

Monday, 5 December 2016

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(11.00 am)

Opening statement by THE PRESIDENT

THE PRESIDENT: Before we start, I would like to raise a few matters. We order that no one shall publish or reveal the names or addresses of various parties, prospective claimants and interested parties in these proceedings, or any information likely to lead to the identification of those people or their families, in connection with these proceedings, or the home address of the first respondent or any of the interested parties. Copies of this order with further details will be available to anybody who wishes to see it.

We have made this order largely because various individuals have received threats of serious violence and unpleasant abuse in emails and other electronic communications.

Threatening and abusing people because they are exercising their fundamental right to go to court undermines the rule of law. Anyone who communicates such threats or abuse should be aware that there are legal powers designed to ensure that access to the courts is available to everybody.

Secondly, it is right to record that at the direction of the court, the registrar has asked all the

1 parties involved in these proceedings whether they wish
2 to ask any of the justices to stand down. All parties
3 to the appeal have stated that they have no objection to
4 any of us sitting on this appeal.

5 Third, these proceedings involve a large number of
6 parties and a great deal of legal submissions and
7 supporting material, and the proceedings have come to
8 this court very quickly. That this has occurred in
9 an orderly fashion is entirely thanks to a lot of hard
10 work done by and cooperation between the parties, their
11 lawyers and the court staff. The justices would like to
12 thank all those involved.

13 There are an unprecedented number of lawyers and
14 party representatives. We are grateful to them for
15 agreeing seating arrangements which involve many of them
16 sitting in less convenient places than they may have
17 expected. We have been keen to ensure that members of
18 the public can be here and given the limited space, this
19 has meant that not all members of the legal teams can be
20 accommodated in the courtroom.

21 All parties have filed written submissions which we
22 have carefully read. Because of the limited time
23 available for the hearing, we have had to ask some
24 advocates to confine their submissions to their written
25 argument, and others to spend less time developing their

1 oral submissions than they would have wished. We are
2 grateful for their cooperation and understanding.

3 I remind those advocates who will be addressing us
4 that their oral submissions must not repeat points
5 already raised by other advocates in earlier
6 submissions.

7 Next, many people are watching these proceedings
8 because they are being streamed on our website and
9 broadcast on television. This is a very important
10 aspect of open justice, and we are pleased that so many
11 people are able to read the written arguments online and
12 listen to the oral arguments as they are being
13 developed.

14 Finally, I would like to take this opportunity to
15 remind everyone who has taken an interest in these
16 proceedings that the Supreme Court exists to decide
17 points of law which fall within its jurisdiction. The
18 justices of the court are of course aware of the public
19 interest in this case, and we are aware of the strong
20 feelings associated with the many other wider political
21 questions surrounding the United Kingdom's departure
22 from the European Union.

23 However, as will be apparent from the arguments
24 before us, those wider political questions are not the
25 subject of this appeal. This appeal is concerned with

1 legal issues, and as judges, our duty is to consider
2 those issues impartially and to decide the case
3 according to the law.

4 That is what we will do.

5 Mr Attorney.

6 Submissions by THE ATTORNEY GENERAL

7 THE ATTORNEY GENERAL: My Lady and my Lords, good morning.

8 I appear on behalf of the appellant in this matter, and
9 I know that the court has seen a list of other
10 representation in this case. In the interests of time,
11 I will not, unless the court wishes me to, take you
12 through that.

13 THE PRESIDENT: Very sensible.

14 THE ATTORNEY GENERAL: I am grateful.

15 I note the court also has a timetable as to the
16 submissions that will be made, and I know that all
17 counsel will do their best to keep to that.

18 There are, if I may, two points I wish to make at
19 the outset on which I believe all parties are agreed,
20 and they follow from what my Lord President has just
21 said. The first is that this is a case of great
22 constitutional significance in which there is
23 understandable and legitimate interest, both inside and
24 outside this courtroom and, second, in light of what
25 followed the divisional court's judgment, it should be

1 said with clarity that this is a case which the
2 claimants brought perfectly properly and which it is now
3 perfectly proper for this court to decide.

4 That is so because there is a clear question of law
5 before the court, namely, whether the Government has the
6 legal power to give notice under Article 50 of the
7 Treaty on European Union to begin negotiations for the
8 UK's withdrawal from the EU, or whether further specific
9 legislative authority is required to do so.

10 That, we submit, is a clear question. But it is not
11 a narrow one. It raises issues going to the very heart
12 of our constitutional settlement. The question arises,
13 of course, because the United Kingdom is about to leave
14 the European Union, as a result of a course of events
15 which I submit is worth restating.

16 At the last general election, the Government was
17 elected with a manifesto commitment to hold an in/out
18 referendum on the UK's membership of the EU. Parliament
19 provided for that referendum through the European Union
20 Referendum Act of 2015. The referendum was conducted,
21 we say, in the universal expectation, including in
22 Parliament, that the Government would implement its
23 result. As the foreign secretary told the House of
24 Commons at second reading of the bill, and I quote:

25 "This is a simple but vital piece of legislation.

1 It has one clear purpose: to deliver on our promise to
2 give the British people the final say on our EU
3 membership in an in/out referendum by the end of 2017."

4 My Lords, I don't propose to ask you to turn to
5 that, but if you wish to find it, it is at volume 18 of
6 the bundles, tab 203.

7 A majority of those who voted in the referendum
8 wanted the UK to leave the European Union, and
9 Article 50 provides the specific legal mechanism to
10 begin doing so.

11 Now, my Lords, the divisional court treated all of
12 that as legally irrelevant and concluded that the
13 process could not lawfully be begun by the Government
14 using prerogative powers but only by further legislation
15 in Parliament. We say, respectfully, that the
16 divisional court was wrong about that. We say that use
17 of the prerogative in these circumstances would not only
18 be lawful but fully supported by our constitutional
19 settlement, in line with parliamentary sovereignty and
20 in accordance with legitimate public expectations.

21 So in opening this appeal, I make three submissions
22 by way of introduction to our case from this fundamental
23 constitutional perspective. My learned friend Mr Eadie
24 will then develop our case and the Advocate General for
25 Scotland will deal with the devolution and other issues

1 raised in relation to the Scottish, Northern Irish and
2 Welsh jurisdictions.

3 My three submissions are these. First, that the
4 foreign affairs prerogative is not an ancient relic but
5 a contemporary necessity. Including the powers to make
6 and withdraw from treaties, it is a fundamental pillar
7 of our constitution as a sovereign state and it is
8 essential to the effective conduct of public business.

9 Second, that the prerogative operates as part of
10 a dualist system, including in the EU context.

11 Third, that the prerogative operates wholly in
12 accordance with parliamentary sovereignty. Parliament
13 has a clear understanding of the constitutional function
14 and usefulness of these powers, and where it chooses to
15 limit them, it does so carefully and specifically.

16 So, my first submission is on the importance of the
17 foreign affairs prerogative. The powers to make and
18 unmake treaties, conduct diplomacy and take part in
19 multilateral decision-making do not, we say, reside with
20 the executive as unfinished business or as a result of
21 historical oversight, but because there are good
22 constitutional and practical reasons why they should.
23 The need for the Government to maintain control over
24 strategy, policy and operational matters in conducting
25 our bilateral or multilateral international

1 relationships is, we say, clear and compelling.

2 That has long been true. I want to read from
3 Blackstone's Commentaries on this matter. Again,
4 I don't invite your Lordships to turn it up for these
5 purposes, but it can be found at volume 27 of the bundle
6 at tab 329.

7 At that point, describing the foreign affairs
8 prerogative as, and I quote "wisely placed in a single
9 hand by the British constitution for the sake of
10 unanimity, strength and dispatch". It goes on to say,
11 and again I quote:

12 "With regard to foreign concerns, the King is the
13 delegate or representative of his people. It is
14 impossible that individuals of a state in their
15 collective capacity can transact the affairs of that
16 state with another community equally numerous as
17 themselves. Unanimity must be wanting to their measures
18 and strength to the execution of their counsels."

19 My Lords, we submit that remains the case. Ours is
20 not the only constitutional system where this is
21 accepted. Other common law jurisdictions recognise
22 similar power for their own governance. In the
23 United States, in Canada and in Australia, the executive
24 branch holds the power to make and unmake treaties, and
25 these are powers that are used often.

1 In the last 12 months the Government has signed 31
2 new treaties on a range of subjects, including
3 transport, mutual legal assistance, defence, prisoner
4 transfer and the environment.

5 They have been used too by the Government in playing
6 our full part as a member state of the European Union,
7 including in the process of shaping the development of
8 the EU legal order, and all the ebb and flow of EU law
9 rights and obligations that that entails.

10 The Government has been doing this since 1972 by
11 participating in Council of Ministers' decision-making
12 as well as in the day-to-day transaction of Commission
13 negotiations in Brussels, and diplomatically with other
14 member states. All this, we say, is done using
15 prerogative powers and with Parliament's acceptance.

16 My second submission is that all this is done as
17 part of the functioning of the UK's dualist legal
18 system. Mr Eadie will develop this submission in more
19 detail, but I want to give the court a flavour of it at
20 this stage.

21 It is common ground that treaties are not
22 self-executing. Prerogative actions of the Government
23 on the international law plane on the one hand, and on
24 the other, Parliament giving effect as necessary to
25 rights and obligations on the domestic plane are legally

1 and constitutionally separate. The EU legal order, we
2 say, is not an exception to that dualist system; it is
3 a clear example of it.

4 To implement the UK's original treaty obligations,
5 the 1972 European Communities Act provided for a conduit
6 for the inflow of the EU legal order; that was its
7 purpose. But the existence of a mechanism such as the
8 1972 Act for implementing the consequences of EU
9 membership in domestic law has no bearing, we say, in
10 a dualist system on the existence or use of the foreign
11 affairs prerogative to remove the EU legal order at
12 international level.

13 That is at least in part because the 1972 Act does
14 not and cannot create EU rights and obligations. It
15 says so in terms, and you will be taken to the relevant
16 language. EU rights and obligations are negotiated and
17 agreed by Government and are created and arise on the
18 international law plane.

19 Doing so we say involves and has always involved the
20 use of prerogative powers. The 1972 Act provides for
21 the rights and obligations from time to time existing on
22 the international plane to be part of domestic law.
23 Those rights and obligations in domestic law are
24 therefore inherently liable to change, to be expanded,
25 shrunk or withdrawn altogether by action at the EU

1 level.

2 An action which has that effect, an effect which can
3 include the removal of previously existing
4 treaty-dependent rights, is action taken in the exercise
5 of prerogative powers. That, we say, is the logical
6 consequence of the conduit mechanism which Parliament
7 brought into being with the 1972 Act.

8 Which brings me to my third submission. Parliament
9 is sovereign. Parliament can, if it chooses, legislate
10 to limit the prerogative and it has done so, but where
11 it has done so, it has done it sparingly and explicitly,
12 conscious, as it has always been, of the need for
13 prerogative powers and the effective conduct of
14 Government business.

15 So Parliament has considered carefully the proper
16 extent of its involvement in the making of treaties.
17 The provisions in part 2 of the Constitutional Reform
18 and Governance Act 2010 were the culmination of
19 a lengthy process of dialogue between Parliament and the
20 executive and of wider public consultation.

21 That Act introduced a series of controls in relation
22 to the ratification of treaties, but it did not
23 introduce a requirement for primary legislative
24 authority, nor did it seek to control the prerogative
25 power to make or significantly to withdraw from

1 treaties.

2 Parliament has also considered, with particular care
3 and in detail, what the balance of legislation and
4 prerogative power should be in the specific context of
5 the European Union. Parliament has done so in a series
6 of acts, beginning with the 1972 European Communities
7 Act and ending with the 2015 European Union Referendum
8 Act. We will take you to the details of that sequence.

9 But I would make two points at this stage: first,
10 there is nothing in the wording of the European
11 Communities Act, or indeed in the later legislation to
12 which Mr Eadie will take you, to inhibit withdrawal from
13 the European Union treaties or subject it to
14 a requirement of prior legislative authority. That
15 therefore remains to be done by the Government in
16 exercise of well-established prerogative powers. It is
17 not as though Parliament has been short of opportunities
18 to impose such restrictions if it had wanted to.

19 There has been legislation in 1978, in 2002, in
20 2008, in 2011 and in 2015, where it could have done so
21 and did not.

22 Secondly, nowhere in the three acts that followed
23 the Lisbon treaty in 2008, 2011 and 2015 is there any
24 basis for inferring a legislative restriction on the
25 prerogative in relation to Article 50, to begin

1 negotiation of withdrawal.

2 On the contrary, we say, close attention to the
3 respective roles of Government and legislature in this
4 context has been given by Parliament in each of these
5 acts, and the Government's role on Article 50 has been
6 consciously conserved.

7 The last of these acts is the 2015 European Union
8 Referendum Act. That Act was passed in the clear
9 expectation inside and outside Parliament that the final
10 decision, made by the people in the referendum it
11 provided for, would be implemented by the Government.
12 At the heart of the referendum campaign between
13 remainers and leavers was the proposition that the
14 referendum would provide the definitive answer to the
15 question of our future inside or outside the European
16 Union, and the assumption that this was so was surely
17 clear from the vigour with which the campaign was fought
18 by both sides.

19 Parliament passed the 2015 Act and provided for the
20 referendum, we say, in full knowledge that the
21 Government had publicly and repeatedly committed to
22 implement the outcome and fully expecting it to do so.
23 We say, too, that because implementation of a decision
24 by the people to leave the EU would require withdrawal
25 from treaty obligations, Parliament expected also that

1 this would be done in the normal way, by use of
2 prerogative powers. We say Parliament definitively and
3 deliberately assigned to the public vote and to
4 prerogative action, the very question it is said it now
5 needs to ask itself again in precisely the same terms.

6 Parliament passed the 2015 Act in the clear
7 knowledge, and expectation, that the process by which
8 the exit from the EU would take place was set out in
9 Article 50 of the Treaty on European Union.

10 It knew what would happen when that process was
11 begun, and it took no step, made no provision, imposed
12 no constraint, to prevent the Government giving notice
13 to do so in the usual exercise of prerogative power.

14 So, my Lords, the triggering of Article 50, we say,
15 will not be an exercise of prerogative power on a whim,
16 or out of a clear blue sky. It is the logical
17 conclusion of a process in which Parliament has been
18 fully and consciously involved, a process in which
19 Parliament resolved to put a clear and decisive question
20 about our nation's future to the British people, and in
21 which Parliament expected the Government to act on the
22 answer they gave.

23 None of this means, of course, that Parliament will
24 not be closely involved in the process of the UK's
25 withdrawal from the EU over the coming months and years.

1 Through parliamentary debate and scrutiny, through the
2 procedures set out in the Constitutional Reform and
3 Governance Act for scrutinising the withdrawal agreement
4 which Article 50(2) envisages, and through legislation
5 in the form of the Great Repeal Bill to deal to the
6 extent necessary with the domestic law consequences for
7 former treaty-dependent rights and obligations,
8 Parliament will continue to exercise its sovereignty as
9 it does these things, both when it legislates and when
10 it chooses not to, because Parliament can demonstrate
11 its sovereignty, we say, as much when it decides not to
12 act as when it acts. Parliament is sovereign to impose
13 whatever legal controls it wishes on the prerogative,
14 and it is sovereign to choose not to, or to rely on
15 political rather than legal controls on the Government.
16 That must be what parliamentary sovereignty means.

17 The position of the respondents and others in this
18 case has always been that they have no interest in
19 derailing Brexit but only in defending Parliament's role
20 in the process.

21 But if this is all about standing up for Parliament,
22 I say Parliament can stand up for itself. When it comes
23 to leaving the European Union, Parliament has had full
24 capacity and multiple opportunities to restrict the
25 executive's ordinary ability to begin the Article 50

1 process and it has not chosen to do so.

2 However much they may wish it had, those who support
3 parliamentary sovereignty should, we submit, respect
4 this exercise of parliamentary sovereignty too.

5 So, my final submission, my Lords, is that in the
6 context of this case, the imposition of a legislative
7 precondition by the courts which Parliament did not
8 choose to impose itself, cannot be supportive of
9 parliamentary sovereignty, but must be positively
10 inconsistent with it. In the delicate balance of our
11 constitutional settlement, this court should, we submit,
12 resist the invitation to make such an imposition.

13 My Lords, as I indicated, there are some further
14 submissions that the appellant wishes to make. Mr Eadie
15 and Lord Keen will make them. Unless there is anything
16 further I can assist with on what I have said, those are
17 the submissions I wish to make at this stage.

18 THE PRESIDENT: Thank you very much, Mr Attorney, thank you.

19 Mr Eadie.

20 Submissions by MR EADIE

21 MR EADIE: My Lords, my Lady, can I indicate where my
22 submissions are going to go and give you an overview, if
23 I may.

24 THE PRESIDENT: Thank you.

25 MR EADIE: I am going to start with three brief submissions

1 on the nature of the prerogative.

2 Then I am going to deal with some basic principles
3 relating to dualism and the impact of the prerogative on
4 to domestic legal rights and obligations.

5 Then I am going to take you briefly, because I know
6 you will be well familiar with them, through some of the
7 cases dealing with the De Keyser principles.

8 Then I am going to have a slightly longer section,
9 trying to apply both of those basic sets of principle to
10 the concepts that you have before you today, before
11 turning finally to two topics, one of which the Attorney
12 has already flagged, namely parliamentary sovereignty,
13 and secondly asking the direct question which the
14 divisional court treated as being in effect dispositive,
15 namely is there a background constitutional principle of
16 the kind that they described.

17 That is the structure, and, even in describing it,
18 it appears that my submissions to you are going to be
19 longer than they ordinarily would be, but the complex
20 issues in this case perhaps lead to that. But I will
21 bear clearly in mind what I have been told, which is
22 that in order to maintain the broader interest, if there
23 is any in the issues in this appeal, these submissions
24 have to be marginally more entertaining than the one
25 that Serenade the Stars is about to make in the 11.50

1 Maiden Stakes at Lingfield Park.

2 I am not optimistic on that front, but with that
3 lead in, could I turn first to the prerogative. Three
4 basic points if I may. They are general in nature but
5 they are, I would respectfully submit, important to
6 emphasise at the outset of this appeal.

7 Firstly, the point that the Attorney has already
8 flagged, that the prerogative powers are, we submit,
9 an essential and fundamental component or pillar of the
10 modern British constitution. One only has to list the
11 paradigm examples that the courts have given of
12 prerogative powers to appreciate that constitutional
13 fact. War and peace, the conduct of international
14 relations, including the powers to make and unmake
15 treaties.

16 Those are powers that are exercised today and that
17 have, for years, been exercised by the Government. It
18 probably matters not whether that is a good thing or
19 a bad thing. It is, we submit, a basic constitutional
20 fact. If one had to justify that, it is not difficult,
21 particularly in the sphere of foreign affairs, to see
22 why, under our constitution, such powers continue to be
23 exercised by the Government, subject, of course, to the
24 limited and specific control that the legislature has
25 seen fit to impose upon that exercise.

1 The conduct of foreign affairs involves myriad
2 decisions, a daily exercise of power, a series of
3 judgment calls, the negotiations between sovereign
4 states on the international plane leading to the
5 conclusion, and indeed to the withdrawal from agreements
6 that are so made. It was, we respectfully submit,
7 properly described by Viscount Radcliffe in the
8 Burmah Oil case, core authorities bundle 3, tab 34, MS
9 1356 at page 118 as "a power to act according to
10 discretion for the public good".

11 There has been a recent article exploring the
12 question in justificatory terms, good thing or bad
13 thing, the prerogative, by the professor of legal
14 philosophy at Balliol, Oxford, Professor Endicott, and
15 you have that lecture which we recommend as at least
16 interesting reading behind tab 11 of the little blue
17 file, for which apologies, but the little blue or black
18 file on your desk with 11 KBW written on the back.

19 THE PRESIDENT: Thank you.

20 MR EADIE: That is it. Tab 11 is Professor Endicott if you
21 want. I am not going to take you through it now but
22 there it is.

23 THE PRESIDENT: Thank you.

24 MR EADIE: He relies upon, amongst other things, the very
25 section from Blackstone's Commentaries that the Attorney

1 has just taken you to.

2 THE PRESIDENT: Yes.

3 MR EADIE: I say an essential and fundamental component or
4 pillar under our constitution, but we are, as the
5 Attorney has already flagged, not alone in having that
6 system, in having the system that we do. Other common
7 law jurisdictions have exactly or precisely similar
8 systems relating to treaty-making, ratification, and
9 withdrawal.

10 Specifically and for example treaty withdrawal, to
11 focus on that for a moment, is a decision taken by the
12 executive alone in Australia, in Canada, and we cite the
13 Turp case, I am not going to take you to it, authorities
14 26, tab 308, 8950 in the electronic -- and New Zealand.
15 And the same position exists in --

16 LORD CARNWATH: Can I ask, the Turp case does interest me,
17 are you going to come back to that at some point? That
18 is an unusual example of the prerogative being used in
19 fact to go against a specific act of Parliament on one
20 view of the matter. I don't know whether you are going
21 to come back to it.

22 MR EADIE: My Lord, I can come back to it.

23 LORD CARNWATH: Perhaps later on.

24 MR EADIE: Very well. I was saying that the same position
25 exists in relation to the United States where treaty

1 ratification is subject to two-thirds majority Senate
2 approval; that is ratification; but the power to
3 withdraw vests exclusively in the executive. You have
4 got in the bundle, and it is perhaps worth turning this
5 up very briefly -- I will try and keep the authorities I
6 take you to to an absolute minimum, given the time, but
7 this is perhaps of some interest. Authorities bundle 27
8 tab 27, tab 332, and it is 9367 on the electronic.

9 THE PRESIDENT: Thank you.

10 MR EADIE: The passage that it may be worth just inviting
11 you to side line is the passage that you see on
12 page 9367 in the left-hand column, halfway down
13 beginning:

14 "Termination of a treaty ..."

15 THE PRESIDENT: Yes.

16 MR EADIE: Again, with my Lords' permission, could I invite
17 you to read that, just that paragraph.

18 THE PRESIDENT: Ending "section 332"?

19 MR EADIE: Ending "section 332".

20 THE PRESIDENT: Thank you. We will read that.

21 (Pause)

22 Thank you.

23 MR EADIE: This first statement of basic principle, we
24 submit is enhanced and supported and not diminished by
25 the fact that the powers themselves are ancient.

1 LADY HALE: Could you just tell us what it is that you have
2 directed us to? You gave us a tab reference and you
3 didn't actually tell us what it was.

4 MR EADIE: Sorry, that is the third restatement.

5 LADY HALE: The third restatement.

6 THE PRESIDENT: 9364 is the page.

7 MR EADIE: I am so sorry, I should have introduced it.

8 THE PRESIDENT: Yes.

9 LADY HALE: Thank you.

10 MR EADIE: It is indeed the case that the prerogative powers
11 in question are ancient. What that implies, we submit,
12 is that a long-standing, well-recognised set of powers
13 can properly be recognised as both firmly established in
14 our constitutional arrangements, and as having real and
15 continuing value in contributing to effective
16 government.

17 Describing a particular prerogative power as a relic
18 of a past age, a phrase which I know my Lords and my
19 Lady will be familiar with, needs to be approached with
20 some little caution. That was the statement or one of
21 the statements by Lord Reid in *Burmah Oil*, and which the
22 divisional court chose as their descriptive quotation,
23 if I can put it that way, in paragraph 24 of their
24 judgment.

25 The statement, if one goes back to Lord Reid in

1 Burmah Oil, was in fact made in order to justify the
2 correct analytical approach in that case to the nature
3 of the war prerogative, namely, as Lord Reid described
4 it, a historical one designed to see, in effect, if the
5 Government had ever taken property in time of conflict
6 without compensation. So it was a statement for
7 a purpose, implying no suspicion of the underlying
8 doctrine by reference to its age.

9 If describing it as a relic of a past age implies
10 a long history, we agree. If it implies as a general
11 proposition that more today is done by statute and there
12 is less reliance than in Stuart times on the
13 Government's prerogative, again, we agree, but to the
14 extent that the description has connotations of
15 anachronism because the power has existed for many
16 centuries, we profoundly disagree.

17 The correct starting point, we submit, is not
18 suspicion of prerogative powers accompanied by judicial
19 concern at their exercise; it is quite the opposite. It
20 is the recognition that the prerogative powers that
21 remain in the hands of Government are fundamental to our
22 constitution, and effective government -- are essential
23 to effective government.

24 That properly leads to the exacting tests that
25 I will come to, that the courts have developed before

1 a conclusion can be reached, either that the powers have
2 been taken away or limited by Parliament, and I will
3 come back to De Keyser obviously and the rigour of that
4 test; my submission is going to be that the rigour that
5 that imposes is sound. Or that the power should be
6 subjected to a broad general limitation in principle
7 imposed by the courts. That is the first submission,
8 therefore, fundamental.

9 The second submission is that prerogative powers are
10 by definition those powers that can be exercised by the
11 Government without statutory authority. They do not
12 depend for their existence or their source on
13 legislation. Otherwise, they would be, and become,
14 statutory powers. So statutory intervention into
15 a sphere in which prerogative powers are exercised
16 involves a legislative decision to impose limits or to
17 abrogate or to remove existing, properly sourced
18 elsewhere, prerogative powers.

19 If a limitation on prerogative power is asserted,
20 such as the interposition of some form of requirement of
21 parliamentary involvement in decision-making in the
22 sphere of a prerogative, decisions will necessarily
23 therefore be necessary as to the precise nature and
24 effect of any such limitation.

25 CRAG, the Constitutional Reform and Governance Act

1 is an example of this. Preceding CRAG, and I will come
2 back to it as you will recall, there was much debate
3 about the precise extent and nature of the parliamentary
4 controls that should be imposed on the exercise of the
5 prerogative, and detailed provisions, a detailed
6 position was arrived at.

7 So these two are factors we respectfully suggest
8 that indicate that clarity of parliamentary intention is
9 necessarily to be looked for if the assertion is made
10 that the prerogative has been controlled a fortiori
11 abrogated.

12 The third submission in relation to the prerogative
13 is this. Parliament is of course sovereign. It can
14 choose to limit, it can choose to control the
15 prerogative power in any way or ways that it sees fit,
16 and, of course, ultimately, it can choose to remove such
17 power in any particular context altogether. So it is
18 accurate and more accurate, certainly, in the context of
19 foreign affairs, than using "relic" language, to
20 describe the prerogative, again Lord Reid in *Burmah Oil*
21 as "part of sovereignty which Parliament has chosen to
22 leave in the Government's hands".

23 That is 1338 in the MS numbering, core authorities
24 3, tab 34.

25 THE PRESIDENT: Thank you.

1 MR EADIE: In the context of foreign affairs and
2 treaty-making, there has been specific recognition of
3 that fact, ie that that sort of prerogative power is
4 left in the hands of the Government by Parliament, in
5 the Bill of Rights itself, as noted by the court in the
6 McWhirter case. Again, I don't invite you to take it up
7 but that was a case in which there was an unsuccessful
8 challenge made to the Government's signature of the
9 Treaty of Rome and the relevant reference for your note
10 is core authorities 3, tab 46, MS 1849, at paragraphs 6
11 and 8.

12 Again, what this indicates and emphasises is that
13 the continued existence and exercise of prerogative
14 powers, such as in the conduct of international
15 relations, is constitutionally sound and not suspect and
16 is in nature subject to parliamentary control when
17 Parliament chooses to do so.

18 But the premise or the basic constitutional default
19 position is the continued existence of these fundamental
20 powers, and that renders it just as important in the
21 context of an argument about limitations on prerogative
22 power to examine and take into account what Parliament
23 has not done. Legislative intervention is necessary, we
24 submit, to limit or remove. It is not necessary to
25 leave the prerogative power in place, to be exercised in

1 the usual way without further parliamentary
2 authorisation.

3 So those are the submissions we make, the basic
4 submissions we make about the nature of the royal
5 prerogative.

6 Can I turn to the second of the topics, which was
7 basic principles relating to dualism and the impact of
8 the prerogative on domestic legal rights and
9 obligations.

10 LORD CARNWATH: Can I just interrupt again. Will you be
11 coming back to the extent to which the prerogative is
12 reviewable by the courts? Because I think this is
13 an area which is touched on in some of the submissions,
14 whereas I mean some years ago, it would have been
15 assumed it was not justiciable at all, whereas more
16 recently, in cases like Abbasi and Sandiford, we have
17 accepted the power to review and it is something we
18 might like to look at a little later.

19 MR EADIE: My Lord, we have. I was not proposing to devote
20 a lot of time to that. You will have seen below there
21 was a flirtation, if I can put it that way, with the
22 non-justiciability argument, and that is no longer being
23 mounted before this court. We accept that the
24 prerogative power, including the prerogative power to
25 exercise foreign relations, may raise non-justiciability

1 issues, but in a context such as this which raises the
2 fundamental and basic legal question, namely whether the
3 prerogative exists or has been abrogated, it is
4 appropriate for the court to rule on that issue --

5 LORD CARNWATH: Why it may come in, and we can see how this
6 goes, when one is asking what difference does the
7 referendum make, then arguably, if the Government said
8 we are going to get out of Europe without any
9 parliamentary mandate at all, or indeed in the face of
10 an adverse referendum, that might well be said to be
11 an abuse of power which is reviewable on that basis by
12 the courts; whereas alternatively, when it is doing, as
13 they say, something which has actually been anticipated
14 by Parliament, then it is not an abuse of power. It
15 seems to me that distinction might be worth
16 investigating.

17 MR EADIE: Yes, and that is a point I am going to come back
18 to when I consider the 2015 Act, but the basic
19 proposition that we accept is that exercise of
20 prerogative power, subject of course to the
21 non-justiciability limitations that continue to exist,
22 the subject matter is open but only to some extent. The
23 courts have been very, very wary obviously, a series of
24 cases, Lord Carlisle springs immediately to mind, they
25 have been wary about second-guessing policy judgments

1 made by the Government; but matters of the kind that
2 my Lord raises particularly in the context of the
3 2015 Act, we respectfully submit that if it has a chime,
4 it is probably there, so that if the Government acted in
5 a way that could properly be described as abusive, at
6 least arguably, that would be a matter competent at
7 least for the courts to consider.

8 Basic principles in relation to dualism. Obviously
9 I am going to have to come back and develop some of
10 these themes as I go when we go into the statutory
11 scheme, which is going to occupy a little bit of time
12 later, but I wanted to set the scene first by taking you
13 to some basic constitutional principles on dualism, and
14 then some basic principles on De Keyser, and see how
15 those two marry up, and then go to the statutory scheme
16 and show you how that flows. If that is a convenient
17 course, that seems the logical way of doing it.

18 So five, short basic points around dualism and the
19 impact of the prerogative on domestic legal rights and
20 obligations, if I may.

21 Firstly, we submit that prerogative powers may be
22 exercised to create international legal effects on the
23 international plane.

24 When the Government makes a treaty, it binds the
25 United Kingdom, it acts on behalf of the United Kingdom

1 and it binds the United Kingdom to that agreement on
2 that plane. It does so by exercising prerogative
3 powers, as the famous, the now famous quote from Lord
4 Oliver which I will come back to in the JH Rayner case,
5 core authorities 3, tab 43, 1779 in the electronic
6 numbering is the key page, or 1778 to 1779, now engraved
7 on all of our minds, we have set out the relevant quote
8 in our case at paragraph 41, but as that quote
9 acknowledges --

10 LADY HALE: Forgive me, Mr Eadie, I am back at references.

11 Is it 343 or is it 543?

12 MR EADIE: It is core authorities 3. Do you have a set of
13 files called CA?

14 LADY HALE: On the electronic bundle.

15 MR EADIE: On the electronic bundle, it is 1697.

16 LADY HALE: It is 543.

17 THE PRESIDENT: I think it is bundle 3, tab 5.

18 LADY HALE: It is volume 5.

19 LORD MANCE: There is a distinction between core authorities
20 and all the authorities.

21 LADY HALE: I am sorry, it is just confusing.

22 MR EADIE: It is. It is in many places, I am afraid.

23 I think in the core volumes, at least they have
24 maintained consistently the MS numbering. If you take
25 up the hard copy for the moment.

1 LORD CLARKE: The tab numbers are the same.

2 MR EADIE: The tab numbers are the same, which is why it
3 jumps. If you go to core volume 3 in the hard copy.
4 I should have started with the bewildering nature of the
5 bundles.

6 LORD CARNWATH: I don't think we have all caught up with the
7 core authorities.

8 MR EADIE: They are quite useful because they are a proper
9 dragging out from a set of other bundles.

10 LADY HALE: That is very kind of you, Mr Eadie. I just
11 wanted to reassure myself that I was not looking at the
12 wrong thing. Volume numbers were different but of
13 course it is a very sensible thing to have done,
14 especially for those who are not using the electronic
15 bundles.

16 MR EADIE: It means you do not have to lug five boxes
17 around, which I have been doing for most of the weekend.
18 Core authorities 3 in the hard volume, if you will.
19 Just to show you how it works, I will do it once and we
20 can pass on, as it were.

21 Tab 43, and you will see in the hard copy it jumps
22 from tab 34 to tab 43. That, however confusing, is
23 deliberate.

24 THE PRESIDENT: That is page 1778 that we look at.

25 MR EADIE: 1778, but it is the same if you go into volume 5,

1 et cetera, et cetera, et cetera, it is exactly the same.

2 LADY HALE: Thank you for the explanation. That is very
3 helpful. Now we know where we are, we can carry on.

4 MR EADIE: 1778 to 1779, my Lady.

5 Creating effects on the international legal plane is
6 really the first point, and that is acknowledged by Lord
7 Oliver in the famous quote.

8 THE PRESIDENT: Yes.

9 MR EADIE: The royal prerogative embraces the making of
10 treaties, and of course the royal prerogative also means
11 that the Government can withdraw from treaties in
12 accordance with their terms or with general principles
13 of international law in the same way. As Lord Templeman
14 put it also in the Tin Council or the JH Rayner case,
15 this time at 1755 -- I don't invite you to turn it up,
16 for your note it is there. He said:

17 "The Government may negotiate, conclude, construe,
18 observe, breach, repudiate or terminate a treaty."

19 That is the first proposition, effects on the
20 international plane.

21 The second that the United Kingdom system is
22 a dualist system. That means that there is
23 a distinction between the ability to create legal rights
24 and obligations on the international plane and the
25 transposition of those rights and obligations into

1 domestic law. Treaties are not in the trite phrase,
2 self-executing. They do not automatically become part
3 of UK domestic law when made.

4 So the Government cannot, without parliamentary
5 intervention, to take that phraseology also from Lord
6 Oliver, alter domestic law by taking steps on the
7 international plane to make treaties. They require
8 instead the intervention of Parliament in order for
9 domestic law to be altered.

10 That position was, we submit, accurately stated,
11 unsurprisingly, by Lord Hope in the Privy Council in the
12 Roberts case which you have in the little black file
13 with 11 KBW written on the back of it, which doesn't
14 have MS numbers, I am afraid, but it is the Roberts case
15 in the Privy Council, and I know my Lady was also
16 a member of that court. Supplemental tab 9.

17 The facts do not terribly matter, but it was in
18 an extradition context in an appeal from the Bahamas,
19 and some people were wanted for suspected drug
20 trafficking by the United States, who made a request for
21 their extradition to the United States from the Bahamas,
22 but the relevant paragraphs for our purposes are
23 paragraph 9 on page 4, page numbering on the top in the
24 middle, just to see the shape of the argument. You see
25 halfway down paragraph 9 it says:

1 "We also submitted that as legislation was necessary
2 to enable effect to be given to a treaty in domestic
3 law, Parliament had to pass an enabling statute before
4 it was ratified."

5 The "it" there being the international agreement
6 between the Bahamas and the United States regulating
7 extradition.

8 That then leads into the statements of general
9 principle which you see recorded by the Privy Council at
10 paragraphs 12 and 13.

11 THE PRESIDENT: Thank you.

12 MR EADIE: Could I just ask you to cast an eye over those,
13 rather than my reading them out.

14 THE PRESIDENT: Yes, of course.

15 (Pause)

16 Yes, thank you.

17 MR EADIE: The third proposition is that consistently with
18 dualism, legislation then creates by whatever means
19 a conduit between international and domestic law, if the
20 international agreement is to sound in domestic law, but
21 the fact that Parliament needs to do that consistently
22 with dualism and has chosen to do that consistently with
23 dualism, tells one nothing beyond that a conduit is
24 required. It does not imply that Parliament, by
25 creating the necessary conduit and recognising thereby

1 new legal rights and obligations in domestic law, has
2 also intended to constrain future Government action on
3 the international plane.

4 Lord Oliver did not state or come close to
5 suggesting otherwise and there are of course, as you
6 will be aware, various ways in which Parliament may
7 choose to transpose from the international to the
8 domestic planes.

9 We give examples in our case, if I just turn that up
10 so I can take this tolerably quickly, at paragraph 43,
11 core volume 2, the first tab, and in the electronic it
12 is page 12342 -- I don't dare say thousands.

13 12342.

14 LADY HALE: I am sure you are right.

15 MR EADIE: We will test the system to destruction by the end
16 of this case.

17 THE PRESIDENT: You are right, Mr Eadie.

18 MR EADIE: Good. At least that is something.

19 THE PRESIDENT: On this point.

20 MR EADIE: I wondered how long it would be before it came.

21 Paragraph 43 is the one I am after.

22 THE PRESIDENT: Yes.

23 MR EADIE: It gives the examples, including -- so the
24 examples of transposition, how that could be done, the
25 various ways, you could make legislation with no

1 reference to the treaty rights and obligations that are
2 being transposed; the Criminal Justice Act of 1988 about
3 compensation for miscarriages of justice is an example
4 of that, no reference to the treaty at all. You can
5 give effect, but effect in the legislation's own words,
6 indicating as you do that you are giving effect to the
7 international agreement or instrument; EU directives are
8 perhaps a paradigm example of that; or, HRA, one can
9 simply schedule the treaty rights in their own terms and
10 then say they are to have effect in domestic law.

11 So there are a variety of different ways in which it
12 can be done. All of those models create domestic legal
13 rights by transposition and none of them, we
14 respectfully submit, does anything to constrain. There
15 is no implication in any of those that in some way,
16 shape or form, Parliament, by having chosen those models
17 or any particular model, has sought to constrain or has
18 impliedly constrained Government action on the
19 international plane thereafter.

20 LORD CLARKE: Is each model a statutory model?

21 MR EADIE: Each model is necessarily a statutory model.

22 LORD MANCE: Does any of your three examples cater for
23 a situation where the continued operation of the
24 domestic legal provisions is affected by whether or not
25 the international position remains the same?

1 MR EADIE: My Lord, none of those three does, and of course
2 I am going to come to that because that is the basic
3 1972 model, so I am going to come to that, but the point
4 that I am on at the moment is the prior point, as it
5 were, which is that there are various ways in which this
6 can be done; and the question is whether in relation to
7 these other models which do not directly create that
8 sort of situation, whether in relation to any of these
9 other models, there is some form of implication, that by
10 having introduced the conduit, there is an implication
11 that Parliament thereby intended that you could not do
12 anything on the international plane thereafter. Of
13 course they do not have a direct impact, and I will come
14 to that, but we do respectfully submit that it is at
15 least of some interest to recognise that if another set
16 of models is used, no implication, as it were, of
17 continuation of said rights would flow.

18 LORD MANCE: No implication of continuation ...

19 MR EADIE: Of the rights thereby transposed. They would
20 simply exist on the domestic plane because Parliament
21 has legislated, and the Government could do whatever it
22 wished on the international plane, but it would not
23 obviously sound into the domestic scheme. So, for
24 example, if one takes a directive, a directive imposes
25 an obligation of result as a matter of international

1 law, the usual way of doing that is to introduce
2 domestic regulations; and the domestic regulations would
3 continue to sit irrespective of whether or not the
4 directive formally finishes, begins, is amended or ends.
5 It would require some other act.

6 They are of course different from the situation that
7 we are dealing with, but we respectfully submit that it
8 is at least of some interest, that is the position in
9 relation to those sorts of models, and that there is not
10 any necessary implication to be derived from the mere
11 fact that a conduit is necessary, consistently with
12 dualism, and has been created by Parliament.

13 Of course, I emphasise, to flag submissions that are
14 yet to come, that this sort of implication or inference
15 from what Parliament has done is not, we will be
16 submitting, at large. There are a set of principles
17 that have been developed by the courts to govern the
18 nature of any such inference or implication.

19 My submission is going to be on De Keyser that
20 before you conclude that a prerogative power has been
21 taken away, that needs to be done by Parliament either
22 expressly or by necessary implication. So it is not
23 just an inference which is at large, and that feeds into
24 the other point to bear in mind which I will come back
25 to, which is that if Parliament wants to go to the point

1 of preventing the creation of legal effects on the
2 international plane, it does so specifically. Look at
3 CRAG, look at the bespoke controls under EU law and so
4 on which I will come back to.

5 That is the third of the submissions, the third of
6 five, as it were, on the basic position on dualism.

7 THE PRESIDENT: Yes.

8 MR EADIE: The fourth is that the dualist principle is not
9 that prerogative acts on the international plane can
10 never create effects in domestic law, including the
11 removal of rights and the imposition of fresh
12 obligations, as a result of action on the
13 international plane by the Government. It is plain that
14 in a variety of more or less direct ways, such acts can
15 have an impact into domestic law.

16 Again, I will come back to it, but we give a series
17 of examples of that sort of situation, those sorts of
18 effects, including citing *Post Office v Estuary Radio*,
19 which I will come back to in paragraph 40 of our case.

20 So there are a variety of more or less direct ways,
21 or indirect ways, that action by the Government can
22 affect domestic legal rights. Again, just to jump
23 ahead, *Post Office v Radio*, I am sure you will have seen
24 or you will recall, involves someone broadcasting
25 a radio station from some territorial waters, the

1 Government effectively defined where the territorial
2 waters begin and end, and those territorial waters were
3 then extended by prerogative act, the consequence of
4 which under the relevant legislation was to render
5 criminal the continued publication of said radio station
6 from where the boat was located, but -- so more or less
7 indirect ways, the prerogative can have those effects.

8 LORD MANCE: That is just another example of your pro tem
9 argument; the rights under the statute or the
10 obligations are whatever -- or relate to whatever the
11 scope of the territorial waters is from time to time.

12 MR EADIE: It is an example of that, and it is a -- whether
13 one puts it directly alongside or as a slightly more
14 indirect version of the next way in which Parliament can
15 do that, which is parliamentary intervention, the point
16 my Lord, Lord Mance was raising with me earlier on,
17 parliamentary intervention can be done so as to make
18 express provision, the effect of which in domestic law
19 is without more to give domestic legal force to the
20 exercise of prerogative powers, and I will of course
21 come back to the 1972 Act and other similar models, but
22 that is one of various models of transposition.

23 The effect of that sort of model, perhaps the
24 fourth, I gave you three before, this is the fourth, in
25 other words direct legislative impact and effect to

1 actions by Government on the international plane, but it
2 gives domestic legal effect to what may be described as
3 an ambulatory system, created on the international legal
4 plane; the body of rights and obligations, the entire
5 legal structure or set of structures on the
6 international plane, may change from time to time; and
7 the domestic legislation on this model makes provision
8 for a transposition into domestic law that is
9 characterised by the fact that it is both automatic, no
10 further parliamentary intervention required, and direct,
11 in terms of impact on or alteration of the scheme's
12 rights and obligations.

13 LORD CLARKE: This is your paragraph 44, is it?

14 MR EADIE: My Lord, this is our paragraph 44, exactly so.

15 The key points we respectfully submit about this
16 model are that Parliament thereby creates a system under
17 which rights and obligations alter and shift. A right,
18 to focus on that, rather than an obligation, for
19 a moment, may be amended or changed by prerogative
20 action. It may be removed altogether by prerogative
21 action, but all of that is done by the exercise of
22 prerogative powers without further parliamentary
23 intervention.

24 LORD CLARKE: Is it a question of the true construction of
25 the legislative provision, the relevant legislative

1 provision? It is?

2 MR EADIE: It is a question of construction of that, it is.

3 But it is of the very essence of this model, if this is
4 the model that you are dealing with, that Government
5 can, under our constitution, entirely lawfully take
6 steps without further parliamentary authorisation,
7 derived, of course, from the initial intention being, as
8 my Lord has correctly pointed out, that that being the
9 intention of Parliament, but the Government can entirely
10 lawfully take steps without further parliamentary
11 authorisation, which directly alter domestic law,
12 including by removing rights. The possibility of
13 subsequent alteration or removal of rights is inherent
14 in the method of creation of domestic law under this
15 model.

16 That is the fourth point.

17 THE PRESIDENT: Yes.

18 MR EADIE: The fifth flows from it. It is that the nature
19 of domestic legal rights recognised under this model of
20 transposition, is contingent. Such rights are
21 inherently limited. That was the description of
22 Lord Millett writing, obviously, extra-judicially, in
23 a recent article which is bundle 34, tab 471 at
24 electronic page -- I think it must be supplemental,
25 1154, so SUP 1154, if the electronics go crazy.

1 The rights are inherently limited. They have no
2 existence independent of the international legal
3 position from which they derive. What that means is
4 that the legislation transposing them from the
5 international plane into the domestic legal plane is
6 a necessary but not a sufficient matter for their
7 existence, and they are also in nature susceptible to
8 change as a result of the exercise of prerogative
9 powers, precisely because they are dependent on steps
10 taken on the international legal plane, where it is the
11 Government that acts.

12 So if one jumps forward a bit to the 1972 Act which
13 I will come to in a moment, they are indeed rights which
14 are dependent on section 2(1) of the ECA, as we will see
15 when we come to it, but that is but one of the twin
16 ingredients necessary to sustain their existence. The
17 other is dependent on the shifting international legal
18 picture, shaped as it is by the exercise of prerogative
19 power.

20 So section 2 of the ECA does not define the rights
21 or shape them so as to require alteration by further
22 legislative intervention, or so as to create
23 an inconsistency with statutory rights, if the
24 Government exercises its powers on the
25 international plane to remodel or reshape EU law.

1 Of course the rights are dependent, not merely on
2 the prerogative acts of the Government, on the
3 international plane, but also the acts of other
4 sovereign actors. We give, in our case at paragraph 51,
5 the example, the hypothetical example of Greece leaving
6 the EU, with the impact on free movement rights of UK
7 citizens that that would necessarily have.

8 A real life example is the departure of Greenland
9 within which, should they have chosen to do so, UK
10 citizens could no longer exercise their treaty rights,
11 and the leaving of which was subject to a withdrawal
12 treaty given effect to by an order and not by primary
13 legislation. You have that order, if you want it, in
14 authorities 19, tab 233, MS 6656.

15 THE PRESIDENT: Sorry, can you say that again, please.

16 MR EADIE: The Greenland order is in authorities bundle 19,
17 tab 233, MS 6656.

18 LADY HALE: 66?

19 MR EADIE: 6656.

20 I think I gave you a wrong reference in relation --

21 LADY HALE: You did earlier on but we found it out.

22 THE PRESIDENT: My Lady found it first.

23 LADY HALE: That is why we need to know how to navigate,
24 because you cannot get everything right all the time,
25 Mr Eadie.

1 MR EADIE: Even on some points perhaps.

2 In relation to the hypothetical example of Greece
3 leaving and the real example of Greenland leaving as
4 illustrations of the broader proposition, which is that
5 they are not merely dependent on prerogative exercise,
6 prerogative powers by the UK Government but also other
7 sovereign governments, my learned friend Lord Pannick
8 says: that is irrelevant because our constitutional
9 principles regulate the conduct of the UK Government and
10 not that of other states. Of course he is right, so
11 they do. But that doesn't answer the point, and the
12 point is that the rights are self-evidently of a very
13 special kind, linked to action, not merely of the UK but
14 also of other sovereign states on the
15 international plane, and it is therefore simply
16 inaccurate by way of analogy to treat them as if, in
17 relation to their creation, modification or even
18 removal, as if they were the same as what might be
19 called purely domestic rights.

20 So those are the five points we make.

21 LORD MANCE: Is there a distinction between the scope of the
22 rights under the treaties which, as you point out, is
23 ambulatory, may go up or down, may even be affected by
24 somebody else leaving the treaty, and the existence of
25 the treaties themselves?

1 MR EADIE: Well, my Lord, we know that there are certain
2 provisions in the ECA when we get to it that deal with
3 the treaties themselves, but my respectful submission is
4 that in terms of whether or not the Government can enter
5 into or withdraw from treaties themselves, the position
6 is fundamentally the same. That goes back to
7 Lord Millett's concept of inherency; it is not just
8 dependent upon or contingent upon the methods of
9 creation of EU law; it is dependent upon the
10 continuation of the very structures which govern. So we
11 respectfully submit that it is essentially the same
12 principle that governs.

13 I was going to move to the De Keyser principles, the
14 third of the topics.

15 THE PRESIDENT: Yes.

16 MR EADIE: The courts have considered, on various different
17 occasions and at the highest level, the correct approach
18 in principle to be applied in considering the question
19 whether Parliament has abrogated or limited prerogative
20 powers or their exercise.

21 Again, to try and identify the core principles if
22 I may before taking you to -- it will probably only be
23 three or four cases, the core principles are we submit
24 as follows.

25 LORD CLARKE: Are these summarised in your case?

1 MR EADIE: I am not sure in quite the order or form I am
2 about to do them, but I will locate the bit in the case
3 if I may, if I can ask someone to find the most directly
4 analogous bit.

5 Firstly, Parliament can, of course, limit, control
6 or remove prerogative powers expressly. It is sovereign
7 to decide whether to do so and if so how.

8 Secondly, whether it has done so outside that
9 express sphere and therefore in other circumstances is
10 a question of statutory interpretation.

11 THE PRESIDENT: Yes.

12 MR EADIE: I am told that the nearest is 64 in our case
13 where we start dealing with De Keyser, 64 and following.

14 THE PRESIDENT: Yes.

15 MR EADIE: Thirdly, the starting point is to expect from
16 Parliament and for the courts to require real clarity,
17 to put it neutrally, real clarity before prerogative
18 powers are removed. There is good reason for that. It
19 is no small thing, we submit, to alter the
20 constitutional balance, particularly one that has
21 existed for many years, by abrogating or limiting
22 long-standing powers. All the more so where they are,
23 as the foreign relations powers are, fundamental and
24 essential to effective Government.

25 LORD SUMPTION: Most cases in which statutes have been held

1 to limit the prerogative have been cases where it has
2 done so implicitly, is that not right, by virtue of the
3 field being at least partly occupied by a statutory
4 scheme; it is never said the prerogative is now
5 abolished, all that has happened is that the subject
6 matter has received legislative treatment.

7 MR EADIE: My Lord, that is true. I don't want to quibble
8 at this stage because I am going to develop the
9 principles as we come, but covering the field exactly is
10 going to be the submission, but there are cases,
11 including in the specific context of EU legislation, the
12 Rees-Mogg case being the paradigm example of that, in
13 which the courts, in approaching the concept of
14 necessary implication, have effectively reasoned thus:
15 they say here is Parliament that has intervened
16 expressly to impose a sequence or series of controls on
17 the exercise of prerogative in a particular sphere.

18 So, is the next step of the reasoning, one can fully
19 expect them if they are going to do it in relation to
20 some other matter in the same sort of context to do so
21 equally expressly, and we respectfully submit that is
22 the correct reading of Lord Justice Lloyd's judgment in
23 Rees-Mogg.

24 But my Lord is right, that in the majority of cases
25 where the issue is controversial, the question has been

1 whether Parliament has, by occupying the field to
2 whatever degree, created the necessary implication.
3 That is why I put as this third proposition, it was
4 neutral, as it were, to the precise nature of the test;
5 it was one can expect clarity because of what is being
6 done; one can expect clarity because it is no small
7 thing to alter that constitutional balance, but one can
8 expect clarity for a slightly different reason, which is
9 that clarity is obviously necessary where there are, or
10 there is, a variety of ways in which the powers could be
11 limited or controlled.

12 LORD MANCE: Mr Eadie, do you say that the European
13 Communities Act 1972 was neutral as to whether the
14 United Kingdom was a member of the European Communities?

15 MR EADIE: We say it proceeded on the fundamental assumption
16 that that ultimate decision on the international plane
17 was a matter for Government, and I am going to come to
18 develop that submission. It was a subject of particular
19 consideration which I am going to take you to by
20 Professor Finnis recently, drawing a comparison
21 between -- in relation to the long title, but equally in
22 relation to the operative provisions of the relevant
23 legislation between the ECA and various bits of
24 legislation that dotted around it temporally, 67, 70,
25 73, to do with the creation of independent status in the

1 Bahamas, Barbados and so on. But I am going to draw
2 that contrast and come back to that if I may in the
3 context of the 1972 Act.

4 THE PRESIDENT: Very well.

5 MR EADIE: I am simply on De Keyser for the moment, if
6 I may.

7 THE PRESIDENT: Yes.

8 MR EADIE: The second reason for expecting clarity and for
9 the courts demanding clarity, because obviously the
10 principles are for you, is obviously necessary to have
11 clarity where there are a variety of ways in which
12 control could be exercised, could be imposed. Various
13 mechanisms of parliamentary control. What is the nature
14 of that control? Is it primary legislation, is it
15 affirmative resolution, is it negative resolution, is
16 it approval by motion; all sorts of questions that would
17 need to be resolved if control is to be imposed.

18 So that the third of the propositions. The starting
19 point is clarity, or the expectation of clarity.

20 THE PRESIDENT: Yes.

21 MR EADIE: The fourth is that it is just as important to
22 have regard to what Parliament has chosen not to do, as
23 it is to have regard to what it has done in the context
24 of a particular legislative scheme. So a limited,
25 carefully considered scheme of limits and controls will

1 imply that matters falling outside such limits and
2 controls remain untouched. That is likely to lead in
3 practice and in principle to a place in which Parliament
4 has evinced an intention in the particular context, if
5 that is so, to control expressly or not at all, to come
6 to the point that my Lord, Lord Sumption was putting to
7 me. That is significant.

8 LORD SUMPTION: This is presumably a harbinger of the point
9 you want to make about the 2008 and 2011 acts.

10 MR EADIE: They are. They are leading towards those. I am
11 going to take you through that statutory scheme.

12 Fifthly, if there is no express control and the
13 context is not as I have just described, in other words
14 Parliament has already intervened to put a series or
15 sequence of controls in place, if there is not express
16 control and you are not in that place, the test
17 developed by the courts is whether legislative
18 intervention in a sphere where prerogative powers exist,
19 creates a necessary implication. That is the test, that
20 the prerogative can no longer be exercised. In other
21 words, that it can no longer be exercised without
22 legislative -- prior legislative authority.

23 A necessary implication is, we submit, the correct
24 test, it is the test that has been regularly applied by
25 the courts, and it imports the stringency of logical

1 imperative from the language used, rather than mere
2 reasonableness.

3 Again, you need no introduction from me to that test
4 first laid down by Lord Hobhouse in *Morgan Grenfell* but
5 that, we respectfully submit, is the nature of the
6 necessary implication case. The necessary implication
7 flows, again to finish the answer to my Lord, Lord
8 Sumption's point, it flows if at all from the fact that
9 the very thing, the very thing which had been previously
10 done by prerogative has now been, to use the phrase that
11 we will see in the case law when I come to it in
12 a moment, "directly regulated by statute".

13 The sixth of the propositions, before coming to the
14 case law, is that, in approaching the issue of whether
15 or not the prerogative continues to exist at the point
16 at which the power is to be exercised or is proposed to
17 be exercised, it is necessary to consider the scheme of
18 the legislation as it exists at that time. Because
19 legislative schemes can change from time to time and the
20 question is a current one.

21 That is the conventional approach, the set of
22 principles that I have just outlined, we respectfully
23 submit is the conventional approach that the courts have
24 developed over the years for asking the question whether
25 fundamental prerogative powers existing under our

1 constitution have or have not been abrogated. It is to
2 be acknowledged as such, in other words, it is to be
3 acknowledged as the conventional approach directly
4 relating and directly addressing the principles that
5 apply in answering that question.

6 I fully appreciate and I will come back to it, that
7 the key focus of the respondents' case is whether there
8 is another principle or set of principles in play in the
9 present context to do with affecting statutory rights as
10 a result of the exercise of prerogative powers, but the
11 conventional approach remains, we submit, of critical
12 importance, as the correct approach, and in any event in
13 testing whether a principle of such clarity and such
14 weight of the kind for which the respondents contend, is
15 properly applicable in our context. In effect, to
16 reverse that conventional approach. In effect to say it
17 is no longer a question of asking whether Parliament has
18 expressly or by necessary implication removed the
19 prerogative; now if this other principle is in play,
20 that test is in effect reversed and it is said you have
21 to ask the question the other way round and point to or
22 be able to point to express powers and legislation
23 permitting you to interfere with rights.

24 So it does involve a pretty much direct reversal of
25 the conventional approach set out in De Keyser.

1 LORD KERR: If there was a real circumscription of the
2 prerogative by implication, and the Act which brings
3 about that implication is repealed, does the prerogative
4 power revive? Is it resurrected?

5 MR EADIE: My Lord, it can do, is I think the logical
6 consequence of my submission because it is a current
7 question. If I propose to exercise prerogative power on
8 behalf of the Government, what the courts need to do is
9 ask the question: does that prerogative power exist
10 today? Of course there are some circumstances where
11 when a prerogative has been put into abeyance, it
12 doesn't come back, but if it is fundamentally dependent
13 upon the nature of the legislative scheme, that, we
14 respectfully answer to my Lord's question, is a current
15 question.

16 I will come back, I am going to develop submissions
17 as to whether or not -- on one view it is fairly
18 critical, because it is jolly difficult, we will
19 respectfully submit, for my learned friends to answer
20 the flow of the legislation that follows the 1972 Act.
21 The high-water mark of that case is the 1972 Act,
22 because it does not contain the great scheme of controls
23 that Parliament subsequently developed. You know from
24 reading the divisional court's judgment that they
25 effectively treated as legally irrelevant for this

1 purpose any Act which followed the 1972 Act, and we
2 submit that that is fundamentally wrong as an approach,
3 but I will come back to develop that submission, if
4 I may.

5 I was going to take you to De Keyser, it is in core
6 authorities bundle 2, tab 10, MS 228.

7 The essence we submit is in, just for my Lord, Lord
8 Clarke's note, the quote from Lord Parmoor which we have
9 set out in our case at paragraph 66.

10 THE PRESIDENT: Thank you.

11 MR EADIE: The basic points we get from it, I have already
12 summarised, if the statute directly regulates, directly
13 regulates, the source of the authority becomes
14 statutory, it ceases to be the prerogative, and then is
15 subject to such controls as Parliament has specified,
16 but it is the direct regulation of the very thing which
17 creates the necessary implication of legislative
18 abrogation or control. So it requires, as essential to
19 this approach, a precise identification of the
20 Government activity, and then asks the question: has
21 that very activity been subject to new statutory
22 conditions, governing its exercise so as to lead to that
23 implication. Of course, so as to avoid having to repeat
24 it as we go through, the precise activity in question is
25 the withdrawal from the treaties on the

1 international plane or more directly, the giving of the
2 Article 50 notice.

3 So when we come to our legislation, that is going to
4 be the key focus.

5 You know, I hope, and think, and if not, someone
6 better shout, but you know the background and the nature
7 of the facts. The army council requisitioned a hotel
8 for the use of the Royal Flying Corps and it denied the
9 hotel owners a right to compensation, compensation which
10 the claimant said was due to them and the Crown, in the
11 House of Lords, claimed that the right to requisition
12 was a right to be found and sourced in the prerogative,
13 and the prerogative did not carry with it the burden of
14 compensation. So a critical question was whether or not
15 the requisition was entitled to be done in exercise of
16 that prerogative, for which no compensation was payable
17 at all.

18 The speeches are interesting because they indicate
19 the test which is to be applied in answering the
20 question whether the prerogative has been abrogated or
21 supplanted.

22 LADY HALE: Do the speeches proceed on the assumption that
23 that was correct, that the royal prerogative existed to
24 requisition property in the UK in wartime without paying
25 compensation? Do they proceed on the assumption that

1 that is correct, or do they discuss that?

2 MR EADIE: Well I think they do a bit of discussion of that.

3 My Lady is right to draw me up. They do a bit of
4 discussion on that, as it were, in phase 1 of the
5 analysis, and then phase 2 says assume for the sake of
6 argument that that is so, that the prerogative would
7 otherwise exist, and it is the sort of question that was
8 discussed in the context of foreign requisitions in
9 Burmah Oil, as you will recall.

10 LADY HALE: That is why I am asking.

11 MR EADIE: Quite, but in relation to this, they do discuss
12 that question, but then go on to consider, assume even,
13 that the prerogative was ever of a nature that allowed
14 requisitioning without compensation, has that now been
15 subjected to conditions as a result of the introduction
16 of legislation?

17 So my Lady is right to draw me up on that, but the
18 key part for our purposes is perhaps the second phase of
19 that analysis.

20 In the first of the speeches by Lord Dunedin, and
21 the key passage, or passages, I am going to go on the MS
22 numbering, if I may, bottom of the page, 246, and you
23 will see about five or six lines up from the bottom of
24 the first full paragraph, a line beginning "equally
25 certain", just to pick up that sentence there:

1 "Nonetheless it is equally certain that if the whole
2 ground ..."

3 I have circled "whole ground".

4 "... was something which could be done by the
5 prerogative is covered by statute, it is the statute
6 that rules. On this point I think the observation of
7 the learned Master of the Rolls is unanswerable."

8 Then you see the question that was unanswerable
9 towards the end of that paragraph. Then there is
10 a definition of the prerogative and then you see picking
11 it up again three lines up from the bottom -- perhaps
12 you could read that sentence about five lines up from
13 the bottom of that page:

14 "In as much as the Crown is a party to every Act of
15 Parliament, it is logical enough to consider that when
16 the Act deals with something which before the Act could
17 be ... by the prerogative [my Lady's question] and
18 specifically empowers the Crown to do the same thing,
19 but subject to conditions, the Crown assents to that and
20 by that act to the prerogative being curtailed."

21 It is direct overlap, the concentric circles, the
22 whole ground, the same thing, and that leads Lord
23 Dunedin to his conclusion which is that the Act of 1842
24 which provided for compensation and indeed the Act of
25 1914, which was neutral on the point, did indeed cover

1 the whole ground. It allowed the requisitioning to take
2 place. It effectively said: if you are going to
3 requisition you had better pay, and you cannot get round
4 that statutory regime by relying on prerogative power.

5 You see his conclusion most clearly expressed on
6 this point at page 248, just before the end of the long
7 paragraph occupying most of that page, about seven lines
8 up:

9 "It is therefore impossible in my opinion ..."

10 THE PRESIDENT: Yes.

11 MR EADIE: Could I invite you to read from there to the end
12 of that paragraph:

13 (Pause)

14 That was Lord Dunedin. Lord Atkinson, if you want
15 it there is a little bit explaining why the 1914 Act
16 does not alter that, but that is on the next page, about
17 a third of the way down, but not central to the
18 reasoning. Lord Atkinson is next and the relevant parts
19 of his speech are really on page 259 to 260.

20 THE PRESIDENT: Thank you.

21 MR EADIE: Can I invite you to read again rather than my
22 reading them out, sorry, it may be difficult to follow
23 for those just listening but it is about a page worth.
24 If you go to 259, if you go to the first full paragraph:

25 "I further concur with him ..."

1 Could you read from there to the end of the full
2 paragraph on the next page.

3 THE PRESIDENT: If you want to sit down while we do that,
4 you are welcome.

5 (Pause)

6 Thank you, so we have something on answer to Lord
7 Kerr's point there about while it is still in force.

8 MR EADIE: My Lord, yes, and the bits I was going to
9 particularly invite you to circle as it were, and the
10 only thing that changes is the precise description and
11 the fact it is sometimes plural and sometimes singular,
12 the first of the paragraphs, I invited you to read the
13 one beginning:

14 "I further concur ..."

15 Three lines up from the bottom of that, "the very
16 things". Next paragraph, six lines down, of the line
17 beginning:

18 "Of its prerogative to do the very thing ..."

19 Two lines up from the bottom of the page,
20 "particular thing", which becomes plural in the second
21 line of the first full paragraph on the next page,
22 "particular things", but it is all the same point.

23 THE PRESIDENT: All the same thing.

24 MR EADIE: It is. That is Lord Atkinson. Lord Milton(?),
25 274, again a similar analysis, 274, the key bit is

1 probably the second full paragraph on page 274, asking
2 the question that it does in the final sentence, and
3 then essentially the same reasoning that we have just
4 seen in the remaining paragraph on that page.

5 THE PRESIDENT: Thank you.

6 MR EADIE: That is the relevant bit in him. Lord Sumner,
7 281, and again could I invite you just to read down the
8 first full paragraph, the only full paragraph, on that
9 page, 281, could you just cast an eye down to -- you can
10 stop at the word "speed", three lines up from the bottom
11 of the page.

12 THE PRESIDENT: Right, thank you.

13 (Pause)

14 It is subject matter rather than thing.

15 MR EADIE: It is subject matter rather than thing, but it is
16 still directly deal.

17 THE PRESIDENT: Thank you.

18 MR EADIE: It is essentially the same reasoning. And Lord
19 Parmoor, 295 to 296.

20 THE PRESIDENT: This is the passage you quoted in your case.

21 MR EADIE: This is the passage we quoted in our case, you
22 perhaps don't need it, but just for your note, there it
23 is.

24 LORD WILSON: Endless concurring speeches.

25 MR EADIE: All expressed in subtly different ways but

1 substantively the same, is the submission.

2 That is therefore De Keyser. Laker Airways is in
3 the same volume of authorities behind tab 12, starting
4 at MS 307.

5 THE PRESIDENT: Thank you.

6 MR EADIE: Again, the facts will be very familiar to
7 my Lords. This involved the Government effectively
8 trying to use the prerogative to give in effect
9 a direction to the Civil Aviation Authority to frustrate
10 or terminate the ability of Freddie Laker to run
11 Skytrain between Stansted and New York, in circumstances
12 in which there was an express legislative power, which
13 was subject to conditions which could have been used.
14 That is the summary of the facts. Can I take it first
15 try and deal with it quickly, take it first in the
16 judgment of Lord Justice Roskill. 307 is the first of
17 the pages, Lord Justice Roskill at page 382.

18 THE PRESIDENT: Thank you.

19 MR EADIE: Where he identifies the issue. The letter G.
20 "The sole question", do you see that by the letter G.

21 THE PRESIDENT: Yes.

22 MR EADIE: So that just frames the issue. Just that
23 sentence will do for that purpose.

24 THE PRESIDENT: Thank you.

25 MR EADIE: Then he sets out on the next page, 383, at letter

1 E, what he describes as "the relevant principles":

2 "The relevant principles upon which the courts have
3 to determine when a prerogative power has been fettered
4 by statute were exhaustively considered by the House of
5 Lords."

6 He sets out lots of quotes which you have now seen.

7 THE PRESIDENT: We have read, yes, thank you.

8 MR EADIE: Principles to be applied plain, 385 at F, and
9 then he proceeds to analyse on the particular facts of
10 that case why it is that the necessary implication
11 arises, to preclude the exercise of statutory power.
12 The key reason that it might be thought is 386 between
13 F:

14 "In short I do not think the Attorney General's
15 argument ... prerogative power and the power ...
16 municipal law can march side by side each operating in
17 its own field is right ..."

18 Can I just ask you to read from there to the bottom
19 of the page.

20 (Pause)

21 THE PRESIDENT: Yes.

22 MR EADIE: So it is simply an application of the principles
23 that he has taken and considers to be plain from the
24 House of Lords speeches in De Keyser, but you will see,
25 and it is not very difficult to understand, how the

1 direct regulation, the same thing, all of those
2 principles, all of that approach is applying --

3 LORD MANCE: Is it quite on those lines? I thought that
4 this was a slightly different application or possibly
5 principle. The fundamental reasoning was that, having
6 gone through all the necessary statutory hoops, the
7 airline had received a licence, and this was then being
8 nullified by the Government, by using a power which it
9 had to withdraw designation under a Bermuda agreement
10 with the United States, thereby, by the back door,
11 undermining what it wasn't -- what it had done by the
12 front door.

13 MR EADIE: My Lord, it is in part that, you are right. It
14 is a slightly more subtle, as it were, application of
15 the same thing. But it also had an element of direct
16 De Keyser, if I can put it that way, as you see on 386
17 between B and C, because the relevant legislation did
18 indeed provide for power under the Secretary of State to
19 revoke the licence.

20 THE PRESIDENT: Under section 4, yes.

21 MR EADIE: Under section 4 and what was being done was the
22 power to exercise the prerogative power --

23 LORD MANCE: Only in certain circumstances.

24 MR EADIE: Exactly, subject to the limitations that
25 Parliament has imposed, so there is a bit of direct

1 De Keyser in that way, and there is a bit of the point
2 that my Lord put to me between F and G. I perhaps took
3 it a bit quickly, I should have taken you to between B
4 and C as well but you have a bit of both in there, and
5 then Lord Justice Lawton, to similar effect, and you
6 probably ought to read between H on page 391 down to D
7 on page 392, just to get the essence of his reasoning.

8 (Pause)

9 You see in particular that between C and D, he
10 essentially focused on what I call straight De Keyser.

11 THE PRESIDENT: Necessary implication, yes.

12 MR EADIE: Necessary implication, but also reliance
13 particularly, focus particularly on section 4.

14 THE PRESIDENT: I understand.

15 MR EADIE: Lord Denning, I don't know why I have come to him
16 last but I have.

17 LORD CARNWATH: I think A, of the passage on which the
18 respondents rely.

19 MR EADIE: Quite, that is why I invited you to read the
20 whole passage. It has to be read in context.

21 LORD CARNWATH: You cannot use the Crown powers to take away
22 the rights of citizens.

23 MR EADIE: In circumstances in which, as we then see,
24 section 4 provides the right to revoke the licence, and
25 Parliament has subjected any such deprivation to

1 statutory control.

2 LORD MANCE: Presumably the same reasoning would apply, even
3 if there had not been a statutory right to revoke.

4 MR EADIE: You would be frustrating, cutting across.

5 LORD MANCE: You would be cutting across, so that is
6 an independent line of reasoning to the one you have
7 referred to under article 4.

8 MR EADIE: My Lord, it is, but we respectfully submit it has
9 effectively the same source and drive which is
10 parliamentary intervention in the field of scheme of
11 regulation, and so on. It is not, and I should have
12 picked up directly, my Lord is right, it is not simply,
13 as it were, and as a freestanding principle, the point
14 between A and B. That needs to be read properly in its
15 context, is our submission about that.

16 THE PRESIDENT: You were going to take us to Lord Denning.

17 MR EADIE: I was going to take you to Lord Denning.

18 LORD CARNWATH: Lord Denning was perhaps not in the majority
19 on this one.

20 MR EADIE: That may explain why I am taking you to him last.
21 I can't remember if it was quite on this point, but the
22 essence of his reasoning was similar at least. 370 at
23 H, over to C on the next page.

24 (Pause)

25 We have back door and front door which is always

1 an attractive submission.

2 THE PRESIDENT: Yes.

3 MR EADIE: It might be thought to echo strongly in Lord
4 Denning's mind, but one also has -- could he disclose
5 the statute by invoking a prerogative.

6 Ex parte Fire Brigades Union, same bundle, tab 15,
7 MS 444. This also is subtly different in terms of the
8 facts, because you will recall the way in which the
9 issue arose. It is really De Keyser by analogy rather
10 than directly, because the legislation in question was
11 not in force. But the court was concerned with
12 a situation where Parliament had legislated for the way
13 in which the Secretary of State was to act in order to
14 achieve a particular objective, there setting up the
15 criminal injuries compensation scheme; but the Secretary
16 of State had sought to achieve different results through
17 the exercise of the prerogative and setting up
18 an ex gratia or slightly different tariff form of
19 scheme, and had then deliberately, as it were, decided
20 not to bring in the relevant legislative provisions.

21 I perhaps only need a custom short bits from
22 Fire Brigades, 483, using the MS numbering in the speech
23 of Lord Browne-Wilkinson, 483, it is really the bit
24 between D -- that paragraph beginning by the letter D on
25 page 483, culminating in the citation of De Keyser.

1 (Pause)

2 THE PRESIDENT: Yes.

3 LORD MANCE: Again, it is a different principle, or
4 certainly a different ambit to De Keyser's principle.
5 They actually say, don't they, two of the majority, Lord
6 Browne-Wilkinson and Lord Lloyd, that De Keyser's Royal
7 Hotel does not help in this case. The case has been
8 decided on a different principle, if you look at 553 G
9 and 573 C. 573 C.

10 MR EADIE: My Lord, yes, but that is because the statutory
11 provisions are not at that point in force, so it is by
12 necessity, as it were, De Keyser by analogy, but the
13 reason I took you to the passage between D and F on 483
14 is because he is there citing the basic approach in
15 De Keyser and setting out the principle that applies.

16 Of course the position is here that the legislation
17 is not in force.

18 LORD MANCE: The principle being implied is that you cannot
19 use the prerogative power to undermine a right or
20 an obligation, isn't it? In this case it was
21 an obligation to consider bringing into force the
22 legislation.

23 MR EADIE: My Lord, ultimately, if the legislation had been
24 in force, or if the legislation was in force, it would
25 be direct De Keyser, so you cannot undermine -- you

1 cannot use the prerogative to undermine the law of the
2 land. That is the general principle, and everyone
3 accepts that, that is uncontroversial, but the question
4 is how it applies. You can do, see Lord Oliver, if
5 there is parliamentary intervention as he put it.

6 But the reason I keep going back to 483 D to F is
7 because it sets out what De Keyser does stand for, which
8 is where you have got reputation in play, the test is
9 expressly or, as he puts it here, by implication.

10 LORD WILSON: Are these three cases anything more than
11 interesting examples of the application of the necessary
12 implication test?

13 MR EADIE: My Lord, I respectfully submit not. I am sorry
14 it has taken a long while to get to that point, but I
15 did want to drive home the idea that it is expressly or
16 by necessary implication as -- the scheme and then
17 everything else flows from that. You can take it by
18 analogy from that stage on, or you can apply it
19 directly, but in the end it is the same thing, it is the
20 same beast, the same principle.

21 The vice, it might be thought, in Fire Brigades
22 Union, and we will come to its specific facts as an
23 example, and the reason Lord Browne-Wilkinson ultimately
24 decides as he does, one sees from 485 between G and H.
25 That is really the nub of the objection, the last two

1 sentences of that paragraph, by introducing the tariff
2 scheme he debars himself and so on, that is the essence
3 of it.

4 We see that also, in terms of the final reference
5 here, from Lord Nicholls at 509, between E and F.
6 Perhaps we could pick it up at the line beginning:

7 "The inescapable conclusion is that the home
8 secretary has effectively written off ..."

9 (Pause).

10 Ex parte Rees-Mogg then if I may, same bundle,
11 tab 14, MS 424. You see the context from the headnote,
12 I would just invite you to cast an eye down there to
13 get -- this is all about Maastricht and whether or not
14 there was powers to sign up to various protocols that
15 were part of the Maastricht treaty and the key passages
16 for our purposes are on -- start on page 439.

17 THE PRESIDENT: 439.

18 MR EADIE: 439 electronic, under the second issue.

19 THE PRESIDENT: Yes.

20 MR EADIE: Just so you see it, can I invite you to read that
21 page and a half, or a bit more than a page and a half
22 under the second issue before you get to the third issue
23 on the next page.

24 (Pause)

25 THE PRESIDENT: Thank you. Yes.

1 MR EADIE: So we respectfully submit that the key paragraph
2 for present purposes, which is the primary basis for
3 rejecting the argument is the paragraph at the bottom of
4 page 439. They were unable to accept the argument that
5 Lord Pannick was mounting.

6 LORD SUMPTION: Do you submit that means there is
7 a difference between the test to be applied, depending
8 on whether we are talking about the prerogative to make
9 treaties or unmake them, or other aspects of the
10 prerogative, as we have seen in the cases you have just
11 cited? In general, it is an implicit displacement by
12 statutory intervention in the relevant field, but is it
13 your submission that there is a tougher test to be
14 applied for this particular prerogative power?

15 MR EADIE: My Lord, there is a tougher test to be applied in
16 accordance with this reasoning, not so much because it
17 is treaty power, although it was treaty power there, but
18 because Parliament had intervened in the area in which
19 the prerogative was exercised, to impose a whole series
20 of controls already. And that carried with it, as it
21 were, the implication that if it was going to intervene
22 to control that sort of action, it would do so
23 expressly, so it is almost an aspect --

24 LORD SUMPTION: It is a sort of exclusio --

25 MR EADIE: Exactly. It is almost that. It does say you

1 have gone in there, you have designed the scheme of
2 control; having gone there and designed the scheme of
3 control, you can draw the inference if you will that if
4 Parliament is going to control, it is going to do so
5 expressly and that is the sort of thing one would
6 expect, if what you are dealing with is a beast that
7 requires decisions to be made of a legislative kind
8 around things as basic as what should the mechanisms of
9 control be; should there be primary legislation, should
10 there be affirmative resolution, should there be motions
11 to which Parliament consents and so on. That is the
12 point that is being made.

13 My learned friend below, and I think the divisional
14 court accepted this, said no, no, you can pretty much
15 bypass that paragraph with that reasoning in it, because
16 as they ultimately go on to conclude, the protocol on
17 social policy, and this is the remaining part of the
18 analysis under the second issue, they then conclude that
19 that protocol would not in any event become part of
20 domestic law, so where is the worry?

21 But my respectful submission is that is a second
22 strand, a distinct strand of reasoning and it doesn't
23 touch, because it provides simply a distinct reason for
24 reaching the same conclusion, it doesn't touch the
25 reasoning that one sees in the final -- which it might

1 be thought is self-evident -- one sees in the final
2 paragraph on page 439.

3 LORD CARNWATH: Just to clarify, it is not your case that
4 the treaty-making prerogative is subject to a different
5 principle?

6 MR EADIE: It is not my case that treaty-making prerogative,
7 just because it is treaty-making prerogative, is subject
8 to different rules on the back of this paragraph --

9 LORD CARNWATH: Generally.

10 MR EADIE: Generally, and I will come to develop that
11 argument -- well, I will come to develop that argument,
12 but the point that is being made here is not dependent
13 upon it being a treaty, but is dependent upon the fact
14 that Parliament has chosen to intervene in the way that
15 it already has. It is that that creates the inference
16 that if it is going to do so again, it will do so
17 expressly because it will be altering the nuanced scheme
18 that it has already designed.

19 LORD SUMPTION: Can I just ask you where this fits into the
20 scheme of your submissions as a whole? Does one not
21 have to ask first what is the nature of the prerogative
22 power? Is it a prerogative power which authorises one
23 to do things on the international plane which do not
24 have the effect of altering domestic law, or is it
25 a general prerogative power? The reason why that

1 matters is that, if the prerogative power never did
2 extend to doing something that altered the domestic law,
3 then no question of abrogation arises. You arrive at
4 a situation where its exercise would alter domestic law,
5 and you cannot do it, not by virtue of any implied
6 statute or express statutory provision, but simply
7 because of the conditionality of the prerogative right
8 one is talking about.

9 MR EADIE: My Lord, yes. I think the way I would answer
10 that is that there are two different beasts in play in
11 our particular context. The first of them asks what is
12 the usual way in which the courts and what are the
13 principles on the basis of which the courts seek to
14 answer the question whether or not the prerogative power
15 has been abrogated; and the second of them asks what is
16 the nature of the 1972 Act to which I will come, and the
17 way in which it has set matters up, so that effects on
18 the international plane are directly and automatically
19 introduced into domestic law.

20 LORD SUMPTION: Before you get to that, you surely have to
21 ask: what are the limits if any of the prerogative power
22 to make and unmake treaties? If the position is that
23 the prerogative power is only as broad as it is, because
24 the assumption is being made that it does not alter
25 domestic legal rights, then, you know, one may well

1 arrive at a situation in which you just never get to the
2 question of what the statute says, unless it is being
3 suggested that it actually confers a prerogative right
4 to change the law which would not otherwise exist.

5 MR EADIE: My Lord, I see that as a prior question, but we
6 respectfully submit that the prerogative power in the
7 field of making of treaties, ratification of treaties
8 and withdrawal from treaties, is and always has been
9 a general power, untrammelled by any such implication
10 which can have, and I will develop this in a variety of
11 ways, impacts into domestic law through any or all of
12 the various models that we have analysed our in our
13 cases.

14 So although I see the force of asking that as
15 the prior question, as it were, as a prior question, we
16 respectfully submit that is a question that has to be
17 answered, recognising that (a) it is a general and
18 untrammelled power ordinarily, and so if you get to the
19 stage where you are saying: is there a freestanding
20 principle that would control it in limine; you have to
21 answer that question or ask that question in the context
22 in which it arises; and recognising that exercises of
23 prerogative power can and do have impacts into domestic
24 law. That is not to say you don't still go back to the
25 statutory scheme to see whether there are limits on that

1 that Parliament has imposed.

2 LORD SUMPTION: What do you mean by impacts on domestic law?

3 Do you mean actually changing the content of domestic
4 law, or do you mean simply altering the facts to which
5 an existing principle of domestic law applies?

6 MR EADIE: It could be either or both --

7 LORD SUMPTION: They are very different things.

8 MR EADIE: They are very different things, but they could be
9 either or both, which is why the ambulatory scheme and
10 how the 1972 Act works and all of that is important.

11 I accept that one is not necessarily dealing with the
12 same beast when one is considering *Post Office v Radio*
13 or matters of that kind, or even in the argument that
14 my Lord advanced in *JH Rayner*, which was fundamentally
15 premised on drawing that distinction between factual
16 matters that sound in international -- or international
17 legal facts, as it were, and other matters.

18 LORD CARNWATH: This is the fundamental distinction between
19 you and the other side, isn't it? Do you start from the
20 proposition that there is a well-recognised power to
21 make and unmake treaties, and the only questions are, is
22 it subject to any statutory restriction, express or
23 implied, or subject to some common law principle such as
24 abuse of power. Alternatively, as my Lord puts to you,
25 you ask: is there actually such a power at all if it has

1 the effects on domestic rights?

2 MR EADIE: One answers that question by looking at the way
3 in which prerogative power has operated in --

4 LORD CARNWATH: I understand how you answer it. But there
5 is obviously an alternative view which is diametrically
6 opposed.

7 MR EADIE: My Lord, that is Rees-Mogg, unless anyone wants
8 more on Rees-Mogg. Just before the short adjournment,
9 can I deal with, just by way of mention only, I am not
10 going to take you to them, but if you still have the
11 will to look at other authorities on the basic approach
12 to abrogation of the prerogative, Northumbria Police
13 Authority, which you will recall is all about police
14 ordering various bits of equipment, that is perhaps
15 worth a read; it is in authorities bundle 8, tab 77 at
16 MS 3059; and a recent case which involves the exercise
17 of prerogative powers by the home secretary to remove
18 people's passports, cancel or withdraw passports, Ex H.
19 Currently we only have the judgment in the divisional
20 court, and I am threatened with the Court of Appeal next
21 week comprising inter alia the Master of the Rolls and
22 Lord Justice Sales, who will no doubt be familiar with
23 the basic De Keyser principles, but that also is of some
24 interest at least in analysing that.

25 THE PRESIDENT: Where is that?

1 MR EADIE: Core authorities, bundle 4, tab 66, 2781.

2 THE PRESIDENT: You say it is of some interest; do they take
3 this any further forward or are they more of the same?

4 MR EADIE: They are really an application. It is
5 an application in a different context, I hesitate to
6 take you to it because my Lord, Lord Wilson raises a
7 fair point. One can go to all these cases, and they
8 are different illustrations of the same basic approach
9 and principle. It is an interesting analysis there and
10 it contains, if you want it in a convenient place, Lord
11 Hobhouse in Morgan Grenfell, but the relevant paragraphs
12 for present purposes are really from 39 to the early
13 50s.

14 52, I think.

15 THE PRESIDENT: Do I get the impression this is a convenient
16 moment, Mr Eadie.

17 MR EADIE: My Lord, it may be a convenient moment. I was
18 going to go to a principle of the legality.

19 THE PRESIDENT: Let's leave the principle of legality for
20 2.00.

21 We will rise now and we will resume at 2.00. The
22 court is now adjourned.

23 (1.00 pm)

24 (The Luncheon Adjournment)

25 (2.00 pm)

1 THE PRESIDENT: Mr Eadie, a word about timetabling before
2 you start. We are due to start at 10.15 tomorrow. One
3 of us has a medical appointment which means it is
4 possible we will start a bit late. If we do,
5 I apologise in advance, and if you have until 1.00 and
6 if you lose 10 minutes at the beginning we will sit into
7 lunch to make up the 10 minutes if you need it.

8 MR EADIE: I am very grateful. I will try and avoid that
9 disaster if humanly possible.

10 THE PRESIDENT: Disaster may be a little bit high, but it
11 depends how much you care for your lunch.

12 MR EADIE: The principle of legality, and still under the
13 broad heading of the De Keyser principles and how the
14 two marry up, we respectfully submit that the approach
15 in De Keyser has at least some similarities to the
16 principle of legality, but what the De Keyser principle
17 does is to focus on the fundamental importance of the
18 rights of Government to act in the public interest for
19 the overall good in exercising prerogative powers such
20 as in the foreign affairs context. It requires,
21 similarly to the principle of legality, real clarity
22 before those powers are taken away.

23 In that sphere, in other words considering whether
24 or not the prerogative power has been impinged upon, the
25 courts do not approach the question of whether the

1 prerogative power has been interfered with or abrogated,
2 by asking simply whether or not that power has the
3 capacity to affect rights.

4 We know that it does, in a variety of different
5 ways, and indeed many of the cases in which the
6 De Keyser principles were hammered out involved
7 precisely that feature.

8 Many of those cases were precisely about the use of
9 the prerogative to interfere with rights, including
10 common law rights to property, as the paradigm example
11 in De Keyser and indeed in *Burmah Oil* itself.

12 The principle of legality is also, you will know,
13 a rule of statutory interpretation designed essentially
14 to control as an aid to interpretation, generally
15 expressed powers conferred on Government by statute.

16 Here we submit the question is not as to the breadth
17 of generally expressed statutory powers; it is
18 different. The question is whether or not Parliament
19 has abrogated the prerogative which sits alongside the
20 legislative schemes impinging, as they sometimes do, and
21 to various different extents, on to that territory
22 occupied by the prerogative.

23 So that question is answered naturally, we submit,
24 by examining the legislative scheme as a whole against
25 the constitutional backdrop we have described. So it is

1 fundamentally different, we submit, from the principle
2 of legality.

3 My Lords and my Lady, I was going to take you next
4 to the fourth topic, which is the application of the
5 basic De Keyser and dualist principles in the present
6 context, and that obviously starts with the nature of
7 the statutory scheme.

8 So, apologies, it has taken a bit of a lead-in to
9 get there, but the statutory scheme, if I can start it
10 here, with CRAG itself, the 2010 Act, which is in core
11 authorities volume 1, tab 5, MS 131.

12 LORD HODGE: I am sorry.

13 MR EADIE: 131.

14 LORD MANCE: We start here not with the 1972 Act.

15 MR EADIE: We start here just because this is a general
16 scheme of control, that is the logic of it, by
17 Parliament over treaty-making powers, treaty making and
18 all other things to do with treaties.

19 LORD CLARKE: Was this the first time any such scheme --
20 general provision had been enacted.

21 MR EADIE: Exactly so.

22 THE PRESIDENT: Basically, to some extent, a statutory
23 codification of the Ponsonby principle.

24 MR EADIE: That was going to be the first point, exactly
25 that, and you have the Ponsonby memo if you want it in

1 bundle 15, tab 158, MS 5038, but it does exactly what
2 my Lord the President has just described; it involves in
3 effect Parliament considering, for the first time in
4 relation to 2010, but Parliament considering the
5 controls which it wished to impose generally in the
6 context of treaties.

7 The upshot is as we see, you may have not had
8 a chance to glance at it briefly but it is in
9 effectively part 2, which are the only bits I hope which
10 are in your bundle, of CRAG. I should point out at the
11 outset, there is a cut out from CRAG for treaties to
12 which now the European Union Act of 2011 applies, as you
13 see from 23.1(c), so there is a separate regime
14 governing controls which I am going to come to in a
15 moment.

16 LORD CARNWATH: Can you give me that section again?

17 MR EADIE: 23.1(c).

18 LORD CARNWATH: What did it say originally in section 23?

19 Do you remember which provisions were specified in it?

20 MR EADIE: It probably would have been the 2008 Act. We

21 will get the original for you overnight.

22 LORD CARNWATH: Thank you.

23 MR EADIE: I am pretty sure it would have been the 2008 Act,

24 because the next one in the sequence after that is 2011,

25 which will have postdated this.

1 So there is a cut-out for treaties to which that
2 applies, and there is detailed provision made for the
3 particular kinds of parliamentary influence over the
4 prerogative powers hitherto untrammelled, as it were, to
5 do with treaties.

6 So in section 20, just to show you very briefly what
7 the scheme involved, subject to what follows, the treaty
8 is not to be ratified, so it is a control over
9 ratification, unless -- and then you see the mechanism
10 of parliamentary control that is imposed, which is the
11 laying before Parliament of a copy of the treaty,
12 20(1) (a), something allowing potentially the public to
13 get engaged in the debate in 20(1) (b), the treaty being
14 published in the way the minister of the Crown thinks
15 appropriate.

16 And then effectively negative resolution, 20(1) (c).

17 THE PRESIDENT: Thank you.

18 MR EADIE: Then period A, so that is 21 days for a negative
19 resolution to be put in place; and the consequence of
20 the House of Commons resolving that it doesn't wish the
21 treaty to be ratified is then dealt with in subsections
22 (4) to (6).

23 THE PRESIDENT: Yes.

24 MR EADIE: But you see from that that you have the negative
25 resolution procedure, then effectively you have a two

1 strikes provision, so that the minister of the Crown can
2 relay, this time explaining why it is that they want the
3 treaty ratified; and then they get another 21 days
4 within which that negative resolution can again be
5 exercised by the House of Commons.

6 Then the clarification in 6 that it can be done,
7 a statement can be laid on more than one occasion.

8 So that is what happens if the Commons votes
9 against, you get another go, and then the Commons can
10 vote against again if they wish. But it is effectively
11 a double negative resolution procedure.

12 Then in 7 and 8, they make specific provision for
13 what happens if the House of Lords resolves that it
14 doesn't want the Government to ratify the treaty, but
15 the House of Commons is content, effectively.

16 THE PRESIDENT: Yes.

17 MR EADIE: On that occasion the consequence is that in sub
18 8, the treaty may be ratified, that is if the House of
19 Lords voted against but the House of Commons -- or are
20 content as it were:

21 "The treaty may be ratified if a minister of Crown
22 has laid before Parliament a statement indicating the
23 minister is of the opinion that the treaty should
24 nevertheless be ratified and explaining why."

25 So there is not a double whammy on that occasion,

1 there is simply a burden of explanation under this.

2 So that is what happens in relation to the general
3 scheme of ratifying treaties; you don't need to worry
4 too much about section 21. All of that, the scheme that
5 I have just identified in section 20, is subject to the
6 exceptionality provision in section 22.

7 Of course the minister of the Crown should
8 rationally have to conclude that the matter was
9 exceptional, but if he did, then the process is
10 a different one. You don't have negative resolution if
11 he decides that exceptionally it should be ratified
12 without them being met, say, for example on time grounds
13 or whatever else it may be, some other exceptional
14 reason. You don't have the negative resolution process,
15 but you do have the duties that are imposed by 22(3).

16 Just for the sake of completeness, there is a burden
17 or a duty to produce an explanatory memorandum, 24 --

18 THE PRESIDENT: Basically this works on the basis of
19 Parliament is given an opportunity to jump in and say:
20 don't do it.

21 MR EADIE: Exactly so, subject to -- even within section 22,
22 it might be thought. They could still say: we insist.
23 That would be within their power.

24 THE PRESIDENT: 22(2).

25 MR EADIE: Yes.

1 THE PRESIDENT: Thank you.

2 MR EADIE: Treaty is defined and ratification is defined in
3 the manner that you see in 25, to complete the picture.

4 THE PRESIDENT: Yes.

5 MR EADIE: So we take three short points from CRAG. It is
6 firstly significant, we submit, because Parliament has
7 intervened in the area of treaties and decided what
8 intervention in this prerogative sphere it wished to
9 have. That piece of legislation was the product of
10 detailed and careful consideration, with a nuanced set
11 of controls, and those are properly judgments for
12 Parliament to make, as it has done in this piece of
13 legislation.

14 Secondly, the intervention by Parliament in general
15 terms in relation to this suite of powers that
16 accompanies treaties is express and nuanced. It
17 reflects precisely the sorts of decisions that one would
18 expect Parliament to make and consider, if intervening
19 in this sort of context to alter the usual position,
20 namely that the Crown exercises those prerogative powers
21 as it sees fit in the public interest.

22 It applies to ratification of treaties. It leaves
23 untouched negotiation or making of treaties. It
24 produces a considered system of controls dealing
25 precisely and in detail with the form of control that

1 Parliament wished to exercise, and you have seen the
2 layering and the subtleties of all of that, laying
3 a copy, subjecting it to negative resolution,
4 exceptionality and all of that; there are a series of
5 decisions about the nature of the parliamentary control
6 that Parliament wishes to impose.

7 The third point is the obvious one, that it includes
8 no requirement, even for limited forms of parliamentary
9 involvement in decisions by governments to withdraw or
10 commence the process of withdrawal from treaties.

11 That is so, we add in brackets, even though
12 withdrawal might have impact on rights and obligations,
13 on the international and domestic legal planes. So
14 there is therefore, we submit, a considered decision by
15 Parliament to leave withdrawal to the Government in the
16 usual exercise --

17 LORD CLARKE: What was the origin of this? Is there some
18 sort of paper behind all this?

19 MR EADIE: Behind CRAG?

20 LORD CLARKE: Yes.

21 MR EADIE: I am sure there will have been a White Paper and
22 there will have been debate in the usual way.

23 LADY HALE: It was all carefully considered, you have told
24 us, so presumably you have evidence for that.

25 MR EADIE: My Lady, we will check overnight to make sure you

1 have the White or the Green Papers, whatever there was.

2 LORD CARNWATH: It doesn't say anything about domestic
3 rights, does it; the ratification leaves completely
4 unaffected how the treaty will take effect, if at all,
5 in domestic law.

6 MR EADIE: That is true. It is fundamentally a control of
7 the exercise of the prerogative powers on the
8 international plane.

9 LORD CARNWATH: But (Inaudible) legislation, and by the same
10 token it doesn't deal at all with what the withdrawal
11 from a treaty, what the effect of that would be on
12 domestic rights.

13 MR EADIE: It doesn't deal with transposition at all. If
14 one examines these as two separate elements involving on
15 the one hand, as it were, the exercise of prerogative
16 power on the international plane, giving of notice,
17 whatever it may be, the withdrawal from the treaty, the
18 ratification of the treaty, and there is a separate set
19 of questions around transposition and impact into
20 domestic law.

21 LORD CARNWATH: Were these issues discussed, do we know, in
22 a White Paper of any sort?

23 MR EADIE: In terms of transposition? I doubt it, because
24 this is simply designed to control the exercise of those
25 prerogative powers in that way on the

1 international plane.

2 But we will check.

3 LORD MANCE: Going back to your ambulatory rights, there is
4 a whole framework which I think is not reflected in the
5 papers at the moment, involving liaison between the
6 Government and Parliament, and involving parliamentary
7 scrutiny by the European committees, both of the House
8 of Commons and the House of Lords. That is subject to
9 the now published Cabinet Office guidelines. Now, that
10 enables parliamentary input into changes in the rights
11 and obligations which you describe rightly as
12 ambulatory.

13 Is there any equivalent system of liaison and
14 supervision in relation to a decision to withdraw from
15 a treaty or to exercise the royal prerogative in any
16 other respect?

17 MR EADIE: Not as far as I am aware.

18 But we will, again, if we need to, we can pull
19 together that raft of documentation and just double
20 check; so not as far as I am aware is the answer to that
21 but I will check.

22 But that is CRAG and my Lord, Lord Carnwath is
23 right, it goes to the exercise of these prerogative
24 powers on the international plane. It doesn't deal with
25 or purport to deal with transposition or effects into

1 domestic law or anything of that kind, but it is
2 nonetheless significant, because it is the act which
3 controls and exercises parliamentary regulation over
4 those sorts of powers, so it is parliamentary
5 intervention into the field. And you have my submission
6 already, the basic submission, which is that the
7 prerogative power is a freestanding source of power, so
8 if Parliament is going to be intervening into that
9 field, it does so expressly, deliberately and in this
10 sort of nuanced way.

11 LORD CARNWATH: It also helps you to reject the suggestion
12 that the exercise of these powers on the foreign plane
13 were somehow a hangover from medieval times.

14 MR EADIE: Quite so, because this is the 2010 piece of
15 legislation.

16 LORD CLARKE: We know it has some introductory notes,
17 because the note said, but we haven't got them, I don't
18 think.

19 MR EADIE: We haven't got that. We will check if there is
20 anything relevant in that.

21 I am told we have the Green Papers and the White
22 Papers in the bundles. It tells you all you need to
23 know about the weight of preparation. The Green Paper
24 is in bundle 15, tab 166, MS 5189; and the consultation
25 paper is at tab 167 in the same bundle, bundle 15, MS

1 5213.

2 LORD SUMPTION: What was the first reference.

3 MR EADIE: 5189 and then 5213, and 166 and 167 within
4 bundle 15.

5 THE PRESIDENT: Thank you.

6 MR EADIE: The European Communities Act 1972, to go back in
7 time, tab 1, within the core authorities of volume 1 and
8 that is at page 17, as originally enacted.

9 You have the current version if you want it in the
10 next tab but for present purposes it may be sensible to
11 view it as enacted.

12 THE PRESIDENT: Yes.

13 LORD CLARKE: Sorry, which one is as enacted?

14 MR EADIE: As enacted is tab 1, MS 17, and then MS 54 behind
15 tab 2 is current.

16 THE PRESIDENT: Very well. Yes.

17 MR EADIE: I make a general and overarching point first of
18 all in relation to the 1972 Act which I know you will
19 have read, which is that it made no provision whatever
20 regulating any future decision to withdraw from the EEC
21 treaties. That was so, even though withdrawal was well
22 within the contemplation of Parliament at the time of
23 the passing of the ECA, as the divisional court
24 correctly acknowledged. There was debate in the
25 divisional court around how that might occur, but at

1 least if all parties consented, it was plain that
2 withdrawal could occur, as the divisional court accepted
3 correctly at paragraph 56 of their judgment.

4 Indeed, it is notable that the European Communities
5 Act 1972 places no restrictions at all on the treaty
6 prerogative in the EU context. There is a real and
7 serious contrast between that fact and what Parliament
8 chooses to do when it wishes to assert control over the
9 exercise of prerogative powers in this sphere, see CRAG.

10 Start with the long title, "An act to make provision
11 in connection with the enlargement of European
12 Communities to include the United Kingdom", and so on.

13 We submit in relation to the long title, perhaps if
14 I could break this down into the submissions we will
15 make about each of the sections, I know you will be
16 familiar with them and will have read them, but that may
17 be a convenient way to do it, but in relation to the
18 long title we make these submissions.

19 It is, we submit, accurate as a general summary of
20 what the Act does. But it will be accurate in that way
21 whether the Government retained its long established
22 power to withdraw from the treaties or it did not.
23 There is nothing in the wording of the long title -- to
24 put a point negatively, there is nothing in that wording
25 to support the significance that was attached to it by

1 the divisional court, we submit.

2 There may be a positive point to be made in relation
3 to the long title. That is the first submission.

4 The second submission is the positive point. It
5 does not state that it is an act for and in connection
6 with the UK becoming a member of the EEC. Nor is there
7 any operative provision in the Act itself authorising
8 the Government to act on the international plane to make
9 the UK a member.

10 The wording used in the long title is not the
11 wording, "an act to make provision for and in connection
12 with ..." et cetera. That is not the wording that is
13 used, and that stands in contrast to precisely that sort
14 of wording, for and in connection with, that was used
15 around exactly this time when independence was being
16 conferred on Barbados, Fiji and the Bahamas. That is of
17 interest because those pieces of legislation do dot
18 around 1972.

19 If you go into the supplemental bundle, the black
20 11 KBW bundle, you will see the way in which that is
21 done, at tabs 1, 2 and 3. So 1 is Barbados, 2 is Fiji,
22 3 is the Bahamas and they all use the same words, the
23 dates and the significance of the dates because they dot
24 around 1972, you see; 1966 was Barbados, 1970, two years
25 before this act, was Fiji, and then the Bahamas was one

1 year afterwards. But you see that their long title is
2 "An act to make provision for and in connection
3 with ..."

4 It all is in the same form, just to look at the
5 Barbados one, and then you see --

6 LORD CLARKE: The difference is the absence of "for", is it?

7 MR EADIE: "for and".

8 LORD CLARKE: "for and", sorry.

9 MR EADIE: "for and in connection with". That is leading
10 one in to the point of substance which is that they then
11 have an operative provision which is in section 1,
12 effectively. Her Majesty's Government says: I have no
13 responsibility for the Government of Barbados and so on;
14 so they are then setting out the nature and effect of
15 what legal position is being created, as it were, in
16 a way.

17 LORD MANCE: What about the earlier resolution of both
18 Houses, which effectively gave the green light to the
19 Government to go ahead with negotiations or -- do we
20 have that somewhere in the papers?

21 MR EADIE: You do, and I am going to come to that if I may.
22 My Lord is right, but it poses the question whether the
23 Government could have ratified the treaty of accession
24 unless and until it enacted the ECA, which is what the
25 divisional court concluded, my Lord is right;

1 resolutions, as it were, support motions in the House,
2 but there wasn't an Act of Parliament. You didn't need
3 the ECA to ratify feeding the accession treaty to the
4 EEC.

5 Can I come to that? I am going to come to it in due
6 course.

7 Just to finish this point, we claim no originality
8 in terms of this point; it is the point that is made and
9 developed in the recent lecture by Professor Finnis,
10 which you also have in that supplementary bundle, behind
11 tab 12. The relevant part is page 11 and following.
12 But the basic structure of this legislation is therefore
13 as reflected in its long title, and in the absence of
14 any equivalent, as it were, to section 1 of the
15 independence pieces of legislation; the basic structure
16 of the legislation as reflected there acknowledges that
17 dualism is in play, and that, consistently with the
18 Government having constitutional responsibility and the
19 ability to conduct foreign relations, it is for it to
20 make and ratify treaties.

21 So the enlargement referred to in the long title is
22 achieved by Her Majesty's Government in the usual way,
23 signing and ratifying the treaty of accession, and you
24 have that if you need it in authorities 13, tab 141,
25 page 4658.

1 So this statute uses and is premised on dualism and
2 on the constitutional roles of Government and Parliament
3 sitting alongside each other. So everything in part one
4 is about giving domestic legal effects to acts taken in
5 the exercise of prerogative powers on the
6 international plane. That is what part one is about.
7 That is what it does.

8 Its fundamental nature is focused not on actions on
9 the international plane at all, but on the distinct
10 aspect of domestic transposition and the creation of
11 domestic -- the recognition of domestic legal effects.

12 We do submit that the divisional court was
13 inaccurate to conclude that the Government could not
14 have ratified the treaty of accession, unless and until
15 the ECA was enacted.

16 LORD SUMPTION: It would have been in breach of a large
17 number of principles of EU law if they had not done so.

18 MR EADIE: Because there was no domestic transposition.

19 LORD SUMPTION: Exactly, that is the sense in which they
20 suggest that they had to do it, isn't it?

21 MR EADIE: My Lord may be right; I thought they were making
22 the rather broader point --

23 LORD SUMPTION: You couldn't even assume (Inaudible) on an
24 international plane, is your submission.

25 MR EADIE: Quite, and my submission is we plainly could;

1 that is the way in which it was going to be done, and
2 that is entirely clear, that that power was still left
3 with the Government, because when Parliament truly wants
4 to impose limits -- well, making the point in two ways,
5 when it wants to give permission to do something on the
6 international plane, it is perfectly capable of saying:
7 I am giving you permission to do this; a bit like the
8 Bahamas and Barbados situation, creating the legal
9 effect in that way.

10 But if it wants to restrict action on the
11 international plane like ratification, again, we know
12 that Parliament can do that, and we know it has done
13 that, and we saw CRAG. Then it has a whole series of
14 decisions it would have to make around what type of
15 parliamentary permission should be given and how --
16 where the balance should lie between the Government on
17 the one hand and parliamentary control on the other.

18 We know as a matter of fact, if you go back to the
19 1972 Act and you see the date on which it was enacted of
20 17 October 1972, we know that the UK instrument of
21 ratification was in fact deposited the day after it was
22 enacted, in other words on 18 October 1972, but that, we
23 respectfully submit, tells you nothing about whether or
24 not the ECA was some kind of legal pre-condition to
25 ratification. We submit plainly not; there is nothing

1 to authorise ratification in the ECA; how otherwise
2 could we have committed the United Kingdom on the
3 international plane, other than by way of the exercise
4 of the prerogative?

5 THE PRESIDENT: No authorisation and no "for [comma], and in
6 connection with", only "in connection with"?

7 MR EADIE: Exactly so.

8 THE PRESIDENT: Okay.

9 MR EADIE: Of course it avoids -- as my Lord, Lord Sumption
10 pointed out, doing it in this sequence avoids potential
11 breach of international obligations, because you have
12 not got the domestic transposition that is required.

13 So we respectfully do not accept that there was any
14 need for any of that.

15 Moreover, that is the ECA, the 1972 Act does not
16 require the UK to become or indeed remain a member of
17 the EEC, can be demonstrated perhaps by asking what the
18 position would have been if the Government had not
19 ratified the treaty of accession, shortly after the ECA
20 came into force, or indeed at all; as was the case with
21 Norway which signed but did not ratify. The treaty of
22 accession itself set the date for our membership, if
23 ratified, at 1 January 1973.

24 Of course it is not a breach of international law to
25 answer the question posed. It is not a breach of

1 international law to sign a treaty but then not to
2 ratify it; that is precisely what Norway did. The logic
3 of the respondents' argument is that the Government
4 would have been in breach of the ECA, and that plainly
5 was not the case. Parliament was therefore merely
6 facilitating the membership, should the Government, in
7 the exercise of its treaty prerogative, take the
8 United Kingdom into the EEC.

9 LORD MANCE: This is potentially a Fire Brigades Union case,
10 I think it is suggested, against you in that context.
11 You might test your proposition or put your question in
12 a slightly more sophisticated way, by asking what if the
13 Government had announced immediately after the passing
14 of the ECA that it would never ratify the treaty of
15 accession; you would give the same answer, I appreciate,
16 you would say that is their choice.

17 MR EADIE: That is their choice, and as fundamentally or
18 more fundamentally perhaps, this is the basic structure
19 of this Act.

20 LORD CARNWATH: Why wouldn't that be potentially an abuse of
21 power --

22 MR EADIE: It could be. One could have that argument, the
23 same as the 2015 Act we were discussing earlier. You
24 could see a claim being mounted of that kind, but the
25 answer my Lord gives on my behalf, as it were, is one we

1 would give.

2 LORD MANCE: How do you distinguish Fire Brigades Union in
3 this context?

4 MR EADIE: We respectfully submit that that requires
5 an understanding of how this Act is designed to be set
6 up. It is not, as it were, imposing on the Government
7 a duty, otherwise it could easily have said so. It is
8 simply facilitating, and it sits alongside the
9 recognition that the Government exercises prerogative
10 powers on the international plane in that way and always
11 has done.

12 LORD SUMPTION: Exactly what submission are you making on
13 the basis of these statutes? Are you saying that if the
14 Government lacks a suitable prerogative power before
15 2008, the 2008, 2010, and 2011 Acts implicitly created
16 one, presumably not?

17 MR EADIE: No.

18 LORD SUMPTION: Now, in that case, surely we have to look at
19 what the position was before these statutes, and if the
20 position was that the Government did not have the power
21 then, the statutes do not help us one way or the other
22 to decide the present issue.

23 MR EADIE: My Lord, I think that is tolerably close to the
24 question you asked me before the short adjournment,
25 which is: are we starting in the right place before we

1 get to any of this legislative scheme?

2 LORD SUMPTION: It is another possible instance of your
3 starting perhaps in the wrong place.

4 MR EADIE: Quite. That was the point I believe you were
5 putting to me before the short adjournment, but my
6 answer to that is that these prerogative powers to
7 exercise international relations powers, to ratify, to
8 negotiate, to agree, to withdraw from treaties, they
9 have always been expressed as general prerogative
10 powers, as it were. They have never been defined by
11 potential impact on rights in that way.

12 So they have been expressed as general prerogative
13 powers, and they have then been regulated by Parliament
14 in a variety of ways. So you have all the various
15 examples which we will come to, you have seen CRAG
16 already; and in the treaties sphere, we know that
17 Parliament has regulated those otherwise generally
18 expressed powers very specifically. So the nature and
19 content of that prerogative from the beginning has been
20 a general prerogative power to do these various things,
21 and it is then characterised by different forms of
22 impingement into those generally expressed powers by
23 Parliament, none of which, it may be said, have been
24 defined or set by reference to a potential effect on
25 rights.

1 We know that the exercises of the prerogative in
2 this sphere, and I will come back to this because I am
3 going to have to develop this principally in answer to
4 is there a background constitutional principle, of the
5 kind the provisional court identified, we know that
6 prerogative powers can be and are exercised to have
7 serious impacts, potentially, sometimes, into domestic
8 law rights.

9 The 1972 Act, as I will develop in a moment, is
10 a paradigm example but we have, and I will develop this,
11 a similar position created when we left EFTA, before we
12 joined the EEC, so we have an example in this Act of
13 that sort of process happening, and we know that double
14 taxation treaties similarly, but I will come back
15 probably to all of that tomorrow now but those matters
16 are all there.

17 It does therefore depend fundamentally on analysing
18 what -- we entirely agree, what the nature of the
19 prerogative is, if the prerogative starts as generally
20 expressed, which is our case, and is then impinged upon,
21 then that is the correct starting point. The correct
22 question becomes what species of control, what forms of
23 control has Parliament chosen to impose upon this
24 exercise; and we know that in relation to leaving, for
25 example, the EU, the only way in which that can be done

1 is by way of exercise of the prerogative.

2 LORD WILSON: Mr Eadie, you have shown very convincingly
3 that our entry into the EU was a joint effort, the
4 exercise of prerogative power by the executive and the
5 exercise of legislative power by Parliament. So, put
6 very simply, one of the arguments that you will have to
7 deal with is, if our accession was the result of joint
8 effort, should our departure not equally be so.

9 MR EADIE: My Lord, the submission I make is that the joint
10 effort, as it were, in the 1972 Act is a joint effort in
11 the sense that it assumes that all the prerogative
12 powers continue to exist and be operated. So all that
13 this is doing, this Act, is not to -- put it in the
14 positive: this Act is designed, and that is all that
15 part 1 does, to deal with transposition.

16 It doesn't authorise, it doesn't purport to be
17 a joint effort in relation to the going in. It simply
18 assumes and is premised on the continued existence of
19 that power, and withdrawal, therefore, is entirely
20 consistent, to put it in my Lord's helpful way, is
21 entirely consistent with that framework. Because when
22 you withdraw, you withdraw on that basis. You withdraw
23 in exercising the prerogative powers that sit in
24 parallel to and are the premise for the 1972 Act.

25 THE PRESIDENT: I see the force of that but it is not quite

1 an answer to Lord Wilson's question, is it, because the
2 way the treaty was signed and then not ratified until
3 Parliament had done its bit in passing the 1972 Act
4 meant that it was very much of a joint effort, to use
5 Lord Wilson's expression, whereas on your analysis,
6 pulling out would not be a joint exercise.

7 MR EADIE: Pulling out would not be a joint effort.

8 THE PRESIDENT: That is the point.

9 MR EADIE: But the fact that it is ratified the day after
10 this Act is enacted, for the reasons I have given, is
11 significant only because it avoids, as it were, the
12 Government being in breach of its international
13 obligations once it decides to go in. That is the true
14 significance of it. That is what it has done.

15 As I say, when we get to EFTA, I don't want to get
16 too far ahead, because EFTA is quite complicated and we
17 will try to simplify it overnight, but we get to EFTA
18 and you see that that is how they do it there, as it
19 were. They leave in the exercise of the prerogative and
20 then some time later Parliament comes in but I will show
21 you that tomorrow. But of course it depends, I suppose,
22 how one defines joint effort, but joint effort there
23 undoubtedly was, but only because in part 1, they are
24 transposing, they are giving domestic legal effect to
25 the rights that are created on the international plane.

1 LORD CLARKE: As a result of a joint effort between
2 Parliament on the one hand and Government on the other.

3 MR EADIE: That is the answer my Lord, Lord Wilson has put
4 to me.

5 LORD CLARKE: What is the answer to it?

6 MR EADIE: The joint effort involves assuming, and this
7 whole Act is premised on, the prerogative powers
8 continuing to exist. This does not purport to authorise
9 us to ratify. It would not place us in breach if we
10 didn't ratify. It simply says, once on the
11 international plane, you have entered into the treaty,
12 which was signed some time before, once you have
13 ratified, then these are going to be the domestic legal
14 effects.

15 LORD KERR: Your argument really is you needed a joint
16 effort to go in in order to get the powers transferred
17 to the (Inaudible) UK, but you don't need it to come
18 out.

19 MR EADIE: We don't need it to come out, because we can
20 withdraw, and again, I don't want to get too political
21 about it, but if joint effort is what is required, then
22 joint effort you have. Parliament decided to set up the
23 referendum. To ask the very question -- again I don't
24 want to get too far ahead of myself because I am going
25 to come to the 2015 Act in due course, and it does not

1 precisely deal with the legal point that my Lord is
2 making but there is, as it were, constitutionally the
3 joint effort that is provided by that.

4 But I think my fundamental legal answer to the point
5 my Lord puts to me is this Act is not saying, it doesn't
6 say in section 1: thank you very much, you are now
7 authorised to ratify; PS, section 2, here is the effect
8 in terms of transposition into domestic law.

9 LORD MANCE: Isn't this to some extent, because we are just
10 looking at 17 and 18 October 1972, and if you look back
11 at the history, before the treaty of accession was ever
12 negotiated or signed, both Houses considered the matter,
13 and in October a year before, 1971, they separately
14 resolved that:

15 "This House approves Her Majesty's Government's
16 decision of principle to join the European Communities
17 on the basis of the arrangements which have been
18 negotiated."

19 Possibly not even that is the starting point, but
20 that is a relevant starting point when you consider this
21 statute. They are hardly going to repeat anything like
22 that in the statute, because it is a given. What they
23 are doing is taking the final step to implement quite
24 major changes in rights and obligations domestically.
25 On your analysis, Parliament is effectively prepared,

1 isn't it, to do whatever the Government decides without
2 actually expressing a view itself. Is that realistic?

3 MR EADIE: The significance of those motions is one, they
4 are not primary legislation.

5 LORD MANCE: Of course not.

6 MR EADIE: They are not primary legislative authority, and
7 you do not remove or abrogate the prerogative by passing
8 a motion of that kind in Parliament anyway.

9 LORD MANCE: But they are background, aren't they? That is
10 what the 1972 Act is doing.

11 MR EADIE: They are background but the true significance of
12 that, my Lord is right to draw attention to the fact of
13 it, the true significance of that, it might be thought,
14 is that there are myriad ways in which Parliament, if I
15 use the word neutrally, politically, as it were, can
16 exercise control and give consent, can recognise the
17 significance of an issue.

18 So what is not being done is to say: we need primary
19 legislative authority for you to go and ratify this
20 treaty. This Act is not in any shape or form that sort
21 of beast. My Lord is right to say there were some
22 motions beforehand, but all that demonstrates is that
23 under our constitution, there is flexibility as to how
24 Parliament chooses to get engaged in a particular issue,
25 what steps it wishes to set out beforehand, what matters

1 it wants to debate and how it wants to go about doing
2 that.

3 The true parallel, if there is one, once you
4 recognise that it is not primary legislative authority
5 to do the thing on the international plane, the true
6 parallel between the motions that you identify and the
7 present situation involving withdrawal is that here we
8 had the referendum, and Parliament got involved
9 beforehand to set up the referendum, to ask the very
10 question: should we leave?

11 So as a matter of law, I quite understand why
12 my Lord, Lord Wilson asked the question that he does,
13 and I have given the answer that I have -- I have tried
14 on a couple of occasions to give the answer that I have
15 to that question, but in answer to my Lord, Lord Mance,
16 yes, there may be significance to that in the sense that
17 it continues to be a joint effort in a broad sense,
18 because Parliament has chosen to get involved. But
19 nothing in those motions by the Houses of Parliament
20 suggest that it was a legal precondition, otherwise it
21 would have been legislation or a legal authorisation.
22 It was simply Parliament expressing its view that this
23 was an appropriate thing to do in the exercise of the
24 prerogative, and the parallel therefore with the
25 2015 Act is exact.

1 LORD CARNWATH: That was an exercise of the Ponsonby
2 convention, wasn't it?

3 MR EADIE: That was an exercise that was pre-CRAG
4 effectively.

5 LORD CARNWATH: Which, as you say, does not apply to
6 withdrawal. The thing that is puzzling me in relation
7 to Lord Wilson's question is that you, in your case,
8 make something of the fact that there will be
9 parliamentary involvement, once the Article 50 notice
10 has been served, and indeed there is something called
11 the Great Repeal Bill, which the Attorney General
12 mentioned. Do we have any evidence about that.

13 MR EADIE: About the Great Repeal Bill?

14 LORD CARNWATH: Yes, about what it is, what it is going to
15 do. It seems to be of some relevance to ask ourselves:
16 what actually is Parliament's role going to be between
17 now and the end of the (Inaudible) period.

18 MR EADIE: Yes, I am sure we do and we will find -- I think
19 currently there has simply been a statement by
20 Government about what is intended to be covered by
21 the --

22 LORD CARNWATH: I think there has been a statement at the
23 Conservative party conference; has there been anything
24 else?

25 MR EADIE: Pass. We will double check and get you anything

1 else there has been on that. I think there is no more
2 than that at the moment. I don't think there is a White
3 Paper or anything of that kind.

4 THE PRESIDENT: Can we just go back to this point about the
5 2015 Act. In a way, I suppose, you would say it fits in
6 with the argument that says that if you are right, the
7 day after the treaty had been ratified, on your
8 argument, the Government could have had a change of
9 heart and pulled out. The idea of a partnership with
10 Parliament is that in practice, that would never have
11 happened without either Parliament approving or without
12 the 2015 Act which you say, although not as a matter of
13 strict law, was in practice, Parliament's involvement.

14 MR EADIE: My Lord, yes, and I have hesitated to go back in
15 this case to the quote that you may have seen in our
16 annex from Lord Bingham in the Robinson case about the
17 fluidity of the constitution. I do not rely upon that
18 because we respectfully submit the position is entirely
19 clear in terms of the existence of the prerogative and
20 how this legislation as a matter of strict law is set
21 up, which is the case that I have to meet. But we do
22 submit that there is real significance in the various
23 and myriad ways in which that partnership, that joint
24 effort, if you will, can operate.

25 It can operate by way of motions, it can operate in

1 the CRAG sense, it could operate in the Ponsonby
2 memorandum sense that preceded CRAG. Or, as
3 significantly, it can operate because Parliament chooses
4 to produce in primary legislation a referendum, and we
5 know when we come to it, 2011 did that in various
6 different respects, in the 2011 Act, and the 2015 Act
7 the same.

8 The difficulty is drawing, as it were, the straight
9 constitutional line.

10 THE PRESIDENT: Because the UK constitution, such that it
11 exists, is not a straight line.

12 Now, we have not got past the long title because of
13 questions from us. Perhaps we should be moving on from
14 the long title.

15 MR EADIE: Yes, it is the long title and what part 1 does.

16 I don't want to rest too much on the long title, because
17 the long title, we know, is a beast of limited
18 assistance in terms of interpreting, or it can be a
19 beast of limited assistance in terms of interpreting,
20 but it is fundamentally what the operative provisions in
21 part 1 are doing, which are all about transposition and
22 not about regulating international plane action.

23 THE PRESIDENT: Yes, we have that, yes.

24 MR EADIE: Section 1, then, steady progress, section 1 sets
25 out the mechanisms by which treaties come to be approved

1 and put on the list. The significance of section 1 is
2 that the divisional court thought that that was a strong
3 indicator that the treaty prerogative generally,
4 including withdrawal therefore, was controlled by the
5 ECA. But of course we submit that the restriction or
6 any restriction on the exercise of the prerogative power
7 to withdraw or to give Article 50 notice simply cannot
8 be inferred from section 1 of the ECA.

9 By definition, a number of points on that, by
10 definition we submit, the ECA cannot have been intended
11 to abrogate the Article 50 notice power for the simple
12 reason that Article 50 was not even a gleam in someone's
13 eye at that point, and the EEC treaties did not in terms
14 deal with withdrawal at all, so it cannot have been
15 designed to deal with that. But as we have already
16 seen, the Act as a whole in 1972 imposes no restriction
17 of any kind, still less of the sort that we see in CRAG
18 and later piece of legislation. It imposed no
19 restriction at all on action or treaty making or
20 anything else to do with treaties on the
21 international plane. It didn't authorise us to become
22 a member or to ratify.

23 And so we could have, until at least 1978, the next
24 Act I am going to come to, when there was an express
25 restriction introduced into the EU context for the first

1 time, we could have negotiated, agreed and ratified new
2 treaties, and hence bound the UK to those treaties under
3 international law without the prior authorisation of
4 Parliament.

5 That is not, of course, to say there would not be
6 all sorts of very good practical and political reasons
7 for wanting the prior approval of Parliament, but that
8 is a different matter. That broadens the concept of
9 joint venture, as it were, even though the line may not
10 be straight.

11 So this is all about the imposition of restrictions
12 and giving effect at the level of transposition into
13 domestic law, and so we do submit that standard dualist
14 practice of which this Act is a paradigm example,
15 standard dualist practice simply indicates that there is
16 a need to provide for a mechanism of transposition.

17 That is what this Act does. Once one recognises
18 that as the fundamental nature of it, it becomes
19 entirely clear that it is not to do with or seeking to
20 control the exercise of prerogative powers on the
21 international plane.

22 So you have the mechanism that you see in
23 section 1(1), and section 1(2), with its references to
24 listed treaties, and indeed to ancillary treaties. And
25 then there are mechanisms for introducing new treaties

1 on to that list in 1(3). In the manner that -- there
2 has been some debate in the past around whether or not
3 1(3) would operate as the legislative mechanism for
4 simply ancillary treaties or other treaties to come.
5 I think the position the court arrived at in Smedley was
6 it applied to the ancillary treaties only.

7 Certainly the position is that subsequently, when
8 treaties have been added to the list, that has been done
9 by primary legislation, but as we see, that may be
10 explained by the fact that specific introduction --
11 there was specific introduction from the 1978 Act
12 onwards, to require primary legislation whenever the
13 powers of the European Parliament were being expanded,
14 so that might explain why that happened.

15 It may be at least not entirely easy to say, to see,
16 why as a matter of ordinary construction at least,
17 section 1(3) might not be taken as authorising both
18 types of treaty addition, both ancillary and listed.

19 LORD MANCE: Which was the case you said that treated it?

20 MR EADIE: Smedley, I think it is.

21 LORD MANCE: Smedley.

22 MR EADIE: Yes. As a matter of pure interpretation, it is
23 coming at the thing as a matter of straight
24 interpretation, there is at least a question there.

25 But Smedley appears to have resolved it for the time

1 being.

2 Then we come to section 2. And the first point to
3 make in relation to -- sorry, my Lady, I am going to try
4 and speed up a bit, but section 2 you will all have
5 read. The first point to make about it is that it
6 created the conduit.

7 THE PRESIDENT: Yes.

8 MR EADIE: It is the first of four relevant points we want
9 to make on section 2. It creates the conduit.
10 Consistently with dualism, it needed to do so given that
11 the treaties took effect and created rights and
12 obligations only on the international plane, and in that
13 way Parliament, consistently with dualism, enabled the
14 United Kingdom to comply with its international/EU law
15 obligations.

16 THE PRESIDENT: Yes.

17 MR EADIE: The nature of the conduit as we see from 2(1),
18 the transposition model if you will, was direct and
19 automatic. And what that means is that the rights and
20 the obligations that were created on day 1 could be
21 altered, and could be removed by action taken under the
22 prerogative by the Crown.

23 Section 2 simply sets out the basis of
24 transposition, necessary for all the reasons I have
25 given, but the significance of it doing that and of that

1 being its nature is that the introduction of a conduit
2 or a transposition model of this kind tells one nothing
3 about the discrete issue of some form of parliamentary
4 control of Government action later on the
5 international plane. It simply is creating the
6 necessary transposition mechanism.

7 THE PRESIDENT: Yes.

8 MR EADIE: The divisional court attached some significance
9 to the title alongside section 2 and we have dealt with
10 that in the annex to our case where we track, as it
11 were, the textual analysis of the divisional court and
12 answer them paragraph by paragraph. I am not going to
13 spend a lot of time on that now, but it might be thought
14 in relation to the heading, the fact of the matter is
15 that that heading is accurate and descriptive and
16 adequate to give a general summary as to what the
17 section is doing.

18 It suggests, if anything, accurately, that section 2
19 is, as it were, a consequence of dualism, but it doesn't
20 do more than that. It doesn't carry some form of
21 implementation, that because this is about general
22 implementation of the treaties, that means the treaties
23 must always stay the same or cannot be withdrawn from.

24 Indeed, we know, when we come to it later as I will
25 do shortly, that when Article 50 does become part of the

1 EU framework in the Lisbon treaty, it is then added to
2 the list in section 1(2), and Article 50 is thereby
3 given effect, as it were; so that these rights and
4 liabilities exist subject to that, but the general
5 title, we submit, the general heading, does not avail
6 one.

7 LORD MANCE: Does that involve the proposition that
8 Article 50 is incorporated in domestic law?

9 MR EADIE: It has become part of the listed treaties.

10 LORD MANCE: But is it incorporated into domestic law by
11 this Act?

12 MR EADIE: My Lord it is not incorporated by this act, it is
13 not?

14 LORD MANCE: No.

15 MR EADIE: I don't make that suggestion.

16 LORD MANCE: No. Because it only operates on
17 an international plane.

18 MR EADIE: It is not directly effective, it operates on the
19 international plane, but it indicates that the rights
20 and liabilities as they exist from time to time are
21 subject on the international plane to that power of
22 withdrawal.

23 LORD WILSON: This phrase "from time to time" that we read
24 twice, "rights from time to time created", "remedies
25 from time to time provided for", is that simply talking

1 about changes in European law, changes from time to time
2 in European law, or do you say that the phrase also
3 encompasses rights being changed and remedies being no
4 longer provided for as a result of withdrawal from the
5 EU?

6 MR EADIE: My Lord, I respectfully submit that it is
7 a recognition that -- and I will come to develop this
8 point -- the rights that are created are inherently
9 susceptible to change.

10 LORD WILSON: But change where?

11 MR EADIE: Change at the EU level, principally by exercise
12 of Government action.

13 LORD HODGE: (Inaudible comment, off microphone).

14 MR EADIE: Exactly.

15 LORD HODGE: (Inaudible) the common law, you have
16 (Inaudible) institutions.

17 MR EADIE: Yes, and my Lord used the word "recognition"
18 which we respectfully agree with, rather than, as it
19 were, creation, so as to create an analogue with other
20 domestic statutory rights, but it is recognising exactly
21 that.

22 LORD SUMPTION: I think the point that is being put to you
23 is that this may be concerned solely with variations in
24 the content of EU law and not with the possibility of
25 withdrawal from the whole scheme of EU law.

1 MR EADIE: My Lord, that is right in terms, but it doesn't
2 touch, we respectfully submit, our power to withdraw
3 which continues to exist under the prerogative, is the
4 way we put it.

5 LORD CLARKE: (Inaudible) ambulatory, as far as you advance
6 it.

7 MR EADIE: I am not sure it does weaken it, with respect.
8 The way we put the argument is that we have always had
9 the prerogative powers existing. What this does
10 demonstrate most clearly is that by exercise of
11 prerogative power, the Government can affect rights, can
12 withdraw rights, can remove rights in any event. It
13 could remove 99.9 per cent of the rights entirely
14 consistently with 2(2).

15 LORD MANCE: You say by an exercise of the prerogative
16 power. The likelihood of the Council of Ministers and
17 now the European Parliament agreeing to remove
18 99 per cent of EU rights is rather remote, isn't it?

19 MR EADIE: My Lord, it may be rather remote in practice but
20 as a matter of law.

21 LORD MANCE: It is certainly not done by the unilateral
22 exercise of the UK prerogative.

23 MR EADIE: No, and I have made the point already, that it is
24 not only our prerogative powers that are in play.

25 THE PRESIDENT: I think the issue we are trying to focus on

1 is whether you rely for your purposes in this appeal on
2 the words "from time to time".

3 MR EADIE: We do.

4 THE PRESIDENT: Because?

5 MR EADIE: Because it demonstrates that rights can be
6 affected directly by the exercise of Government power on
7 the international plane.

8 LORD MANCE: But there is a huge difference between
9 submitting to the rulings of a club committee as to what
10 the club rules are, the dress code or whatever, if you
11 happen to be a member of a club, and not being a member
12 of the club at all, either being expelled or giving
13 notice. Isn't that the point that is being put to you
14 rather?

15 MR EADIE: My Lord, it is a scale point, therefore. We can
16 affect domestic legal rights and obligations in this way
17 through exercise, albeit not on our own because there
18 are other EU actors in play, we can affect domestic
19 rights in this way, by exercising our prerogative powers
20 on the international plane.

21 THE PRESIDENT: Do you say those words really just apply to
22 changes in, as it were, EU rules?

23 MR EADIE: They apply to changes in the corpus of EU law,
24 but what that illustrates is that the powers that exist
25 under the prerogative to engage with Europe in that way

1 to achieve that domestic legal effect continue to inure.
2 Of course I accept that there is a difference in the
3 scale at least between the withdrawal, a leaving of the
4 club and a voting about whether or not you should wear
5 a tie in the dining room.

6 THE PRESIDENT: This is not really a major point in your
7 argument, though.

8 MR EADIE: It is a major point -- two major points, one is
9 that this is a conduit, and a necessary conduit and
10 therefore --

11 THE PRESIDENT: This emphasises it is a conduit through
12 which water is going to keep on passing.

13 MR EADIE: Yes, and therefore you do not imply anything
14 about control over exercise of prerogative power on the
15 international plane, because this is simply a conduit;
16 and the second is that the rights and obligations under
17 this provision created into domestic law once
18 transposed, are capable of being affected, including
19 removed from time to time, by actions which are at least
20 in part dependent with(?) other actors, on the exercise
21 of prerogative powers.

22 THE PRESIDENT: Yes, I see.

23 LORD SUMPTION: It may be that the answer to these questions
24 is different as you construe the Act with the additions
25 made in 2008 by comparison with what it would have been

1 before. Although Article 50 only operates on the plane
2 of international law, from 2008 onwards, it was plain
3 that if the object of section 2 was to ensure that the
4 domestic law obligations were no wider than the
5 international law obligations, that included withdrawal
6 after 2008.

7 MR EADIE: Everyone knew they could leave, my Lord, yes.

8 There is quite a fundamental significance to
9 section 2, which is that, as you will recall, the
10 divisional court's judgment is fundamentally premised on
11 the idea that you cannot affect through the exercise of
12 a prerogative, you simply cannot do it. That is the
13 background constitutional principle, you cannot affect
14 rights in domestic law and here we know you can. The
15 rights can be affected, they can be altered, they can be
16 amended, they can be removed.

17 LORD CLARKE: It is not just a question of scale, as it
18 seems to me at the moment. The difficulty you have to
19 face up to, I think, is that what is envisaged is not
20 merely the size of the stream, as it were, coming down
21 the conduit may vary from time to time, and what
22 precisely its composition is varies from time to time,
23 but you are envisaging making the conduit completely
24 redundant by the sound of things.

25 MR EADIE: My Lord, if you withdraw, that is the effect.

1 LORD REED: That is different in nature, one might argue,
2 from merely a change in the composition or the quality
3 of the water that is flowing down the conduit.

4 MR EADIE: My Lord, I accept -- I am not sure much is going
5 to turn on whether we characterise it as a difference of
6 nature or a difference of scale, it is the same point:
7 is there a distinction between withdrawal, complete
8 removal of these rights, and not? That has to be
9 approached in sequence, as it were. The first point is,
10 we know from this, because it is precisely the essence
11 of it, that the Government can destroy rights, to use
12 the emotive phrase that litters the other side's cases,
13 we know they can do that; that is the very essence of
14 this model.

15 LORD MANCE: When you say we know they can do it, just
16 explain in what way do you say that the Government can
17 destroy --

18 MR EADIE: Because they can operate on the
19 international plane in the context of the EU to agree to
20 various forms of directly affected measure, regulations,
21 matters of that kind, and the consequence of that may
22 well be that the rights that exist on day one either are
23 altered on day two or cease to exist on day two.

24 LORD MANCE: They certainly have no right to do it; they may
25 be unfloated(?) in many contexts.

1 MR EADIE: They may be. All of that is true, but it all
2 depends upon the Government being able to act within
3 that partnership, if that is the right way of looking at
4 it, on the EU plane.

5 LORD MANCE: That is what is contemplated by this Act, that
6 the Government will, under the EU law-making
7 institutions, play its part and that may lead to changes
8 in one direction or another. I think the question is
9 whether what is contemplated by this section also
10 includes withdrawal from the treaties.

11 LORD CARNWATH: Surely dealing with the argument --

12 THE PRESIDENT: Let him answer the question.

13 LORD CARNWATH: Sorry.

14 MR EADIE: My Lord, there are undoubtedly differences
15 between withdrawal entirely and the affecting of the
16 corpus of rights from time to time, but what it
17 illustrates is that the Government can remove rights
18 under this basis, and that fundamentally, we
19 respectfully submit, causes a problem for the reasoning
20 and analysis of the divisional court. When you come to
21 ask the bigger question, does this contemplate
22 withdrawal, my submission is that it contemplates and is
23 premised upon all of the Government's prerogative powers
24 on the international plane continuing to exist.

25 That is the fundamental premise on which this sits.

1 I am going to come to develop the submission in
2 a second, but what that means is that the rights that
3 are conferred into domestic law by this section are
4 inherently limited. They are inherently limited by the
5 ability to act in concert with others on the
6 international plane, under the EU auspices and all the
7 various ways that they make and create rights and
8 obligations from time to time; and it is inherently
9 limited because at a much more fundamental level, all of
10 this is premised on the continued existence of that
11 basic relationship.

12 LORD CARNWATH: Can I put my point. I don't quite
13 understand why we are spending so long on the 1972 Act,
14 because I mean your main point -- you have to address
15 the divisional court's point that it cannot affect
16 rights at all, but your main point is that things change
17 in 2008 --

18 MR EADIE: 2008, 2011, and 2015.

19 LORD CARNWATH: -- where you for the first time get
20 Article 50, and of course the key thing with Article 50
21 is the two-year automatic exit, which is a completely
22 new feature.

23 MR EADIE: My Lord, yes. I agree with all of that. Can
24 I just finish the answer on scale, if I can call it
25 that, scale/nature, and the answer, one of the answers

1 on scale/nature is -- the twin answers are, nothing
2 inconsistent with the continued existence of the power
3 to withdraw in section 2, because it is premised on the
4 prerogative powers continuing; and if you get to scale,
5 and you take into account subsequent developments, you
6 take into account in addition the 2015 Act.

7 Now, again, the line may not be entirely straight at
8 that point, but the fact of the matter is that it, like
9 the rest of the legislation, subject to the controls we
10 are about to come to, does nothing to take away or seeks
11 to control the prerogative powers that exist, including
12 withdrawal.

13 THE PRESIDENT: As I understand it, sorry to keep on about
14 section 2, but as I understand it, if it didn't say
15 "from time to time" in section 2, your basic point would
16 still hold that nothing in this Act takes away the
17 fundamental prerogative, either by necessary
18 implication, let alone expressly, upon which you rely.
19 All it from time to time does ultimately is merely to
20 give a bit of support to that argument by the notion
21 that as a result of the Government's involvement in
22 decisions in Luxembourg or Brussels, that the laws in
23 this country will be changed through the exercise of the
24 prerogative, and that is really as far as it goes, is
25 that right?

1 MR EADIE: My Lord, that is its core significance,
2 I entirely agree. That is its core significance, but as
3 I say, what it does do is to demonstrate that the rights
4 themselves -- forget about whether or not there is any
5 implication because it doesn't deal with withdrawal
6 expressly, of course not. So the question is what
7 implication is to be derived from it.

8 THE PRESIDENT: Very well.

9 MR EADIE: The best implication, or the only real
10 implication from it, we submit, is not that it controls
11 the prerogative power which sits alongside, but that
12 domestic legal rights that are recognised in the way set
13 out in section 2 can be affected by the Government
14 acting within those EU constitutions.

15 THE PRESIDENT: Thank you very much.

16 LORD MANCE: If the Government were to give notice --
17 I think that it is accepted that before section 50, the
18 Government could have extracted the UK internationally
19 from the European treaties.

20 MR EADIE: Yes.

21 LORD MANCE: If it had done so, it would have left a scene
22 where some European Union obligations disappear, that
23 once others remained as remnants of membership of the
24 Community, all those which required specific domestic
25 implementation, eg obligations to give effect to

1 directives and so on; is that easy to contemplate in the
2 context of section 2, which contemplates regulations and
3 so on to implement -- it doesn't have any provision for
4 the event of the prerogative being exercised to
5 disimplement the treaties.

6 MR EADIE: My Lord, yes, we respectfully submit it is
7 consistent, because the fundamental premise for
8 section 2 is we continue to be members and they are --
9 it is dealing with the transposition of the rights and
10 obligations such as they are. The points that my Lord
11 has been putting to me are the mechanics of exit, as it
12 were. We are in that position now, hence eg the Great
13 Repeal Bill that is proposed, where you put everything
14 that used to be EU law on to the domestic statute book,
15 and it is easier then to pull out and make policy
16 decisions policy area by policy area.

17 LORD MANCE: You say again, Parliament's only role is simply
18 to give effect to whatever the executive decides at the
19 international level.

20 MR EADIE: Exactly so, at that stage and at that base level.
21 If one is worrying about scale, one is saying: what
22 implications can we draw from this; you don't stop
23 there, you wind the clock on to the point when the
24 decision is actually being made and Parliament has at
25 that point decided that it should submit that very

1 question with all its implications to the people in the
2 referendum. But there is no implication the other way,
3 in section (Inaudible). Indeed the one thing that is
4 clear, we respectfully submit, subject to acting with
5 others, the point my Lord, Lord Mance made, the one
6 thing that it is clear about 2(?), is that the things
7 that the Government does on the international EU plane
8 have, as it were, direct effect into our domestic law,
9 including the removal of rights.

10 I suspect the submissions I was going to make on
11 section 2 can now be rather shorter, but can I just run
12 through them anyway just in case.

13 The next point I was going to make about section 2,
14 the first one having been conduit, the next one was
15 going to be that section 2 recognises rights and
16 obligations created elsewhere and altered elsewhere, in
17 other words on the international plane. There are
18 therefore two necessary preconditions to the rights and
19 obligations having effect in domestic law. (a), the
20 general conduit that is section 2, and (b), acting under
21 the prerogative by the Government shaping and creating,
22 removing and altering that scheme of rights and
23 obligations.

24 So these are, as section 2 expressly recognises,
25 rights and as section 2 puts it, created and arising by

1 or under the treaties.

2 THE PRESIDENT: Yes.

3 MR EADIE: That is where they are created and/or they arise.

4 Those rights are simply then, again, track back to the
5 wording in 2(1), recognised, available in law and
6 enforced and allowed accordingly. The creation is on
7 the international plane. The explanation for that
8 structure is that treaty dependent rights are not and
9 could not be created by Parliament, depending, as they
10 do, on international, including Government prerogative
11 action.

12 That point serves to undermine at base, we submit,
13 the truth and force of any analogy with rights properly
14 described as having been created in the sense of defined
15 by Parliament on the domestic plane. Of course, rights
16 and obligations created under the treaties, the wording
17 used, includes all the ways in which EU law is created,
18 so it includes regulations which have directly effective
19 legal impact and where the Government acts representing
20 the UK, negotiating and agreeing those sorts of
21 measures.

22 The divisional court also relied upon the concept of
23 an enforceable Community right that you see at the end
24 of 2(1), and they indicate that it implies, as it were,
25 that Community rights would continue. We respectfully

1 respond that the wording and the concept, that
2 definition, was necessary for the structure which
3 transposes rights created on the international plane, as
4 is recognised in that section, and it implies no
5 continuation of those rights.

6 That is the second of the points, as it were, so
7 conduit and rights and obligations, secondly created
8 elsewhere and altered elsewhere. And flowing from that,
9 the third point perhaps on 2 is that those rights are in
10 nature inherently limited or contingent as already
11 indicated.

12 What that does, once you recognise that they are
13 inherently limited or contingent, is that it serves to
14 undermine, we submit, any statement of principle that is
15 expressed too generally, or that it is taken from one
16 context, where it may remain true, and transplanted into
17 a different context; in other words, if you take the
18 statements in particular, and I will come back to this
19 when I deal directly with the point, take the
20 statements from Lord Oliver about self-executing
21 treaties and prerogative not being capable of being used
22 to alter the law of the land; but we know under this
23 model it can do precisely that.

24 It also strikes fundamentally at the proposition
25 that the giving of notice or withdrawal is in some way,

1 shape or form to be regarded as constitutionally
2 objectionable, because the effect would be to remove
3 rights currently enjoyed under the ECA. So ultimately
4 it would, but that is the essence of the rights created
5 by the ECA anyway; they are inherently limited,
6 inherently dependent upon and contingent upon actions
7 occurring on the international plane.

8 THE PRESIDENT: Yes.

9 MR EADIE: So one can analyse it, as I think Lord Millett
10 does in his article, on the basis that the withdrawal
11 from the EU and the giving of notice by the Government
12 will simply cause those rights to which the ECA gives
13 life in domestic law to expire in the way envisaged by
14 the 1972 Act and in accordance with their terms. It is
15 not therefore accurate to describe the process of
16 withdrawal, the starting of that process, as, in any
17 real sense, revoking or overriding statutory rights.

18 LORD CLARKE: You say that Lord Millett's analysis is
19 correct?

20 MR EADIE: We do, and we respectfully adopt it and at a more
21 fundamental level, it is a point I made already, at
22 a more fundamental level, we submit that this
23 recognition of their inherently limited nature, their
24 contingent nature indicates that all of the rights and
25 obligations to which section 2 gives effect are

1 dependent upon the continued relationship between the UK
2 and the EU.

3 There is no need to imply anything into section 2
4 for that to be accurate; it is simply inherent in the
5 very nature of the rights and obligations that section 2
6 creates.

7 LORD CLARKE: You did give us the reference to
8 Lord Millett's paper before. Can you remind us where it
9 is.

10 LADY HALE: It is 34, 471.

11 LORD CLARKE: Thank you.

12 MR EADIE: It is inherently dependent, not merely upon
13 action from time to time, but upon more fundamentally
14 the continuation of that basic relationship.

15 THE PRESIDENT: Yes.

16 MR EADIE: It depends upon the maintenance of that
17 relationship. The club's rules apply and the right to
18 elect people to its institutions, for example, are
19 dependent upon the continued membership of the club.

20 THE PRESIDENT: Yes.

21 MR EADIE: It is also to be noted in relation to section 2
22 that its effect is expressly limited to giving effect to
23 treaty rights and obligations in the UK. It gives
24 effect to rights and obligations which are, as it says,
25 without further enactments to be given legal effect or

1 used in the UK. It doesn't, therefore, give effect to
2 treaty rights which are enforceable in or against other
3 member states. It doesn't create a right of a British
4 citizen to live in France, because it couldn't possibly
5 do that. We could not legislate for their ability to
6 live in France. That would be a matter for France to
7 regulate.

8 What that indicates is that the ECA only intended to
9 regulate the treaties in the UK and didn't have the
10 wider purpose of authorising entry into the treaties, or
11 creating or guaranteeing the full range of rights
12 arising under the treaties.

13 It is a much more limited purpose. That is
14 section 2.

15 Section 3, which deals with the creation in relation
16 to section 3 -- sorry, I am just focusing on the points,
17 trying to focus on the points that the divisional court
18 made about section 3, and we have dealt with that in our
19 annex at paragraph 5(7) -- I don't repeat that. It no
20 doubt does assume the existence of issues of EU law
21 which the CJEU can deal with, but it doesn't imply or
22 state that the rights and obligations under EU law
23 continue to exist. It tells one nothing other than, for
24 as long as we are members of the EU, then there needs to
25 be an institution which resolves issues about rights.

1 So those are the core provisions of the 1972 Act and
2 just before going to the remainder of the sequence, as
3 it were, there is a question which hangs over the
4 remainder of the EU-based legislation here, which is
5 that if the 1972 Act had the effect of removing
6 prerogative powers to act in a variety of ways in
7 relation to the EU law structures, if that was, as it
8 were, removed or taken away by implication, then it is
9 jolly difficult, it might be thought, to see what the
10 later legislation is doing, with its nuanced scheme of
11 control over that very thing.

12 LORD MANCE: Isn't the point put against you on that that it
13 is dealing or addressing -- dealing with or addressing
14 increases in European competences rather than
15 diminution?

16 MR EADIE: It is in part doing that, but we will see when we
17 get to the scheme of control, that it is actually
18 imposing a whole raft of controls in this entire area.
19 That is maybe the fundamental political driver for some
20 of it, the ever increasing expansion of EU law, but that
21 is a matter of law. It is pretty much a specific aspect
22 of the point I have already made in relation to CRAG.
23 It is Parliament's considered decision-making as to what
24 controls it wishes to impose in this context.

25 The first of the later pieces of legislation is in

1 the same core volume, but you jump forwards to tab 112,
2 so it is core volume 1, tab 112.

3 THE PRESIDENT: Page?

4 MR EADIE: Page 4218.

5 THE PRESIDENT: Thank you.

6 MR EADIE: It is the 1978 Act.

7 THE PRESIDENT: Yes.

8 MR EADIE: This is an important step, we submit, because for
9 the first time, Parliament decides to control an aspect
10 of the treaty prerogative; in other words it decides to
11 control how the Government is able to act on the
12 international plane, and it does so expressly. If you
13 go to page 4219, section 6 required primary legislation
14 to be passed before any treaty increasing the powers of
15 the European Parliament could be ratified. So that was
16 an express and a specific and limited control of the
17 treaty prerogative. Parliament decides what element of
18 the treaty prerogative it wants to limit and it chose
19 the ratification of particular treaties and it chose the
20 form of control of primary legislation.

21 If the treaty prerogative has been excluded, then
22 this limited form of control -- this very specific form
23 of control becomes difficult indeed to explain. That
24 had two important consequences. The first, and for the
25 first time, the Crown is no longer free to exercise the

1 treaty prerogative however it chose. This precedes CRAG
2 by some years, you will recall. It could not any longer
3 agree and ratify without prior reference to Parliament
4 in this specific context.

5 The second --

6 THE PRESIDENT: It could agree, it couldn't ratify, is that
7 right?

8 MR EADIE: It could agree, it couldn't ratify, exactly.

9 THE PRESIDENT: I see.

10 MR EADIE: Secondly, it explains the subsequent chronology
11 of parliamentary involvement. After this Act Parliament
12 always passed implementing legislation for the major new
13 EU treaties before and not after they were ratified, but
14 the reason for that is because section 6 meant that
15 Parliament had imposed itself into the process.

16 THE PRESIDENT: Yes.

17 MR EADIE: That is the 1978 Act.

18 THE PRESIDENT: Right.

19 MR EADIE: Then there is 2002, which is in -- it is actually
20 in the supplemental bundle, the little black 11 KBW
21 bundle. It was omitted because it was replaced in the
22 2011 Act. Just so you see the sequence, it is tab 4.

23 THE PRESIDENT: Yes, thank you. And that is similar to
24 section 6.

25 MR EADIE: Virtually identical. It was re-enacted in

1 section 12 of the 2002 Act, but of course the
2 significance of it, the added significance potentially
3 is that the 1978 act was in 1978 and we are now in 2002.
4 Yes, the assembly had become a Parliament but time
5 period is of interest because Parliament has now seen
6 numerous major treaty revisions, negotiated by the Crown
7 under its prerogative, and has chosen not to implement
8 any further restrictions on the prerogative treaty
9 power. This simply replicates section 6 originally
10 passed with slightly different language in 1978.

11 So that is the 2002 Act. Back to core volume 1, if
12 you would, and tab 3. This is the European Union
13 (Amendment) Act of 2008, MS 117. It incorporated
14 Lisbon. The features perhaps to note are these. In
15 section 5 on MS 119, it altered the position we have
16 just seen in section 12 of the 2002 Act, expanding the
17 circumstances in which primary legislation was required
18 before ratification of any amendment to the founding
19 treaties made by ordinary revision procedure.

20 THE PRESIDENT: Yes.

21 MR EADIE: So there is an example of primary legislation,
22 primary legislative authority being required by express
23 provision.

24 But note in relation to a very specific matter.
25 This piece of legislation also had to consider and deal

1 with Article 50. Article 50, we know did not pass
2 unnoticed. If you could keep that open but briefly go
3 to authorities bundle 30, tab 402, those are the
4 explanatory notes.

5 THE PRESIDENT: What is the MS number?

6 MR EADIE: MS number 10346.

7 THE PRESIDENT: Thank you. And you see that it didn't pass
8 unnoticed, Article 50, because if you look on 10346,
9 just above the bullets in paragraph 5, the principal
10 changes made by the treaty are as follows, so principal
11 changes made by the treaty, over the page, 10347, fourth
12 bullet down.

13 Of course, just by way of note, that was, and you
14 can put that bundle away, that was -- that, Article 50,
15 was a provision that increased the powers of the
16 European Parliament because they had to be involved in
17 the Article 50 process, and so Parliament had to grant
18 specific consent *inter alia* for that reason. That
19 explains the content, if you go back to page 119 in
20 volume 1, that we have just been looking at into the
21 2008 Act, that explains the content of section 4. So
22 the 2008 Act adds Lisbon to the list of now renamed EU
23 treaties designated by the ECA and the effect is that
24 Parliament is acknowledging that the other rights and
25 obligations under other parts of the EU treaties, and we

1 have touched on this point before in debate, were now
2 subject to the exercise of the Article 50 withdrawal
3 right.

4 So the idea that they could thereafter be regarded
5 as set in stone or permanent cannot be maintained after
6 that.

7 LORD MANCE: The increase in powers of the European
8 Parliament related to a whole range of things.

9 MR EADIE: It did, that is why I said inter alia, but
10 my Lord is right. This is one of them, because you will
11 remember the European Parliament had some involvement in
12 the Article 50 process. So that is the second of the
13 bits of significance as it were. We have gone from 5
14 back to 4, and then we go forward to section 6,
15 page 120. This is significant because for the first
16 time, Parliament passes in section 6 a series of
17 parliamentary controls over decisions ministers took
18 under various parts and processes of the treaties.

19 So this is not control over entering into new
20 treaties or ratifying new treaties; this is about the
21 performance by the Government of its functions under the
22 treaties, prerogative powers being exercised therefore.

23 THE PRESIDENT: I understand.

24 MR EADIE: The list is set out in section 6(1) and applied
25 both to the TEU and the TFEU, and the terms of

1 section 6(1) are restrictive. The minister of the Crown
2 cannot exercise the prerogative power of the Crown in
3 respect of specific enumerated decisions, but they are
4 enumerated, the controls are nuanced; and they are not
5 merely identified, as it were, the specific things that
6 now need some form of parliamentary authorisation, but
7 the mechanism of control is itself nuanced.

8 You see that the species of control that this
9 section provides for in section 6(2) is parliamentary
10 approval of motions. So you have got within the same
11 Act, the various decisions that we say Parliament would
12 be expected to make if it entered into the territory of
13 trying to control the Government's prerogative powers in
14 the way that it saw fit.

15 We have the requirements carried over from the
16 previous legislation for primary legislative authority
17 in some contexts, see section 5, and now we have got
18 a different species of parliamentary control, this time
19 motions, and approval of motions in section 6(2).

20 LORD SUMPTION: Is it in fact that different? As

21 I understand it, the 2008 Act extended to a large number
22 of species of decisions, because the Lisbon treaty had
23 created a number of procedures for modifying the
24 operation of the treaty, which would previously have
25 required a new treaty, but under the terms of in

1 particular article 48, but there are also other
2 articles, it could be done by inter-governmental
3 agreement internally.

4 So effectively, what section 6 is doing is simply
5 carrying out the policy of section 5, but applying it to
6 a wider range of decisions which had a similar effect.

7 MR EADIE: And introducing a different mechanism for
8 parliamentary control. It doesn't have to be primary
9 legislative like section 5; it can now be by a motion
10 and agreeing to a motion, but my Lord is right.

11 LORD SUMPTION: The reason for that difference is presumably
12 that the treaty, having been included in the definition
13 of treaties under the 1972 Act, would otherwise simply
14 have automatically have carried any changes through into
15 English domestic law, so you didn't need primary
16 legislation, resolution (Inaudible).

17 MR EADIE: Well, I am sure that is right, but whether that
18 is right or not, you have still got Parliament thinking
19 about what mechanisms of control it wants to introduce,
20 and deciding that it is going to do it in this nuanced
21 way. What the explanation, the base explanation for
22 that might be, I am sure my Lord is right about that,
23 the basic structure of it and how it all worked and so
24 on, but the fact of the matter is you have in this
25 legislation, consideration of particular types of

1 decision, which one should be subjected to any form of
2 control, and you have decisions about what species of
3 control, what mechanisms of parliamentary control are
4 appropriate, demonstrating, we respectfully submit, the
5 fluidity with which that issue is approached.

6 LORD MANCE: These are all procedures under which the
7 competences of the institutions of the EU could be
8 increased or would be increased.

9 LORD SUMPTION: Or the voting system.

10 LORD MANCE: Yes, either that you could have qualified
11 majority voting and so on, simplified revision
12 procedure, they are all procedures which would lead to
13 a expansion of the legislative capacity or activity.

14 MR EADIE: True. True. But you have my points about the
15 significance of it, despite the truth of that statement.

16 THE PRESIDENT: We understand.

17 MR EADIE: The key point is the obvious, but, we
18 respectfully submit, thoroughly important one, when you
19 are trying to assess parliamentary intention, against
20 this backdrop, a series of decisions, forced however,
21 based on whatever policy considerations, legislative
22 policy considerations Parliament saw fit to feed into
23 the way in which this Act was structured. You have
24 primary legislative rule, you have a different form of
25 parliamentary approval, you have specific types of

1 decision being subjected to either or both of those
2 features, and you don't have anything at all in relation
3 to Article 50. Which did not pass unnoticed. Because
4 it was one of the principal changes introduced by
5 Lisbon, so they are looking --

6 THE PRESIDENT: You have drawn us to Parliament's attention
7 in the notes you took us to. Yes, we have that.

8 MR EADIE: You are looking at the very power which is now to
9 be exercised and you are looking at a piece of
10 legislation which represents Parliament's considered
11 response to the forms of control it wants to exercise,
12 in relation to the new powers introduced by Lisbon, and
13 Article 50 is not one of them.

14 THE PRESIDENT: Thank you.

15 MR EADIE: I mean, we pose one question, what species of
16 control would Parliament have decided in 2008 it wished
17 to subject Article 50 to? Section 5 or section 6? If
18 there is not a good answer to that question, then it
19 perfectly illustrates that Parliament's intention was to
20 leave Article 50 well alone. It cannot be said it
21 didn't realise it was there. It specifically identified
22 it in the explanatory notes and said: here it is, it is
23 one of the principal changes that has been introduced.

24 THE PRESIDENT: I understand, thank you.

25 MR EADIE: Just to finish on section 6, section 6(1)(a), you

1 will note, which precludes a minister voting in favour
2 of a measure under Article 48(6) of the TEU, the
3 simplified revision procedure, and that procedure
4 allowed the European Council to adopt a decision
5 amending all or part of the provisions of part 3 of
6 TFEU, and part 3 of the TFEU includes the provisions on
7 free movement.

8 No need for a treaty amendment before -- a new
9 treaty before amendment under this procedure; that
10 plainly would alter the content or existence of the
11 rights given under section 2(1) of the ECA, but on their
12 case, the respondents' case, you could not do that
13 without an Act of Parliament. How does that square with
14 section 6 and its requirement not for primary
15 legislation before a change is made to free movement
16 rights, but simply a motion of each House. On their
17 case, that would be a constitutionally retrograde and
18 inexplicable step, and again, unless there is a good
19 answer to that, their whole thesis becomes difficult to
20 maintain, we submit.

21 That is 2008. 2011, tab 6 in the same bundle,
22 page 136 in the MS numbering, and again, it is in the
23 same vein; section 6 of the 2008 Act and section 12 of
24 the 2002 Act were repealed and replaced in the 2011 Act.
25 That is 14(3), I think. This piece of legislation

1 represents again a clear exercise of parliamentary
2 control and precise parliamentary consideration of the
3 very question: where should the proper division lie in
4 relation to matters to do with EU law, between the
5 prerogative on the one hand and parliamentary control on
6 the other? What are the nature and types of control
7 that are to be imposed, how is it all to work, how is
8 that relationship to work?

9 We know it started in the 1972 Act with the twin
10 track, the prerogative continues, and so on. Now we
11 have Parliament saying: we see how the world is
12 developing and now we want to exercise very specifically
13 some controls over the exercise of your powers on the
14 international plane, forget about transposition, we are
15 now going to control -- we saw the process starting in
16 2008 -- we are now going to control the exercise of
17 certain types of decision-making on the
18 international plane.

19 LORD CLARKE: Which section is it?

20 MR EADIE: We have a few to come to, sections 2, 6, 7, 8, 9,
21 10. Just by way of summary, and I will take you to some
22 of them in a second, the result of this legislation is,
23 we submit, the most significant and extensive set of
24 legislative controls of the treaty prerogative ever
25 seen. It represents a series of detailed and focused

1 controls by Parliament over the exercise of the
2 prerogative under the EU treaties. Sections 2 to 10
3 impose a series of different sorts of control, this time
4 from referenda for some types of decision, through
5 primary legislation to motions of approval. It imposes
6 those controls over a series of different types of
7 action, pursuant to the treaties, all of which would
8 ordinarily and otherwise have been carried out,
9 exercising precisely prerogative powers, from agreeing
10 a new treaty to giving particular notifications under
11 particular articles of a treaty.

12 So by way of example, section 2 makes provision that
13 a treaty which amends the TEU or the TFEU to confer a
14 new competence on the EU may not be ratified unless
15 the treaty is approved by an Act of Parliament and
16 a referendum.

17 LORD WILSON: Or the extension condition.

18 MR EADIE: Or the extension condition. I am not going to go
19 through the detail of it, but the detail is worked out
20 in sections 3 and 4. But that is the first type as it
21 were.

22 Section 6, certain types of decisions of ministers
23 exercising their treaty functions, as you see, are
24 subjected to control by primary legislation again and
25 referendum, including things like adopting the euro or

1 removing border controls.

2 LORD CARNWATH: Including article 53, rather oddly, on page
3 MS 155 in schedule 1, and we heard (Inaudible) a sort of
4 recognition of Article 50, at the bottom there.

5 Curiously you seem to need a referendum to decide to
6 extend --

7 MR EADIE: I am not sure quite what the explanation for that
8 is, because one would have thought the bigger beast in
9 the room was leaving in the first place.

10 LORD CARNWATH: But certainly I suppose you can say there
11 was express recognition --

12 MR EADIE: Of Article 50, my Lord, I am sorry, I had not
13 picked that up, but you are right. Whatever the
14 explanation, there it is.

15 That is section 6. Section 7 deals with types of
16 decision, again by ministers, exercising their treaty
17 functions, and this time they are subjected to control
18 by primary legislation, but not a referendum, and that
19 includes strengthening the rights of EU citizens,
20 7(2)(a), by way of example, not weakening or removing,
21 no control over that; it is not designed in that way,
22 the prerogative power is not controlled in that way.

23 Section 8, we are going down, as it were, in terms
24 of level of control, but the same point remains, these
25 are nuanced controls, this is a critical Act.

1 Section 8, a minister of the Crown may not vote in
2 favour of or otherwise support a decision under article
3 3(5)(2) of the TFEU, unless one of sections 8(3) to (5)
4 is complied with. That may be primary legislation or
5 motions in Parliament.

6 Section 9, certain notifications provided for under
7 the Lisbon treaties, and under article 3 of protocol 21
8 to the TFEU and the TEU on the position of the
9 United Kingdom and Ireland in respect of the area of
10 freedom, security and justice, cannot be given without
11 parliamentary approval. An approval here means motion,
12 not legislation.

13 Section 10 on the same theme. Again, motion is the
14 mechanism, see 10(5), so the point of all of that is
15 that Parliament has carefully selected -- these are the
16 punch lines -- the areas it wishes to control and it has
17 selected the ones about which it wishes to have a say.
18 It has done so both by way of identification of the
19 particular type of decision, and by setting a detailed,
20 careful and varied scheme as to the mechanics of
21 parliamentary control that it demands, and the rest, we
22 submit, is prerogative as normal. That is the only
23 proper inference of all of this, so the UK continues to
24 send ministers to council meetings voting on the vast
25 majority of the council's work without the 2011 Act

1 applying to the body of work that they do.

2 LORD CLARKE: Am I right in thinking that where these

3 sections provided for a referendum, they also provided

4 that the referendum -- there should be a majority.

5 MR EADIE: In favour.

6 LORD CLARKE: In favour.

7 MR EADIE: Yes.

8 LORD SUMPTION: But they automatically produced the relevant

9 consequence, didn't they?

10 MR EADIE: They did, unlike the 2015 Act which my Lord has

11 in mind.

12 LORD SUMPTION: Indeed.

13 MR EADIE: That is true.

14 That is true.

15 My learned friend is pointing out you are not forced

16 to do it, you can do it as a precondition, rather than

17 a requirement, if it does; so in other words if there is

18 a majority, you don't have to do it, it is just

19 a necessary precondition if you want to do it.

20 The final punch line is the obvious one, that

21 despite the fact that it knew full well that Article 50

22 was still in play, and despite the fact my Lord, Lord

23 Carnwath pointed out that 50(3) is referred to in one of

24 the schedules, in schedule 1 on page 155, there is

25 nothing to indicate that it is purporting to restrict or

1 control the Crown's decision-making powers under
2 Article 50.

3 LORD MANCE: I suppose it can be said again in relation to
4 this that these are all restrictions designed to prevent
5 a creep in EU competence or an increase, and even the
6 restriction relating to section -- to Article 50,
7 paragraph 3, is designed to avoid making it more
8 comfortable or easier for someone to leave the EU,
9 isn't it?

10 MR EADIE: My Lord, yes, but the two points that might be
11 thought flow from that are firstly that irrespective, as
12 it were, of the underlying motivation or themes linking
13 these changes, they still represent nuanced
14 parliamentary control in the very area; but the second
15 and more impertinent thought might be that if that is
16 truly the explanation, where is the problem where you
17 are not doing that. Of course there is a different set
18 of questions around how fundamental or grand that thing
19 might be.

20 LORD MANCE: You may at the time, I don't know what the
21 political thinking was at the time, but you may at the
22 time have been happy with what you had, but not wished
23 to extend it.

24 MR EADIE: You now may not. All that illustrates, it might
25 be thought, is that there may be a danger in seeking

1 delve too far below for a common theme that is said to
2 affect the nature of this legislation. What they have
3 undoubtedly done is to look at the scheme of powers that
4 the Crown or the Government previously exercised on the
5 international plane in this sphere and said: we are
6 going to control that, that, that, that and that,
7 brackets, and not that; and that, we respectfully
8 submit, is the key significance of this act.

9 THE PRESIDENT: Yes.

10 MR EADIE: Before moving to the 2015 Act, it may be worth
11 mentioning a point which the divisional court place some
12 reliance on, which was that in a case called Thoburn,
13 Lord Justice Laws had described the ECA, and I think it
14 would follow logically that he is referring, or he can
15 be taken as referring to the entire scheme of EU
16 legislation, as being constitutional in nature. The
17 divisional court placed some reliance upon that, because
18 it was thought to suggest that it would make it less
19 likely because of that description that Parliament would
20 have intended that the rights conferred by the ECA could
21 be taken away by prerogative powers.

22 However, in relation to that point, firstly,
23 constitutional status in that sense entails that
24 legislation itself is protected against implied repeal
25 by later legislation appearing to be inconsistent with

1 it. So that was the force of the point, that was the
2 point that was really in issue in Thoburn, so it is
3 a doctrine which sounds in the principles that are --
4 that the courts have decided should govern implied
5 repeal, and those are, of course, common law principles
6 discovered by the courts as a mechanism for dealing with
7 that set of issues. It doesn't tell you anything about
8 Parliament's intention or about the interpretation of
9 a statutory scheme.

10 It cannot therefore, we respectfully submit, be used
11 to displace the De Keyser approach or what the scheme,
12 read properly as a whole, tells you about parliamentary
13 intention.

14 LORD WILSON: Mr Eadie, reading your case I wondered exactly
15 what your position was on constitutional status.

16 I think you have just indicated you accept that common
17 law does now have a doctrine of constitutional status,
18 and I think you accept that the 1972 Act is a statute of
19 constitutional status, but then you say, so what?

20 MR EADIE: So what. I do. We certainly have not taken
21 issue with that description or indeed the application or
22 the consequences of that description --

23 LORD WILSON: Very well.

24 MR EADIE: -- designation that Lord Justice Laws put on it
25 in Thoburn but we do say, careful, it is about implied

1 repeal and you cannot just say: there is
2 a constitutional looking statute and ergo it has some
3 enhanced status which renders it less likely that the
4 Government could withdraw from the treaties that sit
5 alongside.

6 In any event, if you are to take that forward, so it
7 is a doctrine that sounds in implied repeal, is the
8 first point, but if you are taking constitutionality
9 rather more broadly as an indication of the importance
10 of legislation, then you don't just look at the
11 legislation and say: that might fit that sort of
12 description. You have to drag in all the other
13 essential foundations of the constitution that play into
14 the particular area.

15 LORD WILSON: But if the common law so far indicates that
16 the doctrine is one which, where there is
17 a constitutional statute, there cannot be implied
18 repeal, namely it cannot be repealed by a side wind,
19 I think one of the arguments against you is that for the
20 prerogative now to be emptying the 1972 Act of content
21 is a different sort of side wind.

22 MR EADIE: My Lord, that is one of the arguments put against
23 me, and my essential answer to it is that
24 constitutionality is to be judged in the round, and it
25 includes the prerogative as an essential foundation

1 constitutionally; it includes the 1972 Act being set up
2 at its base on the basis of continued dualist operation;
3 and it includes, if ultimately you are searching for
4 Parliament's intention which is what this game is all
5 about, these are simply aids to working out what
6 Parliament has intended by the legislative scheme, it
7 includes, we submit, the entirety of the legislative
8 scheme. So if the 1972 Act is to be described as
9 constitutional, that is a description which cannot be,
10 as it were, imposed on the 1972 Act and then forgotten
11 about when you look at the later legislation dealing
12 with exactly the same sphere or context.

13 So if you are looking at the scheme and you are
14 saying constitutional, you take into account dualism,
15 you take into account the existence of prerogative, and
16 most importantly, perhaps, and this is the theme I am
17 now on, you take into account the entirety of the
18 legislative scheme. What that tells you is that when
19 Parliament wants to control the exercise of executive
20 power on the international plane, it says so and it does
21 so, not merely generally in relation to CRAG, with its,
22 as it were, general controls over the treaty
23 ratification, but the very specific and nuanced scheme
24 that I have just taken you through. That is my answer.

25 LORD WILSON: Thank you.

1 MR EADIE: Yes but ... is the answer.

2 LORD REED: Perhaps in your submissions tomorrow, I would
3 certainly be interested in knowing how what you have
4 just said about the need for constitutionality to be
5 judged in the round, the dictum you have cited from
6 Lord Bingham's judgment in Robinson about the need for
7 flexibility in applying constitutional principles, the
8 whole of that may feed into the approach you take to the
9 effect of the -- or relevance of the referendum result
10 to these proceedings.

11 MR EADIE: Yes.

12 My Lord, I am going to turn now to the 2015 Act, and
13 if at the end of that I have not answered my Lord's
14 question, someone will make a note and nudge me and
15 I will do it first thing in the morning.

16 The 2015 Act is in the same volume of authorities,
17 at tab 7, MS 160, and we don't need to spend long on the
18 body of the Act itself. It contains all sorts of
19 provisions about all sorts of things and it makes no
20 express provision about the legal consequences of the
21 referendum.

22 So the significance, if any, in our context of the
23 Referendum Act is not in relation to what it says, but
24 what it doesn't say.

25 My fundamental submission on the 2015 Act is that

1 that absence does not mean that the 2015 Act is legally
2 irrelevant. That is how it was treated by the
3 divisional court.

4 Indeed we make the submission that it would be
5 little short of bizarre if that were to be the position.
6 Little short of bizarre, because the 2015 Act posed and
7 put to a vote of all the people of the United Kingdom,
8 the very question which the divisional court and the
9 respondents say has to be repute to Parliament. And that
10 prompts the question: was Parliament really in 2015 in
11 passing that Act, in setting up the referendum, doing no
12 more than simply reserving to itself the right to decide
13 whether to leave or not as it saw fit.

14 Not merely is that highly improbable, but it would
15 lead, it would run counter, we respectfully submit, to
16 the repeated statements by ministers and by the
17 Government, both in the debates leading to the Act, in
18 Parliament, and in statements outside Parliament.

19 We have, in our case, if you could just find that
20 for a moment, in footnote 4, a characteristic
21 understatement -- a footnote, at the various statements
22 upon which we rely.

23 LADY HALE: Page reference?

24 MR EADIE: I am going to give you them 12337.

25 LADY HALE: Thank you.

1 MR EADIE: 12337, and you will see that -- I don't think
2 your version of our case probably has MS numbers in it,
3 does it?

4 THE PRESIDENT: Yes.

5 MR EADIE: Have you got MS numbers for footnote 4 --

6 THE PRESIDENT: We don't have cross-references, if that is
7 what you mean, but this was clearly stated on many
8 occasions, is that what you are --

9 MR EADIE: Exactly so.

10 THE PRESIDENT: We have that.

11 LORD MANCE: What is the nature of this argument? Is it
12 only relevant if there was up until this moment a -- no
13 right to use the royal prerogative, in which case you
14 are arguing, are you, that the Act reintroduces a right
15 to use the royal prerogative, because if there is
16 already -- or is it just confirmatory --

17 MR EADIE: Yes, and it is addressing, I am going to tell you
18 this again in a moment if I may, it proceeds on the
19 premise that the prerogative is available, but if the
20 concern is, and some of the questions that have been
21 asked by the court indicate that the concern may be that
22 there is a difference between the ability of Government
23 under section 2 to go all the way back to 1972 to alter
24 the corpus of rights from time to time, brackets, but
25 the implicit assumption underlying it all is that

1 something will continue to exist; but this is a whole
2 different beast. The answer is, to come perhaps
3 immediately and directly to my Lord, Lord Reed's
4 question, that this serves to allay that constitutional
5 concern, and the reason that I think my Lord, Lord Reed
6 reminded me of Lord Bingham in Robinson was because one
7 should not be unduly concerned if one is looking, as it
8 were, for mechanisms of parliamentary control and
9 parliamentary interest, one should not be too concerned
10 about drawing too straight or direct a line.

11 You look to see whether, in the real world,
12 Parliament has effectively sanctioned, to put it
13 loosely, rather than legally, that which the Government
14 now proposes to do through the exercise of the
15 prerogative. I make it entirely clear, we do not assert
16 that the 2015 Act provides the source, a statutory
17 source of power; the significance of it is in what it
18 doesn't say.

19 THE PRESIDENT: But if you are wrong, standing at 1972,
20 prerogative cannot have been exercised as you argue
21 today, in 1972, how do you say that has changed? Do you
22 say that has changed as a result of subsequent
23 legislation?

24 MR EADIE: We say the legislative scheme has to be looked at
25 as a piece. This is the current issue.

1 THE PRESIDENT: I know you do, but it is the logic of your
2 argument by saying looked at as a piece -- we could
3 conclude that if we were judging this in 1973, we would
4 be against you, but by judging it in 2016, we could be
5 in your favour.

6 MR EADIE: I am not sure that is the logic of my argument.
7 I am not sure I am asserting that the later legislation
8 provides a statutory authority or basis --

9 THE PRESIDENT: Why are we looking at it then?

10 MR EADIE: Because all sorts of concerns have been raised
11 inter alia around the scale of the change, and whether
12 or not this is relevant constitutionally, that
13 Parliament has passed this legislation and has set it
14 up.

15 LORD SUMPTION: It is relevant only to this extent, isn't
16 it, that if it is submitted in the 1972 Act nobody
17 contemplated withdrawal, by the time the Act has been
18 amended in 2008, that argument seems no longer
19 available, but it doesn't seem to have any other
20 significance than that.

21 MR EADIE: My Lord, can I develop the core points we make on
22 it, and give you them, just so I don't go off-piste and
23 give the wrong answer --

24 THE PRESIDENT: Do that, and then we may come back to our
25 questions. That is fair enough.

1 LORD CLARKE: Can I ask one question arising out of the
2 material that was available. In paragraph 107 of the
3 divisional court judgment, they say that -- they refer
4 to a document which they say made it clear to Parliament
5 that it was only to be an advisory referendum. Is that
6 correct, and if so, where is the document?

7 MR EADIE: It is in bundle 18; tab 202, MS 6279. I am
8 slightly out of my course because I was going to give
9 you another --

10 THE PRESIDENT: You were going to come back to this.

11 MR EADIE: No, let's deal with it now, because we are there
12 but if you still have, just by way of -- let's have them
13 both open at the same time, if you still have our case
14 footnote 4.

15 THE PRESIDENT: Yes, we do.

16 MR EADIE: I was going to add in, if I may, one further
17 reference to footnote 4.

18 THE PRESIDENT: What is that?

19 MR EADIE: Which is authorities 39, tab 509, supplemental MS
20 981, a statement by the foreign secretary on second
21 reading of the bill, effectively saying this is going to
22 be decisive, it is a matter for the people to decide,
23 and not anyone else.

24 So --

25 LORD MANCE: What does this go to? Construction of the --

1 MR EADIE: Well, you will have seen from the Lawyers for
2 Britain's written intervention that they do say it goes
3 to interpretation of the Act. We don't need I think to
4 go that far, or do not go that far, but we do
5 respectfully submit that it is relevant, that that was
6 the basis on which Parliament was proceeding in passing
7 this Act and we say that is confirmatory of our
8 position, which is that they left in place, which is the
9 only way in which effect could be given to it, which was
10 to exercise the prerogative power to withdrawal and to
11 give the Article 50 notice. That is the significance,
12 but no more than that.

13 You have seen a pretty desultory debate as well
14 about whether or not this Act is properly to be
15 described as advisory, which is the next lead-in point,
16 as it were, to the briefing paper that I have just taken
17 you to, but again we respectfully submit there is little
18 that can sensibly be attached to that characterisation
19 because it could be advisory, either as the divisional
20 court concluded in 106, for law makers in Parliament, as
21 they put it, or it could be advisory for Government, so
22 it is entirely neutral to call it advisory.

23 Then they say the briefing paper involves in effect
24 the Government assuring Parliament, brackets, contrary
25 to all the express statements I have just shown you in

1 footnote 4, that this is a briefing paper in which the
2 Government, is the implication, has assured Parliament
3 that it is simply going to be advisory in that sense and
4 Parliament, the implication being, is going to have
5 another go, whatever the outcome.

6 LADY HALE: Mr Eadie, before we leave footnote 4, had it
7 been your intention to give us the cross-references
8 which we don't have?

9 THE PRESIDENT: The cross-references within the footnote is
10 what my Lady is referring to.

11 LADY HALE: It refers to the Conservative manifesto, it
12 refers to Hansard and it refers to the leaflet that we
13 all got --

14 MR EADIE: My Lady, could I give those, if you have not got
15 them. The first one, the Conservative manifesto, is
16 authorities bundle 16, tab 178.

17 LORD CARNWATH: We have got them, further up the page.

18 THE PRESIDENT: I think the best thing to do is for you to
19 let us have them in a document tomorrow, rather than
20 going through all this and taking up court time.

21 LORD MANCE: On a different point, in your references to the
22 whole scheme, looking at the whole legislative scheme,
23 could you give us, if we don't already have it in the
24 papers, on authority on the extent to which these
25 statutes can be regarded as in pari materia, in other

1 words dealing with the same subject matter, the whole
2 group that you referred to from 72 up to 2015, or any of
3 them, and the extent to which we can construe an earlier
4 statute by reference to a later in the context of this
5 case? I think it would just be helpful to get the
6 principles.

7 MR EADIE: I will come to that just before I make my four
8 principle submissions on the statutory scheme, I have
9 a little section that says "Is later legislation after
10 the 1972 Act relevant? So you are going to get it.

11 LORD MANCE: Good. We are thinking along the same lines.

12 MR EADIE: I promise to write it down.

13 It is of some significance because the divisional
14 court proceeded on the fundamental premise that it was
15 not. So I am going to have to address that.

16 So advisory I have dealt with -- could be advisory
17 for Government as well as law makers; not undermined by
18 the briefing paper. We have got to the briefing paper.
19 Short points in relation to the briefing paper, the
20 first one is that this is a House of Commons Library
21 briefing paper. Some concern I think may have been
22 expressed by the House of Commons authorities as to the
23 appropriateness of referring to it, but it is referred
24 to in the divisional court's judgment, so that horse may
25 have bolted, but Part 2, Article 9 of the Bill of

1 Rights. It is a House of Commons Library briefing
2 paper, not written by Government but by a member of
3 House of Commons staff. It tells one nothing,
4 therefore, about the intention of Government. It is not
5 an assurance to Parliament by Government, it is not
6 anything that would bear on parliamentary intention. It
7 is not a legitimate aid to interpretation.

8 If it is being suggested that this is some form of
9 Government statement to the House, then it would need to
10 be set alongside the absolutely clear statements that
11 are collected in footnote 4 of our case, but we
12 respectfully submit, at a more fundamental level, it is
13 unhelpful in terms of assessing whether or not the
14 2015 Act is to be treated as advisory in the sense that
15 the divisional court used that term in.

16 So that is what I say about that document. I hope
17 that answers my Lord, Lord Clarke's question on that.

18 Two core points on the 2015 Act, if I may. The
19 first, and this is its true legal significance, we
20 respectfully submit, is that it proceeds on precisely
21 the same footing as the other parts of the scheme of
22 control over the conduct of international relations by
23 Government. It makes no provision seeking to control
24 the prerogative powers that the Government exercises.
25 It imposes no requirement as other acts had done in the

1 same territory as we have seen for primary legislative
2 authority, before any step is taken in the exercise of
3 those powers, nor indeed for any of the other nuanced
4 forms or mechanisms for parliamentary involvement, and
5 that, no doubt, is because it is itself primary
6 legislation. Specifically, there is nothing to
7 constrain the Government giving Article 50 notice. Its
8 significance in legal terms is precisely that it does
9 not do so, as it could perfectly well have done, see the
10 raft of earlier legislation.

11 The silence, we submit, is compelling and consistent
12 with the rest of the legislative scheme and that point
13 is powerfully reinforced by two other facts. Firstly,
14 in the event of a decision to leave, if that was the
15 outcome of the referendum that Parliament set up, the
16 process of withdrawal had to commence in the prescribed
17 way. Article 50 notice was the only, and under the
18 Lisbon treaty the mandated, first step and as we already
19 know from the legislative scheme that we have gone
20 through, from 2008 and 2011 in particular, Article 50
21 was already been considered by Parliament and left in
22 the hands of the Government. So that the first
23 reinforcement.

24 The second is, moreover, the 2015 Act represents
25 specific contemplation by Parliament of precisely the

1 sort of impact on rights and obligations that would flow
2 from withdrawal. Do we leave the club, is the question
3 that the referendum posed and, if we do, the processes
4 of the club necessarily go, the effect on rights
5 necessarily occurs and Parliament was plainly entirely
6 alive to that fact. It could not possibly be improper
7 to use the prerogative to give effect to the results of
8 the democratic process that Parliament had chosen to set
9 up.

10 The counter position, it might be thought, is worth
11 at least considering. It involves contending that
12 Parliament had left Article 50 and the giving of
13 an Article 50 notice within the prerogative sphere in
14 the earlier legislation, and the 2015 Act in effect and
15 implicitly reverses that position and now requires that
16 the giving of such notice should be subjected to primary
17 legislative authority.

18 So they have already considered Article 50 in 2008
19 and in 2011, and the thesis that is now advanced is that
20 in 2015 --

21 THE PRESIDENT: I think the point, the way it would be put
22 against you, I suspect, is that under the 1972 Act it
23 was not left with the prerogative and no subsequent act
24 was inconsistent with that, because that was the
25 position in 1972 and that is what it remains, the

1 argument --

2 MR EADIE: That may well be the submission but that is not
3 the point about the 2015 Act. If they are right at the
4 base level, then so be it. That was the point you were
5 putting to me earlier.

6 THE PRESIDENT: Yes, that is what is put against you.
7 I don't think it is put that it survived any
8 differently.

9 MR EADIE: Quite but there is a jump, we respectfully
10 submit, between 2011 and 2008.

11 THE PRESIDENT: I can see that. I can understand what you
12 say on that point.

13 MR EADIE: And 2015. That contrast is stark.

14 The second on core points on the 2015 Act is that it
15 was passed with Parliament acknowledging at the very
16 least the political realities associated with the scale
17 of the decision to stay or leave. We respectfully
18 submit that the proper implication from that act is that
19 doing so, Parliament was acknowledging and acknowledging
20 plainly, consistently with the statements that happened
21 to have been made, that the vote should decide that
22 question and that all concerned, including Parliament,
23 would respect the outcome.

24 On that basis, it has obvious constitutional
25 significance. In the Shindler case, which as you will

1 recall, preceded this litigation, the Shindler case,
2 I am not going to invite you to turn it up now, but it
3 is in core authorities volumes 3, tab 18, MS627, and
4 Lord Dyson at paragraph 13 describes the matter thus:

5 "The referendum (if it supports withdrawal) is
6 an integral part of the process of deciding to withdraw
7 from the EU."

8 We respectfully submit that that is an entirely
9 correct characterisation of what the 2015 Act was doing.
10 It ascribes proper constitutional significance to the
11 fact of the referendum and to the fact that Parliament
12 has itself decided to put that decision to the people in
13 the vote.

14 I add in parenthesis that some of the other parties,
15 Pigney and Expat respondents, suggest that Lord Dyson
16 was also indicating that he expected that Parliament
17 would have a role in that process. We respectfully
18 submit that, when you actually consider the issues that
19 were truly being debated in Shindler, that point is not
20 a good one but the significance, and you see that from
21 just looking at paragraphs 13 and 19 in their context,
22 but the true significance of it is in the correct
23 description, as I have just indicated: the referendum he
24 said, if it supports withdrawal, is an integral part of
25 process of deciding to withdraw from the EU.

1 Of course the 2015 Act frames the question, we
2 submit, now to be asked, and it does so in circumstances
3 in which Parliament has evidently confronted the
4 consequences of the binary question that it put to the
5 people, including, at a basic level, the consequences
6 that some rights and obligations flowing from membership
7 of the club would not be available and specifically
8 contemplating in the leave part of the binary question
9 the very effect on rights which it is now said is
10 constitutional anathema.

11 So we respectfully submit that it is not correct to
12 treat that as legally irrelevant. The legal effects and
13 the legal significance may be more or less subtle, but
14 they are direct in the sense of it leaving the
15 prerogative power, the Article 50 power, in place, and,
16 if one chooses to review the matter more broadly
17 constitutionally, the effect is precisely as
18 Lord Bingham described it.

19 Is the later legislation relevant? My Lord,
20 Lord Mance's question. We respectfully submit that it
21 is a current question. The legislative impact on
22 prerogative powers can and does change as the
23 legislative scheme alters and Article 50 of course does
24 not arrive until 2008. So you could hardly freeze that
25 issue in 1972. So you don't grapple, we submit, with

1 1972 in isolation because of the nature of the question
2 that you are asking, which is the current state of
3 prerogative powers. You take the legislative scheme as
4 it exists in its entirety, as of the date on which you
5 are asking that question -- in other words today.

6 In any event, we submit that there is good authority
7 which, at the very least, implies at a high level,
8 a high level of judicial decision making, that
9 constitutional issues of the kind that confront you
10 today need to be determined in the light of present
11 constitutional circumstances. That is the true
12 significance, we submit, of the ECA and that legislative
13 scheme governing EU matters, EU treaty making, that is
14 the true significance of describing that legislative
15 scheme as constitutional.

16 We do respectfully submit that, in that respect, the
17 Robinson case to which reference has already been made
18 is of real interest. We have given you quote from
19 Lord Bingham in our annex to our case at paragraph 3,
20 but Robinson itself, which I am not going to take you to
21 but which I recommend to the court, if I may, core
22 authorities volume 4, tab 81, MS3272, Lord Bingham.

23 Can I therefore make four principle summary
24 submissions --

25 THE PRESIDENT: Which page is Lord Bingham's observation on,

1 sorry? Let us know later, it is all right.

2 MR EADIE: I think it is paragraph 12. I will just check
3 that. Paragraph 12 we quote in the annex.

4 THE PRESIDENT: Okay, we will find it. Thank you.

5 MR EADIE: In any event, I think this is the point my Lord,
6 Lord Mance asked expressly, the *in pari materia* one. I
7 can't remember if we have got cases in our case to
8 support that, but, if we do, I think it is our case at
9 paragraph 76, we respectfully submit in any event on
10 ordinary principles of interpretation it is legitimate
11 to rely on later parts of a scheme when considering the
12 1972 Act, firstly because the 2008 Act amends the
13 1972 Act -- that is our case at paragraph 75 -- and,
14 secondly, because we are in *in pari materia* territory.
15 That is our case at paragraph 76 and the citation is
16 there set out.

17 Four principle summary submissions then on the
18 statutory scheme, trying to draw the points together if
19 I may. Submission one is that the shape of the schemes
20 of control over the exercise of prerogative powers
21 represent precisely the exercise of parliamentary
22 sovereignty. Parliament has considered what the nature
23 of those controls should be. Parliament knows what
24 prerogative powers in the conduct of international
25 relations exist in relation to the making of treaties,

1 in relation to the negotiation of treaties, and in
2 relation to withdrawing from treaties. Those are all
3 proper parts of the generally expressed, the generally
4 characterised, prerogative power. That is we submit the
5 legislative premise or base position on which the scheme
6 of legislation exists and the prism through which it is
7 to be viewed.

8 So the specific controls that Parliament has seen
9 fit to enact in the scheme I have taken you through
10 represent their considered view as to the extent of its
11 encroachment on to that base position, on to those base
12 powers, and the base position is otherwise left in
13 place. That is why it is as significant to examine what
14 Parliament has not done as to examine what it has done.
15 That is why I started my submissions in describing the
16 prerogative by indicating that its source was not
17 legislative, and that it had its own freestanding common
18 law source, and it is for Parliament to make those
19 decisions, we submit, about the extent of encroachment,
20 to craft the scheme of control, to make the legislative
21 policy decisions as to when and in what form it wants to
22 exercise that control. Those are not decisions which we
23 respectfully submit the court can or should make under
24 our constitution. So applying the scheme of control
25 that Parliament has chosen is, we submit, an acceptance

1 and not an abnegation of parliamentary sovereignty.

2 That is the first submission.

3 The second submission is that Parliament, it is
4 clear, has legislated expressly, both generally in
5 relation and in relation to the EU, to establish the
6 nuanced system of controls you have seen and it has
7 conspicuously refrained from making any provision to
8 control the withdrawal from treaties or the steps
9 commencing a process leading to withdrawal. It has not
10 done so in CRAG, which is all about ratification. It
11 has not done so when specifically considering which
12 types of decision in the EU context our very contexts
13 should be the subject of what forms of control.

14 LADY HALE: I suppose if one is being really technical about
15 it, it has legislated to control the exercise of the
16 prerogative in relation to the withdrawal of other
17 countries from the EU. That is Lord Carnwath's point
18 about the inclusion of Article 50(3) in schedule 1.

19 MR EADIE: My Lady, yes. You are right.

20 LADY HALE: If one is being really technical about it.

21 MR EADIE: Yes, you are right -- can I add "subject to the
22 point my Lady's point" then to the point I have just
23 made then.

24 LADY HALE: Forgive me, I didn't mean to put you off your
25 stride. That was not my intention.

1 MR EADIE: That caveat, the subject two was the next point
2 -- it was going to be there was no express provision
3 that Article 50 notice or withdrawal is subjected to
4 legislative conditions and must thereafter be exercised
5 accordingly. Of course there are the controls which my
6 Lady has just reminded me about, but, in relation to the
7 exercise of our powers, there is no control in that way.
8 The clear position indeed is directly to the opposite
9 effect. The controls and the limits of the controls
10 have been decided upon and made the subject
11 unsurprisingly of express provision. The rest is
12 prerogative.

13 That was the basis on which the 72 Act proceeded,
14 that was the basis on which each of the pieces of
15 legislation thereafter proceeded and that was the basis
16 on which the 2015 Act proceeded, albeit with its
17 additional constitutional significance of the kind that
18 I have indicated and there is therefore, we submit, no
19 necessary implication, no necessary implication because,
20 in this sphere, this is the force of the reasoning of
21 Lord Justice Lloyd in the Rees-Mogg case, Parliament
22 when it wants to exercise control has done so very
23 deliberately and very expressly.

24 So we are not in the sort of territory that you had
25 in all of those earlier De Keyser type cases. We are

1 not dealing with a situation in which Parliament has
2 said, "This is the activity that you can do and, if you
3 are going to do it, these are the controls, these are
4 the regulations, these are the preconditions, you have
5 to jump over hurdle A, B and C, and then you can
6 exercise the power." That is what has created the
7 necessary implication or something virtually analogous
8 to that in the past and we are simply not in that
9 territory. We are nowhere near it, because what that
10 requires, as we saw from De Keyser, is a very precise
11 identification of the nature of the act in question.

12 What is the act in question here? It is the giving
13 of Article 50 notice and there has been no control over
14 that at all. There is no direct regulation, there is no
15 regulation at all of that activity, and so there is no
16 necessary implication, (a) for the reason given directly
17 transposable into our context by Lord Justice Lloyd in
18 Rees-Mogg, but, (b) and in any event, were one to apply
19 properly the reasoning and principles laid down by the
20 House of Lords in De Keyser and subsequent cases, for
21 the reason I have just identified.

22 It is self-evident, we submit, that withdrawal or
23 revocation of the treaties has the potential to affect
24 EU related rights and obligations in a very serious way,
25 and Parliament knew that and yet left that power

1 untouched, that prerogative power untouched.

2 No one can pretend they were not fully aware of what
3 would happen if Article 50 notice was given, it was one
4 of the principal changes made by the Lisbon treaty noted
5 in the explanatory notes. If its intention truly had
6 been that to subject leaving or withdrawing to
7 a requirement for primary legislation, not merely could
8 it have said so, but we submit it undoubtedly would have
9 said so -- undoubtedly because it is evident that in
10 those pieces of legislation I took you to, particularly
11 the 2008 Act, it was specifically considering both --
12 and they are distinct aspects -- the mechanisms of
13 transposition into domestic law and conduit, the stuff
14 of the 72 Act part 1, and section 2 in particular, and
15 the stuff of the later legislation in particular, the
16 controls it wished to impose on the exercise of
17 prerogative powers by Government on the
18 international plane.

19 LORD REED: You take from the authorities you cited this
20 morning that the current state of the prerogative in
21 relation to this matter depends on the current state of
22 the statute book and what the answer might have been in
23 1972 is not actually the issue?

24 MR EADIE: Yes, and you don't freeze it there. You don't,
25 as it were, get to a place where you say "The Act must

1 have had that meaning then, so it didn't ..." You are
2 not in that territory at all. You are in the territory
3 of asking a current fundamentally important
4 constitutional question. This court in particular,
5 I hesitate to say, but this court in particular has
6 shown itself to be well aware of the concerns about the
7 law reaching conclusions which the ordinary man and
8 woman on the street simply would not understand.

9 If you said to the ordinary man or woman on the
10 street, "Do you regard the fact that a referendum has
11 occurred to be remotely relevant to the question of
12 whether or not the Government can give Article 50
13 notice?" the answer would be, "Of course it is."

14 THE PRESIDENT: If you put it as "remotely relevant" --

15 MR EADIE: Relevant as a matter of law.

16 THE PRESIDENT: As a matter of law, they would probably say
17 "I will ask a lawyer".

18 MR EADIE: My Lord, certainly, but the divisional court's
19 conclusion is that you just exclude that from the
20 court's consideration. They say it is legally
21 irrelevant.

22 LORD HODGE: (Inaudible) as a matter of law, as to what it
23 doesn't say, what it assumes. Your position really is
24 that the source of the power was and remains the
25 prerogative.

1 MR EADIE: The source of the power was and remains the
2 prerogative, that was my first fundamental point about
3 it, and my second one was, as it were, the rather looser
4 constitutional point designed to scotch concerns about
5 scale, if I can put it that way.

6 My Lord, that may be a convenient moment to break.
7 I think we are on track.

8 THE PRESIDENT: Thank you very much for letting us know
9 that.

10 10.15 tomorrow or as soon as thereafter as we can
11 come in. Thank you very much indeed.

12 Court is now adjourned.

13 (4.31 pm)

14 (The court adjourned until 10.15 am the following day)

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9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

Opening statement by THE PRESIDENT1
Submissions by THE ATTORNEY GENERAL4
Submissions by MR EADIE16

