IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM

THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

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

VARIOUS INTERESTED PARTIES AND INTERVENERS

WRITTEN CASE FOR THE LEAD CLAIMANT, MRS GINA MILLER

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Introduction

1 This appeal raises issues of fundamental constitutional importance concerning Parliamentary sovereignty and the limits on the prerogative powers of Ministers.

2 The case for Mrs Gina Miller ("the Lead Claimant" - as so designated by the Divisional Court at its hearing on 19 July 2016) is that:

(1) By the European Communities Act 1972 ("the 1972 Act"), Parliament created statutory rights. Parliament also made a major constitutional change, giving direct effect in domestic law to rights developed at international level, with such rights having priority over other statutes (pre-existing and subsequent), and with their scope and effect being determined with binding effect by an international court. Parliament has also enacted other statutes giving effect to rights under EU law, for example the European Parliamentary Elections Act 2002 ("the 2002 Act").

(2) For the Appellant Secretary of State to give notification under Article 50(2) of the Treaty on European Union ("TEU") that the United Kingdom intends to withdraw from the EU would cause those statutory rights (or at least some of them) to be destroyed or frustrated.

(3) The Appellant may not lawfully use prerogative powers to defeat those statutory rights for two reasons (as held by the Divisional Court at paragraphs 77-96 of its Judgment):

(a) Because the 1972 Act, as interpreted with the aid of relevant legal principles, means that only Parliament itself could defeat the statutory rights which Parliament itself has created. Parliament did not intend that the rights it had created could be defeated or frustrated by the actions of

a Minister purporting to exercise prerogative powers.

(b) Because, in any event, where Parliament has created statutory rights (and in particular statutory rights of constitutional significance) in the 1972 Act and in the 2002 Act, at common law the Appellant has no prerogative power to take action which will defeat those rights. Clear statutory authority is required.

(4) The case for the Appellant suffers from the following main errors of analysis (there are also others, as set out below):

(a) The Appellant fails to recognise the exceptional nature of the 1972 Act in incorporating into domestic law a body of rights which are part of an international legal system, and the consequences this has for the operation of the dualist principle (distinguishing domestic and international law so that action on the international plane does not affect the content of domestic law) on which the Appellant relies.

(b) The Appellant fails to recognise the significance of a series of fundamental principles of domestic law which strongly support the Lead Claimant's contention that it cannot have been the intention of Parliament when enacting the 1972 Act (and the 2002 Act) to authorise the Appellant by the use of the prerogative to take action to defeat or frustrate the rights Parliament has created. The relevant principles are:

(i) The principle of Parliamentary sovereignty which means that the prerogative power to enter into and terminate treaties may not be used to defeat or frustrate domestic law rights created by Parliament.

(ii) The principle that even a statutory power to alter primary legislation by delegated legislation will be narrowly construed. All the more so when the Appellant relies on a prerogative power.

(iii) The principle of legality: that a statute is construed as defeating rights only where Parliament has clearly so provided. All the more so when the dispute concerns the scope of prerogative power.

(iv) The constitutional status of the 1972 Act means that it is exempt from the doctrine of implied repeal by the enactment of later inconsistent legislation. For the same reason, the rights conferred by the 1972 Act cannot be subject to removal by the exercise of a prerogative power.

(5) Notification under Article 50(2) is therefore unlawful without statutory authorisation - that is authorisation by an Act of Parliament.

(6) The Court will wish to note the breadth of the assertion of prerogative power which the Appellant makes in these proceedings. If correct, the Appellant's argument would have the following very surprising consequences:

(a) The Executive could have withdrawn from the EU at any time without Parliamentary authorisation.[1] Indeed, there would be prerogative power

[1] The procedure set out in section 20 of the Constitutional Reform and Governance Act 2010 ("the 2010 Act") - see paragraph 82 below - would not apply if the UK left the EU without any agreement being reached under Article 50(3) within the two year period (or

to do so even if there had been no referendum - and, indeed, even if the referendum had resulted in a vote to remain in the EU.

(b) On the UK withdrawing from the EU, there would be no legal need to amend the 1972 Act. It could remain on the statute book, even though no actual rights or obligations or powers would be conferred by it.

3 In the light of the vituperative and personal attacks by some newspapers and some politicians on the Divisional Court judges after they delivered their judgment, it is important to emphasise certain basic propositions:

(1) The Court is concerned - and concerned only - with questions of law as to the scope of prerogative powers. Paragraph 5 of the Judgment of the Divisional Court clearly explained this point. The Court is not concerned with

(a) Whether or not the UK should leave the EU.

(b) How Parliament should exercise its sovereignty were a Bill to be introduced to seek authorisation for notification under Article 50(2).

(c) Whether it is justifiable for the Minister to exercise any prerogative powers he may have. The question is whether, as a matter of law, he does have relevant prerogative powers.

(2) It is the role of the Court to decide on the legal limits to prerogative power in the present context. The Appellant accepted this in oral argument in the Divisional Court (see paragraph 5 of the Divisional Court Judgment) albeit his Skeleton Argument in that court had disputed justiciability and whether the court could

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any extended period).

grant a remedy by way of a declaration. The Appellant's Written Case in this Court takes no points on justiciability or the appropriateness of the declaration granted by the Divisional Court. In any event, see Lord Bingham of Cornhill in the Appellate Committee in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2009] 1 AC 453, 490, paragraph 69:

> "It is for the Courts to inquire into whether a particular prerogative power exists or not, and if it does exist, into its extent ...".

(3) The Court not only has power to decide the questions of law. It has a duty to do so. And to do so irrespective of whether the judgment finds favour with politicians and the press. As Lord Mansfield CJ stated in R v Wilkes (1770) 4 Burr 2527, 2561-2562, 98 ER 327, 347:

> "The constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences; how formidable soever they might be; if rebellion was the certain consequence, we are bound to say 'fiat justitia, ruat caelum' [let justice be done, though the heavens fall]".

Those who suggest that the Court should focus on matters other than law are undermining basic principles of our constitution: the independence of the judiciary and the rule of law.[2]

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[2] Another aspect of the rule of law is the ability of the Lead Claimant and others to bring these proceedings. At a Directions Hearing on 19 July 2016, the Divisional Court was made aware of the extensive and anonymous threats and abuse online and on social media directed at the Lead Claimant, other parties, potential claimants and their solicitors. As a result of this abuse, some potential claimants withdrew from participation in the proceedings. The Divisional Court made an order protecting the confidentiality of information relating to the identities of the previous potential claimants. The Judges also issued a warning in court regarding possible sanctions that would apply to conduct capable of impeding the administration of justice. That warning was repeated by the Lord Chief Justice at the hearing on 17 October 2016.

EU law and the 1972 Act

4 It is striking that the Appellant's Written Case says so little about the exceptional nature and effect of the 1972 Act in incorporating EU law into domestic law. Yet these matters are fundamental to analysis of the dualist principle on which the Appellant so heavily relies in his Written Case. By the 1972 Act, Parliament enacted major changes to the constitution of the United Kingdom.

5 The 1972 Act implements in United Kingdom law the rights (and powers, liabilities, obligations and restrictions) under what was then the EEC Treaty and are now the EU Treaties. They are unlike other Treaties:

(1) They do not just create relations between States, or even (as with the European Convention on Human Rights and some other international treaties[3]) confer rights on individuals in international law.

(2) The 1972 Act recognises and implements the fact that EU law confers and imposes at international level a body of rights and duties which take effect in national law, and which national courts are obliged to protect and enforce.

(3) Those rights and duties are not defined as at the date of the 1972 Act, but are altered from time to time by EU institutions not answerable to the Westminster Parliament.

(4) Moreover, those rights and duties take priority over inconsistent national law, whether enacted previously or subsequently.

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3 See Mance LJ for the Court of Appeal in Republic of Ecuador v Occidental Exploration and Production Co [2006] QB 432, 449-450, paragraph 19.

(5) The proper interpretation of the scope and meaning of the rights and duties created at international level is conclusively determined by a Court of Justice in Luxembourg whose rulings take priority over those of domestic courts, however senior.

6 As the Divisional Court rightly recognised at paragraph 40 of its Judgment, these basic features of what was then Community law were established well before the UK joined the EEC in 1973. See, for example, the judgment of the European Court of Justice ("ECJ") in Case 26/62, Van Gend & Loos [1963] ECR 2, 12: the EEC Treaty:

> "is more than an agreement which merely creates mutual obligations between the contracting states. ... [T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage".

The ECJ added in Case 6/64, Costa v ENEL [1964] ECR 587, 593:

> "By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves".

See also Case 106/77, Amministrazione delle Finanze v Simmenthal SpA [1978] ECR 630, 643-644, paragraphs 13-24.

7 The Appellant suggests at paragraphs 18-19 of his Written Case (and paragraph 6 of the Appendix) that enactment of the 1972 Act was not a legal precondition for the signature

or ratification or the coming into force in respect of the UK of the Treaty of Accession. The Lead Claimant points out:

(1) The Treaty concerning the Accession of the United Kingdom to the European Economic Community was signed in Brussels on 22 January 1972. It did not come into effect immediately. Article 2 required ratification by the High Contracting Parties "in accordance with their respective constitutional requirements." Article 2 added that instruments of ratification were to be deposited with the Italian Government by 31 December 1972 and the Treaty was to come into force on 1 January 1973.

(2) Under EU law, directly applicable Community law would have binding effect in the United Kingdom, as explained in paragraph 6 above. So, as the Divisional Court stated in paragraph 42 of its Judgment,

> "If [the 1972 Act] had not first been put in place, ratification of the Treaties by the Crown would immediately have resulted in the United Kingdom being in breach of its obligations under them, by reason of the absence of provision for direct effect of EU law in domestic law".

(3) That is why it was after the 1972 Act came into force on 17 October 1972 that the instrument of ratification was deposited with the Italian Government - the following day, on 18 October 1972.

8 The courts of the United Kingdom have recognised the constitutional significance of the 1972 Act in domestic law. See, for example:

(1) Thoburn v Sunderland City Council [2003] QB 151, 186-187, paragraphs 62-63, where Laws LJ for the Divisional Court explained that there are "'constitutional' statutes", such as the 1972 Act, which may not impliedly be repealed. Laws LJ

said at p.186H:

> "It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The 1972 Act is, by force of the common law, a constitutional statute".

(2) In R (Buckinghamshire County Council) v Secretary of State for Transport [2014] 1 WLR 324, Lord Neuberger (the President of the Court) and Lord Mance stated on behalf of the Court at p.382, paragraph 207:

> "The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list."

9 It is not the case (as suggested in paragraph 1 to the Appendix to the Appellant's Written Case) that the Divisional Court judgment was "conditioned" by the constitutional status of the 1972 Act. Rather the Divisional Court correctly understood that the high constitutional status of the 1972 Act makes it all the less likely that Parliament can have intended that the Appellant may lawfully use prerogative powers to defeat the statutory rights which Parliament there created.

10 Although the 1972 Act is the most important example, it is not the only Act of Parliament which creates rights consequent on the United Kingdom's membership of the EU. Another example is the 2002 Act. Section 1(1) provides that:

> "There shall be 72 members of the European Parliament ('MEPs') elected for the United Kingdom".

Section 8(1) states that:

> "A person is entitled to vote as an elector at an election to the European Parliament in an electoral region if he is within any of subsections (2) to (5)".

The rights to vote and stand as a candidate in elections to the European Parliament for UK MEPs are among the core rights consequent on Citizenship of the EU conferred by Article 20 of the Treaty on the Functioning of the EU ("TFEU").

Article 50

11 The Divisional Court accepted at paragraph 17 of its Judgment that a decision by the Appellant to notify that the UK intends to withdraw from the EU under Article 50(2) of the TEU is an "appropriate target for this legal challenge", since it is the giving of the notice which triggers the legal effects under Article 50(3).

12 Those effects are that once notification is given, "[t]he Treaties shall cease to apply to the State in question", from the date of a withdrawal agreement, or - if no such agreement is reached - at the latest within 2 years from notification, unless an extension of time is unanimously agreed by the European Council and the Member State concerned. Notification is therefore the pulling of the trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply.

13 The Divisional Court (see paragraph 10 of the Judgment) was invited by the parties to proceed, and it did proceed, on the basis that:

(1) A notice under Article 50(2) cannot be withdrawn, once it is given.

(2) Article 50 does not allow for a conditional notice to be given.

The Written Case for the Appellant states at paragraph 17 that this remains the

Appellant's position. The Appellant adds that whether the Article 50 notification is revocable

> "is in any event of no practical significance to this appeal. If the D[ivisional] C[ourt] is correct in its conclusion that the Government has no prerogative power to decide that the UK should withdraw from the EU and to commence the process of withdrawal, that conclusion holds good whether the first step in the process of withdrawal is revocable or irrevocable".

14 The Lead Claimant agrees that the Court does not need to address the issue of revocability. Especially as the Attorney General, in making a similar statement in his submissions to the Divisional Court, emphasised that:

> "the defendant [Secretary of State] is also content to proceed on the basis that as a matter of firm policy, once given a notification will not in fact be withdrawn".[4]

So whether or not there is a power to revoke is academic in the present proceedings. Even if there were such a power, the Government is committed to not exercising it. See, similarly R v Secretary of State for the Home Department ex parte Fire Brigades Union [1995] 2 AC 513, 578B-D per Lord Nicholls of Birkenhead: although the Secretary of State there had not taken an immutable step, the ex gratia scheme was "intended to mark out the way ahead for the foreseeable future".

The defeat of statutory rights consequent on notification under Article 50(2)

15 There is, and could be, no dispute that, as recognised by the Appellant in paragraph 62a of his Written Case,

> "The UK's withdrawal from the EU - the only target that the 'bullet' will strike - will undoubtedly lead to the removal of rights and obligations currently conferred or imposed by EU law".

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4 See the Transcript for 17 October 2016, p.64 at lines 16-18.

16 As the Divisional Court recorded at paragraph 51 of its Judgment:

> "It is common ground that if the United Kingdom withdraws from the Treaties pursuant to a notice given under Article 50 of the TEU, there will no longer be any enforceable EU rights in relation to which [section 2(1) of the 1972 Act] will have any application. Section 2(1) would be stripped of any practical effect".

Similarly in relation to section 2(2) of the 1972 Act - the power to implement EU law obligations of the UK into domestic law - as the Divisional Court noted at paragraph 52 of its Judgment.

17 The Appellant contended in the Divisional Court that Parliament may decide to maintain in domestic law some rights substantially equivalent to the rights currently enjoyed under section 2(1) of the 1972 Act, perhaps as a result of agreements between the UK and the EU. No such argument appears in the Appellant's Written Case in this Court. And for good reason. The argument advanced in the Divisional Court is no answer to the complaint that notification will lead to the defeat of statutory rights. That is for three main reasons:

(1) First the Appellant is using prerogative powers to defeat statutory rights. It is no answer to a criticism of such a use of prerogative powers that Parliament <u>may</u> step in and take action to restore some of those rights. The Court cannot know what Parliament may or may not do in the future. The Court's only concern is that statutory rights currently exist, and the action taken by the Appellant will defeat or frustrate them. See paragraph 64 of the Judgment of the Divisional Court.

(2) Second, important process rights would be defeated or frustrated as a result of notification, which Parliament could not restore:

(a) Even if Parliament were to maintain some EU law rights as part of

domestic law, the Lead Claimant will lose her statutory right under section 3(1) of the 1972 Act read with Article 267 TFEU to seek a ruling from the Court of Justice in Luxembourg, in appropriate cases, as to the scope and effect of those rights. She will lose access to the Court of Justice, an important constitutional right. And she will lose that right whatever view Parliament may hereafter take. The views of Parliament are pre-empted if notification is given.

(b) The Lead Claimant will also inevitably lose her statutory right under section 2(1) of the 1972 Act read with Article 7 of Regulation 1/2003 to ask the European Commission to take action in relation to anti-competitive conduct within the United Kingdom. The Commission may impose interim measures (where there is a risk of serious and irreparable damage to competition) and may impose financial penalties.[5]

(c) The Lead Claimant will inevitably lose her statutory right under section 2(1) of the 1972 Act read with Article 258 TFEU to ask the European Commission to consider whether the UK has failed to carry out an

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5 See, for example, Case C-62/86, AKZO v Commission [1991] ECR I-3359, where a UK supplier of bleaching products for bread, ECS, complained to the EU Commission that AKZO, a large Dutch-controlled supplier, was engaged in predatory and discriminatory pricing practices on the UK market: see paragraphs 1-11 of the Judgment. The Commission (i) granted interim measures, forcing AKZO to maintain minimum prices while the matter was properly investigated (see paragraph 3 of the Opinion of Advocate General Lenz) and (ii) imposed a substantial fine on AKZO (paragraph 10 of the judgment), which the Court of Justice reduced to 7.5 million ECUs; and (iii) imposed ongoing behavioural restrictions to protect competitors (paragraph 11 of the judgment). Since the AKZO case, Regulation 1/2003 has been adopted: Articles 7 and 8 provide for decisions imposing behavioural and structural remedies and interim measures; Article 23 provides for penalties; and Article 16 imposes an obligation on the national courts and competent authorities of the Member States to avoid inconsistency with Commission decisions.

obligation under the Treaties and for the Commission, or another Member State (under Article 259), to take enforcement action against the UK.

(3) Third, there are substantive statutory rights which are currently enjoyed by reason of the UK's membership of the EU which notification will cause to be defeated, and which Parliament will be unable to restore, whatever view Parliament may take in the future:

(a) The 2002 Act confers the right to stand for election to the European Parliament and the right to vote for UK MEPs. See paragraph 10 above. The giving of notification ensures that those rights are defeated. Indeed the giving of notification by the Appellant ensures that the statutory scheme enacted by the 2002 Act is rendered nugatory. Any consideration of this matter by Parliament is pre-empted by the notification and its consequences.

(b) The Lead Claimant will also lose the right to rely on directly effective EU law rights in the English courts to interpret, or to override, other legislation enacted by Parliament, for example by reference to the right to equal pay without sex discrimination (under Article 157 TFEU).[6] Similarly the right to claim compensation against the UK where domestic law has not properly implemented EU law.[7]

(c) Other rights currently enjoyed by British citizens and companies under

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6 See, for example, Macarthys Ltd v Smith [1981] QB 180 (ECJ and Court of Appeal).

7 See, for example, Case C-6/90, Francovich v Italy [1991] ECR 1-5403.

EU law - rights to free movement of goods, persons, services and capital, and the right to freedom of establishment, rights to mutual recognition, rights to equal treatment - will be defeated or frustrated, whatever view Parliament may take. As the Divisional Court noted at paragraph 63 of its Judgment, since the Appellant accepts that at least some rights currently enjoyed under statute would irretrievably be lost as a result of notification (those under (2) and (3)(a) and (b) above), it does not matter for the purposes of these proceedings how extensive the loss of rights would be. In any event, there is no substance to the point made by the Appellant at paragraph 21(b) of his Written Case, that section 2(1) of the 1972 Act implements only those rights and obligations which are "to be given legal effect or used in the United Kingdom". The true legal position is as stated by the Divisional Court at paragraphs 65-66: the Appellant's submission that the right to free movement throughout the EU is not a right under the 1972 Act is "divorced from reality". That is because Parliament knew and intended when it enacted the 1972 Act that this would confer on persons within this jurisdiction "rights of major importance" in the EU, as reciprocal rights to those enjoyed by nationals of other EU States in the UK, and indeed that the enactment of the 1972 Act was a necessary precondition to enjoyment of those rights. If Parliament had not enacted the 1972 Act, those rights would not be enjoyed. By notification, the Appellant is frustrating or defeating those rights, the product of the 1972 Act, irrespective of the views of Parliament, and so pre-empting the views of Parliament.[8]

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8 Contrary to paragraph 8 of the Appendix to the Appellant's Written Case, the position under the 1972 Act is very different from the application of diplomatic immunities and privileges. The Diplomatic Privileges Act 1964, although based on the Vienna Convention on Diplomatic Relations, is plainly only concerned with diplomatic rights and privileges within the UK.

18 It is no answer to the destruction of these rights which will be caused by notification under Article 50(2) for the Appellant to say (see paragraph 63a of his Written Case) that "[t]he UK is leaving 'the club' and of course will no longer have access to the institutions of the club". These are important rights conferred by Parliament which will be defeated or frustrated as a consequence of notification by a Minister purporting to exercise prerogative powers and so without authorisation by Parliament.

The relevant principles for determining whether the Appellant has prerogative powers to defeat rights contained in the 1972 Act and the 2002 Act

19 The Lead Claimant submits that there are principles of constitutional law which will assist the Court in determining whether Parliament intended by the 1972 Act (and the 2002 Act) to permit the Appellant to defeat the statutory rights contained therein by the exercise of prerogative powers (and, in any event, whether such a use of prerogative power is permitted at common law):

(1) The principle of Parliamentary sovereignty and the limits it places on the exercise of prerogative power in relation to international treaties where the action taken on the international plane will defeat statutory rights. See paragraphs 20-33 below.

(2) The principle that a power to make delegated legislation will be narrowly interpreted. See paragraphs 34-36 below.

(3) The principle of legal certainty. See paragraphs 37-38 below.

(4) The principle that, by reason of its constitutional status, the 1972 Act is exempt from the doctrine of implied repeal by the enactment of later inconsistent

legislation. See paragraphs 39-42 below.

Parliamentary sovereignty and the limits of the prerogative power in relation to international treaties.

20 As Lord Bingham stated in R (Jackson) v Attorney General [2006] 1 AC 262, 274, paragraph 9:

> "The bedrock of the British constitution is ... the supremacy of the Crown in Parliament".

See also the statements by Professor A.V. Dicey in An Introduction to the Study of the Law of the Constitution (8th edition, 1915) referred to in paragraph 22 of the Divisional Court judgment.

21 An important consequence of Parliamentary supremacy is that the Crown (that is Her Majesty acting on the advice of Ministers) has no prerogative power to alter the law as stated by Parliament. It is a basic proposition of law that Ministers cannot rule by decree. As the Divisional Court stated at paragraph 26 of its Judgment:

> "This subordination of the Crown (ie the executive government) to law is the foundation of the rule of law in the United Kingdom".

See, for example:

(1) The Case of Proclamations (1610) 12 Co Rep 74, where Sir Edward Coke, Chief Justice, declared, after consultation with the other Judges:

> "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm ... Also it was resolved, that the King hath no prerogative, but that which the law of the land allows him".

Holdsworth says in A History of English Law (volume 4, p.297) that:

> "It was not until after the Great Rebellion that these principles were recognized by all parties as finally settling the law upon this point".

The Appellant recognises at paragraph 55b of his Written Case that this is an "uncontroversial proposition". But he adds that it "does not cater for the vast range of circumstances which have arisen over the following 400 years" and it does not "deal with the particular situation of the treaty-making prerogative". The Lead Claimant responds that Lord Coke stated a principle which is important when the Court seeks to identify the limits of prerogative powers in the contexts of the treaty-making prerogative and the rights conferred by the 1972 Act.

(2) Section 1 of the Bill of Rights 1688 made plain that the Crown enjoys no power to suspend laws "without consent of Parliament" and enjoys no "dispensing" power.

(3) In The Zamora [1916] 2 AC 77, 90, Lord Parker of Waddington (for the Judicial Committee of the Privy Council) stated:

> "The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution."

Therefore, Lord Parker added at p.93, Prize Courts in this country are not

> "bound by the executive orders of the King in Council".

The Appellant's Written Case suggests at paragraph 55c that this "provides no basis for a general principle for unquestioning application in all cases, including

the present". The Lead Claimant responds that Lord Parker stated a principle which is important when the Court seeks to identify the limits of prerogative powers in the context of the rights conferred by the 1972 Act.

(4) In ex parte Fire Brigades Union, Lord Browne-Wilkinson stated at p.552D-F:

> " ... it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme ... . It is for Parliament, not the executive, to repeal legislation. The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body. The prerogative powers of the Crown remain in existence to the extent that Parliament has not expressly or by implication extinguished them. ...".

See similarly Lord Lloyd at pp.568H:

> "It might cause surprise to the man on the Clapham omnibus that legislative provisions in an Act of Parliament, which have passed both Houses of Parliament and received the Royal Assent, can be set aside in this way by a member of the executive. It is, after all, the normal function of the executive to carry out the laws which Parliament has passed, just as it is the normal function of the judiciary to say what those laws mean."

22 Prerogative powers are what Dicey described as

> "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown".

See An Introduction to the Study of the Law of the Constitution (8th edition, 1915, p.420), cited by Lord Bingham in the Appellate Committee in Bancoult at p.490, paragraph 69.

23 There is no dispute that, in general, the conduct of international relations and the

making and unmaking of treaties on behalf of the UK are matters for the Crown in the exercise of its prerogative powers: see paragraph 30 of the Judgment of the Divisional Court.

24 But, as explained by the Divisional Court at paragraph 32 of its Judgment, the Crown enjoys a broad power in the conduct of foreign relations and the making and unmaking of treaties precisely because - by reason of Parliamentary sovereignty - what is agreed on the international plane does not affect, and cannot affect, the content of domestic law, and especially the rights created by Parliament.

25 This principle was stated by Lord Oliver of Aylmerton for the Appellate Committee in JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, 500B-D:

> "as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals bare concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant".

The Appellant argues (at paragraph 42 of his Written Case) that this principle is not a restraint on the power to enter into, or withdraw from, treaties. But the principle would be frustrated if it were not a legal restraint on the exercise of prerogative power where - as in the context of the 1972 Act - the action of which complaint is made *would* alter domestic law by depriving persons of rights conferred by Parliament.

26 The principle as to the limit of prerogative powers in relation to treaties was repeated by Lord Hoffmann for the Judicial Committee of the Privy Council in Higgs v Minister of National Security [2000] 2 AC 228, 241A-H:

> "In the law of England and The Bahamas, the right to enter into treaties is one of the surviving prerogative powers of the Crown. Her Majesty does not require the advice or consent of the legislature or any part thereof to authorise the signature or ratification of a treaty. The Crown may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government.
>
> But the corollary of this unrestricted treaty-making power is that treaties form no part of domestic law unless enacted by the legislature. This has two consequences. The first is that the domestic courts have no jurisdiction to construe or apply a treaty ...
>
> The second consequence is that unincorporated treaties cannot change the law of the land. They have no effect upon the rights and duties of citizens in common or statute law ...
>
> The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative. This was the great principle which was settled by the Civil War and the Glorious Revolution in the 17th century".

27 Lord Hoffmann referred with approval to The Parlement Belge (1879) 4 PD 129, where Sir Robert Phillimore sitting in the Admiralty Division rejected the contention by the Attorney General that a treaty had placed a packet-boat in the category of a public ship of war. Sir Robert Phillimore stated at p.154:

> "If the Crown had power without the authority of parliament by this treaty to order that the *Parlement Belge* should be entitled to all the privileges of a ship of war, then the warrant, which is prayed for against her as a wrong-doer on account of the collision, cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished.
>
> This is a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of the constitution".

28 The Appellant's Written Case emphasises the scope of the prerogative in the context of treaties but seeks to avoid what Lord Hoffmann in Higgs described as "the corollary": that this prerogative power cannot be used to alter domestic law rights, especially those created by Parliament.

29 The Appellant contends (at paragraphs 40, 45 and 56 of his Skeleton Argument) that the exercise of the prerogative can alter domestic law. None of the examples (which are largely based on blogs by Professor Feldman and Professor Finnis) assist the Appellant, as explained in blogs agreeing with the judgment of the Divisional Court by Professor Sir Jeffrey Jowell QC and Naina Patel[9], Professor Campbell McLachlan QC[10], Professor Sionaidh Douglas-Scott,[11] and Professor Jeff King and Professor Nick Barber[12]:

(1) Post Office v Estuary Radio Ltd [1968] QB 740 concerned whether a radio station in the Thames estuary was "in .... the United Kingdom or the territorial waters adjacent thereto ..." for the purposes of section 6 of the Wireless Telegraphy Act 1949. It is well-established that the Executive has a prerogative power to define the territorial boundaries of the State, and the courts are bound by a certificate issued by the Executive on the subject. It is a matter for the Executive to determine the extent of the realm within which the laws of the land have effect. See Estuary Radio at pp.753E-F. This principle does not assist the Appellant in

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9 https://ukconstitutionallaw.org/2016/11/15-sir-jeffrey-jowell-qc-and-naina-patel-miller-is-right

10 Professor of International Law at Victoria University of Wellington, and author of Foreign Relations Law (Cambridge University Press, 2014). See https://ukconstitutionallaw.org/2016/11/14/campbell-mclachlan-qc-the-foreign-affairs-treaty-prerogative-and-the-law-of-the-land

11 Professor of Law, Queen Mary University of London. See https://ukconstitutionallaw.org/2016/11/15/sionaidh-douglas-scott-miller-why-the-government-should-still-lose-in-the-supreme-court-even-with-new-arguments/

12 Professor King is Professor of Law at University College London, and Professor Barber is Professor of Law at the University of Oxford. They say that the Divisional Court produced "an outstanding judgment". See https://ukconstitutionallaw.org/2016/11/22/jeff-king-and-nick-barber-in-defence-of-miller/

the present case. The Executive has no power to certify, or otherwise determine, the scope of its prerogative power in any relevant respect.

(2) The Appellant relies on the prerogative power to accredit a person as head of a diplomatic mission and to make a diplomat *persona non grata* under Articles 4 and 9 of the Vienna Convention on Diplomatic Relations 1961. Parliament incorporated by the Diplomatic Privileges Act 1964 only those provisions of the Vienna Convention in respect of which Parliament intended to confer domestic law rights. The matters to which the Appellant referred are not the subject of domestic law rights. In any event, Parliament itself has conferred power on the Executive to certify those persons who enjoy privileges or immunities under the 1964 Act. Section 4 of that Act states:

> "If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under this Act a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question shall be conclusive evidence of that fact".

(3) The Appellant relies on bilateral investment treaties and similar treaties which (as the Appellant says at paragraph 40(c) of his Written Case) confer "treaty rights which are not actionable in the UK courts and do not form part of the law of the land". But that is simply an example of the uncontentious principle that treaties may be entered into on the international plane which confer rights in favour of individuals which are not rights in domestic law.[13] That does not assist the Appellant in relation to whether he can use prerogative powers to defeat or frustrate statutory rights.

(4) The Appellant refers to Assange v Swedish Prosecution Authority [2012] 2 AC

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13 See paragraph 5(1) above.

471 as an example of the uncontentious principle that statutory provisions should be interpreted and applied, where possible, consistently with an international treaty to which the UK is party. That does not assist the Appellant to show that the prerogative power to make treaties may be used to defeat or frustrate statutory rights. Indeed, in JH Rayner (paragraph 25 above), Lord Oliver recognised the interpretative principle at p.500D-F, while nevertheless stating that the prerogative power relating to treaties cannot be used to affect rights in domestic law.

(5) The Appellant has referred (relying on the views of Professor John Finnis) to double taxation treaties. In this context, Parliament has provided that the agreements reached at international level have effect in national law if arrangements specified in an Order in Council are given approval by the House of Commons: see section 2(1) and 5(2) of the Taxation (International and other Provisions) Act 2010 (which replaced section 788 of the Income and Corporation Taxes Act 1988). In his Skeleton Argument in the Divisional Court at paragraph 36, footnote 11, the Appellant gave the example of the UK's agreements with Malta. The Double Taxation Relief (Taxes on Income) Malta Order 1995 SI 1995/763 gives effect to the arrangements set out in the Schedule - which contains the 1994 Malta-UK Double Taxation Convention ("the 1994 Convention"). Article 30 of the 1994 Convention addresses "Termination". It states that the Convention remains in force "until terminated by one of the Contracting States ... through diplomatic channels". It specifies that in such an event, "the Convention shall cease to have effect", and it specifies the result "in the United Kingdom" for tax relief. Parliament has therefore made clear in this context that as a matter of domestic law the arrangements which otherwise "have effect" in the United Kingdom, under the Schedule to the SI, cease to do so

if there is termination on the international level "through diplomatic channels". It is no part of the Lead Claimant's case to dispute that Parliament can so provide, if it does so clearly. Parliamentary sovereignty applies. The Lead Claimant's point is that the context and content of the 1972 Act and the 2002 Act are very different to those relating to double taxation treaties. In fact, it is very rare indeed for a double tax agreement to be terminated without agreement as to a replacement treaty, which has no effect in domestic law unless a new Order in Council is approved under the statutory procedure.[14]

(6) The Appellant relies on Regulation 14 of the National Health Service (Charges to Overseas Visitors) Regulations 2015 SI No. 238, exempting overseas visitors from charges for health services "where those services are provided in circumstances covered by a reciprocal agreement with a country or territory specified in Schedule 2". That is an example of Parliament itself clearly recognising in the secondary legislation a power for the Executive to implement a statutory provision. It is, of course, no part of the Lead Claimant's argument to dispute that Parliament may so provide if it sees fit to do so.

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14 Where a double taxation treaty is replaced by another treaty, the practice is for the new treaty not to come into force until after Parliamentary approval has been given. In relation to Malta, the 1994 Convention replaced an earlier 1974 Convention that was implemented in domestic law by the Double Taxation Relief (Taxes on Income) (Malta) Order 1975 SI 1975/426. The 1994 Convention did not, however, take effect upon signature. Article 29(1) of the 1994 Convention made provision for Malta and the UK first to complete legal requirements necessary to bring the 1994 Convention into force at domestic level and provided that the treaty would come into force only if and when notification had been given of the completion of such domestic requirements. Article 29(2) of the 1994 Convention further provided that the 1974 Convention would only cease to have effect upon the 1994 Convention coming into effect, that is after the completion of domestic legal requirements. The Double Taxation Relief (Taxes on Income) Malta Order 1995 SI 1995/763 was brought into effect under section 788(10) of the Income and Corporation Taxes Act 1988 on 15 March 1995. The 1994 Convention came into effect (and the 1974 Convention ceased to have effect) on 27 March 1995, after this change to domestic law.

(7) The Appellant relies on CCSU v Minister for the Civil Service [1985] AC 374. That was not a case about the prerogative power to make treaties. Indeed, the employees (who were no longer permitted to belong to national trade unions) had no employment law rights because their appointments were at the pleasure of the Crown. See Lord Fraser of Tullybelton at p.400G-H.

(8) The Appellant relies on Burmah Oil Company v Lord Advocate [1965] AC 75. This concerned the scope of prerogative powers to fight a war outside the UK. The scope of that prerogative depends on very special circumstances and does not assist on the scope of prerogative powers to enter into or revoke treaties, on which Lord Oliver accurately stated the relevant principles (see paragraph 25 above). See Burmah Oil at pp.100F-101D per Lord Reid:

> "The reason for leaving the waging of war to the King (or now the executive) is obvious. A schoolboy's knowledge of history is ample to disclose some of the disasters which have been due to parliamentary or other outside attempts at control. So the prerogative certainly covers doing all those things in an emergency which are necessary for the conduct of war ...
>
> What we have to determine in this case is whether or when, in a case not covered by any statute, property can be taken by virtue of the prerogative without compensation. That could only be an exceptional case, because it would be impracticable to conduct a modern war by use of the prerogative alone, whether or not compensation was paid. The mobilisation of the industrial and financial resources of the country could not be done without statutory emergency powers. The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute. So I would think the proper approach is a historical one: how was it used in former times and how has it been used in modern times?"

In any event, even the exercise of the prerogative concerning the defence of the realm during wartime may be confined by statutory provisions: see

Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508 (see paragraph 71 below).

(9) The Appellant refers to R (XH and AI) v Secretary of State for the Home Department [2016] EWHC 1898 (Admin) which concerned the prerogative power to issue and withdraw a passport. There is no statutory right to be issued with a passport. Nor is there any common law right to be issued with a passport. The XH and AI decision is under appeal to the Court of Appeal.

(10) Some of the academic commentary has also referred to Bancoult in relation to the scope of prerogative powers. The case concerned the prerogative power to legislate for a ceded colony. The case does not assist the Appellant. The Judicial Committee of the Privy Council recognised the limits of the treaty-making power and also that in a ceded colony, the Crown is the legislature. See Lord Hoffmann at p.485, paragraph 44:

> "... since the 17th century the prerogative has not empowered the Crown to change English common or statute law. In a ceded colony, however, the Crown has plenary legislative authority. It can make or unmake the law of the land".

See, similarly, Lord Rodger of Earlsferry at p.495, paragraph 81; and Lord Carswell at p.508, paragraph 124.

30 The Appellant refers (at paragraph 51 of his Written Case) to the power of other state parties to withdraw from the EU, and the effect that would have on statutory rights (for example, the right to move to Greece, were Greece to leave the EU). But this appeal is concerned with the scope of the prerogative powers of Ministers of the Crown in this country. The applicable constitutional principles regulate the powers of the Executive of

this country; the conduct of other States is (legally) irrelevant.

31 The Appellant contends (at paragraphs 46-50 of his Written Case, relying in particular on Professor Finnis' views) that the Divisional Court failed to recognise that there is a distinction between the Government's power to act on the international plane, and the transposition of rights and obligations on the international plane into domestic law. According to the Appellant, the 1972 Act is simply the legislative means ("a conduit") by which Parliament has implemented international obligations, and it imposes no restrictions on the prerogative power to act on the international level. The Lead Claimant responds that this ignores the principles stated by Lord Oliver in JH Rayner and Lord Hoffmann in Higgs (see paragraphs 25-26 above) in a context where rights on the international plane are, by reason of a decision by Parliament itself, incorporated into domestic law. In such a context, prerogative powers cannot lawfully be used on the international plane to destroy the rights recognised by Parliament as part of domestic law. As explained by Professor Sir Jeffrey Jowell and Naina Patel, in the context of the 1972 Act:

> "Our dualist system cannot be placed on its head so that domesticated rights under a treaty can be removed by prerogative alone when they cannot be conferred in that way. This much follows from Articles 1 and 2 of the Bill of Rights 1689. Once treaty obligations are committed to domestic law, those laws cannot be removed by simply withdrawing from the treaty. ...
>
> [Under the 1972 Act] ... traditional dualist principles are overridden and the distinction between EU rights and statutory rights is blurred. ... [T]he very *reason* EU law is *sui generis* as a matter of constitutional law is because domestic law has provided for its direct effect. So whereas the rights conferred by an Order in Council remain even if the underlying tax treaty has been revoked (unless the Order in Council already contains express provision governing the termination of its arrangements) because they are given independent existence in domestic law through replication in that Order, the same is not true in relation to the rights conferred by section 2(1) of the 1972 Act upon the UK's withdrawal from the EU *precisely because* that provision acts as a 'conduit' through which EU rights take effect as domestic rights without the need for such replication.
>
> The 1972 Act also provided a fundamental constitutional innovation by

> specifically conferring prior authority to those laws over our own acts of parliament, such that any subsequent inconsistent act would need to be disapplied. This innovation was consistent with the principle of parliamentary sovereignty because parliament (not the executive) retained the right to reverse this arrangement and decide that EU laws should no longer be given priority over domestic statutes. This innovation was made by Parliament and parliament alone and there is nothing in the 1972 Act that supports the proposition that this major constitutional change could be reversed without parliament's authority".[15]

32 As the Divisional Court explained at paragraph 89 of its Judgment, the Appellant's reliance on the breadth of the prerogative power to conduct foreign relations ignores the fact that the Appellant is, in the present context, seeking to use prerogative power to "bring about major changes in domestic law". The limits on the use of the treaty-making prerogative power - that it cannot be used to destroy statutory rights - is of especial force and significance in the present context. By the enactment of the 1972 Act, Parliament intended to introduce profound legal changes of constitutional significance. It is especially unlikely in such a context that Parliament intended to leave it in the hands of the Executive to defeat or frustrate - by the use of prerogative powers - the statutory rights thus created. As the Divisional Court stated at paragraph 87 of its Judgment:

> "Parliament having taken the major step of switching on the direct effect of EU law in the national legal systems by passing the [1972 Act] as primary legislation, it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again".

33 The Appellant suggests at paragraph 61 of his Written Case that if the Divisional Court judgment were correct, then this would confine generally the Crown's power to withdraw from a treaty. That is incorrect:

(1) The Lead Claimant does not suggest that the enactment of legislation implementing a treaty prevents the Crown from acting on the international

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15 See footnote 9 above. See similarly Professor King and Professor Barber (footnote 12 above): "Article 50 refers to a Member State's 'own constitutional requirements' - it does not purport to grant a new power to the executive".

plane to withdraw from such a treaty. But that is because the action on the international plane generally has no effect on domestic law rights, unless and until Parliament so provides. What is so special about the present context is that (as explained in paragraphs 11-12 and 15-16 above) notification under Article 50(2) will cause the destruction of statutory rights conferred by Parliament.

(2) For the same reason, the argument is not advanced by the Appellant's reference (paragraph 39 of his Written Case) to the law in Canada, Australia and New Zealand that "treaty-making powers ... reside with the executive". There is no dispute that, in general, such powers do reside with the executive. The issue in this case is much more narrowly focused. None of the foreign materials to which the Appellant refers addresses the use of prerogative powers so as to defeat statutory rights, far less in the exceptional context of EU law. With regard to New Zealand, Professor Campbell McLachlan QC [16] has described the Divisional Court Judgment as "correct". And Professor Philip Joseph[17] has said that the Executive cannot use prerogative powers to notify under Article 50 without Parliamentary authorisation.

(3) The Lead Claimant recognises that, of course, Parliament may, in clear terms, grant the Executive a power to take action which defeats rights which Parliament has conferred. There are well-established principles of construction in relation to whether such powers have been granted, and as to their extent: see paragraphs 34-36 below.

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16 See footnote 10 above.

17 Professor of Law at University of Canterbury, New Zealand, and author of Constitutional and Administrative Law of New Zealand (Sweet & Maxwell, 4th edition, 2014). See https://ukconstitutionallaw.org/2016/09/23/philip-joseph-a-view-from-afar/

The principle that a power to make delegated legislation will be narrowly construed

34 The Lead Claimant also draws attention to the principle applicable in relation to "Henry VIII" powers, that is a delegated power conferred by Parliament on a Minister to use subordinate legislation to amend primary legislation.

35 Recently, in R (Public Law Project) v Lord Chancellor [2016] 3 WLR 387, 395, paragraph 27, Lord Neuberger, the President (for the Court), noted that the Appellate Committee had on two occasions cited with approval the observations of Lord Donaldson of Lymingtom MR for the Court of Appeal in McKiernon v Secretary of State for Social Security (1989) 2 Admin LR 133, 140:

> "The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach".

36 The courts will be even more reluctant to recognise a power in the Executive to modify or defeat statutory rights when Parliament has conferred no such express power on the Executive, but the Executive claims to be exercising prerogative powers.

The principle of legality

37 The Lead Claimant also draws attention to the principle of legality - that if Parliament intends to legislate to defeat fundamental rights, it must say so clearly. See R (Morgan Grenfell Ltd) v Special Commissioners of Income Tax [2003] 1 AC 563, 607, paragraph 8 (Lord Hoffmann for the Appellate Committee):

> "the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary

implication."

Lord Hoffmann referred with approval to his speech in R v Secretary of State for the Home Department ex parte Simms [2000] 2 AC 115, 131E-G:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

See also R v Secretary of State for the Home Department ex parte Pierson [1998] AC 539, 573E-575D where Lord Browne-Wilkinson accepted that there is a very similar principle that a statutory power, although expressed in general terms, will not be construed as affecting basic common law principles "unless the statute conferring the power makes it clear that such was the intention of Parliament".

38 Again, if the courts presume that Parliament did not intend itself to defeat or frustrate fundamental statutory rights or basic common law principles unless Parliament clearly so provides, all the more so the courts will conclude that Parliament did not intend to authorise the use of prerogative powers to defeat such rights or principles unless Parliament itself has clearly so provided.

The exclusion of implied repeal

39 The constitutional status of the 1972 Act means that it is exempt from the doctrine of implied repeal by the enactment of later inconsistent legislation: see Thoburn at

paragraph 8(1) above. Only a clear later statute would be recognised by the Court as demonstrating a Parliamentary intention to repeal or amend the 1972 Act.

40 As the Divisional Court stated at paragraph 88 of its Judgment:

> "Since in enacting the [1972 Act] as a statute of major constitutional importance Parliament has indicated that it should be exempt from casual implied repeal by Parliament itself, still less can it be thought to be likely that Parliament nonetheless intended that its legal effects could be removed by the Crown through the use of its prerogative powers".

41 The Appellant contends (paragraph 2 of the Appendix to his Written Case) that the constitutional status of the 1972 Act, and the common law principle that it is protected from implied repeal, "tells one nothing" of relevance about the proper interpretation of the 1972 Act "and still less" whether Parliament intended to allow prerogative powers to be used to defeat the statutory rights created by the 1972 Act. The Lead Claimant responds that the reason why the courts have recognised that the rights conferred by the 1972 Act cannot be impliedly repealed by Parliament is the same reason why the Divisional Court recognised that the rights conferred by the 1972 Act cannot be defeated by the use of prerogative powers, that is without a clear Parliamentary authorisation. In each case, the courts have recognised that Parliament itself cannot have intended that rights so important could be defeated other than by a very clear statement by Parliament itself.

42 The Appellant suggests (paragraph 3 of the Appendix to the Appellant's Written case) that the decision of the Appellate Committee in Robinson v Secretary of State for Northern Ireland [2002] NI 390 supports "a flexible response" to constitutional developments. Lord Bingham said at paragraph 11 that the relevant Act "should, consistently with the language used, be interpreted generously bearing in mind the values which the constitutional provisions are intended to embody". The Lead Claimant

relies on the purpose and values of the 1972 Act, as explained in paragraph 49 below.

Conclusion on the relevance of these principles

43 These principles assist in the present context:

(1) Given the constitutional significance of the rights created by the 1972 Act, and the 2002 Act, and the need for clear Parliamentary authority if such rights are to be defeated or frustrated, it is most unlikely that Parliament intended to allow a Minister to defeat the rights by the use of prerogative powers.

(2) Since notification under Article 50(2) will cause the removal of rights conferred by the 1972 Act and the 2002 Act, the authorisation of Parliament is required before such a step can lawfully be taken.

The Lead Claimant's First Argument

44 Applying the principles set out in paragraphs 20-43 above, the Lead Claimant's first argument is that the contents of the 1972 Act show that Parliament intended that the Appellant should not enjoy a prerogative power to take action to defeat or frustrate statutory rights created by the 1972 Act.

45 As the Divisional Court stated at paragraph 82 of its Judgment, this question of statutory interpretation of the 1972 Act must be approached by reference to the relevant constitutional principles which inform an assessment of the intention of Parliament. The stronger the constitutional principles, the stronger the presumption that Parliament intended to act in conformity with them, and not to undermine them, and consequently the greater the need for a clear statement by Parliament that it did intend to override the presumptions against the use of prerogative powers to defeat the rights created by Parliament. As the Divisional Court noted at paragraph 84 of its Judgment, the

Appellant's contention that it was for the Lead Claimant to show that the 1972 Act expressly removed prerogative powers wrongly ignores the important presumptions that Parliament must have intended to act in conformity with basic constitutional principles.

46 Applying the principles of constitutional law set out in paragraphs 20-43 above, and as the Divisional Court held at paragraphs 92-93 of its Judgment[18], it is clear that Parliament intended to legislate by the 1972 Act so as to introduce EU law into domestic law and to create statutory rights

> "in such a way that this could not be undone by exercise of Crown prerogative powers".

47 The points made by the Divisional Court at paragraph 93 of its Judgment on the contents of the 1972 Act, having regard to the relevant constitutional principles, make it impossible for the Appellant to contend that Parliament, having created the statutory rights by the 1972 Act, can have intended them to be capable of destruction by the exercise of prerogative power. In paragraphs 48-65 below, the Lead Claimant addresses the relevant points on the content of the 1972 Act.

The long title

48 It is well-established that the long title to an Act is an aid to construction. As Lord Simon of Glaisdale said in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg [1975] AC 591, 647F:

> "In these days, when the long title can be amended in both Houses, I can see no reason for having recourse to it only in case of an ambiguity - it is the plainest of

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18 The Divisional Court's attention was not drawn to, and it did not mention, the principle relating to Henry VIII clauses, discussed in paragraphs 34-36 above.

all the guides to the general objectives of a statute".[19]

49 The long title to the 1972 Act states that it is

> "An Act to make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar".

Since it would frustrate that purpose for the UK to withdraw from the EU, the Appellant cannot do so without statutory authority. It is no answer for the Appellant to say (paragraph 5(1) of the Appendix to his Written Case) that the long title "says nothing about withdrawal or the period of membership". That is precisely the point: Parliament decided to make permanent provision in national law consequent on the UK becoming a member of what is now the EU - unless and until Parliament decided otherwise. Parliament did not intend that this purpose could be defeated by the use of prerogative powers. See Robinson (paragraph 49) on the importance of the purpose of a constitutional provision. Similarly Axa General Insurance Ltd v HM Advocate [2012] 1 AC 868, 911, paragraph 46 (Lord Hope of Craighead) on the Scotland Act 1998:

> "The carefully chosen language in which these provisions are expressed is not as important as the general message that the words convey".

50 Indeed, by reason of the principle that the Crown cannot use its prerogative powers to alter domestic law (see paragraphs 20-33 above), the Crown could not have ratified the accession of the UK to the EEC, given the content of the obligations into which the UK was entering, unless Parliament had enacted primary legislation. See paragraph 7 above and see the Divisional Court Judgment at paragraphs 41-42. Since an Act of Parliament was required to create EU law rights, it would be very surprising were Parliament to have intended that the Appellant should, by the exercise of the prerogative, have power

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19 See also Bennion on Statutory Interpretation (6th edition, 2013), p.678: "the long title is ... regarded by the courts as a guide to legislative intention".

to defeat or frustrate those rights.

The heading to section 2

51 Section 2 of the 1972 Act is headed "General implementation of Treaties". The "Treaties" there referred to are those specified in section 1(2). It would conflict with the statutory purpose if a Minister of the Crown could use prerogative powers to defeat or frustrate the United Kingdom from those Treaties so that the rights they create are no longer "implemented" in national law.

52 Headings in an Act are aids to construction. See Stephens v Cuckfield Rural District Council [1960] 2 QB 373, 383 (Upjohn LJ for the Court of Appeal):

> "While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind".[20]

53 It is no answer for the Appellant to point out (paragraph 5(2) of the Appendix to his Written Case, and paragraph 78 of the Written Case) that the Treaties include the TEU, containing Article 50. There is no dispute that the Treaties confer a power on the UK to withdraw from the EU. The question, however, is whether Parliament intended to allow a Minister to use prerogative power to notify and so defeat the "implementation" of the rights conferred by the Treaties. As Professor Sir Jeffrey Jowell and Naina Patel state in their blog[21]:

> "Nor can it realistically be said that the adding of the TEU to the list of treaties in section 1 of the 1972 Act by section 2 of the European Union (Amendment) Act

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20 See also Bennion on Statutory Interpretation (6th edition, 2013), p.697: "Modern judges believe it proper to consider sidenotes or headings to sections, and gather what guidance they can from them".

21 See footnote 9 above.

2008 altered this. Article 50(1) provides only that a Member State may decide to withdraw from the EU *'in accordance with its own constitutional requirements'*. It is therefore circular to suggest that in having sight of Article 50, Parliament sanctioned withdrawal through the use of the prerogative alone. In fact, no consequential amendments were made to the text of the 1972 Act to reflect the introduction of Article 50 into the EU Treaties, as paragraph 68 of the Divisional Court judgment recognises. And yet clear and express words are what would be expected if it were truly the case that the 1972 Act envisaged executive withdrawal from the Treaties and therefore its own repeal".

Section 2(1)

54 Section 2(1) of the 1972 Act states:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for 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, and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies."

55 The Appellant relies (paragraph 21(a) of his Written Case and paragraph 5(3) of the Appendix) on the phrase "from time to time". The Lead Claimant submits:

(1) As the Divisional Court explained (at paragraph 93(3) of its Judgment), the phrase "from time to time" recognises that the rights and duties consequent on EU membership will change and evolve through the acts of the EU institutions (in particular the European Parliament, the Council, the Commission and the Court of Justice) without further Parliamentary action at Westminster. Section 2(1) is intended to give effect to this feature of EU law. The words "from time to time" do no more than that.

(2) Section 2(1) is intended to give effect to *the rights, powers* etc arising from time to time by reason of membership of the EU. Section 2(1) is not intended to give effect to rights etc arising from *membership* of the EU existing from time to time.

Section 2(1) does not mean that the Act gives effect to the rights, powers, liabilities, obligations and restrictions, created or arising by or under the Treaties *insofar as the UK remains a contracting party to those Treaties*. That would be to turn the meaning and intention of the section on its head.

(3) The meaning and intention of section 2(1) - to give legal effect in domestic law to the rights created by and under the Treaties (as they stand from time to time) - would be defeated by UK withdrawal from the Treaties. Section 2(1) is intended to implement the rights under the Treaties. The Appellant proposes to defeat or frustrate those rights.

(4) Section 2(1) therefore shows that Parliament intended to introduce into domestic law EU rights which would continue to be enjoyed in the United Kingdom under the relevant Treaties, without the Crown having a prerogative power to undo those rights by effecting the withdrawal of the United Kingdom from the relevant Treaties. The expression "enforceable EU right" in section 2(1) supports this analysis of what Parliament intended to achieve.

(5) As the Divisional Court said, read in context and with regard to the relevant constitutional principles (set out in paragraphs 20-42 above), the Appellant's argument that section 2(1) shows that there is a prerogative power to withdraw from the Treaties despite the impact on the rights created by the 1972 Act is unsustainable.

Section 2(2)

56 Section 2(2) confers a power to make subordinate legislation to implement "any EU obligation of the United Kingdom" and to enable "any rights enjoyed or to be enjoyed by

the United Kingdom under or by virtue of the Treaties to be exercised". Again, this shows that Parliament believed and intended that it was legislating to give effect to EU law in domestic law, and that the effect of the legislation could not be capable of being undone by the Crown through the exercise of its prerogative powers. Parliament cannot be taken to have intended that these provisions could be frustrated by the use of prerogative powers stripping section 2(2) of any effect.

57 Section 2(2)(b) says that this statutory power may be used:

> "for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above".

On the Appellant's argument, section 2(2)(b) would allow the Minister to make subordinate legislation to deal with the removal of EU law rights as a result of the UK's withdrawal from the EU Treaties by the exercise of prerogative powers. But this would make no sense, given that section 2(2) adds that in exercising the powers, the Minister "may have regard to the objects of the EU". Again, this demonstrates that section 2 proceeds on the basis that the rights under the Treaties are to be enjoyed unless and until Parliament decides to the contrary.

Section 3(1)

58 Section 3(1) of the 1972 Act recognises the right to seek a reference of a question of EU law to the Court of Justice under Article 267 TFEU, and it recognises the duty of national courts to determine the validity, meaning and effect of any EU instrument in accordance with the jurisprudence of the Court of Justice. This confirms that Parliament presupposed the continuing applicability of EU law unless and until Parliament legislated for withdrawal. Parliament cannot be taken to have intended that these provisions could be frustrated by the use of prerogative powers stripping section 3(1) of

any effect.

Section 1

59 Section 2(1) of the 1972 Act incorporates into domestic law rights "under the Treaties". Section 1(2) of the 1972 Act defines "the Treaties".

60 The Lead Claimant submits in relation to section 1(2):

(1) An amendment to the Treaties requires a new Treaty, which has no effect in domestic law unless and until the new Treaty is included in section 1(2). That requires an Act of Parliament. That is why on each occasion since 1972 when a new EC or EU Treaty has been agreed, it has only been ratified by the United Kingdom after Parliament has amended section 1(2) of the 1972 Act to add the new Treaty to the list there stated.[22]

(2) The Appellant is wrong to suggest in paragraph 22 of his Written Case that the reason why express Parliamentary approval was required for EU Treaties post-1972 was because of *other* legislation requiring Parliamentary approval for Treaties which (for example) extended the powers of the European Parliament. Express Parliamentary approval was required because the new Treaty either altered the rights etc recognised under the 1972 Act or extended the powers of

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22 Therefore in relation to the treaties added to section 1(2) of the 1972 Act:
(a) The treaties were expressed to come into force only after each Member State had ratified the treaty in accordance its own "constitutional requirements". See, for example, Article 54 of the Treaty of Lisbon (signed 13 December 2007; ratified by UK 16 July 2008; in force 1 December 2009).

(b) The United Kingdom ratified the amending treaties only after an Act of Parliament amended the 1972 Act. See, for example, in relation to the Lisbon Treaty: the European Union (Amendment) Act 2008 (enacted 19 June 2008).
See the Annex to this Written Case setting out the relevant dates for Amendments to add Treaties to section 1(2) of the 1972 Act.

the European Parliament, or both. The legislation in relation to each of the post-1972 Treaties was careful to identify why Parliament was giving its approval, referring to section 1(2) of the 1972 Act or to other legislation or to both (as appropriate). See, for example, the European Union (Amendment) Act 2008. Section 2 added the Lisbon Treaty to section 1(2) of the 1972 Act. Section 4 stated approval of the Treaty for the purposes of section 12 of the 2002 Act. See also paragraph 79(4) below.

(3) The Appellant suggests (paragraph 5(8) of the Appendix to his Written Case) that section 1 is "a statutory recognition of the constitutional principle of dualism". The Lead Claimant responds that section 1 is a recognition by Parliament that the Treaties have created rights which have effect in national law, and so Parliamentary control is required before any amendment to the Treaties can alter those statutory rights. It would make no sense for an Act of Parliament to be required to authorise an amendment to section 1(2) to add a new Treaty where this will alter domestic law, but for no Act of Parliament to be needed for the UK to notify that the UK will be leaving the EU when that will destroy all enforceable EU rights under the Treaties.

(4) The Appellant's argument at paragraph 22 of its Written Case that amendment of section 1(2) is not a legal pre-condition for ratification of a Treaty misses the point, which is that the 1972 Act requires an amendment to section 1(2) before a new Treaty can have any effect on the rights created by the 1972 Act. That is why it has been the practice to seek Parliamentary approval to add a new Treaty to section 1(2) *before*[23] ratification of a relevant new Treaty. Yet the Appellant contends that, without Parliamentary authorisation, the Executive can take

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23 See (1) above.

action to strip away rights created by the 1972 Act and deny them force and effect in domestic law.

(5) The Appellant draws attention in paragraph 23 of his Written Case (and at paragraph 5(8) of the Appendix) to the fact that specified aspects of specified Treaties are excluded from implementation by way of section 1(2). See, for example, section 1(2)(o), (p) and (s) of the 1972 Act. But this simply confirms the significance of Parliamentary control of the content of the rights which are made part of domestic law, and further undermines the suggestion by the Appellant that rights conferred by the 1972 Act can be defeated or frustrated without such Parliamentary control.

61 Section 1(3) of the 1972 Act confirms the points made in paragraph 60 above about the impact and the implications of section 1(2). The final words of section 1(2) include within the concept of "the Treaties":

> "any other treaty entered into by the EU (except in so far as it relates to, or could be applied in relation to, the Common Foreign and Security Policy), with or without any of the member States, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom".

Section 1(3) allows such a treaty (lower case) to be declared by Order in Council to be a Treaty (upper case) for the purposes of section 1(2) if

> "a draft of the Order in Council has been approved by resolution of each House of Parliament".[24]

62 As the Divisional Court said at paragraph 93(8) of its Judgment:

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[24] Section 1(3) was considered by the Court of Appeal in R v Her Majesty's Treasury ex parte Smedley [1985] QB 657.

> "Moreover, the fact that Parliament's approval is required to give even an ancillary treaty made by exercise of the Crown's prerogative effect in domestic law is strongly indicative of a converse intention that the Crown should not be able, by exercise of its prerogative powers, to make far more profound changes in domestic law by unmaking all the EU rights set out in or arising by virtue of the principal EU Treaties".

63 Paragraph 5(8) of the Appendix to the Appellant's Written case says that the ancillary treaties "could be withdrawn from without any Parliamentary oversight". But once Parliament has approved such a treaty by Order in Council for the purposes of section 1(2), a revoking Order in Council (also requiring Parliamentary approval) would be needed to remove the ancillary treaty from section 1(2).

Conclusions in relation to the contents of the 1972 Act

64 Read in the light of the language and purpose of the 1972 Act (and also having regard to the relevant constitutional principles set out in paragraphs 20-42 above), the provisions contained in the 1972 Act cannot be said to have effect only for so long as the Crown chooses not to exercise a prerogative power to withdraw the United Kingdom from the Treaties and so defeat the statutory rights. As the Divisional Court concluded at paragraph 94 of its Judgment, the clear implication from the provisions discussed in paragraphs 48-63 above is that Parliament intended that the Crown did not have any prerogative power to take action on the international plane which would destroy the rights which Parliament created by the 1972 Act. The argument is as strong in relation to the 2002 Act: notification strips away all the content of the right to vote and stand for election in relation to UK MEPs.

65 The Appellant's Written Case points out at paragraph 62b that even though "notification has irrevocable effects", Article 50 did not exist in 1972. But that is no answer to the Lead Claimant's argument. Parliament created statutory rights in 1972. Parliament's intention was that those rights could only be defeated by Parliament itself. The Article 50(2)

notification power now available may not be exercised by the use of the prerogative when it will destroy statutory rights.

The Lead Claimant's Second Argument

66 The Lead Claimant's second argument is that, in any event, where Parliament has created statutory rights (and in particular statutory rights of constitutional significance) in the 1972 Act and in the 2002 Act, as a matter of common law the Appellant has no prerogative power to take action which will defeat or frustrate those rights. Any such power would be a breach of the fundamental principle of Parliamentary sovereignty and of the other constitutional principles identified in paragraphs 20-42 above. The Appellant needs to show clear statutory authority for the removal of those rights by the Executive.

67 There is no such statutory authority, as the Appellant recognises. The Appellant relies only on prerogative powers. It is no part of the Appellant's argument to suggest that the 1972 Act, or any other Act of Parliament, confers any such statutory power.

68 The Appellant's contention - that the Secretary of State may use prerogative powers unless Parliament has clearly precluded the use of such powers - approaches the issue from the wrong direction. Given the constitutional principles set out above, it is not for the Lead Claimant to show that the 1972 Act and the 2002 Act have clearly removed prerogative power in this context (though the 1972 Act does prevent prerogative power being exercised without statutory authority: see paragraphs 44-65 above). On the contrary, it is for the Appellant to show that there is a clear statutory power authorising him to defeat statutory rights. He has not relied on any such statutory power.

69 The Divisional Court (at paragraphs 95-96 of the Judgment) also accepted this further argument.

De Keyser, Fire Brigades Union, Laker and Rees-Mogg

70 As the Divisional Court explained at paragraphs 97-101 of its Judgment, the conclusions which it reached accepting the Lead Claimant's two main arguments are supported by the decisions of the Appellate Committee in De Keyser's Royal Hotel Ltd and in ex parte Fire Brigades Union, and by the decision of the Court of Appeal in Laker Airways v Department of Trade [1977] QB 643.

71 De Keyser recognised that prerogative powers may be impliedly abrogated by an Act of Parliament: see at pp.526 (Lord Dunedin), 539 (Lord Atkinson), 554 (Lord Moulton), 561-562 (Lord Sumner) and 575-576 (Lord Parmoor). Whether that is so depends on the proper interpretation of the specific statute, read in context, and having regard to relevant constitutional principles. De Keyser provides one example: there a matter formerly dealt with under the prerogative (the taking of property by the Crown for the defence of the realm during wartime) had been directly regulated by a statute which required compensation. But this is not the only type of case where removal of prerogative powers may have occurred on the proper construction of the legislation. See Lord Parmoor at p.576. The Appellant's Written Case emphasises at paragraph 55b and 55c that the principles stated in The Case of Proclamations and The Zamora cannot control all the different circumstances which may arise in relation to the limits on prerogative powers (see paragraphs 21(1) and (3) above). Yet the Appellant's Written Case at paragraph 65 criticises the Divisional Court for not "applying De Keyser principles". De Keyser is not an exclusive code.

72 In ex parte Fire Brigades Union, the Appellate Committee held that the Secretary of State had no prerogative power to introduce a new Criminal Injuries Compensation Scheme when Parliament had approved a different scheme, albeit it was for the Secretary of State to decide when to bring the statutory scheme into effect. To exercise prerogative power in this way would conflict with the duty of the Secretary of State to consider bringing the statutory scheme into effect. As the Divisional Court noted at paragraphs 98-99 of its Judgment, the present case is a much stronger example of the impermissibility of using prerogative power than ex parte Fire Brigades Union. There the statutory scheme was not in effect. Here sections 2 and 3 of the 1972 Act, and the 2002 Act, set out legal rights and duties which are in force, and which require effect to be given to EU law; they would be stripped of practical effect as a result of the notification. Therefore the inference that Parliament did not intend the Appellant to retain or exercise prerogative power is even stronger in the present case than in ex parte Fire Brigades Union.

73 In Laker, the Court of Appeal held that the Crown's prerogative power to make a treaty had been impliedly limited by a statutory scheme for the licensing of air carriers. The analysis of all three judges was based on the proper interpretation of the relevant statutory scheme. The case is an example of a statute impliedly limiting the exercise of prerogative power to make a Treaty on the international level. The Court of Appeal rejected the argument by the Attorney-General, Mr Sam Silkin, summarised by Lawton LJ at p.727B-E:

> "the courts cannot take cognizance of Her Majesty's Government's conduct of international relations",

the Civil Aviation Act 1971 did not refer to designated carriers, and

> "the withdrawal of designation must be within the prerogative powers

exercisable by the Secretary of State on behalf of the Crown".

The Lead Claimant also draws attention to the statement by Lawton LJ at p.728A-B that:

> "the Secretary of State cannot use the Crown's powers in this sphere in such a way as to take away the rights of citizens: see Walker v Baird [1892] AC 491. By withdrawing designation this is what in reality, if not in form, he is doing. A licence to operate a scheduled route is useless without designation".

In the present case, notification would take away the statutory rights of citizens. It would render sections 2 and 3 of the 1972 Act "useless".

74 Lawton LJ was referring to the advice of Lord Herschell for the Judicial Committee of the Privy Council in Walker v Baird [1892] AC 491, 497, where he noted:

> "The learned Attorney-General, who argued the case before their Lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty".

Lord Herschell then rejected, on the facts, the "more limited" argument that the seizure of a British subject's property on British territory could be justified if the treaty was entered into for the purpose of ending a state of war.

75 As the Divisional Court noted in its Judgment at paragraphs 90-91, the earlier judgment of that Court in R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg [1994] QB 552 does not assist the Appellant. There the Applicant was seeking to challenge the ratification of the Maastricht Agreement, in particular the Protocol on Social Policy, even though the Protocol had no effect in domestic law and so did not remove, or indeed extend, domestic law rights. See at p.568A-E. Moreover, Rees-Mogg was not a case about the use of prerogative power pre-empting consideration by Parliament. In that case, Parliament had already included the

Maastricht Treaty - but not the Protocol - in section 1(2) of the 1972 Act: see pp.562D-E.

The European Union Referendum Act 2015

76 The Appellant's Written Case relies on the referendum which took place under the European Union Referendum Act 2015 ("the 2015 Act").

77 The Lead Claimant submits that the 2015 Act and the referendum result provide no answer to the Judgment of the Divisional Court:

(1) The Appellant does not contend that he has statutory authority - whether under the 2015 Act or otherwise - to give notification under Article 50(2). See paragraph 35 of the Appellant's Written Case:

> "As the [D]ivisional C[ourt] correctly noted (paragraph 105), the Secretary of State does not contend that the 2015 Act provides the source of power to give notification under Article 50".

(2) As the Divisional Court stated at paragraph 105 of its Judgment, the Appellant is undoubtedly right to accept that the 2015 Act confers no statutory power to notify under Article 50(2). Section 1(1) of the 2015 Act says simply:

> "A referendum is to be held on whether the United Kingdom should remain a member of the European Union".

The 2015 Act says nothing about the consequences of the referendum decision (cf. section 8 of the Parliamentary Voting System and Constituencies Act 2011, for example).

(3) The Appellant contends in paragraph 33 of his Written Case that:

> "There is nothing in the language of the Act or in its legislative history to suggest that Parliament intended that the Government should only

> commence the process of implementing a 'leave' vote, by giving the notification prescribed by Article 50(2) if given further primary legislative authority to do so".

But that is because the 2015 Act did not address the process by which the UK would leave the EU if the people voted (as they did) to leave, and in particular did not address the respective roles of Parliament and Ministers. Far less did the 2015 Act authorise the Appellant, without Parliamentary approval, to take action to defeat statutory rights under the 1972 Act and the 2002 Act. Whatever the proper legal scope of prerogative power in this context, it is unaffected by the 2015 Act.

(4) Insofar as the Appellant refers to the 2015 Act as justifying the use of prerogative powers to notify under Article 50(2), the Court is not concerned with whether the use of prerogative powers is justified in the present context. The question for the Court is one of law: does the Appellant have a prerogative power to notify under Article 50(2)?

(5) Insofar as the Appellant refers to the 2015 Act as an event of political significance for Ministers and Parliament to take into account or act upon, that is not a matter for the Court: see paragraph 108 of the Judgment of the Divisional Court. As a matter of law, the position remains as stated by Dicey (An Introduction to the Law of the Constitution at p.72) (see the Divisional Court Judgment at paragraph 22):

> "The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament ...".

The post-1972 legislation and the limitations placed on the use of prerogative powers

78 The Appellant relies on statutory provisions post-1972, which have imposed various limits on the power of the Crown to ratify Treaties, particularly Treaties concerning EU law:

(1) Section 6 of the European Parliamentary Elections Act 1978 which was replaced by section 12 of the 2002 Act (repealed by the European Union Act 2011 ("the 2011 Act")).

(2) Section 6 of the European Union (Amendment) Act 2008 (repealed by the 2011 Act).

(3) Section 2(1) of the 2011 Act.

(4) Part II of the Constitutional Reform and Governance Act 2010 ("the 2010 Act").

The Appellant contends (paragraph 78 of his Written Case) that this post-1972 legislation shows that Parliament has provided a series of restrictions on the use of prerogative powers relating to treaties without imposing the constraints found by the Divisional Court in the present case.[25]

79 The Lead Claimant submits that the post-1972 legislation does not assist the Appellant:

(1) The Appellant does not suggest (nor could he) that any of these statutes confers a statutory authorisation on the Appellant to notify under Article 50(2). He relies

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25 Paragraph 78 of the Appellant's Written Case also contends that the post-1972 legislation shows that Parliament was aware of Article 50, and indeed had given approval to it by including the Lisbon Treaty in the Treaties to which section 1(2) of the 1972 Act refers, without imposing limits on its exercise. The Lead Claimant has addressed this argument at paragraph 53 above.

on a prerogative power.

(2) Given the significance of the statutory rights conferred by the 1972 Act (and by the 2002 Act), and the importance of the principles set out in paragraphs 20-42 above, only the clearest of statements by Parliament post-1972 could justify a conclusion that the post-1972 legislation is designed to remove a restriction on the use of the prerogative to defeat statutory rights which would otherwise exist, either as a result of the proper construction of the 1972 Act or at common law. None of the post-1972 statutes comes close to providing that clear statement. Not least because the post-1972 Acts are not addressing the question of whether prerogative powers may be used to defeat statutory rights.

(3) Indeed, the Appellant expressly accepts (see paragraph 31 of his Written Case) that the group of post-1972 statutes, in particular the 2011 Act,

> "is not a complete code. ... Parliament has carefully selected the exercises of prerogative power which it wishes to control, not including Article 50".

Since there is no "complete code", Parliament's silence on the issue in this case cannot be taken as any indication that Parliament intended prerogative powers to apply. The relevant constitutional principles, and their application in the context of the 1972 Act, are unaffected by later legislation which does not address the matter, far less address the matter clearly. Any other conclusion would conflict with the principles identified in paragraphs 20-42 above: it would be implicitly to confer power on the Executive to defeat statutory rights, even though - either as a matter of interpretation of the 1972 Act or at common law - such a fundamental alteration of constitutional principle would require clear statutory authority.

(4) The post-1972 legislation addresses a different issue to that raised in the present case. The legislation requires Parliamentary approval for ratification of treaties in specified circumstances concerning the giving of additional powers to the EU institutions, initially the European Assembly/Parliament. The post-1972 statutes are not concerned with the exercise of prerogative powers in relation to leaving the EU, and they are not concerned with whether a treaty defeats statutory rights. So:

(a) The Maastricht Protocol on Social Policy is an example of a provision which required statutory approval under the post-1972 Acts even though it did not remove (or indeed create) statutory rights. See section 1 of the European Communities (Amendment) Act 1993: section 1(1) of the 1993 Act stated that the Protocol, unlike the rest of the Maastricht Treaty was not included in section 1(2) of the 1972 Act (because the Protocol did not affect domestic law rights under section 2(1) of the 1972 Act); whereas section 1(2) of the 1993 Act did approve the Protocol for the purpose of section 6 of the 1978 Act.

(b) By contrast, there are also Treaties for which Parliamentary approval was not required under the post-1972 legislation - see the European Communities (Spanish and Portuguese Accession) Act 1985 which did not require to be approved under section 6 of the European Parliamentary Elections Act 1978[26] - but where the Treaty was added to

26 Cf. the European Union (Accessions) Act 1994 concerning the accession of Norway (though Norway did not in fact accede), Austria, Finland and Sweden, which included approval under the 1978 Act (section 2) in addition to amending section 1(2) of the 1972 Act to incorporate the accession treaty (section 1 of that 1994 Act). The approval under section 2 of the 1978 Act was necessary in this instance because the Accession Treaty gave new powers to the European Parliament in minor respects (to verify the credentials of representatives elected in the acceding states).

section 1(2) of the 1972 Act because rights under section 2(1) of the 1972 Act were amended.

(5) Indeed, even in relation to an amendment to the same Act (which is not this case, as the post-1972 legislation does not amend the 1972 Act), "generally speaking an amendment cannot affect the construction of an Act as originally enacted ...": R (JB (Jamaica)) v Secretary of State for the Home Department [2015] 1 WLR 1060, 1069, paragraph 24 (Lord Toulson for the Court).

The role of Parliament

80 The Appellant points out (at paragraph 80 of his Written Case) that there have been debates in Parliament and select committee reports on issues raised by withdrawal from the EU. The Appellant states that "[i]t is entirely a matter for Parliament to decide the nature and extent of its involvement". The Lead Claimant agrees subject to an important qualification. It necessarily follows from each of the arguments which she advances above (see paragraphs 44-65 and paragraphs 66-69) that only an Act of Parliament could lawfully confer power on the Appellant to notify under Article 50(2). Because notification would cause the destruction of statutory rights, only an Act of Parliament could authorise the removal of such rights. Parliamentary debate or a Motion in the Houses of Parliament (or indeed in the House of Commons alone) would not suffice. That is because, as Lord Denning MR explained in Laker at p.703E-G, a Parliamentary motion approving the Minister's action in that case "could not override the law of the land". The approval of the Houses of Parliament cannot alter the law: see F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry [1975] AC 295, 365C-D (Lord Diplock) and 372E (Lord Cross of Chelsea).

81 The Lead Claimant also draws attention to Lord Diplock's statement in R v Inland Revenue Commissioners ex parte Federation of Self-Employed [1982] AC 617, 644F-G (cited with approval by Lord Lloyd in ex parte Fire Brigades Union at pp.572H-573C) that:

> "It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are accountable to a court of justice for the lawfulness of what they do, and of that the court is the only judge".

82 The Appellant says (at paragraph 81 of his Written Case) that the procedures under the 2010 Act - requiring Parliamentary approval - are "very likely" to apply to a withdrawal agreement concluded pursuant to Article 50. That does not assist the Appellant in these proceedings:

(1) There may be no withdrawal agreement, in which case the UK would still leave the EU under Article 50(3). The Treaties would cease to apply and statutory rights would be defeated.

(2) If Parliament were to refuse to give approval to a withdrawal agreement, Article 50(3) would still apply: the UK would leave the EU, the Treaties would cease to apply to the UK, and statutory rights would be defeated.

(3) Therefore, the crucial stage, so far as the defeat of statutory rights is concerned, is notification under Article 50(2). Parliamentary authorisation is therefore required for notification.

83 For the same reasons, a "Great Repeal Bill" (to which the Appellant refers at paragraph 81 of his Written Case) does not assist the Appellant in these proceedings. Because notification will cause the destruction of statutory rights (and so pre-empt

Parliamentary consideration of any future Bill), statutory authorisation is required for notification under Article 50(2). The Court cannot proceed on any assumption as to what Parliament will do with a Great Repeal Bill. It may be enacted, it may be rejected, it may be amended. Come what may, the act of notification under Article 50 (and Government policy)[27] commits the United Kingdom to leaving the EU with the consequence that statutory rights currently enjoyed will be defeated or frustrated. The Appellant cannot lawfully use prerogative powers to commit the law of the land to the removal of statutory rights and then defend his actions on the basis that it is possible that Parliament may take certain action in the future, especially when that action could not restore some of those rights.[28]

Conclusion

84 The Lead Claimant invites the Court to dismiss the appeal for the following

REASONS

(1) The Divisional Court correctly concluded that the 1972 Act, as interpreted with the aid of relevant legal principles, means that only Parliament itself could defeat the statutory rights which Parliament has created. Parliament did not intend that the rights it has created could be defeated or frustrated by the actions of a Minister purporting to exercise prerogative powers.

(2) The Divisional Court correctly concluded that, in any event, where Parliament has created statutory rights (and in particular statutory rights of constitutional significance) in the 1972 Act and in the 2002 Act, at common law the Appellant has no prerogative

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27 See paragraphs 11-14 above.

28 See paragraph 17 above.

power to take action which will defeat those rights. Clear statutory authority is required. There is no such authority.

LORD PANNICK QC

RHODRI THOMPSON QC

ANNELI HOWARD

TOM HICKMAN

PROFESSOR DAN SAROOSHI

Instructed by
James Libson
Mishcon de Reya LLP
Africa House
70 Kingsway
London WC2B 6AH

Amendments to add Treaties to section 1(2) of the European Communities Act 1972

Act Amending s.1(2) ECA	Related Legislation / Treaty	Date Treaty Signed	Royal Assent of Act	Date Treaty Ratified	Date Treaty Effective
European Communities Act 1972	Treaty establishing the European Economic Community	22 January 1972	17 October 1972	18 October 1972	1 January 1973
European Communities (Greek Accession) Act 1979	Treaty of Accession of Greece (1979)	28 May 1979	20 December 1979	22 December 1979	1 January 1981
European Communities (Spanish and Portuguese Accession) Act 1985	Treaty of Accession of Spain and Portugal (1985)	12 June 1985	19 December 1985	20 December 1985	1 January 1986
European Communities (Amendment) Act 1986	Single European Act	17 & 28 February 1986 (UK signature was in 17 February 1986)	7 November 1986	19 November 1986	1 July 1987
European Communities (Amendment) Act 1993	Treaty on European Union-Maastricht Treaty	7 & 12 February 1992 (UK signature was in 17 February 1986)	20 July 1993	2 August 1993	1 November 1993
European Economic Area Act 1993	Agreement on the European Economic Area	2 May 1992	5 November 1993	15 November 1993	1 January 1994
European Union (Accessions) Act 1994	Treaty of Accession of Austria, Finland and Sweden (1994)	24 June 1994	3 November 1994	29 November 1994	1 January 1995
European Communities (Amendment) Act 1998	Treaty of Amsterdam	2 October 1997	11 June 1998	14 June 1998	1 May 1999
European Communities (Amendment) Act 2002	Treaty of Nice	26 February 2001	26 February 2002	25 July 2002	1 February 2003

Act Amending s.1(2) ECA	Related Legislation / Treaty	Date Treaty Signed	Royal Assent of Act	Date Treaty Ratified	Date Treaty Effective
European Union (Accessions) Act 2003	Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (2003)	16 April 2003	13 November 2003	18 December 2003	1 May 2004
European Union (Accessions) Act 2006	Treaty of Accession of the Republic of Bulgaria and Romania (2005)	25 April 2005	16 February 2006	5 April 2006	1 January 2007
European Union (Amendment) Act 2008	Treaty of Lisbon	13 December 2007	19 June 2008	16 July 2008	1 December 2009
European Union Act 2011	Protocol Amending the Protocol on Transitional Provisions annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty Establishing the European Atomic Energy Community	23 June 2010	19 July 2011	28 July 2011	Section 15 and Part 3 - 19 July 2011 Part 1 and Schedule 1 - 19 August 2011[1]. Rest of the Act - 19 September 2011[2].
European Union (Croatian Accession and Irish Protocol) Act 2013	Treaty of Accession of Croatia (2012)	9 December 2011	31 January 2013	20 May 2013	1 July 2013

[1] S.21 and European Union Act 2011 (Commencement No. 1) Order 2011.
[2] S.21 and European Union Act 2011 (Commencement No. 2) Order 2011.