

IN THE SUPREME COURT OF THE UNITED KINGDOM

UKSC 2016/196

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

Divisional Court Case Nos: CO/3809/2016 and CO/3281/2016

Neutral Citation of Judgment appealed against: [2016] EWHC 2768 (Admin)

BETWEEN:-

THE QUEEN
on the application of
(1) GINA MILLER
(2) DEIR TOZETTI DOS SANTOS

Respondents

-and-

THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Appellant

-and-

(1) GRAHAME PIGNEY & OTHERS
(2) AB, KK, PR & CHILDREN

Interested Parties

– and –

(1) GEORGE BIRNIE & OTHERS
(2) THE LORD ADVOCATE
(3) THE COUNSEL GENERAL FOR WALES
(4) THE INDEPENDENT WORKERS UNION OF GREAT BRITAIN
(5) LAWYERS FOR BRITAIN LIMITED

Interveners

SUBMISSIONS ON BEHALF OF LAWYERS FOR BRITAIN LIMITED

Introduction

Lawyers for Britain Ltd (“**LFBL**”) (President: Rt Hon Sir Richard Aikens), a non-party-political group of lawyers, legal academics and retired judges, focusses on research on legal issues relating to the UK’s withdrawal from the EU. Although formed to assist the Leave campaign, it is now also supported by some who voted Remain who wish the result of the referendum to be implemented without further delay. It respectfully submits as follows:

First submission: the European Union (Amendment) Act 2008 (“the 2008 Act”) and the European Union Act 2011 (“the 2011 Act”)

A. *The ECA 1972 did not “create rights”: how it really operates.*

1. The Respondents argue that, in the European Communities Act 1972 (“**the ECA 1972**”), Parliament “*created*” rights, which therefore only it may “*destroy*” (R1 Case, §2; and see R2 Case, §2). This is unsound. The ECA 1972 s.2(1) created no rights. Rather, it gave “*legal effect*” in the UK to the body of what is now EU law. Rights conferred by that law are created, and may be enhanced, altered or (as R1 would put it) “*destroyed*”, not by Parliament but by EU instruments that come into existence when the Member States and EU institutions perform their allotted roles, and exercise their respective rights, under the Treaties.¹ This system, in an earlier version, is what Parliament was (as the Divisional Court (“**DC**”) expressed it) “*switching on in the [UK’s] national legal systems [...] by passing the ECA 1972 [...].*”²

2. The UK’s powers in this system are exercised on its behalf by the Crown, which is accountable politically to Parliament for what it does with them. Parliament has never conferred authority on the Crown to exercise these powers. It has never needed to, because the prerogative already supplies the Crown with authority to exercise the UK’s powers under treaties, as the Court said in *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs*:³

“The source of [the Minister’s] powers [to vote in the UN Security Council] under domestic law lay not in any statute but in the exercise of prerogative powers for the conduct of foreign relations.”

¹ For a routine example of an EU law right being “*destroyed or frustrated*”, see Council Regulation (EU) 2016/72, article 47, limiting rights to fish previously conferred by Council Regulation (EU) 2015/104.

² Judgment at §87, endorsed in R1 Case at §32.

³ [2016] UKSC 3, [2016] 2 WLR 509 at §25. See too at §34. [35/496].

3. Neither, subject to important exceptions discussed below, has Parliament limited the Crown's legal authority to cause the UK to act under and in relation to the Treaties.

B. Parliamentary intent in 1972 is not decisive of this case

4. The conclusion of the DC, which the Respondents support and on which they principally base their arguments, is that the Crown has no authority to cause the UK to invoke its right under Article 50 TEU to withdraw on notice from the EU, because

*“Parliament intended to legislate by [the ECA 1972] so as to introduce EU law into domestic law [...] in such a way that this could not be undone by exercise of Crown prerogative powers.”*⁴

5. Even if this was Parliament's intention in 1972,⁵ it does not follow that in 2016 the Crown lacks authority to cause the UK to invoke Article 50. Article 50 did not exist in 1972. The Treaty of Rome had been ‘concluded for an unlimited period’ (Article 240) and contained no express right to withdraw. Ending British membership would have involved some act by the UK *outside* the terms of Treaty. Whether the Crown had authority to do that under the prerogative is not the question today.

C. The correct analysis

6. The question today is whether the Crown has authority under the prerogative to cause the UK to act *under Article 50*. This can only meaningfully be addressed from 2008, when this new power first arose and came to Parliament's attention. The intention of Parliament as it appears from the 2008 Act is the proper focus of inquiry.

7. Article 50 TEU began life in the draft Treaty Establishing a Constitution for Europe. This never came into force. But much of it ended up in the Lisbon Treaty.⁶ This extended many competences of the EU and conversely diminished the powers of the individual Member States. Article 50 was a counterbalance. As the Bundesrat submitted to the Bundesverfassungsgericht in 2008, “*The safeguarding of state sovereignty is [...] clearly expressed in [...] the right to withdraw from the Union pursuant to article 50 Lisbon TEU.*”⁷

8. The 2008 Act did two main things:

⁴ Judgment at §92, endorsed in R1 Case at §46.

⁵ LFBL agrees with the Appellant that it was not, but will not duplicate the Appellant's argument here.

⁶ *Re Ratification of the Treaty of Lisbon* (2 BvE 2/08) [2010] 3 CMLR 13 at §16-17: the European Council “gave an Intergovernmental Conference a mandate to draw up a so-called Reform Treaty amending the existing Treaties [...], bas[ing] its proposal on the Constitutional Treaty, of which the actual content was to be included as much as possible in the new Reform Treaty.” [35/494].

⁷ *Ib.* at §129.

a. It added⁸ the Lisbon Treaty into the “*Community treaties*” (re-named “*EU treaties*”) designated by the ECA 1972. Thus, Article 50, together with the other amended and inserted Articles set out in the Lisbon Treaty, became an integral part of the treaties accorded the status of “*EU treaties*” (formerly “*Community treaties*”). Parliament thus explicitly acknowledged the international law position that the rights etc. arising under other parts of those “*EU treaties*” were now subject to the exercise of the withdrawal right in Article 50.

b. In section 6 it imposed explicit Parliamentary control over the exercise of prerogative authority under certain Articles of the EU treaties (including, in particular, Article 48 TEU), but no such restriction on the exercise of the prerogative to invoke Article 50 TEU.

9. The question is whether, in these circumstances, the Crown’s undoubted authority to cause the UK to invoke its rights generally under the Treaties (see §2 above) includes authority to cause the UK to invoke its right under Article 50. It is submitted that it does, notwithstanding any finding as to Parliamentary intent in 1972, for five reasons.

10. **First**, in Article 50 the Treaties explicitly acknowledged for the first time that membership of the EU was not necessarily permanent, so that it was no longer true (if it ever had been) that the words “*from time to time provided for by or under the Treaties*” in ECA 1972 s. 2(1) must reveal an intent to apply in the UK an evolving but permanent body of EU law,⁹ and not to contemplate the possibility of withdrawal.

11. **Secondly**, since Article 50 was included within “*the Treaties*” recognised under the 1972 Act, Parliament must be taken to have had Article 50 in contemplation when stipulating in s. 2(1), as amended by the 2008 Act, that

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties [...] as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law [...].”

12. Accordingly, any directly effective rights etc. arising under the Treaties are given effect under s. 2(1), as amended, *subject to the operation of Article 50*. The Respondents’ claim does not work because it requires the Court, when seeking to identify the class of

⁸ By inserting subs.1(2)(s), excluding the parts of the Lisbon Treaty dealing with the Common Foreign and Security Policy, into the ECA 1972.

⁹ See R1 Case, §55(1).

possible “rights [...] as in accordance with the Treaties are [...] to be given legal effect or used in the United Kingdom”, temporarily to avert its eyes¹⁰ from Article 50 TEU, which makes clear that it can be entirely “in accordance with the Treaties” for those rights no longer to exist.¹¹

13. **Thirdly**, as noted at §2 above, the Crown generally has authority under the prerogative to cause the UK to exercise its rights under treaties. There is no reason to exclude from this the authority to cause the UK to exercise such termination rights as a treaty may contain. If Parliament bases domestic law rights on the provisions of a treaty containing an express right of termination, it does not follow that Parliament must have stripped the Crown of such authority in relation to the treaty in question. That the exercise of that authority may result in an alteration or abridgment of domestic law rights flows from Parliament’s own legislative decision to apply rights arising under the treaty “*from time to time*” in the UK.

14. Thus, the general proposition that the Crown lacks authority to take away domestic rights, upon which the DC laid such stress, does not answer this case: it begs the question of what the rights are. The natural starting point is that Parliament has made the law in the UK track the international law, whatever it may be “*from time to time*”, rather than implicitly stripping away the Crown’s powers at the international level.

15. **Fourthly**, the operation by the Crown on the UK’s behalf of Article 50 will indeed extinguish EU rights to which “*legal effect*” is given by ECA 1972 s.2(1). But this is no different in principle (only in scale) from the process—which, it is agreed, is lawful—under which EU rights may be both created and extinguished by Member States, including the UK as represented in EU institutions by the Crown exercising prerogative authority, through the operation of other Articles of the treaties (see §2 above).

16. **Fifthly**, this analysis is supported by the detailed provisions of the 2008 Act.

17. Two aspects are significant. The first is that Parliament addressed the new powers exercisable on the international plane as a result of the Lisbon Treaty, and decided via s.6 (“*Parliamentary control of decisions*”) to introduce a regime of control of the prerogative in

¹⁰ To adapt Lord Hoffmann’s language in *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400 at §51. [35/492].

¹¹ As Lord Millett argues in “Prerogative Power and Article 50 of the Lisbon Treaty”, (2016) 7 UK Supreme Court Yearbook 190 at 194, “[a]ll the rights on which the claimants relied upon in *Miller* have been imported into domestic law in the terms in which they were granted by the Treaties, and all are inherently dependent on the maintenance of an existing relationship between the UK and the EU.” [35/511] This is so *a fortiori* where the right to terminate that relationship appears on the face of the same treaty..

regard to those powers: see subs. (1). This involved subjecting several powers, but *not* Article 50, to a requirement of Parliamentary approval by resolution. Article 50 was very well known and its exclusion from this list can scarcely be attributed to oversight.

18. The implication of the DC's judgment is that Parliament is to be taken as having intended in 2008 that an unstated restriction which the DC in 2016 found to be implied in law from the 1972 Act would apply to the new treaty right under Article 50 sufficiently clearly that there was no need to say anything about it. This is unrealistic to the point of absurdity. The only sensible inference is that Parliament intended that the exercise of this new right would not be subject to legal (as distinct from political) restraint.

19. The second point is that s.6(1)(a) provided that

“A Minister of the Crown may not vote in favour of or otherwise support a decision under any of the following unless Parliamentary approval has been given in accordance with this section [...] (a) Article 48(6) of the Treaty on European Union (simplified revision procedure)”.

20. Article 48(6) TEU sets out simplified procedures under which, subject to approval by all Member States in accordance with their respective constitutional requirements, the European Council could adopt *“a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union”*.¹² TFEU Part Three includes the core provisions on the internal market and free movement. It could be amended under Article 48(6) without the need for a new treaty, and such amendment could clearly alter the content or indeed existence of rights given effect in domestic law by s.2(1) of the 1972 Act.

21. If the Respondents' case is right, it was already the law that the Crown could not approve such a treaty revision without an Act. This is inconsistent with s.6, which prohibits a Minister from supporting a decision under Article 48(6) without the prior approval of a motion in each House - and it cannot sensibly be supposed that Parliament intended, by s.6, not to constrain but increase the Crown's powers, by requiring a motion instead of an Act.¹³

22. The logical conclusion is that Parliament did not consider that a treaty revision under Article 48(6) would require, or would but for s.6 have required, an Act of Parliament. Thus,

¹² Subject to not increasing competences conferred on the Union under the Treaties: Art.48(6) third paragraph.

¹³ Nor would it make sense to think Parliament intended to require a motion of both Houses at the decision stage *as well as* an Act at the final Member State approval stage. In addition to rendering the Motion process virtually redundant, such an approach could not sensibly be reconciled with section 5 of the Act, in which Parliament expressly required an Act to approve the ratification of any new treaty amending the Treaties resulting from the ordinary revision procedure (Article 48(2)-(5)), but imposed no similar requirement for an amendment under the simplified revision procedure (Article 48(6)).

the existence of s.6(1)(a) recognised that, but for such a provision, the Crown would have remained entitled to take steps in relation to the Treaties producing automatic legal effects in the UK via the ECA s.2(1); and it negated any implication that might otherwise arise that the Crown's ordinary right to act on the international plane in relation to the Treaties (outside the matters explicitly covered by s.6 itself) had been, or remained, excluded or limited.

23. Taking these two points together, it is impossible to conclude from the statutory scheme up to and including the 2008 Act that Parliament had by implication removed the power, which the Crown would otherwise have had, to exercise Article 50 on the UK's behalf.

24. Moreover, the 2008 Act contradicts the argument that reliance on Article 50 begs the question of what the UK's own "*constitutional requirements*" are for Article 50.¹⁴ In the 2008 Act, and in particular in s.6, Parliament spelled out the UK's constitutional arrangements relating to the exercise of the new rights and powers arising from the Lisbon Treaty. These did not include any requirement for an Act of Parliament for the exercise of the Article 50 right.

25. Finally, the submissions in §79 of R1's Case miss the point. In particular, (a) the Appellant need not show that the post-1972 legislation confers a power to exercise Article 50: it has that unless it can be shown that Parliament has removed it; (b) the phrase "*defeat statutory rights*" begs the question of what the rights are, as explained above; and (c) the post-1972 statutes, in particular s.6 of the 2008 Act, *are* concerned in part with treaty changes capable of altering the content of domestic rights.

D. The 2011 Act

The 2011 Act repealed section 6 of the 2008 Act and replaced it with a more elaborate system of control of prerogative acts by Parliament, and in some cases by referendums. The 2011 Act, the effect of which is summarised in the Appellant's Case at §§29-31, reinforces the point already made about the 2008 Act, in that Parliament again decided to omit Article 50 from its scheme of control of prerogative acts.

¹⁴ See R1 Case, §53.

E. “Very surprising”?

26. Finally, the Respondents will presumably contend that the above argument has the “*very surprising*” consequence that the Crown could have withdrawn the UK from the EU without Parliamentary authorisation or a referendum.¹⁵ But this is only remarkable at all if one considers, as the British constitution never has, that what would be undesirable or constitutionally unwise (or worse) has to be restricted by legal rules.

Second submission: The European Referendum Act 2015 (“the 2015 Act”)

27. A statute is to be “*read in the historical context of the situation which led to its enactment.*”¹⁶ It is also to be interpreted by reference to “*external aids*”. In *Wilson v First County Trust*,¹⁷ Lord Nicholls said:

“External aids include the background to the legislation, because no legislation is enacted in a vacuum. It has long been established that the courts may look outside a statute in order to identify the “mischief” Parliament was seeking to remedy. Lord Simon of Glaisdale noted it is “rare indeed” that a statute can be properly interpreted without knowing the legislative object: [citation omitted]. Reports of the Law Commission or advisory committees, and government white papers, are everyday examples of background material which may assist in understanding the purpose and scope of legislation. [...] A clear and unambiguous ministerial statement is part of the background to the legislation.”

28. In this case, the historical context includes the fact that the holding of referendums on major constitutional questions is a developing practice under our constitution. There have been three UK-wide referendums. The subject-matter of each has been a proposal for important constitutional change (membership of the EEC in 1975, the voting system in 2011, and membership of the EU in 2016). Each has been presented to the people as having binding effect, albeit that the Act concerned has not purported to bind Parliament.

29. The recent referendum is the first to have resulted in a vote in favour of change and therefore to have raised a question of authority to implement that change.

30. The 2015 Act, like the 1975 Act, contained no express provision for implementation of the referendum’s result.¹⁸ However, part of the background was the existence of the Article 50 mechanism and the fact that its operation under prerogative authority had not been

¹⁵ See R1 Case, §2(6).

¹⁶ Per Lord Bingham in *R (Quintaville) v Health Secretary* [2003] 2 AC 687, §8. [35/490]

¹⁷ [2004] 1 AC 816, §56, 58. Lord Scott expressly agreed with this part of Lord Nicholls’ speech at §173. [35/491].

¹⁸ That is no doubt for practical reasons: by contrast to the 2011 referendum, it would not have been appropriate before the referendum to require notice under Article 50 to be given on any pre-ordained timescale.

expressly restricted in the 2008 or 2011 legislation or by any other Act. That mechanism, by its nature, could only be operated by a Minister. As to whether constitutional authority for such operation could be provided by the referendum result itself or the prerogative or some further parliamentary proceeding, the 2015 Act was silent. It is therefore legitimate, indeed necessary, to have regard to the “*legislative object*” to be ascertained from the context of the 2015 Act.

31. The background to the 2015 Act shows that the legislative object was to provide for a final and decisive result:

a. The Prime Minister said on 23 January 2013:¹⁹

“I say to the British people: this will be your decision. [...] So we will have time for a proper, reasoned debate. At the end of that debate you, the British people, will decide.”

b. The Conservative Party manifesto for the 2015 general election stated:²⁰

“We will legislate in the first session of the next Parliament for an in-out referendum to be held on Britain’s membership of the EU before the end of 2017. We will negotiate a new settlement for Britain in the EU. And then we will ask the British people whether they want to stay in on this basis, or leave. We will honour the result of the referendum, whatever the outcome.”

c. Opening the debate on the Bill on 9 June 2015, the Foreign Secretary said:²¹

“This is a simple, but vital, piece of legislation. It has one clear purpose: to deliver on our promise to give the British people the final say on our EU membership in an in/out referendum by the end of 2017.” Later in the same speech,²² he said “[...] underpinning this whole process is ***an absolute commitment to allow the British people to have the final say on this issue in an in/out referendum.***”

At the end of his speech, he said:²³

“But whether we favour Britain being in or out, we surely should all be able to agree on the simple principle that the decision about our membership should be taken by the British people, not by Whitehall bureaucrats, certainly not by Brussels Eurocrats; not even by Government Ministers or parliamentarians in this Chamber. The decision must be for the common sense of the British people. That is what we pledged, and that is what we have a mandate to deliver. For too long, the people of Britain have been denied their say. For too

¹⁹ [35/508].

²⁰ [16/178].

²¹ Hansard Commons Vol 596 Col 1047 [18/203].

²² [35/509] Col 1051.

²³ *Ib.* Col 1056.

long, powers have been handed to Brussels over their heads. For too long, their voice on Europe has not been heard. This Bill puts that right. It delivers the simple in/out referendum that we promised, [...].”

- d. Supporting the Bill on behalf of the Opposition, Mr Hilary Benn said:²⁴

*“This Bill will set before the British people a clear and simple question: should the United Kingdom remain a member of the European Union? It is 11 words, but the answer will have profound consequences for the future of our country, as **the people of the United Kingdom make the most important decision** on our place in the world for 40 years. [...].”* He ended his speech:²⁵
*“We believe in the strength of the argument for remaining part of the European Union. [...] **It will be for the British people to decide.**”*

- e. Winding up the debate for the Government, the Minister for Europe said:²⁶

*“The Bill is about delivering on the Government’s pledge to **put the decision about the nature of our relationship with the European Union to the people of the United Kingdom so that they can take it on behalf of us all**, whatever the differences between the political parties.”* He closed the debate with these words:²⁷ *“I believe, however, that this Bill provides a straightforward, fair and effective framework **for the British people to decide** our country’s future in Europe. This Bill delivers on a promise that the Government of the United Kingdom made to the people of the United Kingdom at the general election, and I commend it to the House.”*

- f. The official Government advice leaflet, delivered to every household during the referendum campaign, stated:²⁸

*“On Thursday, 23rd June there will be a referendum. It’s your opportunity to decide if the UK remains in the European Union (EU). [...] The referendum on Thursday, 23rd June is your chance to decide if we should remain in or leave the European Union. ... **This is your decision. The Government will implement what you decide.**”*²⁹

²⁴ *Ib.* Column 1056.

²⁵ *Ib.* Column 1064.

²⁶ *Ib.* Column 1150.

²⁷ *Ib.* Column 1152.

²⁸ [27/340] Emphasis supplied.

²⁹ See also the consistent statements post-dating the Act, including (a) the Prime Minister’s Chatham House speech on 10 November 2015, when he said “*It will be your decision whether to remain in the EU on the basis of the reforms we secure, or whether we leave. Your decision. Nobody else’s. Not politicians’. Not Parliament’s. Not lobby groups’. Not mine. Just you. You, the British people, will decide. At that moment, you will hold this country’s destiny in your hands. This is a huge decision for our country, perhaps the biggest we will make in our lifetimes. And it will be the final decision.*” [16/179]; and (b) Cm 9216 in which the Government stated: “*The result of the referendum on the UK’s membership of the European Union will be final. The Government would have a democratic duty to give effect to the electorate’s decision. The Prime Minister made clear to the House of Commons that ‘if the British people vote to leave, there is only one way to bring that about, namely to trigger Article 50 of the Treaties and begin the process of exit, and the British people would rightly expect that to start straight away’.*” [16/180]

32. It is thus clear that the context in which the 2015 Act was passed was that it was presented, both in Parliament and directly to the people, as providing for a final and binding decision which the Government would implement. This was its legislative object.

33. It follows that the only reading of the 2015 Act which is consistent with the relevant background material is that the Act confirmed (or, if necessary, re-conferred) the Government's authority to give notice under Article 50, at least if the majority of votes cast were in favour of leaving the European Union. Read in its proper context, it is unrealistic to suppose that Parliament in passing the 2015 Act intended that an unstated restriction now held to be implicit in the 1972 Act should mean that the Government could not lawfully implement the result of the referendum by giving an Article 50 notice.

34. The DC accepted that the context of the 2015 Act was relevant but placed strong reliance on: "*a background including a clear briefing paper to parliamentarians explaining that the referendum would have advisory effect only.*"³⁰ This was a reference to p.25 of the House of Commons Library briefing paper at [18/202], with a single named author on the cover page. Such a paper is of no value as a guide to Parliament's intentions regarding the legal effect of the 2015 Act. No such briefing paper has been admitted as an aid to interpretation of a statute in any previous reported case.

35. The DC went on to say: "*Parliament must have appreciated that the referendum was intended only to be advisory as the result of a vote in the referendum in favour of leaving the European Union would inevitably leave for future decision many important questions relating to the legal implementation of withdrawal from the European Union*". This is a clear *non sequitur*. That consequential matters would require legislation is irrelevant to the question of whether the 2015 Act restricted, restored or left unchanged the Crown's *prima facie* power to serve an Article 50 notice initiating the withdrawal process.

Conclusion

36. For all these reasons, the Court is invited to hold that, reading the statutory scheme as a whole, including the 2008, 2011 and/or 2015 Acts, and given the result of the referendum, the Crown has authority to give notice under Article 50.

³⁰ Judgment, §107.

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