

1 Wednesday, 7 December 2016

2 (10.30 am)

3 THE PRESIDENT: Lord Pannick.

4 Submissions by LORD PANNICK (continued)

5 LORD PANNICK: Good morning, my Lady and my Lords, I was
6 completing my fourth submission which is that the
7 1972 Act, contents and purpose, contains no clear
8 statement that the executive does have a prerogative
9 power to nullify the statutory scheme and indeed if
10 I need to go this far, I say, having regard to the
11 statutory presumptions, that is the Henry VIII clauses,
12 legality and implied repeal, the Act clearly indicates
13 in my submission that the executive does have no such
14 power.

15 I had reached section 2(2) of the 1972 Act. We deal
16 with that in our written submissions; it is
17 paragraphs 56 to 57, MS 12419. I am not going to take
18 time on repeating that.

19 The next provision is section 2(4) which I do rely
20 on. I say that since Parliament expressly stated that
21 this Act takes priority, even over a later statutory
22 provision -- therefore there is no doctrine of implied
23 repeal -- Parliament is most unlikely to have intended
24 that the scheme it was creating could be set aside by
25 a minister. That is the submission.

1 Then we have section 3(1). We deal with that in
2 paragraph 58 of our written case, MS 12420, and I don't
3 want to add to that, save to refer to the divisional
4 court's judgment, paragraph 93.7. I don't ask the court
5 to turn it up. It is in the judgment, MS 11800,
6 paragraph 93.7, where the divisional court says that if
7 all the treaty rights can be removed by the executive
8 using prerogative powers, section 3(1) would make no
9 sense.

10 I say that the divisional court rightly concluded,
11 rightly concluded, it is paragraph 94 of its judgment,
12 MS 11801, that the clear implication from all these
13 provisions is that Parliament intended that the Crown
14 did not have prerogative power to take action on the
15 international plane to destroy that which Parliament was
16 creating.

17 My Lady, my Lords, before I move on to my fifth
18 point, can I briefly return to three matters which were
19 raised yesterday afternoon which I promised to deal
20 with. The first is my Lord, Lord Reed's question about
21 authority that Hansard can be relevant to identifying
22 statutory purpose, and not simply a *Pepper v Hart* type
23 exercise.

24 I think we have put on the desks of your Lordships
25 and your Ladyship a Privy Council case which I don't ask

1 your Lordships to go through. It is called Gopal. And
2 it is paragraphs 3 and 7 which I say support my
3 contention. It is nothing to do with human rights.

4 However, I should also draw to the attention of the
5 court the judgments of the appellate committee in the
6 Spath Holme case volume 8, tab 75, please don't turn it
7 up, but it is volume 8, tab 75, MS 2991. It is [2001] 2
8 Appeal Cases, and I do accept there the majority of the
9 appellate committee said Hansard could not be used to
10 identify the purpose of an act. So I draw attention to
11 that.

12 What I would say, however, is that if in this case
13 this court is going to look, if it is going to look, at
14 what ministers said about the 2015 bill, it would be
15 wrong, in my submission, to exclude what Mr Lidington
16 said in the House of Commons; it would be an artificial
17 exercise to look at some of the statements but not what
18 was said on the floor of the House of Commons. That is
19 my submission and that is the first point.

20 LORD MANCE: I think there is further authority. I remember
21 Lord Steyn dealing with this point and there is
22 certainly another case --

23 LORD PANNICK: Yes, Lord Steyn is 2002, I think, it is the
24 local government case your Lordship may have in mind.

25 LORD MANCE: Saying you could look at -- is there

1 inconsistency between that and Spath Holme? On the face
2 of it, it seems to be.

3 LORD PANNICK: If it matters, I would say the law has moved
4 on, with great respect, since 2001. Your Lordships and
5 your Ladyship, of course, have many important
6 constitutional issues to decide in this case; I am not
7 suggesting that the court adds to the list the rather
8 important question, the extent to which Hansard can be
9 used in order to determine the scope or mischief of
10 legislation.

11 THE PRESIDENT: It may have considerable practical
12 importance in more cases than the points we are being
13 asked to decide.

14 LORD KERR: I think we might say that there is a certain air
15 of unreality, if we are considering what effect the
16 1972 Act had and what purpose the 2015 legislation had,
17 to ignore what was said about that.

18 LORD PANNICK: I respectfully agree. The point I make is
19 the point I was making to my Lord, the President, that
20 my case is: look at what the Act actually said; but if
21 the court is to be persuaded by my friends for the
22 appellant that one should look at other material, it is
23 quite artificial to look at some of the other material
24 but not at what Mr Lidington expressly said on the floor
25 of the House.

1 THE PRESIDENT: Yes, I mean, the only trouble with looking
2 at what was said on the floor of the House, and as you
3 say, we don't want to go too much into this, is what
4 a minister or somebody else says does not necessarily
5 represent the reason why people vote, or what they
6 believe when they vote.

7 It is like going into what people say about their
8 contracts when construing their contracts, and that way
9 madness can be said to lie, because you then start
10 looking at everything said in Parliament and balancing
11 up -- it can be a very treacherous course.

12 LORD PANNICK: It can. Of course the point being made by
13 the appellant is what the Government's intention was,
14 what the Government was putting forward because Mr Eadie
15 draws attention, footnote 4, to what ministers said from
16 time to time: this was our intention.

17 THE PRESIDENT: That is what Government said but in the end
18 that is -- highlights the problem. We are here
19 concerned with two separate entities, the Government and
20 the legislature.

21 LORD PANNICK: I entirely accept that, and that is why I put
22 the point, I hope very modestly, it is not my
23 submission, if the court is being told by the appellant:
24 look at what the Government's intention was; it is a bit
25 more blurred than that. But my submission is what the

1 court should focus on, is what the Act actually said,
2 which is not ambiguous in any way; it is a limited act
3 for a very specific, very important purpose. I don't in
4 any way seek to denigrate the purpose; to hold
5 a referendum is a very important matter. My submission
6 is, however, it has nothing whatsoever to do with the
7 issue before the court, which is who enjoys the power to
8 notify; is there a prerogative power once the referendum
9 has taken place; and that is what I invite the court --

10 LORD CARNWATH: I suppose what ministers say might be
11 relevant as creating some sort of legitimate expectation
12 as to what they are going to do, but that tells you
13 nothing about the machinery with which they are going to
14 do it.

15 LORD PANNICK: Absolutely, and this case is nothing to do
16 with legitimate expectation, and any such argument would
17 be exceptionally difficult to sustain.

18 That is the first additional point. The second
19 point is I promised to answer my Lord, Lord Mance's
20 question about the debate in the 1970s. My Lord said,
21 what was I talking about, this debate in the 1970s on
22 whether Parliament could reverse the 1972 Act. What
23 I had in mind is the Blackburn case, and if your
24 Lordships and your Ladyship look -- I don't ask the
25 court to turn it up -- at core authorities 2, tab 11, it

1 is MS 302, Lord Denning at page 305 H adverts to what
2 was then a contemporary debate: could Parliament itself
3 go back on what it had enacted?

4 All I was saying to the court is, it is not my
5 understanding that that is nowadays a point that causes
6 concern, nor could it in the light of section 18 of the
7 2011 Act, if it was otherwise a point of concern.

8 The third point I promised to -- I need to come back
9 to is my Lady, the Deputy President, asked about the
10 acts of Parliament which have amended section 1(2) of
11 the 1972 Act to add the new treaties. The court will
12 find what I hope is a helpful annex to our written case.
13 It is MS 12438, and there we set out the relevant acts
14 which have amended section 1, subsection 2 to take
15 account of the new treaties, Maastricht, Amsterdam,
16 Nice, Lisbon and all the others.

17 What the annex shows is that all of these acts
18 amending section 1(2) were in fact enacted before
19 Parliament ratified the relevant treaty and that is
20 because as the court already heard --

21 LADY HALE: Before the Government ratified.

22 LORD PANNICK: Your Ladyship is absolutely right, before the
23 Government ratified, I apologise, and that is because
24 Parliament needed to amend domestic law before the new
25 EU law treaty came into force which would alter domestic

1 rights.

2 THE PRESIDENT: Just like the 1972 Act, the Government
3 signs, Parliament, as it were, enacts and then the
4 Government ratifies.

5 LORD PANNICK: Precisely so.

6 THE PRESIDENT: Thank you.

7 LORD PANNICK: Precisely so. If one looks at these acts,
8 some (Inaudible) parliamentary approval because of the
9 post 1972 legislation, the 1978 Act and the others.

10 THE PRESIDENT: Yes.

11 LORD PANNICK: Some of them need parliamentary approval
12 because they are being added to section 1(2), because
13 they affect domestic law rights. Some of them need
14 parliamentary approval for both reasons, so if one
15 looks, for example, at core authorities volume 1, tab 3,
16 the court will see the European Union (Amendment) Act
17 2008.

18 This is the one that addressed the treaty of Lisbon
19 and if the court goes -- sorry, it is MS 117, MS 117,
20 core authorities 1, tab 3. If the court, please, would
21 turn to MS 118, at the top of the page, section 2, it is
22 not set out in detail, but the court can see what it
23 does, is it amends the 1972 Act by adding a new
24 section 1 (Inaudible) and if the court then looks on the
25 next page and looks at section 4, this Act does another

1 job. What it does is it approves the treaty of Lisbon
2 for the purposes of the 2002 Act, that is parliamentary
3 approval, as it says, of treaties increasing the
4 European Parliament's powers.

5 So each of the two different functions is addressed
6 separately by Parliament, and there are some treaties
7 for which parliamentary approval was not required under
8 the post 1972 legislation, but it was still necessary to
9 add the treaty to section 1(2) of the 1972 Act. If the
10 court would please look at volume 19 of the materials
11 and look, please, at tab 221, which is MS page 6463.

12 The court will see that that treaty, which was the
13 treaty for accession of Spain and Portugal, that was
14 added to section 1(2) of the 1972 Act, but there was no
15 need for approval under the post 1972 legislation as it
16 then existed, so Parliament is very careful to treat
17 separately the two distinct areas that we are here
18 concerned with.

19 So that is the 1972 Act. There are, of course, many
20 other relevant statutes in many areas of life,
21 competition law, communications law, equality law,
22 environmental law, and many others, at least some of the
23 terms of which would be frustrated if the appellant
24 terminates the UK's membership of the EU, notifies of
25 the termination that is to take effect in two years'

1 time unless there is an extension. We have given the
2 example in our written case of the European
3 Parliamentary Elections Act 2002, and we have given
4 extensive analysis of this in the written argument. It
5 is in our written case, in particular, paragraph 17.3
6 a), which is MS 12394. But it is only an example.

7 It is no answer for the appellant to say, as he
8 does, that of course these rights lapse when we leave
9 the club -- that is their answer -- but that begs the
10 question, and the question is whether the appellant can
11 lawfully use prerogative powers in such a way as to
12 nullify these statutory provisions.

13 But there are many other examples. Can I give the
14 court one other example of our concern. It is volume 13
15 at tab 130, which is MS 4481, volume 13, tab 130, the
16 Communications Act 2003, MS 4481. I am inviting the
17 court's attention to section 4 of the Communications Act
18 2003 -- 13130 -- section 4 of the Communications Act is
19 headed "Duties for the purpose of fulfilling EU
20 obligations":

21 "This section applies to the following functions of
22 Ofcom ... (a) their functions under chapter 1 of part
23 2 ..."

24 That is electronic communications --

25 LORD CLARKE: This is section 4A, is it?

1 LORD PANNICK: No, section 4. It is on MS page 4481.

2 LORD CLARKE: Sorry, I beg your pardon. My fault.

3 LORD PANNICK: "Duties for the purpose of fulfilling EU
4 obligations", section 4(1):

5 "This section applies to the following functions of
6 Ofcom ..."

7 First of all, their functions under chapter 1 of
8 part 2 which concerns electronic communications,
9 networks and services, their licensing function, and
10 there is a lot more detail, none of which matters. My
11 point is under section 4(2):

12 "It shall be the duty of Ofcom in carrying out any
13 of those functions to act in accordance with the six
14 Community requirements which give effect among other
15 things to the requirements of the framework directive.
16 Then subsection 4, the second Community requirement is:

17 "... a requirement to secure that Ofcom's activities
18 contribute to the development of the European internal
19 market."

20 The third Community requirement is:

21 "... a requirement to promote the interests of all
22 persons who are citizens of the European Union, within
23 the meaning of Article 20."

24 My Lords, this simply does not make sense, it
25 doesn't make any sense if the Secretary of State has

1 a prerogative power to notify and to terminate all
2 our -- all the UK's obligations under the EU treaties.
3 All of that is simply frustrated or nullified and
4 I could make the same point -- I am not going to -- but
5 I could make the same point on dozens, perhaps hundreds
6 of statutes covering vast areas of national life.
7 Parliament has adopted sections in primary legislation
8 that proceed on the basis that the United Kingdom is
9 a member of the EU, and these provisions make no sense
10 if we are not a member of the EU.

11 LORD HUGHES: Are you saying what would be needed to undo
12 these -- for example the Communications Act, supposing
13 you are right and the service of the notice requires
14 legislation, what kind of legislation? Are you
15 addressing us on that or not?

16 LORD PANNICK: No, I am not because my submission is a very
17 simple one. My submission is that the Secretary of
18 State cannot proceed along the path of notification
19 without Parliament addressing the problem that will
20 inevitably arise, and I am concerned only with the
21 notification stage. I am coming on to deal with the
22 argument that is going to be there is going to be
23 a Great Repeal Bill and we don't need to worry about it,
24 I will deal with that.

25 My submission to your Lordships is that the statute

1 book has so many provisions, and this is an example,
2 that proceed on the assumption that this country is
3 a member of the EU, that the Secretary of State cannot
4 by prerogative powers take the step of notifying,
5 leading to us withdrawing, without Parliament itself
6 addressing this issue.

7 LORD HUGHES: That is very clear. I understand that
8 perfectly. But supposing you are right and Parliament
9 does address the service of the notice, what is the
10 effect of such an address by act of Parliament on the
11 Communications Act 2003, or do you have the same problem
12 with a legislative authorisation of the notice as you do
13 with a prerogative authorisation?

14 LORD PANNICK: No, because I would accept that if Parliament
15 were to say next week that section 1 of the
16 authorisation Act, the Secretary of State is authorised
17 to notify pursuant to Article 50 of the TEU, then it
18 would be exceptionally difficult to run an argument that
19 there is any legal impediment in him doing so. He would
20 have express statutory authorisation and Parliament no
21 doubt would proceed on the basis, because it would be
22 told to this effect in the parliamentary debates: all of
23 these problems, Communications Act problems and others
24 will be addressed before we actually leave the EU.

25 LORD SUMPTION: This is not an ambulatory statute, so

1 technically the position is that if we were to, if
2 notice is served and we consequently leave the EU this
3 would remain in force, absurd as it is; no doubt in
4 practice it would be changed, but the problem to which
5 statutes like this give rise is a completely different
6 problem to the one arising from the 1972 Act, isn't it;
7 this is simply something which will look very strange
8 but will continue to have effect until Parliament gets
9 round to repealing it.

10 LORD PANNICK: Yes.

11 LORD MANCE: I suppose it might be impliedly repealed or
12 frustrated if there was a statute authorising
13 an Article 50 exit.

14 LORD PANNICK: Frustration is the point. I entirely accept
15 the point my Lord, Lord Sumption puts to me that it
16 would look a bit strange. My point is that when the
17 court is asking itself whether the Secretary of State
18 really has a prerogative power to notify, it is
19 an important dimension of the argument that that which
20 he seeks to do will frustrate, will render insensible,
21 a large number of statutory provisions.

22 That is the submission, and that is not just my
23 view, it is the view -- it is not just my submission, it
24 is the view of the Secretary of State himself, because
25 my friend Mr Eadie handed up to the court yesterday the

1 statement that was made by the appellant,
2 Mr David Davis, to Parliament on 10 October 2016. Does
3 the court still have copies of that? It is the
4 three-page document -- I can't remember, I think
5 Mr Eadie asked the court to put it in the black folder.

6 THE PRESIDENT: He did.

7 LADY HALE: The "next steps" document you are referring to.

8 LORD PANNICK: Yes.

9 LADY HALE: Yes.

10 LORD PANNICK: "Next steps in leaving the European Union".

11 If the court has that --

12 THE PRESIDENT: Yes.

13 LORD PANNICK: I am grateful. On the second page, it is the
14 third paragraph of Mr Davis' comment. He says:

15 "In all, there is more than 40 years of European
16 Union law in UK law to consider and some of it simply
17 will not work on exit."

18 We respectfully agree and we therefore submit that
19 it is impossible to understand as a matter of law how
20 the Secretary of State can claim a prerogative power to
21 notify. He must, in my submission, obtain
22 a parliamentary authorisation to take steps which will
23 leave large elements of the statute book to be rendered
24 insensible.

25 THE PRESIDENT: I understand your argument, Lord Pannick;

1 parliamentary authorisation would not extend even to
2 a motion of both Houses after the issue had been fully
3 debated.

4 LORD PANNICK: Yes, that is the seventh point, which I am
5 coming on to.

6 THE PRESIDENT: Fine, okay.

7 LORD PANNICK: I am going to deal with that expressly,
8 my Lord.

9 THE PRESIDENT: Okay.

10 LORD PANNICK: Can I come on to the fifth topic which is
11 De Keyser and the other case law.

12 LADY HALE: Have I been mispronouncing that case all my
13 adult life?

14 LORD PANNICK: Would your Ladyship like to tell me the
15 correct --

16 LADY HALE: De Keyser.

17 LORD PANNICK: I will call it De Keyser.

18 LADY HALE: I may be wrong, I am often wrong.

19 LORD PANNICK: You say De Keyser, I say De Keyser.

20 LORD CLARKE: Down here we think it is De Keyser.

21 THE PRESIDENT: We can each stick to our own because the
22 transcript will not give away what we have called it.

23 LORD PANNICK: It is my fifth topic, whatever it is called,
24 and whatever it is called, MS 228 CA 2, tab 10, what it
25 was concerned with was Parliament impliedly removing

1 a prerogative power. My submission is that that is not
2 the only type of case where the courts will impose
3 limits on the exercise of prerogative power. Here, we
4 submit there simply is no prerogative power to act under
5 a treaty so as to defeat, nullify, frustrate statutory
6 rights. That is one additional principle.

7 Another principle is where the exercise of
8 prerogative powers would frustrate the provision made by
9 Parliament; that is *ex parte Fire Brigades Union*, core
10 authorities 2, tab 15, MS 444.

11 My Lord, Lord Mance made the point in argument,
12 I think it was yesterday, that in *ex parte*
13 *Fire Brigades Union*, the majority recognised that it was
14 not a *De Keyser* type case; see Lord Browne-Wilkinson,
15 and I don't ask the court to go back to it, see Lord
16 Browne-Wilkinson, page 553 F to G; see Lord Lloyd at 573
17 C to D; and Lord Nicholls, 578 F, his analysis also does
18 not proceed on a *De Keyser* basis.

19 So *De Keyser* in my submission is not, cannot be,
20 an exclusive code as to the limits of prerogative
21 powers.

22 I also need to address *Rees-Mogg*, *ex parte*
23 *Rees-Mogg*. Here I would ask the court to turn it up; it
24 is in core authorities volume 2 at tab 14 and it is MS
25 424. The court will recall that the applicant there was

1 seeking to challenge the ratification of the Maastricht
2 agreement; in particular his concern was the protocol on
3 social policy.

4 Now, it is essential to, in my submission,
5 understanding the case, to recognise that this protocol
6 had no effect in domestic law and therefore did not
7 remove, or indeed extend, domestic law rights, and that
8 is stated by the divisional court at 568. It is MS 440.
9 568 of the report. Can I take the court to that,
10 please. 568 A, MS 440:

11 "Would the ratification of the protocol on social
12 policy alter the content of domestic law.

13 "The protocol itself makes clear that it was not
14 intended to apply to the UK, nor is the UK party to the
15 agreement which is annexed to the protocol. The
16 protocol is not one of the treaties, which for this
17 purpose includes protocols, included within the
18 definition of the treaties in section 1(2) of the
19 1972 Act. It is specifically excluded by the 1993 Act.
20 It follows that the protocol is not one of the treaties
21 covered under section 2(1) of the 1972 Act by which
22 alone Community treaties have force in domestic law. It
23 does not become one of the treaties covered by section
24 2(1), merely because by the Union treaty, it is annexed
25 to the EEC treaty, see section 1(3) of the Act of 1972."

1 So what was being complained about in Rees-Mogg had
2 no effect on domestic law rights.

3 LORD WILSON: I think Mr Eadie says that that paragraph is
4 a second free-standing reason for the disposal of the
5 application. Do you agree?

6 LORD PANNICK: The case has to be understood in its context;
7 I am not avoiding giving an answer to your Lordship's
8 question, but can I come back to that after I have just
9 shown your Lordship one other matter.

10 LORD WILSON: Do.

11 LORD PANNICK: Because the other matter is that at the time
12 when the case was brought, Parliament had already
13 approved that which was to be done at the international
14 level. So if your Lordship looks at page 562, which is
15 MS page number 434, the court will find set out just
16 under letter C the text of section 1 of the 1993 Act,
17 section 1 of the European Communities (Amendment) Act
18 1993, which received royal assent, so it had already
19 received royal assent on 20 July, and the case was
20 brought on 26 July. It provides:

21 "In section 1(2) of the 1972 Act, in the definition
22 of the treaties and the Community treaties, after
23 paragraph F, there shall be inserted the words ... and
24 ... titles 2, 3 and 4 of the treaty on European Union,
25 signed at Maastricht on 7 February 1992, together with

1 the other provisions of the treaty so far as they relate
2 to those titles and the protocols adopted at Maastricht
3 on that date and annexed to the treaty establishing the
4 European Community with the exception of the protocol on
5 social policy ..."

6 So there are two points by way of background,
7 essential background, to understanding what it was the
8 divisional court was deciding in the paragraph on which
9 Mr Eadie relies. The first is that there is no effect
10 on domestic law rights and duties by reason of the
11 protocol on social policy, but secondly, Parliament had
12 approved the treaty, including the protocols.

13 Now, in that context, one goes to the passage to
14 which Mr Eadie invites attention and what the divisional
15 court are rejecting at 567 G to H is an argument,
16 an ambitious argument, as the divisional court
17 concluded --

18 LADY HALE: There being ambitious counsel.

19 LORD PANNICK: Very ambitious counsel in 1993. The
20 divisional court rejected what it regarded as
21 an unsustainable argument, that despite the fact that
22 Parliament had given its approval, despite the fact it
23 had no effect, the protocol, on domestic law rights,
24 nevertheless, the 1972 Act curtailed generally what
25 would otherwise be a prerogative power to amend or add

1 to the EEC treaty. That is what Lord Justice Lloyd is
2 rejecting and the argument is set out at 567 E to G, in
3 particular just above F:

4 "By enacting section 2(1), Parliament must therefore
5 have intended to curtail the prerogative power to amend
6 or add to the EEC treaty."

7 That is what he is rejecting, his Lordship, and just
8 above H:

9 "We find ourselves unable to accept this
10 far-reaching argument ... when Parliament wishes to
11 fetter the Crown's treaty-making power in relation to
12 Community law, it does so in express terms such as one
13 finds in section 6 ..."

14 Et cetera, et cetera. That is the point and my
15 point is this has absolutely nothing whatsoever to do
16 with the issue before this court on this occasion, which
17 is whether or not the Secretary of State has
18 a prerogative power to act on the international plane in
19 a way which will frustrate, nullify domestic law rights
20 and duties and the statutory scheme. That is not what
21 was there being considered. That is my answer and that
22 is why, although I accept -- in answer to my Lord, Lord
23 Wilson's question, although I accept that 567 G to H is
24 a separate answer given by the divisional court to the
25 answer given at 568 B, it is only by understanding what

1 is said at 568 A to B and what is said at 562 C to E,
2 that one can understand what it was that the divisional
3 court was rejecting at 567 H. That is my submission.

4 LORD MANCE: Can you just help me understand your argument
5 in 1994 or whenever. The amendment, which you pointed
6 to on page 562, excluded the protocol from the
7 definition of the treaties and yet your argument was, on
8 567, accordingly the protocol will have effect not only
9 on the international plane but also by virtue of section
10 2(1) on the 1972 Act on the domestic plane. How so?

11 LORD PANNICK: That was the divisional court's reaction.
12 That -- I don't want to complain but it may perhaps be
13 an unfair question to ask me to defend an argument that
14 the divisional court said simply didn't get off the
15 ground.

16 LORD MANCE: I see, it is as simple as that.

17 LORD PANNICK: I plead guilty, my Lord.

18 LORD KERR: Not least because you now support the divisional
19 court on this particular point.

20 LORD PANNICK: Of course I am not inviting this court to say
21 that anything said by the divisional court in the
22 context of what it was deciding was wrong. So that is
23 Rees-Mogg and that is my fifth topic.

24 My sixth topic is the post 1972 legislation and the
25 limitations placed on the use of prerogative powers.

1 The court has heard that Mr Eadie relies on the
2 statutory provisions post 1972 and they have imposed
3 various limits on the power of the Crown to act on the
4 international plane. Mr Eadie first referred to part 2
5 of the 2010 Act, CRAG, and your Lordships and your
6 Ladyship have that at core authorities 1, tab 5, MS
7 page 131. My Lord, Lord Mance I think it was, asked
8 about the green papers and the white paper that preceded
9 the 2010 CRAG legislation. I do invite the court,
10 please, to look at the green paper; the green paper can
11 be found in volume 15 at tab 166. 15, 166. And for the
12 court's note, the white paper appears --

13 LORD CARNWATH: Do you have the MS number?

14 LORD PANNICK: Sorry, MS 5189.

15 LORD CARNWATH: Thank you.

16 LORD PANNICK: That is the green paper. The white paper is
17 the next tab, tab 167 and that is MS page 5213 but could
18 I ask the court, please, to focus on the green paper,
19 5189, volume 15, tab 166 and the particular passage to
20 which I invite the court's attention is at MS page 5207.
21 It is under the heading, "Ratifying treaties".

22 MS 5207.

23 "Ratifying treaties", paragraph 31:

24 "Every year the UK becomes party to many
25 international treaties. These result in binding

1 obligations for the UK under international law across
2 a wide range of domestic and foreign policy issues. It
3 is right that Parliament should be able to scrutinise
4 the treaty-making process.

5 "32. The Government's ability to ratify treaties is
6 currently constrained in two ways. Treaties that
7 require changes to UK law need the enactment of prior
8 legislation which, of course [of course] requires the
9 full assent of Parliament [and they give examples] ...
10 many other treaties [many other treaties] are covered by
11 a convention known as the Ponsonby rule which is
12 explained in box 3 ..."

13 Box 3 is over the page, and the court is very
14 familiar with the Ponsonby rule, that the instrument is
15 laid before both Houses of Parliament as a command paper
16 for 21 days. Back to page 5207, 33:

17 "The Government believes that the procedure for
18 allowing Parliament to scrutinise treaties should be
19 formalised. The Government is of the view that
20 Parliament may wish to hold a debate and vote on some
21 treaties, and with a view to its doing so, will
22 therefore consult on an appropriate means to put the
23 Ponsonby rule on a statutory footing."

24 That is what ends up as CRAG, part 2. It is
25 a statutory enactment of what was the Ponsonby rule,

1 obviously with variations, but that is the purpose and
2 effect of CRAG part 2. It is nothing whatsoever to do
3 with the other constitutional principle, which is
4 recognised in paragraph 32 of that document, that if
5 a treaty is going to require a change to UK law, of
6 course it in any event requires the enactment of prior
7 legislation which requires the full assent of
8 Parliament.

9 In my submission, therefore, CRAG part 2 is nothing
10 to the point. It doesn't assist in answering the
11 question in this case, which is a question concerned
12 with whether there can be a prerogative power in order
13 to amend the -- in order to frustrate legislation which
14 has been enacted.

15 So that is the 1972 Act -- that is, sorry, the
16 2010 Act.

17 Mr Eadie also refers to the other post 1972
18 statutes. The court has been taken through them, the
19 statutes that specifically relate to the EU from the
20 first one in 1978, which addressed increases in the
21 powers of the then European assembly, through to the
22 2011 Act, which is the culmination of this process,
23 requiring not merely an Act of Parliament but in any
24 context a referendum on changes.

25 Now, my Lords, my Lady, leaving aside the post 1972

1 statutes, if we get to this point in the argument, then
2 I have submitted that there was and is no prerogative
3 power to take action on the international plane to
4 nullify the statutory scheme created by the 1972 Act,
5 particularly in relation to a statutory scheme which
6 introduced a new source of domestic law. I have
7 submitted that the 1972 Act, having regard to relevant
8 principles of interpretation, that is the
9 Public Law Project case, on Henry VIII clauses,
10 legality, no implied repeal, that the Act is simply
11 inconsistent with any prerogative power to set it aside.

12 Now, if either of those submissions is correct,
13 I say it would require the clearest of statements by
14 Parliament in any later legislation, that it was
15 intending, Parliament was intending, to create
16 a prerogative power which did not otherwise exist. And
17 I say that nothing in the later legislation comes close
18 to establishing a clear parliamentary statement that
19 a prerogative power that did not otherwise exist now
20 exists.

21 What Mr Eadie relies on is --

22 LADY HALE: It would not be a prerogative power, would it,
23 if it was created by statute?

24 LORD PANNICK: It would be a statutory power.

25 LADY HALE: It would be a statutory power.

1 LORD PANNICK: But of course Mr Eadie does not put his case
2 like that. He doesn't suggest that there is any
3 statutory power to notify, he is very clear about this;
4 he is not saying: look at the 2011 Act or any of the
5 other post 1972 statutes, they confer a statutory power.
6 His case is and has to be that the later legislation is,
7 as he puts it, confirmatory of a prerogative power that
8 previously existed.

9 LORD MANCE: Could it not be a revival of a prerogative
10 power? I mean, you have assumed that the 1972 Act
11 properly construed has the effect of abolishing the
12 prerogative power, eliminating it, but that may require
13 close study of what was actually being decided in the
14 De Keyser and the Fire Brigades cases; on one view,
15 perhaps they might simply be suppressing the prerogative
16 power, and therefore it might be capable of being
17 revived; or they might simply be saying that it was
18 inappropriate to exercise it; do we have to look
19 a little more closely at what they were in fact saying?

20 LORD PANNICK: My submission at its height is that there is
21 simply, and never has been, a prerogative power in the
22 executive to use treaty-making functions in order to
23 nullify that which Parliament has enacted, and that is
24 the strong submission. If that is right, it is not
25 a question of reviving a prerogative power; it has never

1 existed. It would need to be created for the first
2 time.

3 LORD KERR: One should beware of metaphors, of course, but
4 one of the things that has emerged in the course of
5 submissions has been that the 1972 Act constituted
6 a clamp on the power, and the 2015 Act was the means by
7 which this clamp was dismantled. What do you say about
8 that argument?

9 LORD PANNICK: That the 2015 Act constituted a removal --

10 LORD KERR: Of the clamp.

11 LORD PANNICK: I have made my submissions on the 2015 Act.

12 I don't accept that it has any effect, any legal effect
13 on the contents of the 1972 Act or the constitutional
14 principles that apply.

15 LORD KERR: I think you take an anterior point, don't you,
16 and that is it is not a question of a clamp. Once the
17 1972 Act invested the rights of the United Kingdom
18 citizens -- with these rights, then that invoked
19 a superior or at least a different principle, namely
20 that those rights cannot be taken away.

21 LORD PANNICK: They cannot be taken away because Parliament
22 has enacted them, Parliament has provided them, it is
23 basic to parliamentary sovereignty. However, I do
24 accept that a consequence of parliamentary sovereignty
25 is that Parliament can say something different.

1 LORD KERR: Yes.

2 LORD PANNICK: And it is a question of interpretation. All

3 I am saying is that given the significance of that which
4 Parliament did in 1972, and given the other principles
5 of interpretation to which I have referred, it does
6 require the clearest of parliamentary statements post
7 1972 to vary that position.

8 THE PRESIDENT: You say they are the clearest possible

9 words, but we have had to spend a lot of time looking at
10 the statute to persuade ourselves or to be persuaded
11 that the 1972 Act did remove, or put into abeyance, or
12 abolish, or whatever, or did not give rise to, however
13 one chooses to put it, a prerogative; but it seems to me
14 that it could well be said that the statute had the
15 effect of putting a clamp on the prerogative,
16 particularly bearing in mind what Lord Bingham said
17 about the importance of our constitution being seen as
18 flexible in the Robinson case. And in those
19 circumstances, you are not relying on an express term in
20 the 1972 Act, in itself to clamp the prerogative. So we
21 shouldn't be too surprised if we can conclude that the
22 2015 Act impliedly removes or relaxes the clamp.

23 LORD PANNICK: Yes, but there is nothing in the language of
24 the 2015 Act which can be focused upon, there is simply
25 nothing there.

1 THE PRESIDENT: If one sees it in the sort of sense -- the
2 way Lord Wilson puts it, of some sort of partnership
3 between Parliament and the executive, between Parliament
4 and the Government, then it seems to me there may be
5 some force in the argument that says, when Parliament
6 comes to face up to this issue, they say: well, let the
7 British people vote; it is not decisive, of course,
8 because the Government has to decide; but one could say
9 it is Parliament ceding the ground so far as its role is
10 concerned to the people, to a referendum; it has done
11 that; and then it is over to the Government.

12 LORD PANNICK: The former is, with respect, self-evident,
13 that Parliament is saying that the people are entitled,
14 should be given a voice. Where I would respectfully
15 take issue is the second part of your Lordship's
16 question to me. It doesn't follow in my submission that
17 the people having spoken, they are advising the
18 Government as opposed to Parliament.

19 THE PRESIDENT: One of the problems if you are right is
20 that, in terms of the law, the referendum has no
21 consequences at all and the whole Referendum Act has no
22 consequences.

23 LORD PANNICK: It has a very important consequence. Its
24 consequence is a political consequence.

25 THE PRESIDENT: I know but I am saying as a matter of law --

1 in the concept of a flexible constitution, that could be
2 said to be a little surprising.

3 LORD PANNICK: In my submission, it is not surprising, given
4 that that was the intention of Parliament; Parliament
5 intended, in my submission, to establish a referendum
6 which would advise those --

7 THE PRESIDENT: Advise who, precisely?

8 LORD PANNICK: Advise both the Government and Parliament.

9 THE PRESIDENT: Maybe just advise the Government.

10 Parliament was saying: over to you. "Advisory" is not
11 in the statute. We find it in one statement, in
12 a ministerial statement; there are lots of other
13 statements one could look at. It is quite dangerous to
14 look at advisory, but if we are into advisory, I am not
15 sure where it takes us.

16 LORD PANNICK: But one has an Act of Parliament that simply
17 says: there shall be a referendum; it says nothing more,
18 nothing more. What your Lordship is putting to me is
19 that that is sufficient to overturn, if I am otherwise
20 right, what is a fundamental constitutional principle
21 that the Government, the executive, lacks power on the
22 international plane, to set aside an act of Parliament,
23 the 1972 Act, which is nowhere mentioned in the 2015
24 legislation. That is the first point: an absolutely
25 fundamental constitutional principle is to be removed,

1 as it were, as an implication; and I would respectfully
2 submit that that would be a very surprising proposition.

3 THE PRESIDENT: You say as an implication, but that depends
4 how one looks at it; if one looks at the 1972 Act as
5 imposing a fetter by implication on the prerogative,
6 because there is nothing expressly imposing any fetter,
7 then it is not particularly surprising that the fetter
8 is removed by implication.

9 LORD PANNICK: But the fetter is a fundamental
10 constitutional principle. What your Lordship is putting
11 to me is that such a fundamental constitutional
12 principle, that the executive cannot frustrate or
13 nullify a statutory scheme, can be removed without the
14 clearest of statements, and here we don't have any
15 statement at all. It is not that my friends focus on a
16 particular word, and they say, well, in the
17 constitutional context, the language of the legislation
18 ought to be interpreted in a certain way.

19 THE PRESIDENT: But as Lord Bingham said, one doesn't look
20 at the language so much as the purpose.

21 LORD PANNICK: With respect, that is not what Lord Bingham
22 says; he says: within the scope of the language. That
23 is what he says.

24 THE PRESIDENT: But the problem with your argument, and
25 I see the force of what you say, is that in law, and

1 I repeat this, as a matter of law, the referendum has no
2 effect. I understand your point that it has a political
3 one, but it could be said to be a bit surprising that in
4 a flexible constitution, an act such as the Referendum
5 Act and an event such as the referendum, has no effect
6 as a matter of law.

7 LORD PANNICK: But that, with respect, begs the question:
8 what is it that the referendum was designed to achieve.
9 It is open to Parliament to institute a referendum which
10 does have a binding legal effect, and there are many,
11 many examples of where Parliament has done so.
12 Parliament has deliberately chosen a model which does
13 not involve any binding legal effect, and it is
14 a perfectly coherent statutory scheme for Parliament to
15 say that: it is very important that the people be given
16 a voice; this is a highly contentious political issue,
17 and before any steps are taken as to the future of the
18 UK's membership of the EU, the voice of the people
19 should be heard. That is not an event of no
20 significance, but it begs the question: what is to be
21 the consequence?

22 THE PRESIDENT: I quite accept, just as much as you can say,
23 quite rightly, that it doesn't tell us that the effect
24 is intended to be binding; so anyone arguing against you
25 can say it does not say it is not intended to be

1 binding; and one comes back to Lord Mance's point, that
2 one has to look at the act, your point in terms of its
3 language; but one also has to look at its consequence.
4 And it may not be binding on the Government, nobody
5 suggests that the Government is obliged to serve
6 an Article 50 notice, and therefore it is not binding.
7 In the other acts you refer to, it is not merely
8 binding, it is binding on the Government. This Act may
9 be enough for the Government to say: Parliament has
10 ceded the issue, as far as Parliament is concerned, to
11 the people; we can now go ahead.

12 LORD PANNICK: So the argument being put to me is that the
13 2015 Act does not have any binding force as against the
14 Government. It doesn't commit the Government. And
15 no one could, I think, seriously suggest it does commit
16 the Government to notify -- the Government could say, we
17 have decided, actually, we don't ...

18 But nevertheless your Lordship is putting to me it
19 is intended to have a different legal effect, which is
20 to remove what is otherwise the absence of prerogative
21 power on the Government, should it decide to notify, it
22 is now perfectly entitled to do so, even though it would
23 otherwise have no prerogative power to do so.

24 THE PRESIDENT: Yes, it basically revives the prerogative
25 power, the point that was being put to you, of course

1 there is nothing to stop Parliament, before the
2 Article 50 notice is served, calling the matter in and
3 reconsidering it; that is a different point.

4 LORD PANNICK: I am coming on, if I may, to the question of
5 parliamentary involvement.

6 LORD KERR: You could say this illustrates the dangers of
7 metaphors, because if you regard the 1972 Act as
8 suppressing or placing a fetter on or a clamp on the
9 prerogative, then that begs the question how is that
10 fetter or clamp removed. As I have understood your
11 argument, you submit it is not a question of a fetter,
12 it is a question of the 1972 Act creating a new context;
13 and the new context is that, given that powers, rights,
14 have been given to the British citizens by this means,
15 a new constitutional principle is in play, by reason of
16 the different contexts.

17 And therefore when one comes to examine the 2015 Act
18 for its efficacy in putting at nought that
19 constitutional principle, you are not addressing the
20 question: are you removing a clamp or dismantling
21 a fetter; you are asking yourself the question: is it
22 sufficient to displace the fundamental constitutional
23 principle which you say obtains?

24 LORD PANNICK: I respectfully agree. I am relying -- the
25 1972 Act arises in the context of a fundamental

1 constitutional principle which applies generally. It is
2 a fundamental constitutional principle that that which
3 Parliament has created, ministers cannot set aside.
4 Then one has the 1972 Act which adds greater force to
5 the submission for all the reasons that I have sought to
6 give, that it is not just an ordinary Act of Parliament,
7 it is an act of constitutional importance, which
8 contains section 2(4), which makes it even less likely
9 that ministers would have a power to exercise the
10 prerogative.

11 But I respectfully agree, there is no clamp, it is
12 the application of fundamental constitutional principles
13 of the United Kingdom. I do submit that if those
14 fundamental principles are to be removed by Parliament
15 itself, it is necessary for there to be clarity.
16 Whatever else one might say about the 2015 Act,
17 I respectfully submit that it cannot be said that the
18 2015 Act clearly removes the inability of the executive
19 to act so as to frustrate the statutory rights. There
20 is no clarity at all. What one has is an act of
21 Parliament in very simple terms, there shall be
22 a referendum, and that is all it says.

23 LORD WILSON: So in 2015 Parliament says we must have
24 a referendum. Now there has been a referendum, and the
25 significance of the outcome is enormous, but can one

1 discern in the Referendum Act, Parliament going on to
2 say: and by the way the political significance will be
3 for you, the executive, to weigh; or rather, as you say,
4 isn't Parliament more likely to have said, having called
5 for it, and when it has been done, we will assess the
6 significance of it.

7 LORD PANNICK: That is precisely my submission, and I do say
8 that, if the case against me is that the 2015 Act has
9 altered the position, has altered what the position
10 otherwise would be, then it is incumbent on those who
11 make that submission to show that Parliament has clearly
12 altered what is otherwise the basic constitutional
13 position, and there is no clarity whatsoever in support
14 of the appellant's position.

15 One has an act in the most general terms that simply
16 does not address the division of power between executive
17 and Parliament. That is not the subject of the act,
18 that has nothing whatsoever to do with that topic, and
19 I therefore respectfully submit that one cannot discern
20 from this Act of Parliament any alteration of
21 constitutional fundamentals, far less in the context of
22 the 1972 Act.

23 LORD REED: It might be argued that it is a different type
24 of act from most acts that Parliament passes. Its whole
25 point is to have political effects. It is not altering

1 anybody's rights, for example, it is not the sort of
2 legislation that Parliament passes day in, day out. It
3 is an act which is designed to result in an event which
4 will have enormous political significance.

5 The steps that then require to be taken in response
6 to that are inevitably going to be steps taken by
7 Government. It might decide to introduce a bill into
8 Parliament, it might decide not to. Parliament can then
9 respond. If there is a bill introduced, it can decide
10 whether it is going to pass it or not; if there is no
11 bill introduced, Parliament has the means of making the
12 Government accountable to it for that failure.

13 So looking at it that way, it is an essentially
14 political measure designed to have consequences at the
15 political level between the political actors. If you
16 look at it in that way, really, why is the court -- what
17 role does the court have to play? There is not a legal
18 issue really that arises here, other than our ensuring
19 that the political actors are operating their roles in
20 a lawful manner.

21 LORD PANNICK: My answer to your Lordship is that there is
22 a role for the court to play. The role for the court is
23 to identify whether or not the Secretary of State enjoys
24 a power to act on the international plane, using his
25 treaty making, and departing from prerogative, in such

1 a way as it will nullify statutory rights. For all the
2 points that your Lordship makes, the essence remains,
3 and what remains is that, before the 2015 Act, there is
4 a body of statutory rights and statutory principles, the
5 1972 Act, and after the 2015 Act, all of those
6 provisions remain. They are simply untouched by the
7 2015 Act.

8 Also untouched by the 2015 Act is the legal division
9 of responsibility between the executive and Parliament.
10 The Act says nothing about that, and nobody has produced
11 any material whatsoever to suggest that the 2015 Act was
12 intended to touch upon that issue. There is no material
13 before the court in which ministers have said: and the
14 division of responsibility between ministers and
15 Parliament is going to be affected by all of this; none
16 whatsoever.

17 Therefore I do not accept that the political
18 significance of the 2015 Act, which I do not dispute, in
19 any way touches upon the issue before the court, or
20 touches upon the constitutional question. It was open
21 to Parliament, open to Parliament, if it wished to do
22 so, to say whatever it liked on this topic, and it said
23 absolutely nothing.

24 For the court to infer matters that are simply not
25 addressed in the Act, when they touch upon

1 constitutional fundamentals, in my submission, would be
2 fundamentally wrong; it would be wrong for the court to
3 infer, on a matter of this importance and sensitivity,
4 that is the relationship between Parliament and the
5 executive, a radical change of position by reason of
6 an act which says nothing on the subject.

7 LORD REED: The way I have put it to you, obviously the
8 court's role is to interpret the 2015 Act, but if it
9 interprets it the way that I have put to you for your
10 comments, the result is to allow for a flexible response
11 by Government, depending on the outcome of the
12 referendum, obviously, which is subject to parliamentary
13 control in the normal way.

14 If we construe it in the way that you are arguing,
15 inviting us to, the consequence is that the court then,
16 as I understand it, has to effectively compel
17 a Government minister to introduce a bill into
18 Parliament, which is constitutionally a novelty, to say
19 the least, and if, for example, Parliament were to pass
20 a resolution in both Houses approving of notification
21 under Article 50, the court would say to Parliament:
22 that is not good enough, we, the court, are telling you
23 that will not do.

24 LORD PANNICK: Can I come on to that, my Lord, that is the
25 next point. Let me just deal if I may, try to deal with

1 the point your Lordship has made.

2 The court is not being asked in my submission to
3 interpret the 2015 Act. There is no language in the
4 2015 Act which comes close to supporting the contention
5 that is being made by the appellant. There is nothing.
6 The appellant does not focus on any language in the
7 2015 Act, and in my submission, with great respect, it
8 is a constitutional solecism to say that the court can
9 somehow divine an intention from the 2015 Act, without
10 focusing on the language that the legislation uses.

11 There are many statements to that effect, that it is
12 simply not the court's role, even in a constitutional
13 context; it is Lord Hoffmann's famous statement,
14 approving the judgment of Associate Justice Kentridge(?)
15 in the Zuma(?) case, I can't remember the case where
16 Lord Hoffmann said it but I will track it down, the
17 court has to look at the language of the governing
18 instrument; and this is the 2015 Act; there is nothing
19 in it that the appellant has drawn attention to which
20 begins to support a contention that it touches upon the
21 issues with which the court is concerned.

22 Indeed, I repeat, it is not the appellant's argument
23 that power to notify is to be derived from the 2015 Act.
24 That is not their case. It is somehow by means of legal
25 osmosis that the argument is being constructed. There

1 simply isn't anything there; there is nothing there upon
2 which I say this argument can be framed. In my
3 submission, it is not surprising that Parliament has not
4 expressly addressed the question of whether ministers
5 can use prerogative power in order to nullify
6 a statutory provision. The principle is so basic that
7 one would not expect Parliament expressly to address the
8 question.

9 So I say the 2015 Act is an act of political
10 significance; it is entirely neutral on the issue before
11 the court, as to whether or not the minister has power
12 to notify.

13 LORD MANCE: On the question of whether all acts must have
14 legal significance, you might -- I am not sure what your
15 answer is in relation to Lord Keen, the submission
16 relating to the Sewel convention, but the Sewel
17 convention as enacted in section 28(8) of the
18 Scotland Act might be said to be an example of a piece
19 of legislation which doesn't have any legal
20 significance. It simply enacts the convention and -- on
21 one view I appreciate it is an issue in this case, and
22 that people are saying it does have legal significance.

23 LORD PANNICK: I can see the force of that submission. I am
24 entirely neutral, of course, and the court will decide,
25 but it is not unknown for Parliament to pass legislation

1 that has an exhortatory intention. It doesn't
2 necessarily have a concrete legal consequence, and
3 I repeat, it is not difficult to understand why
4 Parliament was enacting the 2015 Act. The court is not
5 ignorant, of course, of the political realities. The
6 political reality is a highly controversial political
7 issue; it is considered appropriate, and understandably
8 so, that there should be a vote, so that all those
9 political actors understand what are the views of the
10 electorate; but that tells you in my submission
11 absolutely nothing as to what is to follow as
12 a consequence of the vote.

13 LADY HALE: But the Act did have an effect. The Act had
14 an effect. It provided for the referendum. The
15 franchise in the referendum, which is different from the
16 parliamentary franchise, made it lawful for the whole of
17 the referendum to do everything. The Act undoubtedly
18 had an effect.

19 LORD PANNICK: Absolutely.

20 LADY HALE: The question is whether the result has a
21 legal effect.

22 LORD PANNICK: Yes, my Lord, Lord Sumption.

23 LORD SUMPTION: I was going to ask you exactly the same
24 question.

25 LADY HALE: I am sorry.

1 LORD PANNICK: I apologise, I am labouring the point but
2 that is the point, that Parliament has spoken. What
3 Parliament required has occurred. This is not
4 a nugatory act of Parliament, and some of your Lordships
5 are putting to me questions that are seeking to divine
6 from the Act a purpose and intention and effect that is
7 simply not there, in my submission.

8 THE PRESIDENT: I think the case you had in mind where Lord
9 Hoffmann approved Zuma is Mattadene(?).

10 LORD PANNICK: Your Lordship is right, 1999 appeal cases.
11 Your Lordship is familiar with it.

12 THE PRESIDENT: I have found it. I cannot pretend to be
13 familiar with it.

14 LORD PANNICK: Lord Hoffmann says, quoting
15 Associate Justice Kentridge, that even in
16 a constitutional context, even in a constitutional
17 context, it is absolutely vital that what the court does
18 is it looks at the language of the relevant instrument,
19 here the 2015 Act.

20 What the court cannot do, because otherwise --
21 I think the term used is divination, what the court
22 cannot do is somehow to infer from the general context
23 a purpose and intention and effect that has no support
24 whatsoever in the language. That is creation. That
25 would be, in my submission, objectionable to traditional

1 law-making.

2 THE PRESIDENT: If the language used by the lawyers is
3 ignored in favour of a general resort to "values", the
4 result is not interpretation, but divination.

5 LORD PANNICK: Precisely so, and what Lord Bingham said in
6 Robinson is entirely consistent with that, because the
7 statement by Lord Bingham in Robinson is within the
8 scope of the language that is used by the instrument.
9 That is my submission.

10 THE PRESIDENT: Thank you.

11 LORD CARNWATH: I am trying to get a word in edgeways here,
12 Lord Pannick. We have jumped from 1972 to 2015. Are
13 you going to come back to the --

14 LORD PANNICK: My Lord, very, very quickly --

15 LORD CARNWATH: I would like at some point to get clear your
16 submission as to what happened in 2008, because that is
17 when Article 50 is created, and undoubtedly Article 50
18 created a new power operating at the international
19 level, which one could assume would be something
20 operated by the prerogative, so a new power which the UK
21 Government has operating in international law; I think
22 we need to ask ourselves what the effect of the 2008 Act
23 was, if anything, on that.

24 LORD PANNICK: I say no effect for these reasons. First of
25 all, I accept, and it is the Government's case, that the

1 United Kingdom had power to withdraw from the treaties
2 prior to the changes made by Lisbon. It is not
3 suggested by the Government this was a new power; it is
4 a new means, it formalises the process. That is the
5 first point.

6 The second point is that Article 50 does not say
7 anything about the way in which domestically the state
8 should act. It refers to the constitutional
9 requirements of the state in question.

10 Thirdly, as Mr Eadie accepted, Article 50 does not
11 have effect as part of section 2(1) of the 1972 Act.
12 Therefore, I submit that it is simply not possible to
13 suggest that what happened in 2008 affects the question
14 of the division of responsibility between the Government
15 and Parliament.

16 LORD CARNWATH: Except that Parliament in the 2008 Act
17 constrains various exercises of prerogative specifically
18 set out in that Act, doesn't do it to Article 50, and
19 then in the 2011 Act, we get this acknowledgment that
20 Article 50 is within the scope, as it were, but simply
21 a reference to Article 50(3).

22 LORD PANNICK: What Parliament has done from 1978 onwards is
23 to impose an increasingly rigorous form, set of
24 controls, and Mr Eadie's argument is that the power --
25 what he says is the prerogative power to notify is not

1 the subject of any specific restraint, and my answer to
2 that is one would not expect it to be, because it is so
3 fundamental an aspect of constitutional law that
4 ministers cannot use prerogative powers in order to
5 remove that which Parliament has created.

6 But of course Parliament has not set out expressly
7 that constitutional principle. It is a fundamental
8 common law principle. The later acts are concerned,
9 essentially, to constrain ministers from taking action
10 at international level to expand the scope of EU law.
11 That is the main focus of all the later legislation.

12 The fact that Parliament has from time to time
13 imposed such constraints cannot establish that
14 Parliament intended to remove a basic constitutional
15 limit. Indeed, if one looks at the authorities, the
16 authorities show that one should be very careful indeed
17 before you use later legislation in order to amend or
18 affect earlier -- the effect of earlier legislation.

19 My Lord, Lord Mance asked about the authorities and
20 my Lord helpfully referred to two authorities. One in
21 your Lordships' and your Ladyship's House most recently
22 is the JB (Jamaica) case, Lord Toulson's judgment. It
23 is in volume 22, tab 276, JB (Jamaica), MS 7778 and it
24 is at paragraph 24 and I invite the court to look at
25 that. I don't have time to take your Lordships or your

1 Ladyship to it.

2 THE PRESIDENT: Sorry, it is as much my fault as anyone
3 else's; we have been rather taking up your time.

4 LORD PANNICK: I don't complain about that, my Lord; I am
5 happy to seek to try to answer the points the court
6 wants to raise.

7 My seventh and final topic is the role of
8 Parliament, and the submission that is made by the
9 appellant is there have been debates in Parliament.
10 There have been Select Committee reports, there will be
11 more such debates, and the appellant says it is a matter
12 for Parliament to decide the nature and the extent of
13 its involvement. Of course we agree, subject to
14 an important qualification.

15 We say it necessarily follows from our submissions,
16 if they are correct, that only an act of Parliament
17 could lawfully confer power on the appellant to notify
18 under Article 50(2). Why is that? Well, because
19 notification would nullify statutory rights and indeed
20 a statutory scheme. The law of the land is not altered
21 by a motion in Parliament; this is a basic
22 constitutional principle. The court knows a motion may
23 be approved in the House of Commons today. I want to be
24 very clear on this. Our submission is that a motion in
25 Parliament does not affect, cannot affect, the legal

1 issues in this case. This issue arose in the Laker
2 case. Can I take your Lordships back to the Laker case;
3 it is core authorities, volume 2, and it is tab number
4 12.

5 THE PRESIDENT: Which page?

6 LORD PANNICK: MS 307. It is at page 367 of the MS, MS 367.

7 This is Lord Denning, and what Lord Denning explains
8 between E and F is that the action of the Government had
9 been the subject of approval in both Houses of
10 Parliament. E to F. At G, Lord Denning says:

11 "... mark you, this approval even by both Houses was
12 not the equivalent of an act of Parliament. It could
13 not override the law of the land ... see
14 Hoffmann-La Roche."

15 That is the point and I can take the court, if the
16 court wants to see the passages in Hoffmann-La Roche, I
17 won't do so because of time, but it is volume 21,
18 tab 257, MS 7183. So a motion in Parliament simply
19 cannot rectify what is otherwise the legal deficiency in
20 the appellant's case.

21 If, as we submit, the appellant cannot act on the
22 international plane by the exercise of the prerogative
23 because it will nullify statutory rights, then an act of
24 Parliament is necessary to change the law of the land.

25 One other authority that your Lordships and your

1 Ladyship may wish to be reminded of, it is the ex parte
2 Federation of Self-Employed case. Volume 8 of the
3 authorities and it is tab 68.

4 THE PRESIDENT: Thank you.

5 LORD PANNICK: National Federation of Self-Employed,
6 volume 8, tab 68, MS 2782. The relevant passage is to
7 be found at MS 2809 in the speech of Lord Diplock,
8 between F and G if your Lordships and your Ladyship have
9 that, at tab 68, Lord Diplock says:

10 "It is not in my view a sufficient answer to say
11 that judicial review of the actions of officers or
12 departments of central Government is unnecessary because
13 they are accountable to Parliament for the way in which
14 they carry out their functions. They are accountable to
15 Parliament for what they do so far as regards efficiency
16 and policy, and of that Parliament is the only judge.
17 They are responsible to a court of justice for the
18 lawfulness of what they do and of that the court is the
19 only judge."

20 That is the point. It is no answer for the Attorney
21 General to say in his submissions, as he did on Monday,
22 and I quote:

23 "Parliament can stand up for itself."

24 With great respect, that is a bad legal argument.
25 The same could have been said in Laker, the same could

1 have been said in ex parte Fire Brigades Union. It is
2 the role of the court and my Lord, Lord Reed asks me
3 about the role of the court, it is the role of the court
4 to address whether there is legal power to act in the
5 relevant respect, and the ability of Parliament to
6 control that which the minister is proposing to do is,
7 with great respect, nothing to the point.

8 This is as fundamental as any other principle in
9 this case and I invite the court not to accept any
10 suggestion that the legal limits -- I emphasise legal
11 limits -- on ministers' powers are to be left to or
12 influenced by political control, or parliamentary
13 control, short of an act of Parliament.

14 The appellant then says, well, the procedures under
15 the 2010 Act, the CRAG act, are very likely to apply to
16 a withdrawal agreement. That is not good enough. There
17 may not be a withdrawal agreement and the UK would still
18 leave the EU under Article 50(3). We don't know. If
19 Parliament were to refuse to give approval to
20 a withdrawal agreement, Article 50(3) would still apply.
21 We would still leave. Parliament's approval is not
22 a necessary condition for us to leave.

23 For the same reasons, the so-called Great Repeal
24 Bill does not assist the appellant. There is no such
25 bill at present. The court cannot proceed, in my

1 submission, on any assumption as to what Parliament
2 would or might do with a Great Repeal Bill. My Lord,
3 Lord Sumption put to Mr Eadie the court cannot assume
4 that the Great Repeal Bill will repeal the 1972 Act.
5 Mr Eadie agreed, and, with respect, so do we. It may be
6 enacted, it may be rejected. Come what may, the act of
7 notification commits the United Kingdom to leaving the
8 EU with the consequence for statutory rights that we
9 have drawn attention to.

10 One other very brief point. The court, I know, will
11 have been much assisted by the various analyses by
12 academic lawyers, of real distinction, on both sides of
13 the argument on this appeal. Each side has extracted
14 from the academic analysis the points which support our
15 respective arguments and the court will decide who has
16 the better of the arguments.

17 My Lords, my Lady, the submission for Ms Miller is
18 that the volume of materials before the court, indeed
19 the volume of lawyers before the court, and the
20 eloquence of my friends the Attorney General and
21 Mr Eadie and the Advocate General for Scotland should
22 not be allowed to obscure the basic principles of
23 constitutional law which I say the appellant's argument
24 would violate.

25 Those are the submissions I want to make, unless

1 there are other matters on which I could seek to assist
2 the court.

3 THE PRESIDENT: Thank you, Lord Pannick. Thank you.

4 Mr Chambers.

5 Submissions by MR CHAMBERS

6 MR CHAMBERS: My Lady, my Lords, I appear on behalf of the
7 second respondent and I gratefully adopt the submissions
8 of my learned friend Lord Pannick. We invite the court
9 to approach this appeal from first principles, based on
10 the fundamental legal doctrine of parliamentary
11 sovereignty. Applying that doctrine, the answer to the
12 issue posed in this appeal is straightforward and the
13 result is clear. It is a three-stage argument which
14 I shall summarise first and then develop.

15 Stage one is the doctrine of parliamentary
16 sovereignty itself. Parliament is supreme. No person
17 or body apart from Parliament itself can override,
18 nullify or set aside legislation enacted by Parliament
19 or the operation or effect of such legislation.

20 Stage two is the concession by the appellant that by
21 triggering Article 50, EU law rights will undoubtedly
22 and inevitably be lost. Those EU law rights are
23 enshrined in primary legislation, most notably the
24 1972 Act and the 2002 European Parliamentary Elections
25 Act. The clear legal effect of those concessions, of

1 that concession, is that by triggering Article 50, those
2 statutes will be nullified and overridden.

3 Stage three is the absence of any parliamentary
4 authorisation for the executive to override or nullify
5 that primary legislation. In the absence of such
6 parliamentary authorisation, by triggering Article 50,
7 the Government will be acting contrary to the doctrine
8 of parliamentary sovereignty and so the Government will
9 be acting unlawfully.

10 It follows from these three simple propositions in
11 our submission, that the appellants' appeal must be
12 dismissed. At heart it really is as straightforward as
13 that.

14 So, starting with stage one, which is the doctrine
15 of parliamentary sovereignty, we have set out in our
16 printed case the relevant principles. I am not going to
17 go through them now, but I do want to highlight some of
18 the core jurisprudential principles behind the doctrine,
19 because they make it clear that the aspect of the
20 doctrine which we rely on is absolute and it admits of
21 no exceptions whatever.

22 The doctrine itself was forged in the fires of the
23 battlefields of 17th century England, and it arose on
24 the basis of the clash between Crown and Parliament for
25 supremacy. At the culmination of the Glorious

1 Revolution of 1688, the Bill of Rights was enacted.
2 Now, the doctrine itself long predated the
3 Bill of Rights but it is in the Bill of Rights that the
4 doctrine finds its legislative expression, and if
5 I could take the court first of all to the
6 Bill of Rights, which is in core authorities 1 at
7 tab 106, electronic 4150 at 4152.

8 At 4150, we have the heading of the Bill of Rights,
9 and then at 4152, suspending power:

10 "... that the pretended power of suspending laws or
11 the execution of laws by regal authority without consent
12 of Parliament is illegal ..."

13 Late dispensing power:

14 "... that the pretended power of dispensing with
15 laws or the execution of laws by regal authority as it
16 hath been assumed and exercised of late is illegal."

17 Articles 1 and 2 are clear in their terms. No ifs,
18 no buts, no exceptions. Legislation enacted by
19 Parliament is supreme, and the executive cannot act to
20 undo that which Parliament has done. That which
21 Parliament has granted, only Parliament can take away.

22 The most celebrated exposition of the doctrine of
23 parliamentary sovereignty is that given by Professor
24 Dicey in his seminal work, "Introduction to the Study of
25 the Law of the Constitution", which was first published

1 in 1885. In our printed case we have cited extracts
2 from the eighth edition of 1915 which was the last
3 edition which Dicey himself wrote. I have described
4 Dicey's exposition as the most celebrated. It is also
5 the most influential and in its relevant respects,
6 Dicey's magisterial exposition still holds good today.

7 If I could take the court to some relevant extracts
8 from Dicey as quickly as I can, that is core authorities
9 5 at tab 157, that is electronic 4989. And at 4990, the
10 sovereignty of Parliament is from a legal point of view
11 the dominant characteristic of our political
12 institutions. If you go down to under heading A,
13 "Nature of parliamentary sovereignty":

14 "Parliament means in the mouth of a lawyer, though
15 the word has often a different sense in ordinary
16 conversation, the King, the House of Lords and the House
17 of Commons. These three bodies acting together may be
18 aptly described as the King in Parliament and constitute
19 Parliament. The principle of parliamentary sovereignty
20 means neither more nor less than this, namely that
21 Parliament thus defined has under the English
22 constitution the right to make or unmake any law
23 whatever, and further, that no person or body is
24 recognised by the law of England as having a right to
25 override or set aside the legislation of Parliament."

1 Then if you would go down about ten lines into the
2 next paragraph, there is a section which reads, halfway
3 down the page:

4 "There is no person or body of persons who can,
5 under the English constitution, make rules which
6 override or derogate from an act of Parliament or which,
7 to express the same thing in other words, will be
8 enforced by the courts in contravention of an act of
9 Parliament."

10 If you would then, please, move to the next tab --

11 LORD MANCE: That is the issue, isn't it, whether what is
12 proposed here is in contravention of the 1972 Act?

13 MR CHAMBERS: My Lord, precisely, that is the issue. That
14 is going to be my stage two, which is looking at the
15 rights to see whether or not there is a contravention,
16 but your Lordship is absolutely correct, on the
17 principle, the question is will there be
18 a contravention.

19 LORD MANCE: Just because rights are lost, which is your
20 stage two, does not mean to say that they are lost in
21 contravention of the statute which granted them; it may
22 be that they are conditional or ambulatory.

23 MR CHAMBERS: My Lord, it could be, if they are conditional,
24 but the point is this, if they are granted by
25 Parliament -- a right is a right, if it is a statutory

1 right, that is something granted by Parliament. The
2 effect will be to override or nullify that primary
3 legislation, because the rights which are afforded by
4 that legislation will have been taken away.

5 THE PRESIDENT: It depends, doesn't it; I mean, if the
6 legislation said so long as the executive agrees, for
7 example, there would be no problem.

8 MR CHAMBERS: My Lord, that is absolutely correct. That is
9 my stage three, which is, is there any parliamentary
10 authorisation.

11 So, for example, there would be parliamentary
12 authorisation if the statute, there was a Henry VIII
13 clause or whatever it may be, made specific provision,
14 for example, for rights to be taken away.

15 So it is a three stage argument and I am on stage
16 one, which is just setting out the principle, before
17 I get to my stage two and then stage three. In stage
18 three I will also be making submissions on the 2015 Act.

19 LORD MANCE: Yes, they could be conditional upon something
20 other than a specific decision to take them away; they
21 could be conditional upon -- any event but in particular
22 they could be conditional on membership of the EU.

23 MR CHAMBERS: My Lord --

24 LORD MANCE: The EU existing.

25 MR CHAMBERS: Yes, that is an example. The one I was going

1 to draw your Lordships' attention to was the argument
2 under the European Parliamentary Elections Act where
3 what is said: well, what if there is no EU Parliament?
4 In our submission, that does not matter. What matters
5 is if there is a right to vote or to stand for elections
6 to the European Parliament which has been granted under
7 the 2002 Act, that is a domestic statutory right which,
8 even if it cannot be exercised, has still been granted
9 by Parliament, and it is Parliament's choice whether or
10 not that right should be taken away.

11 LORD SUMPTION: The rule that the prerogative cannot take
12 away rights is not limited to statutory rights, is it?

13 MR CHAMBERS: My Lord, it is not limited to statutory
14 rights; we would say it applies to all rights, including
15 common law rights.

16 I was going to move quickly to tab 331, which is the
17 next tab, and it is electronic 9343.

18 LORD KERR: What is that number again, please?

19 MR CHAMBERS: Electronic 9343, we are still in Dicey but it
20 is spread over two tabs, I am afraid. The relevant
21 extract is 9343. The very bottom of the page:

22 "Thirdly, there does not exist in any part of the
23 British empire any person or body of persons, executive,
24 legislative or judicial, which can pronounce void any
25 enactment passed by the British Parliament on the ground

1 of such enactment being opposed to the constitution on
2 any ground whatever, except of course it being repealed
3 by Parliament."

4 Then if we go back to the previous tab, which is
5 157, sorry to jump around but it is just that it is
6 spread over two tabs, if we then go, please, to
7 page 5005, in the electronic numbering, you will see
8 halfway down the page:

9 "Two points are, however, well established. First,
10 the resolution of neither House ..."

11 This is a substantial -- result of the case of
12 Stockdale v Hansard, a point which my learned friend
13 Lord Pannick was on, and then specifically relevant to
14 the question of the role of the people in terms of
15 political power and legal power. If you move on,
16 please, to 5010, you will see at the top of the page,
17 the vote of the parliamentary electors and halfway down
18 that page:

19 "The sole legal right of electors under the English
20 constitution is to elect members of Parliament.
21 Electors have no legal means of initiating or
22 sanctioning or of repealing the legislation of
23 Parliament. No court will consider for a moment the
24 argument that a law is invalid as being opposed to the
25 opinion of the electorate. Their opinion can be legally

1 expressed through Parliament and through Parliament
2 alone."

3 Then in the same vein --

4 LORD SUMPTION: That needs to be modified, at any rate to
5 some extent, in an age of referenda.

6 MR CHAMBERS: My Lord, I am going to come to that but in our
7 submission, the answer is yes, if Parliament has
8 authorised a binding referendum. But if there is no
9 binding referendum which has been authorised, this still
10 obtains.

11 LORD HODGE: Does that include the first sentence you read
12 out?

13 MR CHAMBERS: "The sole legal right of electors under the
14 English constitution is to elect members of Parliament."

15 That is correct because it would be for Parliament
16 then to confer rights on the people to hold
17 a referendum, for example, but the sole legal right is
18 to elect.

19 LORD MANCE: There is an anonymous and slightly droll
20 publishers' note at the next section of Dicey, 9322,
21 which says the word "referendum" is a foreign expression
22 derived from Switzerland. 30 years ago it was almost
23 unknown to Englishmen, even though they were interested
24 in political theories.

25 MR CHAMBERS: Certainly Dicey changed his view on referenda

1 because he was terribly against Irish home rule, and he
2 wanted referenda introduced to try and defeat Irish home
3 rule. He didn't succeed.

4 LORD SUMPTION: He wanted a referendum in England about
5 Irish home rule.

6 MR CHAMBERS: That's correct. He didn't get it.

7 My Lords, and my Lady, 5024, halfway down the page:

8 "The matter indeed may be carried a little further,
9 and we may assert the arrangements of the constitution
10 are now such as to ensure that the will of the electors
11 shall by regular and constitutional means always in the
12 end assert itself as the predominant influence in the
13 country ... this is a political, not a legal fact. The
14 electors can in the long run always enforce their will,
15 but the courts will take no notice of the will of the
16 electors. The judges know nothing about any of the will
17 of the people, except insofar as that will is expressed
18 by an act of Parliament, and would never suffer the
19 validity of a statute to be questioned on the ground of
20 its having been passed or being kept alive in opposition
21 to the wishes of the electors. The political sense of
22 the word 'sovereignty' is, it is true, fully as
23 important as the legal sense or more so but the two
24 significations, though intimately connected together,
25 are essentially different."

1 The final extract is over the page on 5026, five
2 lines from the bottom:

3 "The electors are a part of and the predominant part
4 of the politically sovereign power but the legally
5 sovereign power is assuredly, as maintained by all the
6 best writers on the constitution, nothing but
7 Parliament."

8 Now, the appellant says that he does not dispute
9 what he terms the general principle of the doctrine of
10 parliamentary sovereignty, and he goes on to say that
11 nevertheless it is the case that the executive can by
12 the use of the prerogative alter the law of the land,
13 including that set out in statute.

14 Now, from a parliamentary sovereignty purpose, that
15 striking proposition is, we submit, simply wrong. The
16 doctrine of parliamentary sovereignty is not a general
17 principle, it is the fundamental legal doctrine upon
18 which our constitution stands.

19 As we have explained in our written case, and as the
20 courts of the highest authority have said over the
21 centuries, the doctrine of parliamentary sovereignty
22 conditions and refines and defines other relevant
23 concepts. Most importantly in this context, the issue
24 and the extent and use of the prerogative.

25 The United Kingdom's dualist approach to

1 international treaty-making upon which the appellant so
2 heavily relies is a product and a reflection of that
3 fact. The UK's dualist approach exists precisely
4 because the executive cannot alter domestic law by the
5 use of the foreign affairs prerogative and the use of
6 the prerogative of withdrawal. There has to be
7 authorisation by Parliament.

8 The two relevant authorities for that, which I will
9 not ask you to turn up but I will simply ask you to
10 note, is Rayner, that is core authorities 3, tab 43,
11 page 500 in the report at letters B to D, electronic
12 1179; and Higgs, which is core authorities 4, tab 260 at
13 page 241 of the report, electronic 7244.

14 Now, contrary to the submissions made by my learned
15 friend Mr Eadie, parliamentary sovereignty is not a new
16 or a newly discovered principle. It has been well
17 established and operated for over 300 years. But it
18 does not in any way represent a challenge to the way in
19 which the Government operates on the
20 international plane. Nor will it require in the future
21 any parliamentary micromanagement of what the Government
22 does on the international plane. This is because it
23 does not impact treaties which do not require
24 implementation in domestic law. It does not impact on
25 the exercise of power by Government on the

1 international plane which is authorised by Parliament.
2 For example, participation of ministers in the
3 decision-making of EU institutions. The doctrine does
4 not impact on the use of the prerogative in respect of
5 the myriad of examples which are given by the appellant
6 in his case, for example Post Office v Estuary Radio, or
7 in relation to the (Inaudible) of diplomats, so that is
8 stage one.

9 That brings me to stage two, which is the
10 appellant's concession, which is in paragraph 62A of his
11 printed case, the page reference is 12353, and the
12 concession is that the triggering of Article 50 "will
13 undoubtedly lead to the removal ... rights and
14 obligations currently conferred or imposed by EU law".

15 LORD MANCE: Could you just give that page again.

16 MR CHAMBERS: That is 62A of the appellant's printed case,
17 the page reference is 12353.

18 The appellant's description of these rights as being
19 conferred by EU law is not an accurate description of
20 the source of these rights as a matter of domestic law.
21 For the purposes of the doctrine of parliamentary
22 sovereignty, the source of the relevant rights in
23 domestic law is absolutely critical. Of course the
24 source of the EU law rights which are being referred to
25 here are primarily the 1972 Act and the 2002 Act.

1 Now, those rights were directly conferred in
2 domestic law by those two acts of argument. These
3 rights are available in domestic law only because
4 Parliament has expressed its will by primary legislation
5 that this be so.

6 Now, in this context, it is important to have a full
7 appreciation of the circumstances in which and the
8 reason why Parliament decided to enact the 1972 Act at
9 all.

10 LORD CARNWATH: Could I just pick up on a point where these
11 rights come from. In the case of Youssef, we had to
12 deal with a rather unusual situation where one had
13 a decision made by a United Nations body in the
14 terrorism context which then took effect under
15 a European regulation, which then in turn came into
16 domestic law via the 1972 Act.

17 Now, I said in agreement with my colleagues that
18 that was something which arose not from domestic law,
19 although it was brought into domestic law, it is a sort
20 of typical example of the conduit approach.

21 MR CHAMBERS: Yes.

22 LORD CARNWATH: Is that the correct analysis in your view,
23 or is that an oversimplification?

24 MR CHAMBERS: My Lord, with respect, that is not the correct
25 analysis.

1 LORD CARNWATH: I put it to you because it is relied on
2 by -- in one of the papers -- cases before us.

3 MR CHAMBERS: Yes. Under our dualist approach, for any
4 rights to be conferred in domestic law, requires the
5 intervention of Parliament.

6 LORD CARNWATH: I accepted that. That was one of the issues
7 in the case, was whether that had been done effectively,
8 given the particular power interfered very drastically
9 with the rights of a citizen of this country.

10 MR CHAMBERS: Yes.

11 LORD CARNWATH: Now, are you saying we got it wrong or --

12 THE PRESIDENT: Do you need to see the case, really, in
13 order to answer that?

14 MR CHAMBERS: Yes (Inaudible). The general principle as
15 I say in our dualist system requires the intervention of
16 Parliament in order to create these rights. These
17 rights are not just being transposed through a conduit;
18 the domestic legal order is being changed by the
19 1972 Act.

20 LORD CARNWATH: It may be, as my Lord says, better to have
21 a look at the case. I think it is in the papers
22 somewhere, because it is mentioned by the lawyers --

23 MR CHAMBERS: Perhaps I can come back to that after the
24 adjournment so that we can speed on.

25 In 1971 the Government was proposing that we join

1 the then EEC and to do that, they were proposing that
2 the UK sign the accession treaty.

3 Now, joining the EEC would have two important
4 consequences for the UK. The first is that membership
5 would necessarily involve the UK in the significant
6 fiscal obligations of membership. These fiscal
7 obligations could only be sanctioned by Parliament, by
8 primary legislation. We saw that happened in
9 section 2(3) of the 1972 Act.

10 Membership would also involve changes to domestic
11 law and again that could only be achieved by Parliament
12 through primary legislation.

13 So it was that on 28 October 1971, Parliament was
14 asked to give its consent in principle to the UK joining
15 the EEC. The terms of the relevant parliamentary
16 resolution, which were referred to by my Lord,
17 Lord Mance earlier, were identical, they were put
18 separately to both Houses and the terms are important.
19 The court will find them in volume 17 of the authorities
20 at tab 193, and the electronic reference is 5787.

21 LORD CLARKE: You set this out in your case, don't you?

22 MR CHAMBERS: My Lord, we have set out the terms of the
23 resolution. I want to just show your Lordship also
24 a short passage in the debate which we have not set out
25 in the case. I just wanted to first of all take you to

1 that.

2 LORD CARNWATH: Sorry, the page again?

3 MR CHAMBERS: It is page 5787, and you will see the terms of
4 the resolution:

5 "This House approves Her Majesty's Government's
6 decision in principle to join the European Communities
7 on the basis of the arrangements which have been
8 negotiated."

9 So by these resolutions the Houses of Parliament
10 were being asked to give their consent in principle to
11 the Government's in principle decision to join the EEC;
12 in other words if the resolutions were passed,
13 Parliament could next expect the introduction of
14 a European Communities bill to give effect to the in
15 principle decision to join the EEC. But if those
16 resolutions had not been passed, the UK's proposed
17 membership of the EEC would have been stopped in its
18 tracks.

19 Now, this was made clear by Mr Heath, the then Prime
20 Minister, and if I could just take you to two very short
21 passages, first of all at 5846, electronic 5846, which
22 is towards the very end of this tab, 193, for those who
23 have it in paper form. 5846, at the very top of the
24 page, this is Mr Heath winding up the debate:

25 "I do not think that any Prime Minister has stood at

1 this box in time of peace and asked the House to take a
2 positive decision of such importance as I am asking it
3 to take tonight. I am well aware of the responsibility
4 which rests on my shoulders for so doing. After ten
5 years of negotiation, after many years of discussion in
6 this House and after ten years of debate, the moment of
7 decision for Parliament has come. The other House has
8 already taken its vote and expressed its view.
9 Frontwoodsmen have voted in favour of the motion ...
10 I cannot over-emphasise tonight the importance of the
11 vote which is being taken, the importance of this issue,
12 the scale and quality of the decision and the impact it
13 will have, equally inside and outside Britain."

14 So that was the momentous occasion which was the
15 presager to the 1972 Act. If you then go to 5849, at
16 the very bottom, four lines up, this is still in Mr
17 Heath:

18 "It is well known that the President of France,
19 supported by the Chancellor of Germany, has proposed
20 a summit meeting of heads of Government ... This meeting
21 will settle the European approach."

22 Then over the page:

23 "If by any chance the House rejected this motion
24 tonight, that meeting would still go on and it would
25 still take its decisions which will affect the greater

1 part of western Europe and affect our daily lives but we
2 would not be there to take a share in those decisions."

3 So if the resolutions had not been passed, the
4 reality is that the Government would not have been able
5 to go on to sign the accession treaty because if it had
6 done so, it would have been acting directly contrary to
7 the will of Parliament if those resolutions had been
8 rejected. Of course if they had been rejected, there
9 would have been no European Communities bill. However,
10 the resolutions were passed and they led to the signing
11 of the accession treaty on 22 January 1972 and the
12 introduction of the European Communities bill which
13 became an act on 17 October 1972. So that is the
14 context in which the Act was passed.

15 In our submission, everything from then on has to be
16 seen through the prism of the 1972 Act. On the very
17 next day, 18 October, the UK ratified the accession
18 treaty and these dates are no coincidence. Prior to
19 ratification, it was necessary for Parliament to pass
20 legislation which would enable the UK to meet its fiscal
21 obligations and would enable the UK to change domestic
22 law.

23 THE PRESIDENT: As a matter of domestic law, would it have
24 been open to the executive, to the Government, to decide
25 not to ratify the treaty once the 1972 Act had been

1 passed?

2 MR CHAMBERS: My Lord, strictly speaking, as a matter of
3 law, it may have been. Our submission is that if
4 Parliament had expressed its will that the UK join the
5 EEC through these resolutions, if it then passed the Act
6 which makes provision for that joinder, then we would
7 say it would in fact be unlawful for the executive to go
8 against the will of Parliament, because the 1972 Act
9 makes express provision for our entry into the EEC, so
10 that domestic law could be altered, so once the Act was
11 is passed, that is it.

12 LORD MANCE: My Lord's question related to whether there was
13 an obligation to enter into the Act.

14 THE PRESIDENT: No, ratify the treaty.

15 LORD MANCE: To ratify the treaty. But once it was
16 ratified, then at any rate the rights were created.
17 I suppose therefore that there are two stages we have to
18 consider it at.

19 MR CHAMBERS: Yes.

20 LORD MANCE: It is really the latter which is the critical
21 one.

22 MR CHAMBERS: It is the latter, it is the 17 October
23 enactment, 18 October ratification.

24 THE PRESIDENT: Of course that is the history once it has
25 been ratified, but I just wondered whether that tiny

1 24 hours or whatever it was, the position there throws
2 any light on the subsequent position; and it seems to me
3 in some ways that you may well be right, consistently
4 with your argument, there was an obligation to ratify.

5 MR CHAMBERS: Yes, we would say it would have been an abuse
6 of power under Fire Brigades Union principles if there
7 was no ratification.

8 THE PRESIDENT: I see the force of that, thank you.

9 MR CHAMBERS: Article 2 of the accession treaty itself
10 mandated that the accession treaty be ratified in
11 accordance with the UK's "own constitutional
12 requirements", obviously a familiar phrase. We say
13 those constitutional requirements included the passing
14 of the 1972 Act by Parliament.

15 Now, the correct constitutional position, so far as
16 ratification is concerned, is clearly set out by the
17 late Lord Templeman writing extra-judicially in 1991, in
18 his article, "Treaty-making and the British
19 Parliament -- Europe".

20 The court will find that in volume 28, tab 351,
21 electronic, 9688, and I would ask you to turn that up,
22 please. This is an article published in the
23 Chicago-Kent Law Review, volume 67. You see the title
24 page at 9688. If we go to 9689:

25 "Under English law the capacity to negotiate and

1 conclude treaties falls entirely to the executive arm of
2 the Government. Nominally Parliament plays no role at
3 all in the process."

4 If we drop down a few lines:

5 "An understanding of how treaties are entered into
6 and implemented in British law depends on an
7 appreciation of the division between the international
8 aspects of treaty-making and the domestic aspects of
9 implementation. Parliament has very little involvement
10 in the former but almost complete control over the
11 latter aspect."

12 Then at 9690, halfway down the page:

13 "The theoretical powers of Parliament in relation to
14 treaty making may be summarised as follows ...

15 "(2) Parliament may prevent a treaty being ratified
16 if the Government submits the treaty to Parliament
17 before ratification. However, if the House of Commons
18 carried a vote against ratification, this result would
19 also lead ... the Government.

20 "(3) If treaty provisions affect private rights or
21 otherwise conflict with English common law or
22 United Kingdom statutes, Parliament may ensure that such
23 provisions are not effective by refusing to pass the
24 necessary statute which gives effect to the treaty.
25 There again the failure of the Government to retain the

1 enactment of the necessary provisions would lead to the
2 fall of the Government. The threat of defeat means that
3 a Government will always do all in its power to ensure
4 that when negotiating a treaty, the provisions of the
5 treaty will be acceptable to the majority of the
6 legislature into the electorate."

7 Then, over the page at 9691, just above the heading
8 "(2) Negotiations and conclusion of a treaty", four
9 lines up:

10 "In practice a treaty approved by a Government which
11 retains the support of a majority in the House of
12 Commons will be ratified and the effect of the treaty
13 will be given if the necessary in English law by the
14 passage through Parliament of statutory incorporation of
15 the provisions of the treaty."

16 Then at 9693, under the heading "(3) Parliamentary
17 approbation or approval of treaties":

18 "Broadly speaking, Parliament will need to be
19 involved where taxation is imposed or where a grant from
20 public funds is necessary to implement the treaty where
21 existing domestic law is affected ..."

22 And then he gives a few more examples.

23 At 9694, under the heading "Ratification of
24 treaties," the last line of the page:

25 "It is also envisaged that between the time of

1 negotiation and the act of ratification, the legislature
2 of a state may require to be given an opportunity to
3 scrutinise the proposed international agreement, even in
4 those states where legislative involvement is greater
5 than in the UK, in order to give the necessary approval
6 of the treaty."

7 There is then a reference to Article 14 of the
8 Vienna Convention and then:

9 "Ratification, once an opportunity for the sovereign
10 to confirm that the representative did in fact have full
11 powers to conclude a treaty, is now a method of
12 submitting the treaty making powers of the executive to
13 some control of the legislature, so the state may give
14 proper scrutiny to the treaty before it allows the
15 Government to bind the state to it."

16 Then under the heading "The Ponsonby rule", Lord
17 Templeman sets out on page 9695, at footnote 11, the
18 preface by Mr Ponsonby to the Ponsonby rule, and at the
19 beginning he says:

20 "It has been the declared policy of the Labour Party
21 for some years to strengthen the control of Parliament
22 over the conclusion of international treaties and
23 agreements and to allow this House adequate opportunity
24 to discuss the provisions of these instruments before
25 their final ratification.

1 "As matters now stand, there is no constitutional
2 obligation to compel the Government of the day to submit
3 treaties to this House before ratification except in
4 cases where a bill or financial resolution has to
5 receive parliamentary sanction before ratification."

6 So there is a distinction being drawn between, on
7 the one hand, bills where there is a constitutional
8 obligation, treaties to put them before Parliament
9 because they contain fiscal obligations or change the
10 law of the land, and separately the treaties which do
11 not require to be so put forward, but are under the new
12 Ponsonby rule which is coming.

13 We had that at 9696, and at the top of the page
14 I come therefore to the inauguration of a change in
15 custom and procedure. Then about eight lines down, he
16 says:

17 "There are two sorts of treaties. There is the
18 present treaty out of which a bill and a financial
19 resolution arise which necessarily comes before
20 Parliament and in regard to which no change is necessary
21 ... there is another sort of treaty out of which no bill
22 arises, and that is the sort of treaty which, according
23 to the present practice, need never have been brought
24 before the House at all."

25 That then becomes the Ponsonby rule.

1 So we are dealing with the accession treaty with
2 a situation where there was in our submission
3 a constitutional obligation to bring it before
4 Parliament so that domestic law could be changed.

5 There is just one further reference. My learned
6 friend Lord Pannick took you to the green paper in
7 relation to CRAG. There is also a relevant passage in
8 the white paper, which is at bundle 15, tab 167. That
9 is electronic 5213. The relevant electronic page number
10 is -- in this document we are looking at the white
11 paper -- 5282 and it is paragraph 119 of the white
12 paper. Under the heading, "Treaties in domestic law":

13 "In the UK international treaty rights and
14 obligations are not automatically incorporated into
15 national law upon ratification. They are given effect
16 in national law where necessary by primary or secondary
17 legislation. The Government practice is not to ratify
18 a treaty until all the necessary domestic legislation is
19 in place, to enable it to comply with the treaty, since
20 to do otherwise could put the UK in breach of its
21 international obligations. Parliament, including where
22 necessary the devolved legislatures, had the opportunity
23 to debate enabling legislation ... this practice applies
24 equally to all EU treaties that require enabling
25 legislation. Most parliamentary debates take place

1 under this process rather than the Ponsonby rule."

2 LORD CLARKE: Can you just say again what paragraph that
3 was.

4 MR CHAMBERS: 119, my Lord, forgive me.

5 LORD CLARKE: That is all right. Thank you.

6 MR CHAMBERS: So even before the Ponsonby rule came into
7 effect in 1924, there was this constitutional
8 requirement, we submit, for Parliament's consent to be
9 given to ratification of the accession treaty. Now,
10 neither the Ponsonby rule nor CRAG apply to treaties
11 which are required to be implemented under domestic law.
12 Contrary to my learned friend Mr Eadie's submissions,
13 CRAG and the subsequent legislation is nothing to the
14 point on the question of withdrawal from a treaty under
15 Article 50. There is this prior fundamental lock, we
16 would submit, and that lock is brought about by the fact
17 that the EU treaties require implementation in domestic
18 law.

19 Now, the reason I go through all that history at
20 quite some length is for two reasons. First, it
21 demonstrates, we submit, the interaction of the doctrine
22 of parliamentary sovereignty and the UK's dualist
23 approach to international treaties. The treaties could
24 have no impact on domestic law without the 1972 Act, but
25 it was an absolutely essential feature of the treaties,

1 as international law instruments, that much of them
2 should have and should be given effect in domestic law.

3 So the 1972 Act was essential. If the treaties
4 could not have had effect in domestic law, without
5 Parliament passing the 1972 Act, so it must be that the
6 effects of those treaties in domestic law can only be
7 removed by Parliament and not by the executive. The key
8 point about the dualist system from a parliamentary
9 sovereignty perspective is that, when the UK enters into
10 a treaty which requires domestic implementation,
11 Parliament remains in control of the process. It
12 remains in control if the necessary enabling legislation
13 is passed or not. Parliament has a free choice. If
14 Parliament refuses to pass the legislation, the treaty
15 is not ratified.

16 Now the corollary of Parliament having that control
17 is that parliamentary control must equally apply to the
18 withdrawal process. It is for Parliament to choose
19 whether it will repeal the legislation which implemented
20 the treaty in domestic law.

21 For that reason, Parliament remains in effective
22 control, whether the UK withdraws from the treaty or
23 not.

24 The difficulty with the appellant's argument is that
25 the triggering of Article 50 by the Government alone

1 will bypass that parliamentary control, and it will rob
2 Parliament of any substantive choice as to whether or
3 not to repeal the 1972 Act.

4 LORD MANCE: Isn't there a missing middle or -- in that
5 proposition? Take the example of the double taxation
6 treaties and the legislation giving effect to them, it
7 gave effect to them, I think you argue, on the basis
8 that the double taxation treaties would confer domestic
9 rights so long as they were in existence, ie it remained
10 in the executive's power what double taxation treaties
11 to enter into and whether to abrogate them.

12 So that merely because treaties would not have had
13 an effect without an act does not mean to say that they
14 could only be disapplied by an act; the initial Act may
15 itself contemplate, permit, their disapplication because
16 it has a limited effect, the initial Act, and the
17 question in this case comes down to whether the 1972 Act
18 is that sort of limited legislation.

19 MR CHAMBERS: My Lord, yes. I am coming on to that, but
20 specifically so far as the double taxation treaties are
21 concerned, under TIOPA, of course there is the enabling
22 legislation, and then orders in council are made and so
23 the Government has authority.

24 LORD MANCE: Yes, that is because TIOPA says that, and,
25 I mean, TIOPA could have been formulated differently,

1 perhaps, but for good reason, no doubt, it was
2 formulated as it was.

3 MR CHAMBERS: Yes, it could have been but we have the
4 1972 Act, and when I come to the point, my stage three,
5 we will say there is nothing in the Act to deal with
6 that.

7 LORD MANCE: Yes.

8 MR CHAMBERS: Secondly, the reason I go through this
9 history, is because it throws into stark reality in our
10 submission, our respectful submission, the fallacy in
11 the appellant's proposition that the EU law rights
12 enshrined in the 1972 Act are somehow not domestic
13 statutory rights, or they are a conduit, to use my Lord,
14 Lord Carnwath's point.

15 It is absolutely essential to the whole function and
16 the purpose of the 1972 Act, and to the operation of the
17 treaties themselves, and to the UK's membership of the
18 EU, that these rights are precisely that, domestic law
19 rights. That is fundamental to being a member of the
20 EU. They have to be put into domestic law and only
21 Parliament can do that.

22 That is how the position has been understood by the
23 courts in this country over a number of years, and
24 I give two examples, again without asking the court to
25 turn them up but just for your note. The first is

1 Thoburn in core authorities 3, tab 22, it is
2 paragraph 66 of the judgment, electronic page 746; and
3 the second one is McWhirter, which is paragraph 6 of the
4 judgment, which is in core authorities 3, tab 46,
5 electronic 1849.

6 The position is also clear, we submit, from the
7 European Union Act of 2011, section 18, which my learned
8 friend Lord Pannick took you to yesterday. That is the
9 declaratory provision which says that EU law rights fall
10 to be recognised and available in law only, and I stress
11 the word "only", because of the 1972 Act.

12 LORD WILSON: I have to say that I still don't really
13 understand what Parliament was getting at --

14 MR CHAMBERS: I am just about to hopefully enlighten your
15 Lordship because I am going to take the court now to the
16 explanatory notes, which is helpful on this, certainly
17 in the parliamentary sovereignty context.

18 LORD WILSON: You set them out in your case and having read
19 it this morning, I still don't understand it.

20 MR CHAMBERS: Then I am determined to make sure that your
21 Lordship reaches the short adjournment hopefully with
22 a better understanding.

23 The explanatory notes are in volume 30 of the
24 authorities, tab 403. And it is electronic 10362, they
25 start at 10352 and the relevant provisions are

1 paragraphs 118, 119 and 120, and that is at page 10362.
2 Perhaps I could just ask the court to read very quickly
3 118, 119 and 120 and I hope that will answer my Lord,
4 Lord Wilson's question. If not, I will do my best to
5 answer any further questions.

6 (Pause)

7 Does my Lord, Lord Wilson have the relevant passage?

8 LORD WILSON: Yes, I do.

9 MR CHAMBERS: So we see from that in parliamentary
10 sovereignty purposes, the reason this has been done was
11 because although it was thought the doctrine of
12 parliamentary sovereignty was sufficient to ensure that
13 EU law was not supreme in the parliamentary sovereignty
14 sense, section 18 is declaratory, and it is really belt
15 and braces, to make it absolutely clear to everybody
16 that EU law rights solely take effect under English
17 domestic law through the will of Parliament.

18 It is --

19 LORD WILSON: What has been said to the contrary which
20 concerned Parliament?

21 MR CHAMBERS: My Lord, I imagine various noises in certain
22 sections of the House of Commons, by certain MPs who may
23 have been concerned about what they might term the
24 encroachment -- this was --

25 LORD SUMPTION: It had been suggested at one stage, had it

1 not, that the doctrine of primacy, combined with the
2 statements of principle in cases like Costa v ENEL, did
3 have precisely that effect, and indeed Ms Sharpston made
4 a submission to that effect to the divisional court in
5 Thoburn which was rejected.

6 MR CHAMBERS: Yes. My Lord, that is very helpful. Of
7 course there is also Factortame which is in a similar
8 vein.

9 LORD MANCE: There is the long-standing discussion between
10 constitutional courts around Europe and the European
11 Court of Justice as to which is supreme in areas falling
12 within the scope of the local constitution, isn't there;
13 it is the same point?

14 MR CHAMBERS: My Lord, it is.

15 LORD SUMPTION: It generally resulted in the conclusion
16 which is the same as the one that exists here,
17 essentially based on the local constitutional
18 arrangement.

19 MR CHAMBERS: Yes.

20 My Lord, moving on, the appellant's argument based
21 on the phrase "from time to time" in section 2(1) of the
22 1972 Act, in our submission, does not detract from
23 parliamentary sovereignty. You have our printed case on
24 that, I will not ask you to turn that up, but it is
25 paragraph 38 of our printed case, at 12470. But I do

1 want to deal with one particular argument which was in
2 fact raised by Lawyers for Britain in its written
3 intervention, and that argument to a certain extent was
4 taken up to a certain extent by Mr Eadie. The argument
5 is that from the passing of the 2008 Act, the rights
6 given by section 2(1) must be read as rights granted
7 from time to time subject to the operation of
8 Article 50.

9 Now, you have heard from my learned friend, Lord
10 Pannick in relation to that, and the broad point is that
11 Article 50 throws you back to domestic constitutional
12 requirements, but I want to add this, that the
13 introduction of Article 50, specifically in the context
14 of the doctrine of parliamentary sovereignty and the
15 1972 Act, was considered by Parliament. It was
16 considered by the House of Lords select committee on the
17 constitution, during the passage of the bill which
18 eventually became the 2008 Act. The select committee's
19 report is at volume 17 of the authorities at tab 198.

20 LORD CLARKE: Does this get a mention in your case?

21 MR CHAMBERS: My Lord, it does, I believe, get a mention in
22 our case. I will just check, certainly we have referred
23 to it below but I believe it is in our case as well.
24 I will give your Lordship the reference. It is
25 electronic 5977. This is 17 at 198 -- sorry, it

1 actually starts at 5917 which is the sixth report of the
2 select committee. It is a report with evidence.

3 If you start, please, at page 5922 and paragraph 6,
4 you will see that the committee wrote to the foreign
5 secretary to ask him to set out the Government's view of
6 how the Lisbon treaty would affect the UK constitution,
7 and his reply is produced and the court will find that
8 at 5974. The relevant passage is at 5977, and it is the
9 final two paragraphs above the heading, "Courts and the
10 judiciary":

11 "The Lisbon treaty has no effect on the principle of
12 parliamentary sovereignty. Parliament exercised its
13 sovereignty in passing the 1972 Act and has continued to
14 do so in passing the legislation necessary to ratify
15 subsequent EU treaties. The UK Parliament could repeal
16 the 1972 Act at any time. The consequence of such
17 repeal is that the UK would not be able to comply with
18 its international and EU obligations and would have to
19 withdraw from the European Union. The Lisbon treaty
20 does not change that and indeed for the first time
21 includes a provision explicitly confirming member
22 states' rights to withdraw from the European Union."

23 That then led to the committee's relevant conclusion
24 in paragraph 95 of the report itself, which is at 5943.
25 In paragraph 95 the committee say this:

1 "We conclude that the Lisbon treaty would make no
2 alteration to the current relationship between the
3 principles of primacy of European Union law and
4 parliamentary sovereignty. The introduction of a
5 provision explicitly confirming member states' rights to
6 withdraw from the EU underlines the point that the
7 United Kingdom only remains bound by European Union law
8 as long as Parliament chooses to remain in the Union."

9 Now, in our submission, that explains at a general
10 level why there was no need for any parliamentary
11 control under article -- control of Article 50, under
12 section 6 of the 2008 Act. Because Parliament was
13 proceeding on the basis that under the doctrine of
14 parliamentary sovereignty, it was for Parliament to
15 decide whether or not to remain in the EU.

16 So my Lords, that is the position in relation to the
17 1972 Act. The point can also be illustrated in relation
18 to the European Elections Act 2002 and there, I don't
19 ask you to turn it up but for your note it is at core
20 volume 1, page 128, electronic 4434, the rights granted
21 under that Act, rights to stand for election and to
22 vote, are conferred by the 2002 Act itself.

23 There is no reference made to rights deriving from
24 a different legal system, or rights obtained in any
25 other instrument; in other words, the source of the

1 rights in every sense is legislation enacted by
2 Parliament. And that is all that is required to engage
3 the doctrine of parliamentary sovereignty.

4 I have already dealt with the existence of the
5 European Parliament point and my learned friend, Lord
6 Pannick, has dealt with the other point which arose on
7 this, which is the rights are contingent on the
8 executive deciding to exercise the prerogative to
9 withdraw. That, as Lord Pannick submitted, simply begs
10 the question of whether the executive can give
11 an Article 50 notification without the approval of
12 Parliament.

13 For parliamentary sovereignty -- so far as the 2002
14 Act is concerned, the rights which are granted to
15 citizens take effect of and function under the domestic
16 legal order. It is precisely because those rights take
17 effect under the domestic legal order that the principle
18 of parliamentary sovereignty has been engaged. It is
19 important to note that the "from time to time" argument
20 could not in any event work in relation to the 2002 Act,
21 and nor could the supposed impact of the advent of
22 Article 50 have any impact on the 2002 Act, because the
23 point there is there is no warrant to make those rights
24 contingent on the introduction of Article 50; the 2002
25 Act is such that the rights are set out in stone.

1 So just before the short adjournment, I can now
2 return to the core of my stage two argument, which is
3 that once it is understood that the source of the
4 relevant rights in domestic law is primary legislation
5 passed by Parliament, then the legal effect of the
6 appellant's concession in paragraph 62A of his case can
7 be properly understood, because what it amounts to is
8 that rights granted by Parliament under primary
9 legislation will undoubtedly and inevitably be lost or
10 removed by notification under Article 50.

11 Not just EU law rights, but rights granted by
12 Parliament under acts of Parliament.

13 So that brings me to stage three which is whether
14 Parliament has authorised the executive to bring about
15 the inevitable loss of rights. Under the doctrine of
16 parliamentary sovereignty, the authorisation of
17 Parliament is needed because only Parliament can
18 override, set aside or nullify legislation. It is
19 important here to underline that the appellant does not
20 claim any parliamentary authorisation; he says he
21 doesn't need it, he says that the prerogative power
22 suffices.

23 But this, in our respectful submission, goes back to
24 the flaw in the appellant's argument because the
25 appellant's approach, we submit, betrays a fundamental

1 misunderstanding of the doctrine of parliamentary
2 sovereignty. Looked at through the prism of
3 parliamentary sovereignty, the prerogative is nothing
4 more than a label for executive action. The prerogative
5 can only be exercised through executive action. And
6 executive action is unlawful if it contravenes the
7 doctrine of parliamentary sovereignty, and given that in
8 this case, in our submission, the exercise of the
9 prerogative will lead to this loss of rights in primary
10 legislation, the only question which remains is whether
11 or not there is parliamentary authorisation. And under
12 the doctrine of parliamentary sovereignty, that is the
13 correct approach to the issue, but the appellant seeks
14 to persuade the court to look at matters from the wrong
15 end of the telescope.

16 The appellant says that the starting point is to
17 look to see whether there a prerogative and, if there
18 is, he says the issue becomes whether or not the
19 prerogative power has been limited by Parliament in the
20 relevant respect.

21 But that, in our submission, looks at the matter
22 completely the wrong way round, because it turns the
23 doctrine of parliamentary sovereignty on its head. No,
24 once it has been accepted, as it has here, that
25 executive action will override primary legislation, the

1 correct approach in our submission is for the executive
2 to show that Parliament has authorised the loss of
3 rights in question.

4 It is not a question of looking to see if there
5 a prerogative power which has or has not been limited,
6 it is for the executive to show in clear terms that
7 Parliament has authorised the loss of statutory rights
8 intended to be brought about by this executive action.

9 So just to finish this point off, in answer to
10 a question my Lord, Lord Reed raised yesterday, and that
11 was whether or not the referendum result could provide
12 a basis for the rational use of the prerogative, if
13 there was a prerogative. Well, we submit this case does
14 not involve the question of whether or not what the
15 appellant proposes to do is a rational use of the
16 prerogative; without parliamentary authorisation, the
17 proposed executive action is not lawful, so there is
18 simply no prerogative at all, in our submission, in that
19 respect.

20 THE PRESIDENT: Is that a convenient moment?

21 MR CHAMBERS: My Lord, I was just about to ask.

22 LORD CARNWATH: Could I mention the Youssef case, if you
23 want to come back to, I think it is at 36, 496 in the
24 supplementary bundle, MS 67.

25 MR CHAMBERS: That is very helpful, thank you.

1 THE PRESIDENT: Thank you very much. Court is now
2 adjourned.

3 We will resume again at 2.00 with Mr Chambers.
4 Thank you.

5 (1.01 pm)

6 (The Luncheon Adjournment)

7 (2.00 pm)

8 THE PRESIDENT: We are going to try a new angle,
9 Mr Chambers.

10 MR CHAMBERS: My Lady and my Lords, in accordance with the
11 registrar's excellent ambulatory seating plan, I have
12 moved slightly to the right -- or the left.

13 In answer to my Lord, Lord Carnwath.

14 LORD CARNWATH: I thought you were trying to escape from me.

15 MR CHAMBERS: My Lord, the reference to Youssef, as your
16 Lordship very kindly pointed out, is in tab 496. At
17 paragraph 34 of the judgment, supplementary electronic
18 page 693, it was the Secretary of State who exercised
19 prerogative powers at the international level to
20 sanction or to list Mr Youssef on the sanctions list.
21 The effect of that was to cause alterations to his
22 domestic law rights under the EEC regulation 881, or EU
23 regulation 881, which of course comes into English
24 domestic law through section 2(1) of the 1972 Act. So
25 it is no different in our submission to any European

1 Union law which is given domestic legal effect through
2 section 2(1).

3 My Lords, I am going to go back to my stage three,
4 and that is parliamentary authorisation. In our
5 submission, there is nothing in the 2015 Act which could
6 provide parliamentary authorisation, whether it is
7 viewed through the prism of the prerogative or
8 parliamentary sovereignty. Parliament passed the
9 2015 Act knowing full well that in our system of
10 representative parliamentary democracy, referendums are
11 not legally binding.

12 That was the legal position back in 1975, when the
13 1975 referendum was held on then EEC membership, and the
14 1975 Referendum Act is in volume 12 of the authorities
15 at tab 111, electronic 4213. The reason I am taking you
16 to that is because it is in materially identical terms
17 to the 2015 Act, which is in core authorities 1, tab 7,
18 electronic 1601.

19 Both are in section 1 and both say:

20 "A referendum is to be held on whether the
21 United Kingdom should remain a member of ..."

22 "the European Union" for 2015, or "the EEC" for
23 1975.

24 Under the terms of the 1975 Act, in our submission,
25 the 1975 referendum was not legally binding. This is

1 clear from a variety of sources but I will take the
2 court to two, if I may. The first is Professor Vernon
3 Bogdanor's book, "The new British constitution", which
4 the court has in volume 15 at tab 168. That is
5 electronic 5308.

6 Unfortunately the front page to the book is missing,
7 and we can have that copied, but "The new British
8 constitution", Professor Vernon Bogdanor, 2009.

9 This is in chapter 7, the referendum. The relevant
10 passage is at 5325. It is the last paragraph on 5325:

11 "In countries with codified constitutions, the
12 outcome of a referendum generally binds both Parliament
13 and Government. In Britain, however, with an uncodified
14 constitution, the position is much less clear. Although
15 neither Parliament nor Government can be legally bound,
16 the Government could agree in advance that it would
17 respect the result, while a clear majority on
18 a reasonably high turnout would leave Parliament with
19 little option in practice other than to endorse a
20 decision of the people. Shortly before the European
21 Community referendum in 1975, Edward Short, then leader
22 of the House of Commons insisted to the House that 'this
23 referendum was wholly consistent with parliamentary
24 sovereignty. The Government will be bound by its result
25 but Parliament of course cannot be bound'. He then

1 added 'although one would not expect honourable members
2 to go against the wishes of the people, they remain free
3 to do so'.

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

10 There are echoes of Dicey there which I took the
11 court to this morning.

12 At footnote 19 there is a reference to Mr Short
13 which I would like to take the court to; it is volume 17
14 at tab 195. Electronic reference 5904, it is volume 17,
15 tab 195. This is the Lord President of the council and
16 the leader of the House of Commons, Mr Edward Short, and
17 the relevant passage is at 5905, the very top of the
18 page:

19 "I understand and respect the view of those devoted
20 to this House and to the sovereignty of Parliament who
21 argue that a referendum is alien to the principles and
22 practices of parliamentary democracy. I respect their
23 view but I do not agree with it. I will tell the House
24 why. This referendum is wholly consistent with
25 parliamentary sovereignty. The Government will be bound

1 by its result but Parliament of course cannot be bound.
2 Although one would not expect honourable members to go
3 against the wishes of the people, they remain free to do
4 so. One of the characteristics of this Parliament is it
5 can never divest itself of its sovereignty. The
6 referendum itself cannot be held without parliamentary
7 approval of the necessary legislation, nor, if the
8 decision is to come out of the Community, could that
9 decision be made effective without further legislation.
10 I do not, therefore, accept that the sovereignty of
11 Parliament is in any way affected by the referendum."

12 Then, to follow the history through, we have the
13 Government's response to the House of Lords select
14 committee's report on referendums of 2010. The court
15 will find that in volume 18 at tab 201. That is
16 electronic reference 6265. Tab 201, 6265, this is the
17 fourth report of 2010 to 2011, the Government response
18 to the report on referendums in the United Kingdom,
19 published on 8 October 2010.

20 This report is incorporating the Government's
21 response to the select committee's report on
22 referendums. What the committee does is it sets out its
23 conclusions and the Government's response to each of its
24 conclusions. The relevant page is 6275, where, if you
25 go to 6275, you will find two columns, one headed

1 "Recommendation" and one headed "Government's response".

2 It is recommendation number 3 on that page, the third
3 one down:

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

9 The Government's response was:

10 "The Government agrees with this recommendation.
11 Under the UK's constitutional arrangements, Parliament
12 must be responsible for deciding whether or not to take
13 action in response to a referendum result."

14 Then to complete the story, we also rely on the
15 House of Commons briefing paper, which was referred to
16 in paragraph 107 of the divisional court's judgment.
17 The briefing paper is also in volume 18 and it is in the
18 next tab, 202. The electronic reference is 6279. This
19 is briefing paper number 07212, 3 June 2015.

20 European Union Referendum bill by Elise Uberoi from the
21 House of Commons library.

22 If you go to 6281, under "Summary", the bill was
23 introduced in the House of Commons on 28 May 2015 and
24 requires the holding of a referendum on the UK's
25 continued membership of the European Union before the

1 end of 2017.

2 LORD CLARKE: What page is this?

3 MR CHAMBERS: 6281. This is the first paragraph of the
4 summary. This paper has been prepared as a guide in
5 advance of the second reading debate on Tuesday,
6 9 June 2015.

7 Then if the court would please go to 6303, in
8 section 5, with the heading, "Types of referendum":

9 "This bill requires a referendum to be held on the
10 question of the UK's continued membership of the EU
11 before the end of 2017. It does not contain any
12 requirement for the UK Government to implement the
13 results of the referendum, nor set a time limit by which
14 a vote to leave the EU should be implemented. Instead,
15 this is a type of referendum known as a pre-legislative
16 or consultative, which enables the electorate to voice
17 an opinion which then influences the Government in its
18 policy decisions. The referendums held in Scotland,
19 Wales and Northern Ireland in 1997 and 1998 are examples
20 of this type where opinion was tested before legislation
21 was introduced. The UK does not have constitutional
22 provisions which would require the results of
23 a referendum to be implemented, unlike, for example, the
24 Republic of Ireland, where the circumstances in which
25 a binding referendum could be held are set out in its

1 constitution.

2 "In contrast, the legislation which provided for the
3 referendum held on AV in May 2011 would have implemented
4 the new system of voting without further legislation,
5 provided that the boundary changes also provided for in
6 the Parliamentary Voting System and Constituencies Act
7 2011 were also implemented. In the event there was
8 a substantial majority against any change."

9 LORD CLARKE: Do we know who the author of this was? We
10 were referred to it before.

11 MR CHAMBERS: Yes on the first page at 6279 on the cover
12 sheet, does your Lordship see "Elise Uberoi"?

13 LORD SUMPTION: Who is she?

14 MR CHAMBERS: Elise Uberoi is a member of the House of
15 Commons library. I am being helpfully referred to the
16 back page at 6311, where the status of this briefing
17 paper is set out in the sense that it is a publication
18 of the House of Commons library research service, which
19 provides MPs and their staff with impartial briefing and
20 evidence, based -- they need to do their work in
21 scrutinising Government, proposing legislation and
22 supporting constituents.

23 Now, we relied on this briefing paper in the
24 divisional court to evidence the historical fact that
25 during the passage of the bill which became the

1 2015 Act, parliamentarians were informed that under the
2 form of the bill, the result of the referendum would be
3 advisory only. Which was consistent in our submission,
4 which was the law as it then stood or the law as it was
5 then understood by those who were going to consider this
6 legislation. When the referendum is referred to as
7 advisory only, what that means is that it was not
8 legally binding.

9 The distinction sought to be drawn by my learned
10 friend Mr Eadie about whether it was advisory for the
11 Government or advisory for Parliament is not to the
12 point, because the only point for this court, in our
13 respectful submission, is whether the result of the
14 referendum has any legal effect. In our submission it
15 has no legal effect, consistent with the history, with
16 the wording of the Act, and the law as it was understood
17 at the time.

18 LORD CLARKE: What was the wording of the previous, the
19 2011 -- whichever date it was.

20 MR CHAMBERS: There was the 1975 Referendum Act but as
21 I say, the wording is materially identical to the 2015.

22 LORD CLARKE: But is there any wording which made any of
23 these compulsory, if you like?

24 MR CHAMBERS: My Lord, yes, there is the AV referendum.
25 That was the 2011, forgive me.

1 LORD CARNWATH: But there was no question of a prerogative,
2 that was simply being done as a matter of domestic law,
3 and so in a way, the question of prerogative under
4 foreign powers, whether that exists is a separate
5 question which didn't arise under the AV referendum.

6 MR CHAMBERS: No, but what one is looking at is the question
7 of where power lies.

8 LORD CARNWATH: I understand your point but I am saying that
9 is not a direct parallel.

10 MR CHAMBERS: My Lord, I fully take that point. All I would
11 submit is that there are two types of referendum and
12 this was the first type and therefore Parliament did not
13 surrender its sovereignty to its people --

14 LORD CLARKE: What was the relevant provision in the AV
15 referendum? Do we have that?

16 MR CHAMBERS: We do have that and the relevant provision --

17 LORD CLARKE: If you just give me the reference.

18 MR CHAMBERS: Yes, we will get that for you, my Lord,
19 certainly.

20 LORD CARNWATH: Perhaps while that is going on, can I ask
21 you a more general point which is one that has been
22 troubling me, and it arises out of what Lord Reed was
23 saying, whether really the question we are dealing with
24 is not so much a question of parliamentary sovereignty,
25 which everyone accepts, but whether we as a court can

1 tell Parliament how to exercise that sovereignty.
2 Imagine this situation, assume after the referendum vote
3 the Government said: we think we should regard this as
4 Brexit means Brexit, but we want to make sure that
5 Parliament is with us on that, so we will put a motion
6 before Parliament, rather as they did back in 1972;
7 saying: we want your approval, Parliament, to launch
8 Article 50 and we are not going to go ahead with
9 Article 50 unless we get it.

10 Now, they would say: of course, we accept that is
11 not legislation, we will need in due course, in two
12 years' time or after our negotiations, to have a repeal
13 bill which will deal with the rights that can be
14 transposed into domestic law, make sure there isn't
15 a black hole of rights which cannot, but that will all
16 be done, but for the moment what we are doing is simply
17 making sure that Parliament is with us.

18 Now, as I understand it, you say that would not be
19 good enough. It would be open to us, the court, to say
20 to Parliament: no, no, that motion, even though it has
21 been supported by a large majority (Inaudible) is not
22 good enough, you have to have a one-line bill which
23 makes all the difference. The one-line bill does not
24 solve any of the problems, it doesn't solve any of the
25 problems of what we do about all the detail; but you say

1 that is a magic wand that makes all the difference.

2 MR CHAMBERS: My Lord, certainly not an magic wand. There
3 are two stages, first of all the trigger stage and then
4 what is going to happen after the trigger stage. Your
5 Lordship referred to the Great Repeal Bill; that is
6 after the trigger stage. We have to concentrate on the
7 trigger stage itself.

8 LORD CARNWATH: Not necessarily, because obviously everyone
9 accepts that there has to be legislation in due
10 course -- as indeed the Great Repeal builds on that. So
11 one cannot simply look at the trigger stage without
12 having regard to what is going to follow from it. So
13 the real question is, can we as a court say to
14 Parliament, the trigger stage, a motion would not be
15 good enough, even a motion supported -- a unanimous
16 motion, that would not be good enough; there has to be
17 this one-line bill that says: yes, you can trigger.

18 MR CHAMBERS: My Lord, that is absolutely correct. First of
19 all a resolution would not be sufficient, because what
20 one is looking at is primary legislation on the basis
21 that rights, which are granted in domestic law, are
22 going to be lost. But this court in our submission is
23 the guardian of parliamentary sovereignty.

24 LORD CARNWATH: I understand all that, but still you are
25 saying that Parliament over the road has voted in

1 a motion unanimously that we should go ahead; Ms Miller
2 or Mr dos Santos can come to this court and say: stop
3 them, they cannot go ahead, an injunction, until they
4 have got this two-line bill.

5 MR CHAMBERS: My Lord, no one is stopping Parliament passing
6 whatever resolutions it wants, and this court is not
7 saying to Parliament --

8 THE PRESIDENT: No, it is saying to the executive: you
9 cannot do it.

10 MR CHAMBERS: Exactly.

11 THE PRESIDENT: But that is Lord Carnwath's question; what
12 we would say in those circumstances to the executive:
13 even though Parliament has given you a clear pass
14 through a motion of both Houses, you still have to go
15 back to Parliament and pass the statute.

16 MR CHAMBERS: My Lord, yes, that is absolutely correct.

17 LORD CARNWATH: That is the case. I understand it and so be
18 it.

19 LORD KERR: That is one way of casting it but surely your
20 argument is that it is for this court to decide whether
21 or not the 1972 Act can be set at nought, as Lord
22 Pannick has put it, by the exercise of the prerogative.
23 If we decide that is the position, it is then up to
24 Parliament and indeed the executive to decide what to
25 do. We are not issuing an edict to Parliament or to the

1 executive that you must do this or you must do that; we
2 are simply saying what the law is.

3 MR CHAMBERS: My Lord, that is precisely right, and
4 obviously the divisional court was very careful to
5 ensure that there was no encroachment on any -- Privy
6 Council(?) and the like -- so everyone is being very
7 careful to ensure that Parliament is not being dictated
8 to or the executive is not being dictated to.

9 THE PRESIDENT: I understand that. It sounds very fine to
10 a lawyer who understands the difference, but to the
11 average person in the street, it seems a bit odd if one
12 says to the Government: you have to go back to
13 Parliament and have an act of Parliament passed to show
14 who Parliament's will is; when you have already been to
15 Parliament and had a motion before both Houses which
16 approves the service of the notice. That is really Lord
17 Carnwath's point, and it does seem a bit odd, doesn't
18 it?

19 MR CHAMBERS: My Lord, it may seem odd to the man on the
20 Clapham omnibus, if I put it that way, but for lawyers,
21 that is the correct result, for constitutionalists, that
22 is the --

23 LORD SUMPTION: It is a vital distinction, isn't it? More
24 than for the lawyers, if both Houses of Parliament were
25 to pass a resolution inviting the executive no longer to

1 have any regard to the 1972 Act, that would be totally
2 ineffective --

3 MR CHAMBERS: My Lord, yes, it would.

4 LORD SUMPTION: The reason is that resolutions do not change
5 the law whereas statutes do. It is completely
6 fundamental.

7 LORD CARNWATH: I understand that from a legal point of
8 view, but to say that this is all in the name of
9 parliamentary sovereignty does seem a little odd. It
10 seems to me a vitally important legal point, but it is
11 not about parliamentary sovereignty.

12 LORD SUMPTION: It is about the rule of law.

13 LORD MANCE: It is about what Parliament is, and I don't
14 think that either Professor Dicey or Professor Hart
15 would have been very surprised to find our rule of
16 recognition defined in the way you are defining it.

17 THE PRESIDENT: Your point is that Parliament speaks to the
18 people, and in particular to the courts, ultimately
19 through statute.

20 MR CHAMBERS: That is absolutely right, my Lord, yes, they
21 do.

22 LORD SUMPTION: Resolutions are political acts, whereas
23 legislation is directly affects the law.

24 MR CHAMBERS: Yes.

25 LORD REED: Life has moved on since the time of Dicey. The

1 referendum result is the people speaking to the
2 political institutions, it is giving them
3 an instruction. That is one way of looking at it.

4 MR CHAMBERS: Yes.

5 LORD REED: If that is so, then the question, if that is the
6 right way of looking at the 2015 Act, that it has
7 provided a mechanism enabling effectively the people to
8 give an instruction to politicians, that they want to
9 leave the EU, then the law then has to work out what the
10 constitutional implications of that are. Falling back
11 on Dicey is not going to help because Dicey didn't have
12 to address that kind of situation.

13 MR CHAMBERS: Yes. My Lord, this court's task as part of
14 this appeal is to decide whether or not the instruction
15 which your Lordship refers to is binding or not. In our
16 submission it is not binding because the Act is very
17 clear, the 2015 Act is very clear, and on that point,
18 the ministerial statements which are relied on by the
19 appellant, we would say are not admissible because under
20 *Pepper v Hart* principles, they would only be admissible
21 if there was any ambiguity in the 2015 Act which in our
22 submission there is not. In any event, these
23 ministerial statements are matters of Government policy
24 and Government policy is not the law.

25 LORD MANCE: They are not admissible any more than your

1 House of Commons library briefing note.

2 MR CHAMBERS: My Lord, my House of Commons library briefing
3 paper, with respect, is admissible, because it falls
4 under the historical facts exception as established in
5 many cases --

6 LORD MANCE: On that basis you would be looking at
7 everything that was said and done there, and there is
8 an issue as to whether the House of Commons briefing
9 statement, library briefing statement is accurate; as
10 soon as that issue arises we are incapable of dealing
11 with it, it would be contrary to the Bill of Rights to
12 go into it. I think there is a limit here to what we
13 can look at.

14 MR CHAMBERS: My Lord, yes, but this does not raise the
15 Bill of Rights issues, it doesn't raise the section 9
16 issue of the Bill of Rights because it is not
17 technically a publication under a command paper.

18 THE PRESIDENT: It is a statement of what somebody thinks.
19 MPs who voted on it may or may not have agreed with it,
20 but that is why it is so unsatisfactory, looking at all
21 this material, particularly when it is a controversial
22 bill which has produced a lot of material, a lot of
23 inconsistent statements and it is a classic reason why
24 *Pepper v Hart* in some quarters is not very popular, and
25 in remaining quarters is strongly to be kept to its

1 limitations and not to go outside them.

2 MR CHAMBERS: Yes, my Lord, the only point I would say is
3 that this is what Parliament was told, there was no
4 debate as far as we know about the form of the bill. It
5 was brought in in that respect, it is in familiar form
6 and in our submission it is clear what the result is.

7 THE PRESIDENT: Your short point is this, is it, that it
8 would have been only too easy for the legislature to
9 provide what its effect was if it wanted to tell us. It
10 has not told us, and it is not for the courts to try and
11 guess what the legislature intended, leave it to the
12 legislature to decide what the effect of the referendum
13 is; is that really it?

14 MR CHAMBERS: My Lord, yes.

15 My Lord, could I just finish up on this point and
16 the court's point about the distinction between, if
17 I may put it this way, political sovereignty and legal
18 sovereignty, because obviously it is important that the
19 people do not feel in our constitution that they have no
20 power. Of course they have power; as Dicey said, their
21 power is a political power to elect members of
22 Parliament and it is members of Parliament who, under
23 our constitution, make the law. So the people are not
24 powerless, they always have the right to get rid of
25 their members of Parliament if they want to.

1 LORD SUMPTION: His point was wider than that; they also
2 have a power to bring pressure on their members of
3 Parliament, so that politically they feel an obligation
4 to act in a particular way which need not necessarily
5 coincide with their personal opinions.

6 MR CHAMBERS: My Lord, that is absolutely correct, yes.

7 That is one of the ways of expressing people's power.

8 So my Lords, conscious of the time, our submission,
9 my stage three, is that there is no parliamentary
10 authorisation for this loss of rights, whether it is
11 under the 2015 Act, or any other legislation which has
12 been passed by Parliament, and in the absence of that
13 authorisation, in our submission, the appeal should be
14 dismissed because each of my stages one, two and three
15 lead to that conclusion.

16 Unless there are any further questions --

17 THE PRESIDENT: Thank you very much. Thank you,

18 Mr Chambers.

19 MR CHAMBERS: My Lord, Lord Clarke wanted the reference to
20 the AV referendum Act. It is volume 13, tab 136,
21 electronic 4611 and it is section 8 of the Act which is
22 at 4612.

23 THE PRESIDENT: Thank you.

24 LORD CLARKE: Thank you.

25 THE PRESIDENT: Thank you very much. Mr Scoffield.

1 Submissions by MR SCOFFIELD

2 MR SCOFFIELD: I am very grateful, my Lord.

3 My Lady, my Lords, I appear with professors
4 McCrudden and Antony for the applicants in the Agnew
5 case, and my learned friend Mr Lavery appears in
6 a separate case, the McCord case. The court has given
7 us a speaking allocation of 45 minutes for the Northern
8 Ireland claimants as a whole.

9 Subject to the court, my Lords, my Lady, Mr Lavery
10 and I have agreed that 30 minutes of that allocation
11 will be given to the Agnew case and 15 minutes for the
12 McCord case.

13 THE PRESIDENT: If you have agreed that, that is fine with
14 us, thank you.

15 MR SCOFFIELD: My Lords, my Lady, probably the only
16 authorities volume that I will be taking the court to is
17 the Northern Ireland authorities volume 1, if that is of
18 assistance.

19 My Lords, my Lady, the applicants in the Agnew case,
20 as you will have seen, are a cross party and a cross
21 community grouping of politicians, individuals and human
22 rights organisations who are concerned about how
23 withdrawal from the EU will uniquely affect Northern
24 Ireland -- and further concerned, as the lead claimant
25 is in the other case, to ensure that the process of

1 dealing with the referendum result is both lawful and
2 properly considered.

3 As the court will have seen, there were four issues
4 dealt with by Mr Justice Maguire in the court below,
5 which its common case are broadly reflected in the
6 questions referred for this court. In the time
7 available, I intend to focus my hopefully economical
8 submissions on issues one and two, and within those
9 contexts to avoid duplication of the submissions already
10 made or to be made by parties or interveners in the
11 Miller appeal.

12 If time permits I want to say something very briefly
13 about issue three and to make three short points in
14 response to the Government's case on issue four.

15 My Lords, my Lady, issue one is whether an act of
16 Parliament is required before notice can validly be
17 given to the European Council under Article 50 TEU in
18 light of the provisions of the Northern Ireland Act
19 1998. In summary we say that the Northern Ireland Act,
20 like the European Communities Act, is not neutral as to
21 whether the UK is a member of the EU, or whether the
22 treaties continue to apply in Northern Ireland. There
23 are three strands to the argument we advance on that
24 issue.

25 My learned friend the Advocate General was right to

1 identify paragraph 80 of our printed case as containing
2 a summary of those strands, and that is to be found at
3 MS 23716.

4 LORD MANCE: Say that again.

5 MR SCOFFIELD: MS 23716, my Lord. The three strands are
6 these: first, that the removal of rights granted by the
7 Northern Ireland Act cannot be achieved by the exercise
8 of the prerogative alone.

9 Second, that significant alteration of the
10 devolution settlement in Northern Ireland also cannot be
11 achieved by the exercise of the prerogative alone.

12 Third, that the giving of an Article 50 notice with
13 frustrate the purpose and intention of the
14 Northern Ireland Act in the context particularly of the
15 north/south cooperation established under the Belfast
16 and British-Irish agreements.

17 I want to make extremely brief submissions about the
18 first and second of those two strands, since they are
19 addressed by other parties who are before the court and
20 I want to develop the third strand in just a little more
21 detail.

22 THE PRESIDENT: Right.

23 MR SCOFFIELD: My learned friend the Advocate General said
24 that the third submission was a complex area. If it
25 seems that way, then I am sure that is a fault on my

1 part, but I hope to persuade the court that it is really
2 not that complex at all.

3 My Lords, my Lady, the first strand, the removal of
4 rights, the Northern Ireland Act confers rights under EU
5 law on Northern Ireland citizens. It does so by
6 providing that the legislative and executive branches of
7 a Northern Ireland administration have no competence and
8 no power respectively to act in a way which is contrary
9 to EU law. That is sections 6(2)(d) and 24(1)(b) and
10 your Lordships find those at MS 20048 and MS 20068.

11 Those rights can be and have regularly been relied
12 upon by individuals against the Northern Ireland
13 administration in the courts in Northern Ireland to
14 challenge legislation or executive action. Perhaps
15 a recent example is JR 65's application in which the
16 court, this court, refused leave to appeal on Monday of
17 this week, to my client, unfortunately.

18 But, my Lords, those rights can be relied upon in
19 the courts, and the Government accepts that in this way
20 the Northern Ireland Act is, in their language,
21 "a further conduit" for the operation of EU law rights
22 within the UK. Those provisions represent the UK
23 Parliament embedding the new legal order of the EU into
24 the constitution of Northern Ireland as well as the
25 constitution of the UK.

1 Importantly, my Lords, my Lady, the Government also
2 candidly accepts that each of those provisions will
3 become otiose or will beat the air, when the EU treaties
4 no longer apply. We see that, my Lords, my Lady, in the
5 Government's case in Agnew and the court proceedings at
6 paragraph 57, and that is at MS 25161.

7 THE PRESIDENT: Thank you.

8 MR SCOFFIELD: We submit that those rights cannot lawfully
9 be defeated, frustrated or stripped of all content by
10 the exercise of the royal prerogative.

11 Now, the court will immediately see that that
12 argument is a variation on the central case which is
13 advanced by Lord Pannick for Ms Miller. I gratefully
14 adopt his submissions on that issue and don't for
15 a moment pretend that I could improve upon them, but the
16 court has a brief written summary of our response to the
17 Government's case in Miller, in our printed case at
18 paragraphs 92 to 104. We simply add the concise point
19 that the essential purpose of the dualist theory is to
20 protect the position of Parliament as against the
21 executive, rather than, as the Government seeks to have
22 it, to protect the position of the executive against
23 Parliament.

24 My Lords, my Lady, issue one, the second strand, the
25 alteration of the devolution settlement. This strand of

1 our case is that the removal of EU law obligations as
2 they apply in the EU, or as they apply in the UK rather,
3 significantly alters the competence of the devolved
4 administration in Northern Ireland. In other words, it
5 materially alters the carefully constructed devolution
6 settlement, and it does so, we submit, in at least two
7 ways.

8 Firstly, as we have seen, since the legislative and
9 executive competence of the devolved authorities of
10 Northern Ireland is limited by the operation of EU law,
11 that is section 6 and section 24 read with
12 section 98(1), the removal of EU law obligations
13 necessarily increases that competence. The
14 administration will be able to do things which up to now
15 it has been precluded from doing by EU law restrictions.

16 But, secondly, since observing and implementing
17 obligations under EU law is a transferred matter -- that
18 is in a provision we will look at in due course -- the
19 hollowing out of EU law obligations also necessarily
20 removes some areas of devolved responsibility. So the
21 administration will not be able to do some things which
22 up to now have been its responsibility.

23 In our submission, such an alteration of the
24 devolution settlement in Northern Ireland cannot be
25 affected by the executive alone acting by means of the

1 royal prerogative. To do so offends the legal principle
2 that the law cannot be altered by means of the
3 prerogative alone; much less, we say, can
4 a constitutional statute or indeed a constitution as the
5 Northern Ireland Act is. That would require clear
6 words, even in a later statute, for it to be impliedly
7 repealed or become otiose.

8 My Lords, my Lady, a distinct but related point in
9 this strand is that the use of the prerogative in this
10 way also circumvents or sidesteps the usual requirements
11 for an amendment of the devolution scheme. That usually
12 requires either an act of the Westminster Parliament or
13 an order in council under section 4 of the
14 Northern Ireland Act, converting a reserved matter into
15 a transferred matter, or vice versa, and the court will
16 find section 4 at MS 20044.

17 When one looks at section 4, one sees that any such
18 order in council requires not only approval by each
19 House of Parliament, but also a resolution passed in the
20 Northern Ireland assembly itself, praying in favour of
21 the change, and, given the sensitivity that there is
22 with tinkering with the devolution settlement in
23 Northern Ireland, that resolution also requires to be
24 passed with defined cross-community consent. That is
25 section 4(2) (a) and 4(3).

1 We submit that the use of the prerogative permitting
2 the executive to effect such a change without those
3 protections frustrates the purpose and effect of those
4 provisions.

5 My Lords, my Lady, that strand of our case on issue
6 one has been taken up by both the Lord Advocate on
7 behalf of the Scottish Government and the Counsel
8 General on behalf of the Welsh Government in their
9 submissions to the court, and assuming their submissions
10 orally are consistent with their written cases, we
11 respectively adopt those submissions also.

12 THE PRESIDENT: That is very helpful, thank you.

13 MR SCOFFIELD: But in our submission, my Lords, my Lady, the
14 UK Government's contentions on the extent of its
15 prerogative power are, with respect, cavalier, perhaps
16 in this context with both a small C and a large C; in
17 respect, my Lords, my Lady, of the effect which the
18 cessation of the EU treaties will have on the delicately
19 balanced constitutional settlement in Northern Ireland.

20 I heard my learned friend Mr Eadie to say in his
21 submissions that real clarity is required in a statute
22 before the constitutional balance is upset. His
23 submission, of course, was addressed to what he would
24 suggest is the removal by statute of a well-established
25 prerogative power, and on that, we agree with the

1 claimants in Miller that that is to look at the matter
2 from the wrong end of the telescope.

3 But my Lords, my Lady, Mr Eadie is right to say,
4 where a constitutional balance is being upset, clear
5 statutory authority is required. And where what we have
6 called a pillar of the constitution set out in the
7 Northern Ireland Act is being removed or hollowed out,
8 that can only be done by an act of Parliament.

9 My Lords, my Lady, the third strand of issue one,
10 this is an argument which is peculiar to the
11 circumstances of Northern Ireland, it arises from the
12 provisions of the Northern Ireland Act giving rise to the
13 Belfast agreement, which require -- sorry, giving effect
14 to the Belfast agreement which require north/south
15 cooperation in the context clearly, we say, of continued
16 EU membership.

17 The submission is that continued membership of the
18 EU is an integral part of the scheme of the Act, on this
19 basis, as well as the two bases just mentioned, and the
20 royal prerogative cannot be used in a manner
21 inconsistent with that statutory purpose.

22 As the court will hopefully have seen from our
23 written case, the British-Irish agreement, which we
24 accept is unenforceable as a matter of domestic law but
25 which forms the interpretative backdrop to the

1 Northern Ireland Act, expressly envisaged that the UK
2 and the Republic of Ireland would develop close
3 cooperation between their countries as partners in the
4 European Union. Your Lordships, and your Ladyship, will
5 find that at MS 20373.

6 That partnership, we say, is necessary because the
7 Belfast agreement not only envisaged but required, as
8 part of the north/south cooperation it established, the
9 implementation of EU policies and programmes on
10 an all-Ireland basis and a cross-border basis, or at the
11 very least the possibility of such implementation.

12 Now, we say that that is a core part of the scheme
13 of the Northern Ireland Act, and the purpose for which
14 the north/south machinery has been established in part
15 5.

16 My Lords, my Lady, the kernel of our case on that
17 point is set out in paragraphs 46 to 51 of our written
18 case. It may be helpful if the court would turn briefly
19 to strand two of the Belfast agreement. Your Lordships
20 will find that in Northern Ireland authorities,
21 volume 1, tab 14, beginning at MS 20354.

22 THE PRESIDENT: 20354?

23 MR SCOFFIELD: Yes, my Lord.

24 THE PRESIDENT: Thank you. Yes.

25 MR SCOFFIELD: My Lord, Lord Wilson summarised the

1 Government's case on this yesterday as being that the
2 Northern Ireland Act does not carry this issue far
3 enough. That is because we say the Secretary of State's
4 submissions do not read strand two fairly and as
5 a whole. The North South Ministerial Council is not, as
6 the Government's case essentially suggests in
7 paragraph 38, it is not merely a talking shop; it is set
8 up as a joint executive body which is required to agree
9 and implement policies, including EU policies and
10 programmes on an all-Ireland and cross-border basis.

11 Now, we say, my Lords, my Lady, that simply cannot
12 be done if one part of the island is no longer a part of
13 the EU. Now, none of that, we say, should be surprising
14 in the context of the Belfast agreement and the
15 British-Irish agreement, because the whole context of
16 those agreements is a commitment to developing
17 cooperation, growing closer together and increasing
18 areas of mutual interest, rather than driving a wedge
19 between Northern Ireland and the Republic, but it also
20 emerges, we say, from a simple reading of the text of
21 strand two.

22 LORD MANCE: How do you get this into the
23 Northern Ireland Act?

24 MR SCOFFIELD: I will come to that in a moment, my Lord; two
25 reasons, perhaps three reasons. Firstly, my Lord, it is

1 clear from the long title of the Northern Ireland Act
2 that it is to implement specifically the Belfast
3 agreement. We have seen that.

4 LORD MANCE: Not necessarily the whole of it, at any rate,
5 carry on, yes.

6 MR SCOFFIELD: The second point, my Lord, is as we know from
7 Robinson, this document forms the interpretative
8 background to the Act generally, and when we are looking
9 at constitutional statutes, we are looking at, as we
10 know from Axa, the general message. But perhaps, I hope
11 most convincingly, we will see in a moment or two that
12 a number of these provisions are expressly referenced
13 either in the 1998 Act or in legislation flowing from
14 it. I will come to that in just a moment, my Lord.

15 If I might just very briefly run through some of the
16 provisions of strand two.

17 THE PRESIDENT: Yes.

18 MR SCOFFIELD: As I have said, my Lords, that begins at MS
19 20354.

20 THE PRESIDENT: Yes.

21 MR SCOFFIELD: I will just summarise what we say is the
22 effect of a number of the key provisions. Paragraph 1,
23 the North South Ministerial Council is a joint executive
24 body. It is designed to take action and implement
25 policies on an all-Ireland and cross-border basis. At

1 paragraph 3(iii), it is required to meet in
2 an appropriate format to consider institutional and
3 cross-sectoral matters, and that includes in relation to
4 the EU.

5 Paragraphs 5.3 and 5.4 and paragraph 9, it must make
6 decisions on policies for implementation, both
7 separately in each jurisdiction and on policies and
8 action at an all-Ireland and cross-border level to be
9 implemented by the implementation bodies.

10 Paragraph 11, those implementation bodies will
11 implement the relevant policies on an all-Ireland and
12 cross-border basis.

13 Then importantly, we say, at paragraph 17, those
14 policies must include EU policies or at the very, very
15 least, it must be possible for those policies to include
16 EU policies.

17 So your Lordships, and your Ladyship, see there, the
18 council is to consider the European dimension of
19 relevant matters, that is any relevant matter of mutual
20 interest under paragraph 1. That must include the
21 implementation of EU policies and programmes and
22 proposals under consideration in the EU framework.

23 THE PRESIDENT: The Attorney General made the point that
24 this would still be possible because the Irish Republic
25 would be in the European Union.

1 MR SCOFFIELD: I respectfully say not, my Lord, and that is
2 why we say the Government's case and indeed the
3 Attorney's case does not read strand two as a whole,
4 because in paragraph 17, when one is talking about the
5 implementation of EU policies and programmes, that is
6 a reference back, we say, to paragraphs 1, 5, 9 and 11.
7 Implementation in this context does not mean
8 implementation in one jurisdiction only, it plainly
9 means implementation at an all Ireland and cross border
10 level.

11 We see that phrase repeated a number of times
12 through strand two.

13 We say, respectfully, that is the key flaw in the
14 Government's case. They say it is fine, there will
15 still be things of mutual interest to talk about, but
16 they don't appreciate the executive nature of the North
17 South Ministerial Council and the implementation bodies
18 which follow on, and that they are required to implement
19 policies each side of the border. Finally --

20 LORD SUMPTION: Which provisions of the Northern Ireland do
21 you say that this point assists in interpreting?

22 MR SCOFFIELD: My Lord, part 5 of the Northern Ireland Act
23 deals with the north/south machinery and architecture,
24 and indeed in answer to your Lordship's question and
25 that of my Lord, Lord Mance a few moments ago, these

1 provisions are referred to and we say given statutory
2 effect and essentially incorporated into part 5 in
3 a number of statutory provisions in or under the
4 Northern Ireland Act. So if I can give your Lordships
5 a number of brief references, paragraph 5 of strand 2 is
6 referred to in section 52(c)(5) of the
7 Northern Ireland Act, that is MS 20105. That defines
8 the obligation on ministers in Northern Ireland to
9 participate in the North South Ministerial Council. It
10 is not a matter of choice; they are obliged to operate
11 these arrangements.

12 Paragraph 11, of strand two is referred to in
13 sections 53(5) and 55(5), that is MS 20106 and 20107.
14 That defines the purpose of the implementation bodies.
15 Then the scheme generally is referred to in article 2(2)
16 of the north/south cooperation implementation bodies
17 Northern Ireland order 1999, and the court finds that at
18 MS 20253.

19 THE PRESIDENT: With the exception of paragraphs 5 and 11,
20 the only reference you are telling us is in -- is it
21 a statutory instrument, or is it -- does it have the
22 force of a statute, the regulation?

23 MR SCOFFIELD: It is a statutory instrument made under the
24 Northern Ireland Act, my Lord, giving effect to it,
25 because as the Attorney pointed out yesterday, there had

1 to be a further agreement after this to establish the
2 six implementation bodies, but we say, looking at this
3 statute, the implementation of EU policies and
4 programmes on a joint all Ireland basis is clearly
5 a core part of the North South Ministerial Council's
6 functions set out in part 5, and it is therefore likely
7 to form a significant element of the work of several, if
8 not all, of the implementation bodies which were
9 required to be established by the agreements, and which
10 were in fact established by the implementation bodies'
11 order which I have just mentioned.

12 So the point could rest there, we say, on the basis
13 of the 1998 Act, but it is strengthened, we submit, when
14 one has regard to the establishment of the special EU
15 programmes body, which was one of the few implementation
16 bodies agreed, north and south, and which was
17 specifically set up by the 1999 order.

18 Its functions are to administer EU programmes both
19 north and south of the border, to assist both
20 governments in continuing negotiations with the EU
21 commission about future programmes, and indeed whose
22 current work involves programmes extending into 2020.

23 So, my Lords we say if there was ever any choice on
24 the part of the North South Ministerial Council to leave
25 EU policies to one side, we say that is an incorrect

1 reading of strand two, but if there was ever such
2 a choice, that choice has now gone by the legislative
3 choice set out in the 1999 order. My Lords, my Lady, we
4 say the work of this particular body and the statutory
5 functions which have been assigned to it will
6 essentially evaporate in the event that the UK and
7 Northern Ireland leave the EU.

8 It is not sufficient to say, as the Government does,
9 that those who staff the body may still have some
10 interesting things to talk about. These are bodies, see
11 strand 2, paragraph 11, which must have a clear
12 operational remit and actually implement policies on
13 an all-Ireland, all-island, and cross-border basis. We
14 say, my Lords, that this is not a matter of small
15 moment.

16 As the court will recall, the Belfast agreement
17 makes absolutely clear that all of the arrangements hang
18 together and are interlocking and interdependent. Your
19 Lordships see that reference at paragraph 5 of the
20 declaration of support, MS 20343 to 20344.

21 So, my Lords, even if breaking faith with these
22 agreements is something which as a matter of domestic
23 law, Parliament can do, it can amend the 1998 Act, it
24 can make clear that the North South Ministerial Council
25 no longer has all of the functions set out in strand

1 two, it can amend or scrap the implementation bodies'
2 order or parts of it; the point we make is that that is
3 something that must be done again by legislation,
4 because otherwise legislation of constitutional
5 significance would be frustrated or defeated by the
6 effects of an Article 50 notice without parliamentary
7 sanction.

8 My Lords, before I move on to issue two, there is
9 one further discrete submission I want to make in
10 response to the Government's case on the devolution
11 statutes. The Advocate General took a very broad brush
12 approach to the devolution statutes, and said under each
13 of them, foreign relations are expressly reserved and
14 that the devolved legislatures have no competence in
15 relation to them, and that therefore they can have
16 nothing to say about the exercise of the foreign affairs
17 prerogative. We say that in Northern Ireland that is
18 not a correct starting point as a matter of law, and in
19 any event the conclusion does not follow from the
20 premise.

21 Can I just give your Lordships a reference to
22 paragraph 3 of schedule 2 of the Northern Ireland Act,
23 which your Lordships will find at and your Ladyship will
24 find, MS 20154. That makes clear that there are certain
25 elements of international relations which are

1 transferred to the Northern Ireland authorities.

2 So carved out of the general accepted matter of
3 international relations are north/south cooperation in
4 relation to policing; the exercise of legislative powers
5 to give effect to the north/south arrangements and
6 agreements of implementation bodies; the observance and
7 implementation of obligations under the British-Irish
8 agreement; and effectively all of part 5 of the Act; and
9 also observing and implementing obligations under EU
10 law.

11 So these are all areas of international relations
12 which are not accepted and which are therefore
13 transferred.

14 But even assuming that international relations was
15 entirely an accepted matter under the
16 Northern Ireland Act, that says nothing about the power
17 of the Westminster Parliament in that act to displace or
18 abrogate the prerogative.

19 My Lords, my Lady, issue two arises only if the
20 court determines in this reference or in the Miller
21 appeal that an Act of Parliament is required to
22 authorise the giving of an Article 50 notice.

23 The further question is whether that is
24 a constitutional requirement in the United Kingdom, that
25 the legislative consent convention be complied with. We

1 say that it is, and on this issue we are supported again
2 by the Lord Advocate, and again I adopt the Lord
3 Advocate's submissions in his written case and hope to
4 confine my submissions accordingly.

5 Two brief introductory points, although as I see the
6 time, it may be two brief final points.

7 THE PRESIDENT: I am afraid it might.

8 MR SCOFFIELD: The first is this, my Lord: there is nothing
9 heretical about a contention, particularly in a largely
10 unwritten constitution such as ours, that
11 a constitutional convention may be a constitutional
12 requirement, even if it is not strictly a matter of
13 constitutional law. In fact, my Lords, my Lady, that is
14 an entirely orthodox view and it is covered in
15 paragraphs 20 to 22 of the Lord Advocate's written case
16 and paragraphs 122 to 123 of our written case.

17 Conventions are non-legal rules but they may
18 nonetheless be rules which are fundamental to the
19 operation of the constitution, and the court has seen
20 the reference to the Canadian case, the Canadian Supreme
21 Court case, re a resolution to amend the constitution,
22 which we respectfully commend on that issue.

23 The final point, my Lords, is this. There is
24 a temptation to rush to the endpoint on this question
25 and ask what the result would be if Parliament

1 legislated, in the absence of legislative consent from
2 one or more of the devolved legislatures, and indeed
3 that is how the Attorney General for Northern Ireland
4 has framed the issue, perhaps for presentational
5 reasons, but we are, we say, at this stage a long way
6 off that point.

7 If legislative consent is sought, it may be granted
8 and certainly there would be likely to be, as Mr Gordon
9 says in his submissions, engagement between the
10 executive and Parliament and the devolved
11 administrations. What we are asking the court to do at
12 this stage is simply to clarify whether and how the
13 convention is engaged, and the central case that we make
14 on that, as you will see in our written case, is that
15 this is an obligation on the executive to put Parliament
16 in the position where it is informed on that issue.

17 My Lords, I am sure that my learned friend the Lord
18 Advocate will have much more to say on that question.

19 My Lords, I see that I've got through about
20 two-thirds of a speaking note that I had prepared. Time
21 has defeated me. In the admittedly unlikely event that
22 the court is overwhelmed with suspense about what the
23 remainder of what my submissions would be, or if it
24 otherwise thinks it would be helpful, I am happy to
25 provide the full speaking note to the court and to my

1 learned friends.

2 THE PRESIDENT: If you could make arrangements to do that
3 when we rise or tomorrow, that would be fine.

4 MR SCOFFIELD: I will do that. I am very grateful, my Lord.

5 THE PRESIDENT: Thank you very much indeed. I am sorry
6 about the attenuated time. Thank you very much indeed,
7 Mr Scoffield. Mr Lavery.

8 Submissions by MR LAVERY

9 MR LAVERY: My Lady, my Lords, I appear on behalf of the
10 appellant Raymond McCord, with Mr Fegan, and our
11 position is one which goes further than my friend, and
12 in fact in some respects is contrary to it, because we
13 say that as a matter of the constitution of the
14 United Kingdom, that it would be unconstitutional to
15 withdraw from the EU without the consent of the people
16 of Northern Ireland and we say that for two reasons.

17 First of all, being part of the EU is part of the
18 constitutional settlement which in some respects
19 overlaps with the arguments made by my learned friend.
20 But we say, secondly, that there has been a transfer of
21 sovereignty by virtue of the Good Friday agreement, the
22 Downing Street declaration and section 1 of the
23 Northern Ireland Act, so that in fact the people of
24 Northern Ireland now have sovereignty over any kind of
25 constitutional change, rather than Parliament.

1 The notion that Parliament is supreme, that it has
2 primacy is now gone. There have been various dicta from
3 your Lordships, including Lord Mance in *Axa*, about a law
4 which might discriminate against red-headed people, and
5 of course the dicta from Lord Steyn and Hoffmann in
6 *Jackson*, that the Lords would have to intervene if
7 Parliament were to act in a way which the court might
8 regard to be unlawful or unconstitutional.

9 What is supreme, my Lords and my Lady, is the rule
10 of law, in my respectful submission, and in interpreting
11 what the rule of law is, it is useful to take a look at
12 some of the Canadian cases, which, although there is
13 a written constitution in Canada, which the UK of course
14 does not have, looked at areas where the constitution
15 did not apply.

16 Some extracts from the cases are set out in our
17 printed case and for time reasons, I wonder could
18 I refer your Lordships and my Lady to that; it is core
19 volume 1 of the McCord case, it is a very small binder.

20 THE PRESIDENT: Thank you.

21 MR LAVERY: And the Quebec secession case. First of all,
22 my Lords, my Lady, one of the principles which is
23 extracted by the Canadian cases is that the consent of
24 the governed is a value that is basic to our
25 understanding of a free and democratic society, and

1 indeed that has been historically part of the problem in
2 Northern Ireland, and it was to obtain that very consent
3 of the governed that the Good Friday agreement was
4 arrived at, so that institutions, political institutions
5 and the ultimate question of which country Northern
6 Ireland should be a part of, whether it is part of the
7 United Kingdom or a united Ireland, was determined and
8 looked at.

9 That is the Supreme Court Quebec secession
10 reference, paragraph 77 of our printed case, but
11 paragraph 74, it looks at this question of -- this is
12 distinct before we even look at the Good Friday
13 agreement, my Lords, my Lady, that when one is looking
14 at a federal system, which Canada is, and arguably
15 England, Scotland and Wales may be, that the notion that
16 a majority in one region may simply trump a majority in
17 another is not a fair reflection of what a modern
18 democratic society should do.

19 Paragraph 74, the Canadian courts looked at this
20 question in the case of the Quebec secession
21 reference -- sorry, my Lords, my Lady, paragraph 73,
22 first of all, they say that in looking at the underlying
23 principles of what a constitution should look like, that
24 it should be animated by the whole of the constitution,
25 including the principles of federalism, democracy and

1 constitutionalism.

2 At paragraph 74, then, another extract from the same
3 case is set out, and it looks at the -- a negotiation
4 process which they say should take place if there is
5 a conflict between majorities in a federal system. And
6 that negotiation process, precipitated by a decision of
7 a clear majority of the population of Quebec, on a clear
8 question to pursue secession, would require the
9 reconciliation of various rights and obligations by the
10 representatives of the two legitimate majorities, namely
11 the clear majority of the population of Quebec, and the
12 clear majority of Canada as a whole, whatever that may
13 be.

14 There can be no suggestion that either of these
15 majorities trumps the other political majority, that
16 does not act in accordance with the underlying
17 constitutional principles we have identified, puts at
18 risk the legitimacy of the exercise of these rights.

19 What we say, my Lady, my Lords, is that that is in
20 the context of a federal system. But what section 1 of
21 the Northern Ireland Act does is it puts Northern
22 Ireland's place within the United Kingdom on a voluntary
23 basis. It is more in the nature of confederalism than
24 federalism. To equate the devolution structure of
25 Northern Ireland with the other devolution arrangements

1 for Scotland and Wales does no justice to history, and
2 does no justice to the right of the people of Ireland to
3 self-determination, as set out in the Anglo-Irish
4 agreement, the Good Friday agreement, and does no
5 justice to the principle of consent which is enshrined
6 in section 1 of the Northern Ireland Act. Section 1 of
7 the Northern Ireland Act enshrines, we say, is
8 a statutory expression of both of these principles.
9 When you look at it, which it is in Northern Ireland
10 volume 1, one can see -- my Lords, Northern Ireland
11 authorities, volume 1, tab 3.

12 LORD KERR: 20021.

13 MR LAVERY: I am very grateful, my Lord.

14 THE PRESIDENT: Is this the status of Northern Ireland,
15 20044.

16 MR LAVERY: Section 1 -- we say first of all, what the court
17 should take from section 1 is it is declaratory and
18 says:

19 "It is hereby declared Northern Ireland in its
20 entirety remains a part of the United Kingdom and shall
21 not cease to be so without the consent of a majority of
22 the people of Northern Ireland."

23 So there is a transfer there of power, of
24 sovereignty, over the ultimate question, from
25 Parliament, we say, to the people of Northern Ireland.

1 We say it is not simply the ultimate question, which has
2 been transferred, but it is all rights of
3 self-determination up until that point.

4 That is the unique distinguishing feature of
5 Northern Ireland -- well, perhaps there are two
6 distinguishing features. I will look at section 2 in
7 a moment. But first of all, the voluntary basis upon
8 which the people of Northern Ireland remain part of the
9 United Kingdom, and secondly, that we share power and
10 share sovereignty in respect of the all-Ireland
11 implementation bodies. That is unique to Northern
12 Ireland and does not exist anywhere else.

13 Subsection (2) says:

14 "But if the wish expressed by a majority in such a
15 poll is that Northern Ireland should be part of the
16 United Kingdom and form part of a united Ireland, the
17 Secretary of State shall lay before Parliament such
18 proposals to give effect to that wish as may be agreed."

19 Again, my Lords, my Lady, we say that is
20 an expression of the voluntary basis that the people of
21 Northern Ireland remain part of the United Kingdom.

22 LORD WILSON: Insofar as you are saying that section 1
23 confers on the people of Northern Ireland the say in
24 respect of legislation, and we certainly see that it
25 confers a power in respect of the decision to remain

1 part of the UK or to join a united Ireland, what are the
2 areas of legislation which the people of Northern
3 Ireland under this have? Where does it all end?

4 MR LAVERY: We say, my Lord, that every other section of the
5 Northern Ireland Act, and if one looks at legislative
6 consent motions, they simply divvy up legislative
7 consequences between Westminster and the Northern
8 Ireland assembly and have no real impact upon the point
9 which we are making, which is that the ultimate right,
10 the ultimate sovereignty has transferred by virtue of
11 section 1. One doesn't need to look at, as I say,
12 simply this divvying up of legislative competencies.
13 I am not sure if I answered my Lord's question.

14 THE PRESIDENT: I was simply going to say subsection (2),
15 I suppose, could be said to be another example of
16 a statutory provision which actually says what happens
17 as a result of a referendum or, in this case, a poll.

18 MR LAVERY: The context of that, we say, is important,
19 my Lord, and to the extent that the United Kingdom has
20 no written constitution, we say that the Good Friday
21 agreement now forms a written part of the constitution
22 of Northern Ireland, and unlike my friend, we say that
23 it is binding, parts of it, not all of it but certainly
24 that section of it that deals with constitutional issues
25 is binding, it is a binding arrangement. As a matter of

1 constitutional law, in that it may derive its legitimacy
2 from the rule of law and what has been agreed between
3 the parties, between Britain and Ireland and between
4 Britain and Northern Ireland, it derives legitimacy from
5 that. But it also derives legitimacy as
6 an international agreement, a binding international
7 agreement which has been incorporated into UK domestic
8 law by virtue of section 1.

9 My Lords, if I can just turn very briefly to that
10 agreement, it appears at volume 1, tab 14, 20342 and the
11 constitutional issues which are set out, they are, it
12 must be said, set out initially in what is -- what may
13 be described as binary terms, but what I would say to
14 the court is there is very little about Northern Ireland
15 that can be described in a binary basis.

16 Take the applicant, my client, for instance, he is
17 a Protestant from north Belfast, he is a victim of the
18 Troubles, he is a victims' rights campaigner. He is
19 here, has always attended court with his friend who
20 a Catholic. But his son was murdered by loyalist
21 paramilitaries. He regards himself as British, although
22 many people in Britain may regard him as Irish. It is
23 a complex situation, my Lords, my Lady, northern
24 Ireland, and there is a complex constitutional
25 settlement.

1 It would be very disturbing for the people of
2 Northern Ireland to imagine that the terms so agreed in
3 the Good Friday agreement were not binding to some
4 extent, did not have a constitutional status.

5 Lord Hoffmann in Robinson at paragraph 13,
6 page 3286, refers to the fact that the agreement should
7 be looked at in terms of interpretation of section 1,
8 but in Robinson itself, my Lords, my Lady, the court
9 made a strained interpretation of section 16 of the Act
10 in order to give effect to the agreement and the purpose
11 of the agreement -- in a purposive general way. That is
12 a sort of device employed by courts that have a written
13 constitution. It is a device employed by courts here in
14 this jurisdiction in terms of looking at the European
15 Convention on Human Rights, and we say that is the basis
16 upon which the Good Friday agreement should be looked
17 at.

18 If I could bring your Lordships very quickly to
19 subparagraph (1), sorry, my Lords, it is 20374, where
20 the constitutional issues, and there are simply five of
21 those set out and, to the extent that it has been argued
22 by the Government and in fact by Mr Justice Maguire that
23 there was no provision within the Good Friday agreement
24 which sets out our contentious, if I could direct your
25 Lordships towards subsection (3) and the very last

1 subclause of that, it is after the semi-colon. To put
2 that into context, that is part of the constitutional
3 issues which enshrines the principle of consent.

4 THE PRESIDENT: Reference to changing the status?

5 MR LAVERY: Yes:

6 "... that it would be wrong it make any change in
7 the status of Northern Ireland save with the consent of
8 the majority of its people."

9 It is there beside the principle of consent because
10 we say, my Lord, the history of the agreement, when one
11 looks at it, and it is in the following page, it
12 replaces the Anglo-Irish agreement, the 1985 agreement,
13 which was imposed upon the people of Northern Ireland,
14 it was a joint arrangement between the Republic of
15 Ireland and Britain, imposed upon the people of Northern
16 Ireland, much to unionist disconnect.

17 LORD HODGE: One has to read what is said at the end of
18 paragraph 3 in the context of what is said before.

19 MR LAVERY: One does. It is said in binary terms but it is
20 an addition to the principle of consent and why it is
21 given separate status. My submission is that it is to
22 avoid a scenario like joint sovereignty, like the
23 Anglo-Irish agreement, ever happening again, for the
24 will of the people of Northern Ireland in constitutional
25 issues to be overridden by Parliament against their

1 wishes.

2 Can I say one final point, my Lords, my Lady, that
3 it would be unthinkable that section 1 of the
4 Northern Ireland Act could be repealed and I would refer
5 to the remarks made by Lord Denning in the Blackburn
6 case where he referred to whether one could repeal the
7 acts which give power back to the dominions, and he said
8 it would be unthinkable for such matters to be repealed
9 but he said if that ever did happen in terms of the
10 European arrangements, then the court would look at it
11 but the phrase he used, "What has been given away cannot
12 be taken back", and we say section 1 is a statutory
13 expression of that, my Lords, my Lady, and in those
14 terms the triggering of Article 50 would impede that
15 expression of self determination and the principle of
16 consent.

17 THE PRESIDENT: Thank you very much indeed, Mr Lavery.

18 Thank you very much.

19 Lord Advocate.

20 Submissions by THE LORD ADVOCATE

21 THE LORD ADVOCATE: My Lord President, my Lady, my Lords,
22 may I adopt my written case with the relatively brief
23 supplementary remarks which I will make today and
24 tomorrow.

25 THE PRESIDENT: Yes, of course.

1 THE LORD ADVOCATE: Two days ago, Mr Eadie observed that
2 constitutional issues have to be determined in light of
3 current constitutional circumstances. I agree.

4 I should say, my Lady and my Lords, I am going to make
5 some remarks about the general issue before the court
6 and then turn to the legislative consent question.

7 On the general issue, others have focused on the
8 effect of withdrawal from the European Union on rights
9 and nothing I have to say is intended to detract from
10 those submissions but I invite the court also to attend
11 to the effect of withdrawal on the constitutional
12 arrangements by which we in the United Kingdom are
13 governed.

14 I identify at paragraph 35 and following of my case
15 some constitutional consequences of withdrawal from the
16 European Union. If I may simply refer the court to
17 those paragraphs.

18 One might add to those constitutional consequences
19 the effect which withdrawal from the European Union
20 would have on the rule of recognition which applies in
21 the United Kingdom. It is a point that my Lord, Lord
22 Hodge made yesterday about withdrawal altering the
23 sources of law and not simply the law itself.

24 LORD MANCE: Which was the paragraph you said set out --

25 THE PRESIDENT: 35.

1 THE LORD ADVOCATE: It is paragraph 35 and following,

2 my Lord. It is where I identify the --

3 LORD MANCE: No, I had the wrong case, I am sorry.

4 THE LORD ADVOCATE: It is at MS 12585, and I identify that
5 withdrawal -- and of course this is the point -- would
6 deprive legislative, executive and judicial institutions
7 which currently exercise power as regards the
8 United Kingdom of that power and would mean that none of
9 the legislatures and public authorities of the UK would
10 operate within the framework, as they currently do, of
11 European Union law. I make some other observations in
12 those paragraphs.

13 I say that the only body which has the legal power
14 to authorise and effect such changes to the
15 constitutional law of the United Kingdom, indeed to the
16 constitution of the United Kingdom, is the Queen in
17 Parliament, and I invite the court to take the view that
18 the claim by the executive in this case to effect such
19 changes to the law of the land by an act of the
20 prerogative is inconsistent with the principles, the
21 constitutional principles, articulated in the Claim of
22 Right Act 1689 for Scotland and the Bill of Rights for
23 England and Wales. Those can be found at MS 6358 and
24 MS 4152.

25 That 17th century legislation reflected and enacted

1 in statute what I submit is an imperative rule of
2 constitutional law which sets an outer limit to what may
3 lawfully be done by virtue of the prerogative. The
4 foreign affairs prerogative does not normally buck up
5 against that imperative rule because of the dualist
6 approach which we take to international treaties but
7 when it does, in my submission, the prerogative gives
8 way to that imperative rule of our constitution.

9 LORD REED: That is really a crucial proposition. Now, is
10 there any authority for saying the one trumps the other?

11 THE LORD ADVOCATE: Well, I start from the proposition that
12 what I call the imperative rule is articulated in
13 statute, the Claim of Right Act 1689, the
14 Bill of Rights. But I also respectfully adopt and
15 accept the submissions that have already been made to
16 the effect that it reflects a basic constitutional
17 principle of our constitution.

18 Perhaps I can put it this way, that that principle
19 enshrined in the 17th century constitutional statutes
20 reflects and flows from a recognition of the proper
21 institutional roles in a representative democracy as
22 regards the law of the land of, on the one hand, the
23 representative legislature and, on the other, the
24 executive.

25 That remains the case, notwithstanding that the

1 nature of the our representative democracy has changed
2 since the 17th century, and indeed notwithstanding that
3 today, by the will of Parliament, we have four
4 representative legislatures in the United Kingdom. It
5 is perhaps not an entirely incidental point that when
6 the United Kingdom was founded in 1707, it was to
7 Parliament and not to the Crown that the power to change
8 the laws in use in Scotland was given. That is Article
9 18 of the Act of --

10 LORD HODGE: Exclusively given?

11 THE LORD ADVOCATE: Well, the power was given in terms of
12 the Acts of Union.

13 LORD HODGE: I thought you said only by the British
14 Parliament.

15 THE LORD ADVOCATE: It certainly was not given to the Crown.
16 To Parliament and its delegates, and of course
17 Parliament has through the 1972 Act and through the
18 devolution statutes, transferred legislative powers or
19 acknowledged legislative powers on the part of others.

20 I say that, if that is correct, then we are talking
21 about the scope and limits of the prerogative power
22 relied on here, and that is quintessentially a question
23 of law for the court.

24 Can I make clear that I do not contend that there is
25 any speciality of Scots law as regards the prerogative

1 that affects this case. First of all, the capacity of
2 the Crown in right of the United Kingdom to engage in
3 relations on the international plane on behalf of the
4 United Kingdom is an incident of the Crown in right of
5 the United Kingdom, and it frankly makes no sense to
6 suggest that that might change in the different
7 jurisdictions of the Union.

8 Equally, the limits which Scots law places on the
9 effects which acts of the Crown in the exercise of its
10 foreign affairs prerogative may have within the domestic
11 legal order in Scotland are the same limits as
12 I understand English law to place on those effects,
13 first of all, because Scots law adheres to the dualist
14 theory, as English law does, and, secondly, because
15 Scots law like English law contains the same limiting
16 rule which I mentioned a moment ago which precludes the
17 executive, I say, from changing the law of the land by
18 an act of the prerogative.

19 So, with those remarks on the general question and
20 on the relevance of Scots law in relation to the
21 prerogative, let me turn to the question of legislative
22 consent. I say that the executive's claim in this case
23 not only misconceives the respective roles of Parliament
24 and the Crown in relation to the law of the land, but
25 would elide the constitution the mechanism through which

1 the question of whether the devolved legislatures, which
2 have power to change the law of the land, consent or do
3 not consent to legislation which has the effect with
4 regard to devolved matters. It would elide the
5 mechanism, the legislative consent convent, through
6 which that consent is treated as an issue of
7 constitutional significance.

8 Can I make clear that I do not assert that the
9 Scottish Parliament has a veto on the decision to
10 withdraw the United Kingdom from the European Union.
11 That decision is ultimately, I say, for the Queen in
12 Parliament. What I do say is that the question of
13 whether the Scottish Parliament consents or does not
14 consent to the effects of withdrawal with regard to
15 devolved matters is, by virtue to the legislative
16 consent convention, a matter of constitutional
17 significance. I will elaborate on that and explain what
18 I say the position is.

19 But, ultimately, I say that the approach that
20 I invite the court to take reflects the proper
21 institutional roles of the United Kingdom Parliament on
22 the one hand and the Scottish Parliament on the other,
23 in a context where the Scottish Parliament has wide
24 legislative competence and where the effect of
25 withdrawal from the European Union would be significant,

1 with regard to devolved matters.

2 In other words, in that context, it is
3 constitutionally relevant and significant to know
4 whether the Scottish Parliament consents to those
5 effects. It is then for the United Kingdom Parliament
6 to decide, in light of the views of the devolved
7 legislatures and its own assessment, what to do.

8 LORD REED: I should say Mr Wolffe, for those of us at the
9 edges of the room, it would help if you keep your voice
10 up.

11 THE LORD ADVOCATE: I do apologise, my Lord, and I hope the
12 transcript will at least pick up what I am saying.

13 Yesterday, I think it was yesterday, Mr Eadie
14 reminded the court of the magnitude of the task which is
15 presented by withdrawal from the European Union and the
16 United Kingdom Government will, I hope, not dispute the
17 magnitude of the task which withdrawal will present not
18 only for the United Kingdom Parliament and the
19 United Kingdom Government but also for the devolved
20 legislatures and devolved administrations and I have
21 given examples and illustrations at paragraphs 43 to 49
22 of my case, but I can perhaps summarise the points in
23 this way.

24 First of all, directly affected European law in
25 policy areas which are within the legislative competence

1 of the Scottish Parliament will lapse, to use Mr Eadie's
2 word. Legislation enacted by the Scottish Parliament
3 and Scottish Government which depends for their
4 operation on the subsistence of applicable European law
5 will become potentially ineffective and one might think
6 for example of the regulations which deal with the
7 administration of the Common Agricultural Policy. Other
8 legislation made by the Scottish Parliament and the
9 Scottish Government which cross-refers to EU law will
10 have to be considered from the point of view of whether
11 it can operate or can operate as intended when those
12 laws no longer apply.

13 At a constitutional level, withdrawal from the
14 European Union will effect a significant change on the
15 legislative competence of the Scottish Parliament and
16 the executive competence of the Scottish Government.

17 Mr Eadie accepted in response to a question from
18 my Lord, Lord Reed, that section 2(1) of the European
19 Communities Act would become redundant on withdrawal.
20 In my submission, the same is true of section 29(2)(d)
21 of the Scotland Act, which is at MS 4360, section 57(2)
22 of the Scotland Act, which is at MS 4368, and
23 paragraph 7(2)(a) of schedule 5 to the Scotland Act,
24 which is at MS 4379. These are the provisions which
25 limit the competence of the Scottish Parliament and the

1 competence of the Scottish Government by reference to EU
2 law and the provision which provides that the
3 reservation of international relations has an exception,
4 namely an exception for the observing and implementing
5 of EU law.

6 So I say that at withdrawal those provisions become
7 disabled, to use the word that is in the Claim of Right
8 Act, they become redundant. I say if a bill were to
9 come before the United Kingdom Parliament which changed
10 the competences of the Scottish Parliament or the
11 Scottish Government in these ways, let alone the other
12 effects with regard to devolved competence, then such
13 a bill would engage the legislative consent convention.

14 Can I perhaps draw the court's attention in that
15 regard to the explanatory notes to the Scotland Act
16 2016. It is quoted in my case at paragraph 76 at the
17 top of page 4, and it appears in the bundle at
18 volume 30, tab 407, MS 10379 -- and I should say the
19 reference in my case is a misreference, it should be to
20 number 407 at MS 10379. In the explanatory notes to the
21 Act it said:

22 "This Act required a legislative consent motion from
23 the Scottish Parliament on the basis that it contains
24 provisions applying to Scotland which alter the
25 legislative competence of the Scottish Parliament and

1 the executive competence of the Scottish ministers."

2 LORD WILSON: We are having difficulty finding the passage

3 you are referring to.

4 THE LORD ADVOCATE: Sorry, my Lord. It is quoted in my

5 written case at MS 1612.

6 LORD WILSON: Paragraph?

7 THE LORD ADVOCATE: It is paragraph 76, subparagraph 4,

8 right at the top of the page. It is paragraph 9 of the

9 explanatory notes.

10 LADY HALE: Yes, that is what is at 10379, is paragraph 9 of

11 the explanatory notes.

12 THE LORD ADVOCATE: Indeed, my Lady.

13 Indeed there was a legislative consent motion and

14 the Act was passed.

15 LORD MANCE: This Act is what?

16 THE LORD ADVOCATE: The Scotland Act 2016 changed the

17 competences of the Scottish Parliament.

18 LORD MANCE: I see.

19 THE LORD ADVOCATE: And the legislative -- and the executive

20 competence of Scottish ministers, and of course the

21 point that I make is that it is explained to Parliament

22 in the explanatory notes that the Act required

23 a legislative consent motion, on the basis that it

24 contains provisions applying to Scotland which alter the

25 legislative competence in the Scottish Parliament and

1 the executive competence --

2 LORD MANCE: Where do you get the binding nature of the
3 legislative consent motion? You get it from the Sewel
4 convention and from the enactment in the Scotland Act?

5 THE LORD ADVOCATE: I say two things, my Lord, I say first
6 of all that this court is concerned with what are the
7 constitutional requirements of the United Kingdom under
8 Article 50, and I say that it is of the nature of
9 conventions that they constrain the legal power of
10 actors within the constitution to act in accordance with
11 the constitutional requirements.

12 LORD MANCE: What is it -- that raises the question what
13 a constitutional requirement is and whether -- it is
14 a question of European law, isn't it?

15 THE LORD ADVOCATE: It is ultimately, it may ultimately be
16 but I don't think the United Kingdom --

17 LORD MANCE: Is it for us?

18 THE LORD ADVOCATE: The United Kingdom has not disputed, and
19 I don't think -- I would be surprised if it did dispute
20 that in principle a constitutional convention could be
21 a constitutional requirement.

22 LORD MANCE: For a constitutional lawyer, no doubt it is,
23 but for a lawyer ... perhaps I should have said for
24 a constitutional specialist, it might be a requirement
25 but for a lawyer ...

1 THE LORD ADVOCATE: Well, I say that it is germane to the --
2 it is germane in two ways here. First of all, the
3 Attorney General has invited this court to answer
4 a question, the Attorney General for Northern Ireland
5 has invited the court to answer a question about
6 legislative consent, albeit directed to Northern
7 Ireland; and I also made the submission a few moments
8 ago that the approach that the UK Government is taking
9 here elides not only the proper role of the
10 United Kingdom Parliament, but, I say, of all the
11 representative legislatures of the United Kingdom whose
12 interests are in our constitution protected through the
13 legislative consent.

14 LORD MANCE: I see that point, but can we be specific; do
15 you in the last instance rely on the Scotland Act, the
16 reference, the incorporation of the Sewel convention as
17 law?

18 THE LORD ADVOCATE: I would certainly make the submission --
19 even if it wasn't, if it had not been incorporated into
20 law by section 28(8), I would make the submission. Of
21 course I have the benefit that the convention has been
22 incorporated into statute, and if I could put it this
23 way, in a legal system where the basic rule of
24 recognition is that what the Queen in Parliament enacts
25 as law, that has transformed the juridical status of the

1 rule from a convention into a rule of law.

2 LORD HODGE: I wonder about that, Dean of Faculty, because
3 we will look later at the wording of the provision, but
4 it talks about recognising something. It says -- in
5 subsection (7) it gives the principle which you accept
6 and then it is said: but it is recognised. And it can
7 clearly have legal effect. Insofar as political
8 conventions can change with political practice over
9 time, you can say that subsection (8) prevents its
10 disveritude(?), as it were; in what other sense is it
11 converted into a rule of law?

12 THE LORD ADVOCATE: In the very straightforward sense that
13 it has been enacted into statute, and I can give the
14 court -- the learned Advocate General referred the court
15 to the Canadian patriation case, which raised a question
16 not very dissimilar from the one that this court has to
17 deal with on this issue. In the patriation case, the
18 court divided on whether it would answer a question
19 about whether a constitutional convention of consent by
20 the provinces was required, and the majority held that
21 they would.

22 All of the judges agreed that in the true sense, if
23 a convention is not a rule of law, and they all spoke to
24 the potential transformation of a convention by statute,
25 and the references can be seen at MS 8834, in the

1 opinion of the minority, and 8845 in the opinion of the
2 majority, MS 8834 and MS 8845.

3 LORD REED: Mr Wolffe, I think many of us are struggling to
4 see exactly how the Sewel convention impacts on the
5 central issue before us. Are you saying simply that the
6 impact is this, that if and to the extent that the Sewel
7 convention would politically oblige Parliament to
8 consult the Scottish Parliament before triggering
9 Article 50, that is an extra argument for why this is
10 a matter for Parliament rather than the executive, or
11 does it fit in in another way?

12 THE LORD ADVOCATE: I do say that. I also say, I also say,
13 and it is fair to say I come to this case recognising
14 that the Attorney General for Northern Ireland has asked
15 a specific question, albeit focused on the Northern
16 Ireland situation, which raises directly for the court
17 a question which falls to be answered or not answered,
18 if the court takes the view that it cannot appropriately
19 be answered; and that it is right that I make clear what
20 my position is in relation to the convention.

21 But I do say that on the essential point raised in
22 Miller, that we now are looking to the constitution as
23 it currently exists, we not only have the basic rule
24 which I outlined at the outset, that it is for the Queen
25 in Parliament to change the law of the land; but in

1 a context where we have four legislatures which can
2 change the law of the land, we have a structure of
3 constitutional convention which engages the -- entitles
4 those legislatures to have a voice in the decision.

5 Perhaps I shall make this point at this stage.
6 I drew the court's attention to the explanatory notes to
7 the Scotland Act 2016. Similarly, the Scotland Act
8 2012, where again the legislative competence of the
9 Scottish Parliament was changed, engaged our legislative
10 consent requirement, and the court can see the
11 explanatory memorandum for that act at MS 10369,
12 paragraph 8.

13 Indeed my Lord reads remarks about the Sewel
14 convention in *Imperial Tobacco*, volume 5, tab 41, MS
15 1619, were expressly directed to changes to legislative
16 competence.

17 So in my submission there is no -- there should be
18 no dispute that the legislative consent convention
19 applies where there are changes to the legislative
20 competence or executive competence of the Parliament and
21 the Government. That has reflected consistent practice
22 which I have sought to provide information about in the
23 narrative in my case.

24 What that illustrates in particular, what the
25 application of the convention to the two(?) Scotland Act

1 illustrates, is that a bill may relate to a reserve
2 matter, one which the Scottish Parliament could not
3 itself enact. But may nevertheless, insofar as it has
4 effect with regard to devolved matters, engage the
5 requirement for the consent of the Scottish Parliament.

6 So my learned friend the Advocate General's argument
7 where he points to the reservation of international
8 relations in my submission is --

9 LORD MANCE: It doesn't help.

10 THE LORD ADVOCATE: -- guilty of the fallacy that simply
11 because something is reserved, it cannot engage
12 legislative consent convention, that is simply not the
13 case. That fallacy also underlies the reasoning of
14 Mr Justice Maguire in paragraph 121 of the --

15 LORD KERR: Which paragraph, please?

16 THE LORD ADVOCATE: It is MS 742, paragraph 121 of McCord
17 where his Lordship essentially said, because
18 international relations are reserved, therefore this is
19 nothing to do with the Northern Irish assembly.

20 What I say is that if a bill were presented to the
21 UK Parliament, which had the effects for the competence
22 for the Scottish Parliament and Scottish Government
23 which will take place on withdrawal from the EU, and
24 which had all the other effects within devolved
25 competence, then there would be no doubt in my

1 submission that that engaged the legislative consent
2 convention.

3 LORD REED: I don't suppose there is any definition of
4 either "with regard to" or "devolved matters"?

5 THE ADVOCATE GENERAL FOR SCOTLAND: One of the interesting
6 points, I am going to make a short submission about
7 interpretation directed to section 28(8).

8 LORD REED: We have had a lot of case law on what is meant
9 by, relates to reserved matters.

10 THE LORD ADVOCATE: It is an important point, my Lord, that
11 the phrase, "with regard to devolved matters", does not
12 use the conceptual language that is used elsewhere in
13 the Scotland Act. Rather it points back to language
14 which appears in the memorandum of understanding and
15 which has been articulated in practice. It points back,
16 I say, to the convention as it has been applied in
17 practice and indeed the word, it is recognised that,
18 again is pointing one back to the practice, as regards
19 the convention.

20 LORD REED: Really you have to argue that an act --
21 hypothesising an act which authorises the Government to
22 give notification under Article 50 is an act which
23 legislates with regard to devolved matters, essentially
24 because of its -- because it has a consequential impact
25 on some devolved matters.

1 THE LORD ADVOCATE: Absolutely, my Lord, and perhaps
2 I should put it this way, and it is perhaps helpful to
3 test the argument by assuming a one-clause bill that
4 determines to withdraw the United Kingdom from the
5 European Union, and I do make the point that it would
6 have to be a bill making that decision, not -- and no
7 doubt consequentially authorising the notice.

8 But I say that within that proposition are a whole
9 series of effects with regard to devolved matters, and
10 if Parliament were to unpack the headline proposition,
11 and in separate clauses say all the things that legally
12 would be happening with regard to devolved matters, then
13 it would be plain that the convention is engaged, and
14 I say that it cannot matter as a matter of substance
15 that those propositions are simply implicit in the
16 headline proposition of a determination to withdraw from
17 the European Union.

18 It may be helpful if I invite the court to look at
19 section 28(8), so that I can perhaps make clear what
20 I am saying and what I am not saying about it.

21 THE PRESIDENT: Yes.

22 THE LORD ADVOCATE: The court has that at tab 124 in
23 volume 12 at MS 4359. Can I say immediately that since
24 this is a provision which satisfies our rule of
25 recognition, the question of its meaning and effect,

1 well, perhaps firstly the question of its effect and
2 then of its meaning, are matters of law for the court.

3 Can I say that I accept that it is a provision which
4 requires to be construed against the background of
5 relevant constitutional principles. So I acknowledge
6 that it does not displace the Pickin rule and if -- the
7 validity of an Act of Parliament once enacted could not
8 be, I say, challenged under reference to an alleged
9 failure to respect section 28(8).

10 I also acknowledge that article 9 of the Bill of
11 Rights is part of the relevant constitutional context
12 and that, it may be, is relevant to what the court is to
13 make of the word "normally".

14 LORD HODGE: Will you be addressing us, Lord Advocate, at
15 some stage on any precedents for the use in statute of
16 the words, "it is recognised that"?

17 THE LORD ADVOCATE: I can certainly see if I can put myself
18 in a position to do so, my Lord.

19 LORD WILSON: Equally, "normally" is not a word one sees
20 very often sees in statutes.

21 THE LORD ADVOCATE: Indeed, my Lord, and I accept that the
22 word "normally" implies that there may be circumstances
23 in which the -- where an act will be passed
24 notwithstanding that the consent of the Scottish
25 Parliament is not forthcoming, albeit I am advised that

1 that has never happened, at least knowingly, where
2 legislation is proposed with regard to devolved matters.
3 LORD SUMPTION: Is the question what is normal justiciable?
4 THE LORD ADVOCATE: In the context of article 9 of the
5 Bill of Rights, I accept that -- I find it difficult to
6 imagine how it would engage a justiciable issue.
7 LORD KERR: What if Westminster Parliament could be shown to
8 flagrantly be in breach of the provision, that it
9 legislated continuously on matters of the Scottish
10 Parliament, so that the norm became that they did
11 legislate rather than that they refrained from
12 legislating?
13 THE LORD ADVOCATE: Indeed, my Lord, I proceed on the
14 assumption that Parliament will do what it has said it
15 will do in this provision.
16 LORD KERR: It is a pure question of justiciability; it is
17 possible to conceive, albeit on a somewhat outlandish
18 scenario, but it is possible to conceive of
19 circumstances in which it could be --
20 THE LORD ADVOCATE: I can see that, my Lord, I can see that,
21 my Lord. Perhaps I can put it this way: I don't need to
22 make an argument about the word "normally" in this case,
23 because what I say is that the phrase "with regard to
24 devolved matters" is one upon -- it is a phrase upon
25 which the court can adjudicate.

1 LORD MANCE: But it doesn't have any effect, you say? If
2 the UK Parliament does breach this convention, and
3 breach this convention as recognised in this section,
4 you say it doesn't have any effect. So what is the
5 argument that we would be entitled nonetheless to stop
6 the UK Parliament doing it, if it was proposing to,
7 and -- I suppose the further question is what is the
8 relevance of this? We are not talking about the UK
9 Parliament legislating, we are talking about a case
10 where it is proposing to use its executive powers.

11 THE LORD ADVOCATE: I say two things, my Lord, in response
12 to that. I say first of all that it is -- perhaps on
13 the second point, I have already made the submission,
14 that part of the current constitutional context in which
15 the court should consider --

16 LORD MANCE: If you cannot legislate, you cannot do other
17 things, is your basic point, is it?

18 THE LORD ADVOCATE: The basic point is that, when one is
19 testing whether the Crown can by the prerogative change
20 the law of the land, one has to keep in mind that in the
21 current constitutional arrangements, there are several
22 legislatures that have an interest in that question.

23 LORD MANCE: Not even Parliament can change, you say, so how
24 possibly could the Government?

25 THE LORD ADVOCATE: I say there is a convention,

1 a constitutional requirement, I would say, that
2 Parliament has itself acknowledged in statute.

3 LORD KERR: I think what you can say is that Parliament at
4 the very least commits itself to the question whether it
5 should legislate within -- on a matter which is within
6 the competence of the Scottish Parliament, it would be
7 incongruous with that situation that the Government
8 would in effect change the law of Scotland.

9 THE LORD ADVOCATE: Absolutely. Absolutely, my Lord.

10 LORD REED: I suppose you have to read subsection (8) also
11 in the light of subsection (7), which tells us about the
12 section as a whole, (Inaudible) not affecting the power
13 of the Parliament of the UK to make laws for Scotland.

14 THE LORD ADVOCATE: Yes, but, sorry, my Lord, I might
15 just --

16 LORD REED: 28(8) --

17 LORD MANCE: I don't dissent from Lord Reed's proposition.

18 THE PRESIDENT: You deal with the questions in turn. We
19 will not ask you any more until you have finished.

20 THE LORD ADVOCATE: I am happy to deal with questions and
21 points, but the other point that my Lord, Lord Mance put
22 to me is -- perhaps I can answer in this way. We are
23 concerned with the decision which falls to be made by
24 the United Kingdom under Article 50 of the treaty.

25 LORD MANCE: Yes.

1 THE LORD ADVOCATE: The United Kingdom has to make that
2 decision in accordance with its constitutional
3 requirements. I say that those constitutional
4 requirements include an Act of Parliament --
5 LORD MANCE: And legislative consent.
6 THE LORD ADVOCATE: And the legislative consent.
7 LORD MANCE: Would it be a catastrophe for the devolved
8 settlement if one read subsection (8) as simply
9 a non-legally binding or legally effective *douceur*.
10 THE LORD ADVOCATE: What I will say, my Lord, is there is
11 plenty of evidence, including statements by the
12 United Kingdom Government which I have referred to in my
13 case about the importance of this convention to the
14 working of the devolution settlement.
15 LORD MANCE: I am sure the convention -- conventions are
16 incredibly important, but they are not legally binding.
17 That is their nature.
18 THE LORD ADVOCATE: Indeed, and what I can also say is that
19 the United Kingdom Parliament decided that this
20 convention should be enacted into statute and I might
21 put my Lord's question -- perhaps answer it with what it
22 would be impertinent to suggest is anything other than
23 a rhetorical question, which is, what was the point in
24 enshrining this in law if it doesn't become a provision
25 that the courts can address.

1 LORD MANCE: It may be it would have looked a bit bleak,
2 subsection (7), by itself.

3 LADY HALE: It was there for quite a long time.

4 LORD REED: But subsection (7) is not qualified. It does
5 rather look as though subsection (8) may be symbolic or
6 a *douceur*, as Lord Mance --

7 THE LORD ADVOCATE: Well, my Lord says subsection (7) is not
8 qualified, subsection (8) is introduced by the word
9 "but".

10 LORD HODGE: But you can give legal content to it, that it
11 is more than a *douceur*, if you say that, as I said at
12 the outset of my engagement with you, it was preventing
13 the convention from slipping away by *disveritude* or a
14 change of practice, it is a recognition that this
15 a convention that is to apply. That doesn't make the
16 convention a rule of law. It is merely recognising it
17 as something that is fixed, as a convention.

18 THE LORD ADVOCATE: I would put it this way, my Lord, that,
19 as a provision and an Act of Parliament, it is part of
20 the law of the land. What its effect and interpretation
21 are are matters upon which the court may properly
22 adjudicate.

23 LORD HODGE: You can ask us to say what does section (8)
24 mean.

25 THE LORD ADVOCATE: And what effect does it have in

1 a particular context.

2 It is perhaps important to address the question in
3 the context in which we are currently considering the
4 question, which I accept is one where there is no bill
5 before Parliament, there is no question of the court
6 being asked to interfere with proceedings in Parliament,
7 there is no question of me inviting the court to
8 invalidate its statute even in the extreme hypothesis
9 that my Lord Kerr put to me.

10 We are at a point in the process where this court is
11 seized of the question of what the constitutional
12 requirements of the United Kingdom are to make the
13 decision, the important decision, to withdraw from the
14 European Union and what I am inviting the court to do is
15 to acknowledge in the Miller case, for the reasons
16 I have outlined, and in the Northern Irish case in
17 response to the Attorney General's second question, that
18 one of those requirements is the convention.

19 My Lord, I don't know whether that is a convenient
20 point to --

21 THE PRESIDENT: If it is convenient for you Lord Advocate,
22 yes.

23 THE LORD ADVOCATE: Yes, I am planning to break there and
24 resume again in the morning.

25 THE PRESIDENT: We will resume again at 10.15, and I think

1 you have half an hour, is that right?

2 THE LORD ADVOCATE: Yes, thank you.

3 THE PRESIDENT: And you are on course for that?

4 Thank you very much. We will adjourn now and resume
5 again at 10.15 tomorrow morning. The court is now
6 adjourned.

7 (4.00 pm)

8 (The court adjourned until 10.15 am the following day)

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