eligible for legal aid. That is the
2 context. The relevant statement by Mr Justice Laws as
3 he then was for the court is at page 585 at letter G.
4 At letter G, 585, his Lordship says: .

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

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

23 "I vouchsafed that it could also be done by
24 necessary implication. However, for my part [says
25 Mr Justice Laws] I find great difficulty in conceiving

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

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

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

21 LORD JUSTICE SALES: Thank you.

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

23 LORD PANNICK: The other case is name ex parte Pearson,
24 which is B2, tab 21. It is the next case. This is the
25 case where the Home Secretary of the day increased the

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

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

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

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

25 So that is our answer to my Lord, the Master of the

1 Rolls' question.

2 LORD JUSTICE SALES: I think it is B to C where

3 Lord Browne-Wilkinson expresses doubt about how strictly

4 Mr Justice Laws expressed it in Witham --

5 LORD PANNICK: Yes.

6 LORD JUSTICE SALES: -- in terms of it can't be excluded by

7 necessary implication.

8 LORD PANNICK: Yes, I think your Lordship is right.

9 LORD JUSTICE SALES: I think at D when Lord Browne-Wilkinson

10 says "makes it clear", he is meaning either expressly or

11 by necessary implication; is that right?

12 LORD PANNICK: I would accept that, but I would emphasise,

13 however, the statement of principle that clarity in the

14 legislation is required.

15 LORD JUSTICE SALES: Yes.

16 LORD PANNICK: Therefore we respectfully dispute my learned

17 friend Mr Eadie's contention that the defendant can

18 lawfully use prerogative powers, even though this will

19 defeat statutory constitutional rights created by

20 Parliament unless, as Mr Eadie puts it, Parliament

21 itself has made clear that there is to be a limit on the

22 use of the prerogative power. That is how my friend

23 Mr Eadie put it. And I do submit, with great respect,

24 that that formulation by Mr Eadie reverses the true

25 principle. The true principle is that where, as here,

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

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

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

24 "It is quite obvious [says his Lordship] that it
25 would be useless and meaningless for the legislature to

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

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

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

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

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

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

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

16 LORD PANNICK: No, indeed.

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

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

1 proposed to be taken to defeat statutory rights. I say
2 that De Keyser simply does not assist on that issue.

3 THE LORD CHIEF JUSTICE: But the reason I asked you that
4 question is this: when one comes to look at the question
5 of the legislation, the Communities Act, one is looking
6 at it through a different prism. You are looking at it,
7 I think you say, through the prism of is there something
8 in the Act that gives the power, rather than --

9 LORD PANNICK: Clearly.

10 THE LORD CHIEF JUSTICE: Rather than is there anything in
11 the act that takes away the power.

12 LORD PANNICK: Yes. I say the starting point is that the
13 minister cannot use his executive powers, prerogative or
14 otherwise, to defeat rights created by Parliament unless
15 Parliament itself has clearly conferred on him such
16 a power. That is my submission. I next need to deal
17 with Rees-Mogg.

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

19 LORD PANNICK: I am going as quickly as I can, my Lord.
20 I may take another 45 minutes or an hour.

21 THE LORD CHIEF JUSTICE: What are the arrangements of
22 replies by others?

23 MR CHAMBERS: My Lord, as far as we are concerned, if
24 I could have 15 minutes that would be helpful.

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

1 not an intervener so you can have 15.

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

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

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

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

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

25 The third point is that my learned friend Mr Coppel

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

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

21 (1.07 pm)

22 (The luncheon adjournment)

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