CO/3809/2016; CO/3281/2016

IN 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

Claimants

-and-

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Defendant

-and-

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

Interested Parties

-and-

GEORGE BIRNIE AND OTHERS

Interveners

SKELETON ARGUMENT OF THE SECRETARY OF STATE

Hearing dates: 13 and 17 October 2016
Suggested pre-reading Parties' skeleton arguments
Time-estimate for pre-reading [ ]

Introduction and summary

1. On 23 June 2016, in the EU Referendum, the people of the UK voted by a clear majority to leave the EU. Prior to the referendum, the Government's policy was unequivocal that the outcome of the referendum would be respected. Parliament passed the EU Referendum Act 2015 ("**the 2015 Act**") on this clear understanding. The British people expected to vote, and did vote, on the same understanding. The current Prime Minister

has confirmed that the Government will give effect to the outcome of the referendum by bringing about the exit of the UK from the EU.

2. Under the EU Treaties, Article 50 of the Treaty on European Union ("**TEU**") sets out the procedure by which a Member State which has decided to withdraw from the EU achieves that result. That decision having been taken (Article 50(1)), the next stage in the process is for the state to notify the European Council of its intention to withdraw. The Government intends to give notification, and to conduct the subsequent negotiations, in exercise of prerogative powers to conclude and withdraw from international treaties, against the backdrop of the referendum.

3. Ms Gina Miller (**"the Lead Claimant"**) would like the UK to remain in the European Union (Skeleton Argument, §53). Supported by the Interested Parties and Interveners, she brings this application for judicial review seeking *"a declaration that it would be unlawful for the Defendant or the Prime Minister on behalf of Her Majesty's Government to issue a notification under Article 50 of the Treaty on European Union to withdraw the United Kingdom from the European Union without an Act of Parliament authorising such notification"* (section 7 of her Claim Form).

4. Her claim, if accepted, would thus have (at least) the effect that the Government could not give effect to the will and decision of the people, as clearly expressed in the referendum, to withdraw from the EU, without further primary legislation. It would be necessary, despite the referendum, to subject precisely the same issue to a further series of votes by Members of Parliament. Moreover, her claim rests on the proposition, not merely that Parliament should be involved in the process of exiting the EU and/or in considering matters relating to the giving of notification under Article 50; but that it is a legal and constitutional requirement that Article 50 notification can only be authorised by further primary legislation. On her case, no other form of Parliamentary involvement would suffice. Put another way, on her case, the Courts will be ruling that, in order to avoid illegality, the UK's constitution requires Parliament to take such steps to pass primary legislation before any notification can be given.

5. The Lead Claimant's arguments are supported by the Second Claimant (**"Mr Dos Santos"**), the First Interested Parties represented by Bindmans (**"Mr Pigney"**), the Second Interested Parties represented by Bhatia Best (**"the AB Parties"**) and the Intervener, the 'Fair Deal for Expats' group (**"FDE"**). In very large part, the arguments of all the further parties are repetitive of, parasitic upon, or simply alternative ways of putting the same arguments as, the Lead Claimant's case. They are dealt with as necessary in the course of responding to the Lead Claimant.

6. It is to be noted at the outset that the Detailed Grounds of Resistance filed by the Secretary of State ("**DGR**") drew attention to the conflation in the Claim of the Article

50(1) decision to withdraw from the EU (which is not expressly challenged) and the Article 50(2) notification of that decision (which the Claim seeks, on its face, to prevent) (§9). The Secretary of State pointed out that the Claim was in substance if not in form a complaint that the Government cannot validly decide that the UK should leave the EU, in implementation of the outcome of the referendum, without being authorised to do so by an Act of Parliament (§10). On that basis, the express focus of the Claim on the Article 50(2) notification is merely camouflage. The claimant parties have taken differing approaches in response:

(1) The Lead Claimant's Skeleton Argument studiously avoids any clarification of her position on this point. Absent any such clarification, she must be taken as accepting that the Article 50(1) decision that the UK should withdraw from the EU has been validly taken; whilst at the same time contending that the Government is not entitled to implement that decision by giving effect to the procedure specifically prescribed by Article 50(2) where such a decision has been taken.

(2) In contrast, Mr Dos Santos (Skeleton Argument at §4) and Mr Pigney (Skeleton Argument at §6) do accept that their arguments go to challenge the decision to withdraw itself, but do not appear to recognise that that decision has been taken. Their apparent confusion is not understood. As set out in the DGR, and repeated below, the Government made clear before the referendum and during the passage of the 2015 Act that it would respect and implement the outcome of the referendum. The directly expressed will of the British people was to leave the EU. The then-Prime Minister confirmed on 24 June 2016 that the Government would, as previously stated, implement the outcome of the referendum and (in the circumstances) bring about the withdrawal of the UK from the EU. The current Prime Minister, and the Secretary of State, have repeatedly reaffirmed that position on behalf of the present Government.

(3) FDE does accept that the Article 50(1) withdrawal decision has been taken but complains that it was taken in breach of public law for a variety of reasons, including alleged failure to consider the rights and interests of expatriates and the referendum turnout and margin of victory for the Leave campaign (Skeleton Argument, §§40-45). These complaints are unreal. No claim has been brought challenging the decision. The position of expatriates was fully debated during the referendum campaign. The inevitable overriding consideration was the clear and directly expressed will of the British people to leave the EU.

7. The Lead Claimant's case (and that of Mr Dos Santos) eschews any reliance on EU law, or Article 50 itself, as the basis of challenge. It is right to do so for the reasons given

below. Her case instead rests on the narrow proposition that it would be unlawful, as a matter of domestic public law, for the Government to give the Article 50(2) notification pursuant to its prerogative powers, because the act of giving notification *"would frustrate or substantially undermine rights and duties established by Acts of Parliament"* namely the European Communities Act 1972 ("**ECA**") and other Acts which assume the UK's membership of the EU (Skeleton Argument, §5(2)).

8. The Secretary of State submits that these claims should be dismissed. In summary:

(1) In the circumstances of the present case, it would be constitutionally proper and lawful to begin to give effect to the referendum result by the use of prerogative powers. The basis on which the referendum was undertaken was that the Government would give effect to the result of the referendum. That was the basis on which the people voted. The 2015 Act neither expressly nor implicitly required that further Parliamentary authority would be required before an Article 50(2) notification could be given to commence the process of giving effect to the outcome of the referendum. The Government is entitled to invoke the procedure which is prescribed by Article 50 where, as here, a Member State has decided to withdraw from the EU. The exercise by the Crown of its prerogative power in the circumstances of the present case is consistent with the settled position in international and domestic constitutional law, which has itself neither expressly nor by necessarily implication abrogated that prerogative. Decisions as to the making of and withdrawal from treaties are paradigm examples of the use of the prerogative.

(2) Giving the Article 50(2) notification is not precluded by or inconsistent with the ECA or any other statute. Nor would the commencement of the process of withdrawal from the EU itself change any common law or statute or any customs of the realm. Any such changes are a matter for future negotiations, Parliamentary scrutiny, and implementation by legislation.

(3) In any event, (a) the decision that the UK should withdraw from the EU is not justiciable in the Courts – the Courts should not entertain a claim which in substance challenges that decision directly or, at the least, indirectly by seeking to prevent the decision from being implemented; and (b) the claimants seek relief which, on established authority, the Court will not entertain: the practical effect of the declaration sought would necessarily involve the Courts impermissibly trespassing on proceedings in Parliament.

(4) Contrary to the submissions of other parties:

a. The lawfulness of the use of the prerogative is not impacted by the devolution legislation. The conduct of foreign affairs is a reserved matter such that the devolved legislatures do not have competence over it. Whilst there are provisions in the devolution legislation which envisage the application of EU law, they add nothing to the Lead Claimant's case.

b. The principle of legality and the designation of constitutional statutes have no application outside of principles of statutory construction.

c. There is no international law obligation, concerning the best interests of children or otherwise, which obliges the notification to be authorised by Parliament.

I. Article 50

9. Article 50 TEU provides, materially:

> *"1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
>
> *2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*
>
> *3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."*

10. The Lead Claimant has disavowed any reliance on EU law for the purposes of her claim. So have all the other parties, with the apparent exception of the AB Parties. The Lead Claimant is right not to argue that the Government's intended use of prerogative powers to give the notification prescribed by Article 50(2) would contravene Article 50 or any other provision of EU law. To the extent that the AB Parties take a different stance, which is unclear from their Skeleton Argument (see §§3-9), this is unfounded.

11. **First**, as the Lead Claimant agrees (Skeleton Argument, §11(3)), Article 50(1) does not provide a basis for challenge under EU law of the process by which a Member State has arrived at a decision to withdraw from the EU. Rather, Article 50(1) – reflecting the pre-

existing position under international law – recognises that this is an area in which a Member State may determine its own requirements, free from interference by EU law. This was the *ratio* of the judgment of the Court of Appeal in *R (Shindler) v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469. As Lord Dyson MR explained at §14: "*By Article 50(1) TEU, EU law has expressly provided an area where Member States may adopt their own requirements"*. This is fatal to the reliance on EU law by the other parties.

12. **Secondly**, Article 50 plainly does not confer directly effective rights upon individuals which can be relied upon in domestic courts. Absent such rights, it is not open to any party to complain of a failure by the UK to comply with the requirements of Article 50.

13. **Thirdly**, the giving of notification under Article 50(2) will be an administrative step on the international law plane which, in accordance with the usual principles of international law, will be valid so far as other states are concerned notwithstanding any argument about compliance with requirements of the UK's internal legal order. There is no foundation for the unexplained apparent suggestion of the AB Parties that the notification might not be issued in "*good faith*" (Skeleton Argument, §6).

14. **Fourthly**, in any event, the reference to a Member State's "*own constitutional requirements*" (upon which the other parties' arguments place reliance) applies only to the state's decision to withdraw from the EU: see Article 50(1). It does not extend to the process prescribed by Article 50(2).

II. It is constitutionally proper and lawful to rely upon prerogative powers to give effect to the outcome of the referendum

20. The Secretary of State submits that it is clear that the UK's constitutional settlement does permit notification under Article 50(2) by the Government, without the need for further primary legislation. Prerogative powers may lawfully be invoked for these purposes having regard to the 2015 Act, to standard constitutional practice regarding the conclusion of and withdrawal from treaties and to the limited restrictions which Parliament has chosen to impose upon the exercise of prerogative powers in that context, including in relation to the EU Treaties. In summary:

    (1) The referendum was set up and provided for by Parliament in the 2015 Act. Its legislative purpose and object was to enable the people directly to express their will on a single, binary, question: "*Should the United Kingdom remain a member of the European Union or leave the European Union?*" (see section 1(4) of the 2015 Act). There is nothing to suggest that Parliament intended that the Government should only commence the process of implementing the result of the referendum, by giving the notification prescribed by Article 50(2), if given further

primary legislative authority to do so. On the contrary, the premise of the 2015 Act, the clear understanding of all concerned and the basis on which the people voted in response to the referendum question was that the Government would give effect to the outcome of the referendum.[1] The Lead Claimant's case, and that of all the parties seeking to rely on Parliamentary sovereignty as a determinative principle, involves the proposition that it would be constitutionally appropriate for the British people to vote to leave, and for the Government and/or Parliament then to decline to give effect to that vote. That is a surprising submission in a modern democratic society.[2]

(2) The Lead Claimant's only response to this submission is that the referendum was "*advisory*" (Skeleton Argument, §8). That is a term which does not appear in the 2015 Act and is apt to mislead. The 2015 Act did not prescribe steps which the Government was required to take in the event of a leave vote. That was not because Parliament or the electorate were proceeding on the basis that the outcome of the referendum would not be given effect to. Any such suggestion would be untenable in fact: the Government had been very clear in this respect. It is unsurprising that the legislation did not prescribe steps to be taken in the event of a leave vote given that: (a) Article 50 itself prescribes the formal steps to be taken once a Member State has decided to withdraw from the EU; (b) it would be a matter for the Government to start the formal process of withdrawal by giving notification under Article 50(2), at a time which the Government believed to be in the best interests of the UK; (c) it had not been decided, and Parliament did not itself seek to decide, what outcome the UK should seek to achieve in negotiating

[1] This was clearly stated on many occasions, for example: "*This is a simple, but vital, piece of legislation. It has one clear purpose: to deliver on our promise to give the British people the final say on our EU membership in an in/out referendum by the end of 2017.*" (Second Reading, HC, Hansard, 9 June 2015, col. 1047, the Foreign Secretary); "*As the Prime Minister has made very clear, if the British people vote to leave, then we will leave. Should that happen, the Government would need to enter into the processes provided for under our international obligations, including those under Article 50 of the Treaty on European Union.*" (Report stage, HL Hansard, 23 November 2015, col. 475, Minister of State, Foreign and Commonwealth Office, Baroness Anelay of St Johns). On 22 February 2016, the-then Prime Minister told the House of Commons that "*This is a vital decision for the future of our country, and I believe we should also be clear that it is a final decision…This is a straight democratic decision—staying in or leaving—and no Government can ignore that. Having a second renegotiation followed by a second referendum is not on the ballot paper. For a Prime Minister to ignore the express will of the British people to leave the EU would be not just wrong, but undemocratic.*" (HC, Hansard, 22 February 2016, col. 24).

[2] As the Secretary of State has pointed out: "*I am a great supporter of parliamentary democracy because it is our manifestation of democracy in most circumstances; in this unique circumstance we have 17.5 million direct votes that tell us what to do. I cannot imagine what would happen to the House in the event that it overturned 17.5 million votes. I do not want to bring the House into disrepute by doing that. I want to have the House make decisions that are effective and bite into the process. That is what will happen.*" (HC Hansard, 5 September 2016, col. 61)

its future relationship with the EU. The characterisation of the referendum as merely "*advisory*" is therefore inappropriate and inaccurate if that term is used (as the Lead Claimant uses it) to imply lack of Parliamentary permission to give effect to the result or some Parliamentary requirement to return by primary legislation before beginning that process in the event of a vote to leave.

(3) Having, in implementation of the outcome of the referendum, validly decided that the UK should withdraw from the EU (which is, apparently, common ground between all parties, save for FDE), the Government can only give effect to that decision through the Article 50 process by notifying the European Council pursuant to Article 50(2). It cannot be prevented from doing so by the absence of primary legislation authorising that necessary step.

(4) The use of prerogative powers in this context is entirely consistent with standard constitutional practice when it comes to entering into, and withdrawing from, treaties. Where Parliament wishes to place limits on that prerogative power it must do so clearly, as it has in the Constitutional Reform and Governance Act 2010 (**"the 2010 Act"**). Section 20 of the 2010 Act provides that treaties are not to be ratified without first being subject to a procedure in Parliament akin to a negative resolution, save in exceptional cases (see section 22). The restrictions imposed by the 2010 Act may apply to treaties which require implementation in domestic law as much as to those which do not, and to treaties which entail changes to rights already recognised in domestic law, as much as to those which do not. Save in the particular context of the EU Treaties (as to which see §23 below), the Crown's prerogative powers to enter into and withdraw from treaties have been limited only to the extent set out in the 2010 Act. There is no distinction to be drawn with the present case on the grounds that withdrawal from the treaties in question will affect rights incorporated into domestic law (contrary to §31 of FDE's Skeleton Argument).

(5) That standard constitutional practice plainly holds good for the EU Treaties. The ECA itself did not restrict the Government's power to withdraw from what was then the EEC, notwithstanding that that was a real possibility when the ECA was passed.[3] Parliament made no provision to control the use of Article 50 when giving effect to the Treaty of Lisbon, which introduced Article 50, in the European Union (Amendment) Act 2008 ("**the 2008 Act**"). That Act, and the

[3] Given that the Government of the day defeated an amendment which sought to require a referendum on entry into the EU (HC, Hansard, 18 April 1972, vol. 835, cols. 403-407), and the momentum for that referendum then caused one to be held three years later, it could hardly be maintained that Parliament did not contemplate the possibility of withdrawal.

European Union Act 2011 (**"the EUA 2011"**), have constrained various aspects of the Government's prerogative powers to act under the EU Treaties but have not constrained the Government's power to decide to withdraw from the EU Treaties altogether or to give effect to such a decision by giving notification under Article 50.

21. The above analysis does not, of course, prejudice Parliament's role in the process of the UK withdrawing from the EU. Parliament has many and varied means of holding the Government to account, and influencing its conduct, both prior to notification and during the process of negotiations which will follow from notification (including through debates, select committee scrutiny and the passage of legislation).[4] Parliament has already commenced work investigating the issues surrounding the process of withdrawal from the EU. Parliament would have to implement any elements of any withdrawal agreement which require implementation in domestic law and will consider amendment of the 1972 Act when the UK's membership of the EU comes to an end.

22. The principal authorities relied upon by the Lead Claimant - *The Case of Proclamations* (1610) 12 Co Rep 74, *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 and *Laker Airways v Department of Trade* [1977] QB 643 (dealt with further below) - arose in very different contexts (see further below). None of the cases demonstrates that, in the very different circumstances of the present case, the UK's flexible constitution prevents the Government from giving effect to the will of the people as directly expressed through the referendum without further recourse to Parliament.

23. Other claimant parties rely upon *Shindler* as having decided that Parliament needs to authorise withdrawal from the EU (eg FDE at §18 of its Skeleton Argument). The passage relied upon (in §19 of the judgment of Lord Dyson MR), which refers to a decision by Parliament to withdraw from the EU, was in response to a submission of the claimant in that case, recorded in §18, which included the proposition that "*Parliament does not need the mandate of a specific referendum to give it the power to pass legislation mandating the withdrawal of the UK from the EU*". There is no dispute that Parliament could pass legislation mandating, or simply authorising, the withdrawal of the UK from the EU. The issue in the present case is whether Parliament must do so in order for the outcome of the referendum to be given effect, or whether it is open to the executive to do

[4] It would, of course, be open to Parliament to vote on resolutions regarding notification under Article 50(2) or indeed to pass legislation which inhibited or prevented the Government from proceeding to notify under Article 50(2). By way of example, the Terms of withdrawal from EU (Referendum) Bill, which is a Private Member's Bill and will have its second reading on 21 October 2016, would require the holding of a referendum to endorse the exit package proposed by the Government for withdrawal from the EU prior to the UK giving notification under Article 50.

so. That issue did not arise, was not the subject of any submissions and was not decided, in *Shindler*.[5]

III. Use of the prerogative power is not precluded by, or inconsistent with, the purposes of statute

a. Parliament has not curtailed use of the prerogative

24. Parliament has not made any provision such that the prerogative power to decide to withdraw from the EU Treaties, or to give notification pursuant to Article 50(2), has been abrogated or placed in abeyance or constrained. That is so, despite Parliament having had repeated opportunities to do so if it had considered it appropriate to do so. The Lead Claimant rightly does not suggest otherwise.[6] None of the parties address these various, compelling examples of Parliament leaving untouched the prerogative power to withdraw from the Treaties. On the contrary:

    (1) The ECA contains no express provision regulating any future decision to withdraw from the EEC Treaties (even though, as noted above, withdrawal was well within the contemplation of Parliament at the time of passing the ECA).

    (2) Section 12 of the European Parliamentary Elections Act 2002 required primary legislation to be passed before any treaty *increasing* the powers of the European Parliament could be ratified. (The same provision was made in section 6 of the European Parliamentary Elections Act 1978).

    (3) The 2008 Act, which incorporated the Lisbon Treaty, which introduced Article 50, imposed a number of Parliamentary controls over certain decisions made under the Treaties (see section 6). But no Parliamentary control was imposed in relation to Article 50. It can hardly be said that Parliament has been "*by-passed*" in the operation of Article 50, save by the choice of Parliament itself (cf Dos Santos Skeleton Argument, §33(6)).

[5] Mr Dos Santos also relies upon the recent report of the House of Lords Select Committee on the Constitution, *The Invoking of Article 50* (HL Paper 44) as supporting his position with regard to the necessary role of Parliament (Skeleton Argument, §35(3)). The Secretary of State agrees with Mr Dos Santos that the doctrine of Parliamentary privilege prevents any reliance being placed upon the Committee's conclusions and would add only that those conclusions are not in fact in accordance with the position of the claimant parties in this case. They were to the effect that Parliament could and should give approval to the triggering of Article 50 by a resolution of each House, rather than that primary legislation is legally required.

[6] Mr Pigney also concedes the point (Skeleton Argument, §35).

(4) The EUA 2011 contains a number of procedural requirements which apply in particular circumstances where prerogative powers might otherwise have been exercised to ratify amendments of the EU Treaties or to take steps under them. These requirements, *inter alia*, replaced section 6 of the 2008 Act. For example, under section 2, a treaty which amends the TEU or TFEU to confer a new competence on the EU may not be ratified unless the treaty is approved by an Act of Parliament and a referendum. Under section 8, a Minister of the Crown may not vote in favour of or otherwise support a decision under Article 352 TFEU unless one of sub-sections 8(3) to (5) is complied with in relation to the draft decision. Under section 9, certain notifications – under Article 3 of Protocol No. 21 to the TFEU and TEU on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice – cannot be given without Parliamentary approval. The EUA 2011 does not seek to regulate a decision to withdraw from the EU Treaties or to give notification under Article 50(2). Contrary to the argument of Mr Pigney (Skeleton Argument, §38), on ordinary principles of statutory construction it is a telling point against the claimant parties that Parliament restricted the treaty prerogative in respect of various provisions of the TEU and TFEU, but did not seek to restrict the Crown's freedom to decide to withdraw from the EU Treaties and to implement the procedure set out in Article 50 TEU.

(5) In Part II of the 2010 Act, Parliament made provision for it to exercise influence over ratification of a treaty by the Crown (subject to certain exceptions). It did not take over any prerogative powers in respect of treaty-making, still less the withdrawal or the start of the process of withdrawal.

(6) The 2015 Act, in the passing of which Parliament fully anticipated (and the electorate expected) that the Government would implement the outcome of the referendum, contained no restriction on the Government's use of the prerogative to effect that implementation, using the processes prescribed by Article 50.

25. In the absence of an express restriction on the Crown's powers to take action under the EU Treaties, the Courts will not imply any such restriction. That was the decision of the Divisional Court in *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* [1994] QB 552. In an argument which is closely analogous to that pursued in the present case, the claimant in *Rees-Mogg* submitted that the Government was not entitled to ratify the Protocol on Social Policy annexed to the Maastricht Treaty using prerogative powers because section 2(1) ECA would give the Protocol effect in domestic law, and only Parliament had the power to change domestic law. The argument was rejected for a number of reasons, the first of which was that neither the ECA nor any other statute was capable of imposing an implied restriction upon the Crown's treaty-

making power in relation to Community law. Lloyd LJ, giving the judgment of the Court, stated:

> *"We find ourselves unable to accept this far-reaching argument. When Parliament wishes to fetter the Crown's treaty-making power in relation to Community law, it does so in express terms, such as one finds in section 6 of the Act of 1978. Indeed, as was pointed out, if the Crown's treaty-making power were impliedly excluded by section 2(1) of the Act of 1972, section 6 of the Act of 1978 would not have been necessary. There is in any event insufficient ground to hold that Parliament has by implication curtailed or fettered the Crown's prerogative to alter or add to the E.E.C. Treaty."*

26. Mr Pigney seeks to argue that even though there has been no express statutory prohibition on the use of the prerogative to withdraw from treaties, the Court should nonetheless conclude that Parliament has "*occupied the field*" and excluded the prerogative by necessary implication (Skeleton Argument, §§30-62). It has already been noted above that the Divisional Court in *Rees-Mogg* held any restriction upon the Crown's prerogative powers in relation to the EU Treaties must be express. There are further obvious reasons why Mr Pigney's argument must be rejected:

(1) The concept of necessary implication is a narrow one. As Lord Hobhouse held in *R (Morgan Grenfell) v Special Commissioners of Income Tax* [2002] UKHL 21; [2003] 1 AC 563 at §45: "*A necessary implication is not the same as a reasonable implication…A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation*" (original emphasis).

(2) In the context of Parliament being taken to have "*occupied the field*" otherwise covered by the prerogative, that narrow approach requires a party to show that Parliament has legislated to cover the "*whole ground*" or has "*directly regulated*" the subject-matter: *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 526 *per* Lord Dunedin and 576 *per* Lord Parmoor. In the words of Lord Hope in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208 at §28: "*Where a complete and exhaustive code is to be found in the statute, any powers under the prerogative which would otherwise have applied are excluded entirely*" (emphasis added).

(3) Where Parliament has not adopted a "*monopoly*" of the prerogative power in issue, even where it has enacted legislation which did make provision in the same area, the

prerogative power remains available to the Crown: *R v Secretary of State for the Home Department, ex p Northumbria Police Authority* [1989] QB 26.

(4) Given these stringent tests, and the clear contrary indications from recent legislation of direct relevance to the EU Treaties, the examples of Mr Pigney come nowhere close to establishing a "*complete and exhaustive code*" for the exercise of the prerogative power to withdraw from those Treaties. The devolution legislation is addressed separately below, but it is impossible to understand how the Acts of Union or the Bill of Rights could sensibly be thought to have anything to say at all about prerogative powers in relation to the EU Treaties. If the legislation which specifically covers the Crown's relationship with the EU does not provide a necessary implication (indeed, it is to the contrary), then resort to the extremely general provisions of the Acts of Union and the Bill of Rights certainly cannot.

b. Notification not inconsistent with the ECA

27. The giving of notification under Article 50(2) would not be inconsistent with the object and purpose of the ECA and would not frustrate or substantially undermine the terms of that Act (cf Lead Claimant's Skeleton Argument, §3). Neither in the ECA, nor in any other statute, has Parliament evinced an intention that it would not be open to the Government to withdraw from the EU treaties in the ordinary way, pursuant to prerogative powers. Still less does any statute come close to providing that, having taken a valid decision that the UK should withdraw from the EU, the Government should be prevented from giving effect to that decision pursuant to the procedure laid down by the EU Treaties themselves.

28. In passing the 1972 Act, Parliament did not authorise the UK to join the then European Communities nor authorise the Crown to ratify the Community Treaties. Accession had already been agreed by the then Government, exercising prerogative powers to conduct foreign relations (albeit, as Mr Dos Santos points out in §19 of his Skeleton Argument, after supportive resolutions passed by both Houses of Parliament). Ratification is an international act on the international plane.[7] The Crown could have ratified the Accession Treaty by depositing the instrument of ratification in accordance with Article 2 of the Vienna Convention on the Law of Treaties, without any additional domestic step.[8] But

[7] See Article 2(1)(b) of the Vienna Convention on the Law of Treaties and Aust, *Modern Treaty Law and Practice* (2013, 3rd ed.), p.95: "*The most common misconception about ratification is that it is a constitutional process. It is definitely not.*".

[8] Although it is not the UK's usual practice, the UK has ratified treaties in international law without having first passed necessary domestic incorporating legislation. Two recent examples are the Articles of Association of the Asian Infrastructure Investment Bank (ratified on 3 December 2015) and the

fulfilment of the UK's obligations under the EEC Treaties, which included, critically, the application of EEC law in its domestic legal system, could only be achieved by the passage of domestic legislation. The ECA was, therefore, necessary to ensure compliance with the Treaties - but accession was agreed and ratification was then effected by the Crown in exercise of prerogative powers. The Lead Claimant is therefore wrong in submitting that the ECA is an exception to the dualist principle (Skeleton Argument, §47(1)). The ECA was not a "*constitutional requirement*" of ratification (Skeleton Argument, §12) and nor is it correct that "*the Accession Treaty could not be ratified until the 1972 Act had received Royal Assent*" (Dos Santos Skeleton Argument, §21). Rather, the UK's dualist system required an Act of Parliament in order to give effect in the UK's domestic legal system to the Crown's accession to, and ratification of, the Treaties.

29. Similarly, when new EU treaties have been adopted over the years (Single European Act, Maastricht, Nice, Lisbon etc.), the Government has agreed to the new treaties using prerogative powers and the ECA has subsequently been amended so as to include the new treaties in the list of EU Treaties in section 1 ECA to which domestic effect is given.[9] The Lead Claimant's criticism of that analysis (Skeleton Argument, §47(5)(b)) is misplaced. It is correct that the UK entered into each treaty using prerogative powers and without being authorised to do so by Parliament. Domestic legislation has then been amended prior to ratification of the relevant treaty but this was not a legal condition either of accession or of ratification. Rather, the UK's usual practice is to put the relevant domestic legislation in place at the point of ratification, in order to ensure that the UK can give effect to its international obligations in its domestic law. Moreover, even if it were the case that the passing of domestic legislation were, contrary to the above, found to be a "*constitutional requirement*" of English law in order to ratify the EU Treaties because of the particular terms of those Treaties, that would tell one nothing about what the constitutional requirements for withdrawal from those Treaties might be.

30. Whilst the ECA, as other legislation, might be said to assume that the UK remains a member of what is now the EU, there is no provision of the ECA, or any other statute, which requires the UK to remain a member of the EU or indeed which purports to regulate or circumscribe in any way the exercise of the prerogative to agree to, or withdraw from, EU-related treaties. Use of the prerogative to withdraw is circumscribed nowhere, either expressly or by necessary implication. By way of contrast, restrictions on

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Maritime Labour Convention (ratified 20 August 2013). How the UK approaches ratification will depend on all the circumstances, including the provisions of the treaty in question.

[9] A few examples are section 1 of the European Communities (Amendment) Act 1993; section 1 of the European Economic Area Act 1993; section 1 of the European Union (Accessions) Act 1994; section 1 of the European Communities (Amendment) Act 1998. In some instances, primary legislation was required because the new treaty enhanced the powers of the European Parliament (for example, the Treaty of Lisbon) and was accordingly caught by the specific legislative obligation set out in section 12 of the European Parliamentary Elections Act 2002 (and its 1978 Act predecessor).

certain uses of the prerogative have been enacted in legislation passed subsequently to the ECA, but these have been limited, and have not included any restriction on withdrawal (see above).

31. A decision to withdraw from the EU or to commence the process of withdrawal does not conflict with section 2(1) ECA. This gives effect to the UK's obligations under EU law, whatever they may happen to be at any particular point in time:

> *"2. General implementation of Treaties.*
>
> *(1) 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."*

As Elias LJ put it, in the rather different context of *Shindler*: "*The effect of section 2(1) [ECA] is to bind the UK to the rules of the club whilst it remains a member*" (§58). It does not conflict with section 2(1) for the UK to cease to be a member of the EU, either expressly or by necessary implication.

32. The Lead Claimant submits that section 2(1) ECA does not contemplate a situation in which there are no continuing EU rights at all because the UK has withdrawn from the EU (Skeleton Argument, §45(1)). But that situation would not conflict with the terms of section 2(1). There would simply be no rights etc. on which section 2(1) would bite.

33. In any event, notification of the European Council pursuant to Article 50(2), and the commencement of the formal process of withdrawal from the EU, does not bring about a situation in which the UK has no obligation to comply with EU law: only the actual withdrawal could do so. It remains a matter for negotiation with the EU and other Member States what the terms of the withdrawal will be, what the relationship with the EU will be following withdrawal, and what rights and obligations will flow from that relationship, the outcome of which negotiation cannot be known at this stage. In addition, Parliament may decide to maintain in domestic law certain rights and obligations of substantive equivalence to those in EU law regardless of what agreement is reached with the EU and any other states. Hence, notification under Article 50(2) does not "*pre-empt the decision of Parliament whether or not to retain EU law rights as currently given effect by the 1972 Act*" (cf Lead Claimant's Skeleton Argument, §5(3)), but rather will provoke and indeed require consideration by Parliament of whether or not to retain rights equivalent to those currently conferred pursuant to the ECA.

34. For the same reason, the present case does not fall within the statement in *The Case of Proclamations* (1610) 12 Co Rep 74 that "*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*" (cf Grounds, 17(2)). The commencement of the process of withdrawal from the EU does not itself change any common law or statute or any customs of the realm. Any such changes are a matter for future negotiations, Parliamentary scrutiny, and implementation by legislation. The statement is also too broad in any event, as is that in §64 of Mr Pigney's Skeleton Argument that the prerogative "*may not be used to modify or remove the rights of UK citizens*". There are cases which recognise that the exercise of the prerogative may incidentally modify individual rights: *Post Office v Estuary Radio Ltd* [1968] QB 740, CA. Similarly, the treaty prerogative will often impact or modify individual rights, such as where an unincorporated treaty on which individuals have relied or organised their affairs is renounced by the Crown.[10]

35. The legal process of withdrawal from the EU will follow a similar pattern as accession to the EEC. Negotiations will take place in exercise of the prerogative, and Parliament would have to implement any elements of the outcome which require implementation into domestic law. Parliament will also give consideration to making any necessary amendments to the ECA. Again, this is a standard incident of the UK's dualist approach to international law and of the way in which international legal obligations within the province of the Crown, and domestic statutory obligations within the province of Parliament, are reconciled.

36. Other examples may be found of the Crown withdrawing from international treaties, which it has implemented through or under primary legislation to give effect in domestic law to rights and obligations, without it being said that Parliament was first required to approve the renunciation of the treaty under prerogative powers. Double taxation treaties must be domestically implemented through secondary legislation to have effect upon the rights and liabilities of taxpayers, and are periodically renegotiated by the Crown. Such renegotiations involve terminating the existing treaty and enacting replacement secondary

[10] There are numerous examples of how this might arise. Agreements concerning categories of commercial debt are intended, without ever being incorporated in domestic law, to oblige states to prioritise repayment, or ensure payment on particular terms, to certain categories of creditor who will have organised their business affairs accordingly. Bilateral treaties concerning removal of visa requirements will, upon withdrawal, negatively impact upon the freedom of individuals to travel. More generally, an unincorporated treaty may affect an individual's rights through the principle that legislation, and the common law, is to be interpreted in accordance with the presumption that it was not intended to place the UK in breach of its obligations in international law: *R v Lyons* [2002] UKHL 44; [2003] 1 AC 976 at §27 per Lord Hoffmann. It has never been suggested that that principle could in any way prevent the Crown renouncing those international law obligations.

legislation.[11] Parliament does not authorise the termination of an existing treaty, notwithstanding the effect that a change in the international rules is intended to produce on the rights and liabilities of taxpayers. Still less does it authorise the Crown to commence negotiations on changes to existing treaties. Its role is to scrutinise the secondary legislation implementing a new treaty once it has been agreed by the Crown. The contrary analysis in the Lead Claimant's Skeleton Argument (§47(5)) misses, or ignores, the critical point, which is that section 788 of the Income and Corporation Taxes Act 1988 (**"the 1988 Act"**) authorised neither the termination of an existing treaty nor the commencement of negotiations on changes to an existing treaty nor the agreement of a new treaty. The fact that, under section 788(10), the House of Commons (and not, it is to be noted, Parliament) had a role in scrutinising a new treaty once it had been agreed does not affect the point made.

37. Further, the Crown has repeatedly acted on the international plane, pursuant to the EU Treaties, to agree to new EU legislation which will have the effect of altering rights and obligations in our domestic legal system. Those actions are now subject to limited statutory restrictions, notably in the EUA 2011, but absent such restrictions it is no obstacle to the Crown exercising prerogative powers to act *vis-à-vis* the EU that such actions may lead (or even must lead) to changes in rights and obligations which are currently given effect in domestic law. That was the *ratio* of *Rees-Mogg*: the ECA does not impliedly restrict the prerogative power to agree to new provisions of EU law which add to or amend existing rights.

c. *Laker Airways*

38. The Lead Claimant's challenge is said to be made out, principally, by reference to two authorities: *Laker Airways* and *ex parte Fire Brigades Union.* Neither can be directly applied to the present context.

39. Mr Laker wished to operate "Skytrain", a budget airline to fly passengers across the Atlantic. In order to achieve this, two things had to happen. First, he needed to obtain a licence from the Civil Aviation Authority (**"the Authority"**) under the Civil Aviation Act 1971 (**"the CAA"**). The CAA contained detailed provisions relating to the basis on which, and the process through which, such licences were to be granted. Section 4 of the

[11] See, for example, the termination and replacement of the Arrangement between the UK and Malta for the Avoidance of Double Taxation 1974 (implemented by the Double Taxation Relief (Taxes on Income) (Malta) Order 1975 (SI 1975/426)) with the 1995 Agreement scheduled to the Double Taxation Relief (Taxes on Income) (Malta) Order 1995 (SI 1995/763); and the termination and replacement of the Convention between the UK and South Africa for the Avoidance of Double Taxation 1969 (implemented by the Double Taxation Relief (Taxes on Income) (South Africa) Order 1969 (SI 1969/864)) with 2002 Convention scheduled to Double Taxation Relief (Taxes on Income) (South Africa) Order 2002 (SI 2002/3138).

CAA conferred powers on the Secretary of State to revoke licences in specified circumstances. Secondly, the UK Government had to "*designate*" Skytrain as an air carrier under an international treaty between the UK and the USA, the Bermuda Agreement, under which those nations' Governments mutually agreed to permit carriers to fly into and out of their countries. Mr Laker was granted a licence by the Authority, and the Government designated Skytrain under the Bermuda Agreement. The Secretary of State subsequently made a change to his aviation policy, which involved deciding that Skytrain should not be able to operate. But instead of seeking to use his powers under the CAA (such as in section 4), or seeking to amend the CAA through legislation, he decided instead to withdraw Skytrain's designation under the Bermuda Agreement, which had the practical effect which he wished to achieve and to issue new guidance to the Authority to the effect that Laker's licence should be revoked.

40. The Court of Appeal held that the new guidance was unlawful, contrary to the CAA 1975, and could not be relied upon by the Authority as a basis for revoking Laker's licence. The Secretary of State argued, nevertheless, that the Government was entitled to withdraw Laker's designation under the Bermuda Agreement, in exercise of prerogative powers, the exercise of which was not justiciable. As Roskill LJ explained (at 718G):

> *"The sole question is whether the relevant prerogative power has been fettered so as to prevent the Crown seeking by use of the prerogative to withdraw the plaintiffs' designation under the Bermuda Agreement and thus in effect achieve what it is unable lawfully to achieve by securing the revocation by the Authority of the plaintiffs' air transport licence".*

41. Roskill LJ explained that the relevant principles upon which the Courts have to determine whether prerogative power has been fettered by statute were "*plain*" and had been "*exhaustively considered*" by the House of Lords in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, including in the speech of Lord Parmoor (at 721E):

> *"The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words [or] by necessary implication … I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced".*

42. The Court of Appeal examined the particular statutory framework in question (the CAA). Having regard to that framework, they decided that the prerogative was not available to the Secretary of State to stop Skytrain, because the CAA had specified the circumstances in which and process through which it could be stopped, for example using the Secretary of State's powers under section 4 of the CAA (*per* Roskill LJ at 722F-G, *per* Lawton LJ at 728B, and *per* Lord Denning MR at 706H-707B). On a proper construction of the

CAA, Parliament had, in that case, intended to fetter the use of the prerogative (per Roskill LJ at 722H, per Lawton LJ at 728C-D).

43. In the present case, by contrast, there is no legislation (either in the form of the ECA, or otherwise) which has "*fettered*" the Government's ability to use the prerogative to give effect to the will of the British people as expressed through the referendum. As explained above, no legislation contains any such fetter either expressly, or by necessary implication. There is no legislation other than the 2015 Act which purports to regulate the process by which the UK may decide to withdraw from the EU. Save in the 2015 Act, those matters have not been "*directly regulated*" so as to come within the principle expressed in *Laker Airways*.

d. ***Ex parte Fire Brigades Union***

44. The Criminal Justice Act 1988 (**"CJA 1988"**) provided for a Criminal Injuries Compensation Scheme. By section 171 CJA 1988, this was to come into force "on such day as the Secretary of State may appoint". However, the Secretary of State did not bring the statutory scheme into force. Instead, in exercise of prerogative powers, he replaced an existing non-statutory scheme with a new non-statutory tariff scheme.

45. A majority of the House of Lords accepted the argument of the claimant that it was not permissible for the Secretary of State to use prerogative powers to bring in the new non-statutory tariff scheme. Lord Browne-Wilkinson said, at 552D-G:

> *"… it would be most surprising if … 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 even though the old scheme has been abandoned … 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. But under the principle in Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508, if Parliament has conferred on the executive statutory powers to do a particular act, that act can only thereafter be done under the statutory power so conferred: any pre-existing prerogative power to do the same act is pro tanto excluded".*

46. Lord Browne-Wilkinson held that by "*introducing the tariff scheme he debars himself from exercising the statutory power for the purposes and on the basis which Parliament intended*" (p.554G). Lord Nicholls held that the Secretary of State had "*disabled himself from properly discharging his statutory duty in the way Parliament intended*" (p.578F).

47. The *ratio* of this case, following *De Keyser's Royal Hotel*, is that the Crown may not use prerogative powers to do a particular act where Parliament has prescribed statutory powers for the doing of that act. Again, this has no application in the present case. There is no legislative scheme governing withdrawal from the EU which the Government would be undermining by proceeding under the prerogative. The use of the prerogative to provide notification under Article 50(2) would not frustrate the will of Parliament in any legislation. Indeed, consideration of the broader statutory framework in the present case, including the EUA 2011 and the 2015 Act, confirms that there is no constitutional conflict between statute and the prerogative (see above). These points, taken together, also deal with the argument from Parliamentary sovereignty advanced by Mr Dos Santos (Skeleton Argument, §§7-11) which adds very little to the reliance of the Lead Claimant on *Laker Airways* and *Fire Brigades Union*. On the correct analysis, Parliamentary sovereignty would not be compromised by notification under Article 50(2).

e. Other statutory rights cited by the claimant parties

48. The Lead Claimant and other parties cite examples of particular rights said to flow from the UK's membership of the EU. Contrary to the emphasis of FDE, the legal arguments do not differ whether those rights attach to persons within the UK or outside of it. Many of these rights, such as those relied upon by the AB Parties, are examples of those which will require consideration in the light of the Article 50 negotiations. No doubt, until those negotiations have been concluded some rights and issues of status will be the subject of uncertainty, as the AB Parties and FDE suggest. That is not, however, a matter of legal complaint. It will be a matter for Parliament, in the light of those negotiations, to consider the most appropriate resolution of matters such as the immigration status of EU nationals in the UK after withdrawal. The AB Parties assert that the issue of a notification "*will have the effect of changing their residence status for the foreseeable future*" (Skeleton Argument, §15), with the implication of immediate liability to criminal prosecution. That is legally incorrect: the UK remains a Member State of the EU subject to EU law until the point of withdrawal.[12]

49. It is not necessarily the case that all of the provisions cited by the Lead Claimant (or every provision of primary legislation which was passed to implement EU law) could serve no purpose upon exit from the EU. Whether or not they should do so is a matter of policy and will be related to the outcome of the negotiations. For example, the Financial Services and Markets Act 2000 could continue to provide for the grant of authorisation to

[12] Nor is it accurate to suggest that notification under Article 50(2) will "*tend to force*" children with British nationality to leave the UK (Skeleton Argument at §26). The AB Parties ignore, for example, the interlocking application of Article 8 ECHR, section 117B of the Nationality, Immigration and Asylum Act 2002 and applicable case law such as *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, which provide significant protections for both British national children and their carers.

firms based in the EEA. The Communications Act 2003 could continue to require Ofcom to act in accordance with EU law, as per section 4. The Competition Act 1998 could continue to require courts to apply competition law consistently with EU competition law under section 60. Mr Dos Santos argues (Skeleton Argument, §33) that any rights retained following withdrawal would be on a different legal basis but that is a purely formal objection.

50. Certain provisions of primary legislation may require amendment or repeal upon the exit of the UK from the EU, where they are based on the assumption that the UK is a member of the EU. But the existence of such rights is in no way inconsistent with the Government's providing notification under Article 50(2). It is not contrary to Parliament's providing for rights which *assume but do not require* the UK's membership of the EU for that membership to cease. And, as above, the act of notification would not itself cause such rights to cease to apply.

51. The broad range of statutory provisions and EU law rights which are referred to by the various parties underlines the unreality of the argument that primary legislation which takes or authorises the decision to withdraw from the EU and/or the issuing of notification to the European Council could resolve all of these points. Parliament would be required carefully to consider what amendments and/or repeals are required in respect of the various legislative provisions which incorporate, adopt or refer to EU law. That is, at the least, inherent in the reliance by various parties on the principle of legality, which would apply to such legislation and require express wording in respect of any right that is currently enjoyed but will be modified following withdrawal of the UK from the EU. That exercise cannot sensibly be carried out before negotiations have even begun and were it required would inevitably frustrate the ability of the Crown to give effect to the will of the people.

52. It follows that the Lead Claimant's submissions run contrary to the terms of the ECA itself, to authority and to longstanding constitutional practice.

IV. The claim is not justiciable

53. The relief sought by the Lead Claimant, which is designed to secure that the decision made under Article 50(1) that the UK should withdraw from the EU might not be implemented at all, seeks, in substance, to attack that prior decision. Mr Dos Santos, Mr Pigney and FDE do so expressly (albeit only the latter appears to recognise that that decision has been taken).[13]

[13] Contrary to the assertion of FDE (Skeleton Argument at §29), the Secretary of State did not concede in the DGR the amenability to judicial review of the decision to withdraw from the EU. He explained that a claim which in substance attacked the decision to withdraw should be brought as such

54. The making of and withdrawal from treaties are matters exclusively for the Crown in the exercise of its prerogative powers, and are not justiciable in the Courts: *Rustomjee v R* (1876) 2 QBD 69, 74 *per* Lord Coleridge CJ; *CCSU v Minister for the Civil Service* [1985] AC 374 ("*CCSU*"), 398 and 418 *per* Lord Roskill; also *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, 553D *per* Lord Browne-Wilkinson. These are areas in which there are no judicial or manageable standards against which to judge the Crown: *Buttes Gas and Oil Co v Hammer* [1982] AC 888, 938 *per* Lord Wilberforce. As Lord Roskill explained in *CCSU* at 418B-C:

> *"Prerogative powers such as those relating to the making of treaties … are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded …".*

55. The decision to join the EEC (as it then was) was a non-justiciable act of the prerogative. Hence, in *Blackburn v Attorney General* [1971] 1 WLR 1037, Lord Denning MR stated (at 1040):

> *"The treaty-making power of this country rests not in the courts, but in the Crown; that is, Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treaty, even a treaty of such paramount importance as this proposed one, they act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts."*

See also *McWhirter v Attorney General* [1972] CMLR 882 at §§8-10. The decision to withdraw from the EU Treaties - including, in the present case, the decision to give the British people the opportunity to decide in the referendum whether the UK should withdraw from the EU Treaties and then to implement the outcome of the referendum - can be no different. It is a matter of high, if not the highest, policy; a polycentric decision based upon a multitude of domestic and foreign policy and political concerns, and the giving of effect to the directly expressed will of the British people, on which the Courts are ill-suited to decide.

56. The act of notification prescribed by Article 50(2) in order to give effect to that decision must equally be non-justiciable. Were the position otherwise, it would be possible for a claimant to frustrate the implementation of a decision which is itself not justiciable. The position is rather that (a) an act of notification under Article 50(2) pursuant to the prerogative takes place and has effect only on the international law plane, and (b) cannot

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and that it would be subject to the fatal objections explained later in the DGR, including lack of justiciability (§10).

be challenged in the domestic courts, being a necessary step in implementation of a non-justiciable decision.

57. There are cases in which a specific impact upon a specific individual may require the Court to examine more closely an area which would ordinarily be non-justiciable, but those situations cannot be "*abstract*": *Shergill v Khaira* [2014] UKSC 33; [2015] AC 359 at §43. Yet this challenge could hardly be more abstract. There is presently no way of knowing precisely which, if any, rights or obligations will be removed, varied or added to by the process of withdrawing from the EU. The notification has not yet been given. The eventual outcome of the Article 50 process will be dependent upon the negotiations in which the Government will engage. As a result, this case is one which falls squarely within the "*forbidden area*" explained in *Shergill* at §42 and exemplified by *CCSU*.

58. The Lead Claimant's response to the above analysis wholly ignores the relationship between Article 50(1) and Article 50(2) explained above. The Lead Claimant refers to examples of cases where the Courts have been prepared to consider limits upon the availability of the prerogative (Skeleton Argument, §50) but points to no case in which the Courts have been prepared to entertain a claim such as the present, which is targeted at, and seeks to frustrate, a decision to withdraw from an international treaty. Still less is there authority for the justiciability of a decision to implement the democratic outcome of a referendum. The claim does not arise merely "*in the context of*" a matter of high policy, as the Lead Claimant puts it (Skeleton Argument, §50(2)) but squarely, and impermissibly, attacks the decision of high policy which has been taken. The example relied upon by Mr Dos Santos (Skeleton Argument, §12) underlines this point; the scenario referred to in *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin) ("***Wheeler 1***") required breach of a clear provision of primary legislation restricting prerogative powers of ratification for the Court to contemplate that the treaty-making prerogative might be impeachable in the courts.

59. Further, and contrary to §50(5) of the Lead Claimant's Skeleton Argument, *Rees-Mogg* does not establish that the issues raised in the present case are justiciable. The principal argument in *Rees-Mogg* was that the ratification of a Protocol to the Maastricht Treaty would contravene statutory restrictions which Parliament had expressly imposed upon the power of the executive to ratify EC treaties which enhanced the powers of the European Parliament (see the Court's conclusions at p.565). The interpretation of the relevant statute was plainly a matter for the courts. No such statutory constraints are relied upon by the Lead Claimant in the present case (no doubt because all relevant statutory provisions point in the other direction: see above). When considering a further submission, to the effect that ratification of the Maastricht Treaty would impermissibly alienate prerogative powers, the Court acknowledged that it was open to it to reject that submission on grounds of non-justiciability but it proceeded in the event to assume justiciability and reject the submission on its merits (pp. 570D-571A).

V. The relief sought is constitutionally impermissible

60. As set out in Section 7 of the Claim Form, the Lead Claimant seeks a "*declaration that it would be unlawful for the Defendant or the Prime Minister on behalf of Her Majesty's Government to issue a notification under Article 50 [TEU] to withdraw the United Kingdom from the European Union without an Act of Parliament authorising such notification*." Mr Pigney seeks the same relief and Mr Dos Santos claims relief in materially the same terms.

61. The practical effect of the Court making the declaration sought would be that the Government could not give effect to the will of the people, as expressed through the referendum, unless the Secretary of State were to introduce a Bill into Parliament in order that elected, and non-elected, members of Parliament should decide for themselves whether the will of the people should be respected, and that Bill were to become an Act in terms which permitted the notification prescribed by Article 50(2) to be given.

62. It is well-established that the Court may not grant relief which trespasses on proceedings in Parliament. In litigation not dissimilar to the present claims, it was asserted in *Wheeler 1* that the Government was obliged, because of a failure to comply with a legitimate expectation, to legislate to provide for a referendum on the Lisbon Treaty. The Divisional Court held, at §49, that no such relief could be sought, in terms which squarely apply to these proceedings:

> *"In our judgment, it is clear that the introduction of a Bill into Parliament forms part of the proceedings within Parliament. It is governed by the Standing Orders of the House of Commons (see, in particular, standing order 57(1)). It is done by a Member of Parliament in his capacity as such, not in any capacity he may have as a Secretary of State or other member of the government. Prebble (cited above) supports the view that the introduction of legislation into Parliament forms part of the legislative process protected by Parliamentary privilege. To order the defendants to introduce a Bill into Parliament would therefore be to order them to do an act within Parliament in their capacity as Members of Parliament and would plainly be to trespass impermissibly on the province of Parliament. Nor can the point be met by the grant of a declaration, as sought by the claimant, instead of a mandatory order. A declaration tailored to give effect to the claimant's case would necessarily involve some indication by the court that the defendants were under a public law duty to introduce a Bill into Parliament to provide for a referendum. The practical effect of a declaration would be the same as a mandatory order even if, in accordance with long-standing convention, it relied on the executive to respect and give effect to the decision of the court without the need for compulsion."*

63. The same conclusion was reached in *R (UNISON) v Secretary of State for Health* [2010] EWHC 2655 (Admin) at §§8-11 *per* Mitting J. In *R (Wheeler) v Office of the Prime*

Minister [2014] EWHC 3815 (Admin); [2015] 1 CMLR 46 ("***Wheeler 2***"), the claimant argued that the Government was compelled by primary legislation and by legitimate expectation to hold a vote in the House of Commons before notifying the European Council of its intention to opt in to the European Arrest Warrant Framework Decision. The Divisional Court again held, at §46, that such relief was impermissible:

> *"It is said that to provide relief on this basis is not an interference with the work of Parliament; it merely proscribes executive action in the absence of Parliamentary approval. In substance, however, the claim is that, unless the House of Commons organises its business in a particular way, and arranges for a vote in a particular form, the courts must intervene and either grant a declaration or issue an order prohibiting the government from taking certain steps unless and until there is such a vote. In my judgment, that would involve the courts impermissibly straying from the legal into the political realm."*

The present claim, similarly, is in substance that unless the Secretary of State introduces a Bill into Parliament, which is then passed in appropriate terms, the Court will prohibit the Government – whether by declaration or mandatory order – from taking the step which is required of the UK in order to implement the outcome of the referendum.

64. The Lead Claimant's response to the above is to make the very same argument that was rejected in *Wheeler 2*, namely that the relief sought does not, by itself, compel or oblige the Secretary of State introduce legislation in Parliament or take other action but merely prohibits the Secretary of State from taking action unless such legislation is introduced, and passed (Skeleton Argument, §51). Just as in *Wheeler 2*, this would involve the Court impermissibly straying from the legal into the political realm; indeed more so given that the Court would, in this case, be enabling the claimants and other parties in their endeavours to frustrate the will of the people, as directly expressed in the referendum.

VI. Additional Points Raised

a. Section 18 of the EUA 2011

65. Mr Pigney places considerable reliance on the terms of section 18 of the EUA 2011 (Skeleton Argument, §37). However, section 18 adds nothing to the analysis; in the words of the Lead Claimant (Skeleton Argument, fn3), it merely "*confirms what was already legally obvious*", that EU law takes effect in domestic law because of the ECA, and not because of any overriding authority of EU law itself. It does not alter the effect of the ECA or tell one anything at all about the process of withdrawal.

b. Constitutional Statutes and the Principle of Legality

66. The designation of the ECA as a constitutional statute adds nothing in these circumstances. The designation was set out by Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151 to restrict the ordinary application of the doctrine of implied repeal. No issue as to implied repeal arises here and there is no basis for the use of the designation by analogy as an absolute bar to the exercise of prerogative powers (contrary to the Lead Claimant's Skeleton Argument, §21). Parliament will consider amendment of the ECA in the light of the UK's membership of the EU coming to an end. The Article 50 notification process does not impinge on that role of Parliament.

67. Similarly, the reliance of parties on the principle of legality and the case law on that principle does not assist. The principle of legality is a principle of statutory interpretation: that Parliament is presumed not to have legislated contrary to fundamental rights unless it is clear that it intended to do so (see *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539, 587-589; *AKJ v Commissioner of Police for the Metropolis* [2013] EWCA Civ 1342; [2014] 1 WLR 285, §28). It has no purchase on the exercise of prerogative treaty powers and there is no authority for such a proposition.

68. The AB Parties do not, in their Skeleton Argument, pursue the reliance placed in their Summary Grounds on the Human Rights Act 1998. The point was a bad one. No explanation has been given as to what Convention rights are relevantly engaged; how it is said that the mere commencement of withdrawal (or a decision to withdraw) could interfere with any such rights; why any interference would not be justified by the implementation of the referendum outcome; or why the Convention would require Parliamentary involvement at all. Indeed, given the application of the Human Rights Act to primary legislation, the logic of the AB Parties' case would be that even primary legislation could not compatibly secure withdrawal.

c. The Devolution Legislation

69. Mr Pigney raises the impact of the devolution legislation. The conduct of foreign relations is a matter expressly reserved such that the devolved legislatures have no competence over it.

    (1) In Scotland, see §7(1) of Schedule 5 to the Scotland Act 1998: "*International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters*".

    (2) In materially the same terms for Northern Ireland, see §3 of Schedule 2 to the Northern Ireland Act 1998.

(3) In Wales, foreign relations is a not a matter positively allocated to the Welsh Assembly under s. 108 and Schedule 7 to the Government of Wales Act 2006.

These reservations are fatal to reliance on the devolution legislation as giving rise to the necessary implication that the Crown cannot exercise its treaty prerogative. Far from occupying the field, the devolution legislation deliberately declines to enter the field at all.

70. That there are provisions in the devolution legislation which envisage the application of EU law is undoubtedly correct but adds nothing to the arguments already addressed. That legislation assumes that the UK is a member of the EU but does not require it to be so and does not become unworkable as a result of the commencement of the process of withdrawal. It underlines that Parliament will have an important role in considering amendments to legislation during the process of withdrawal, but says nothing about the international relations function of the Crown under Article 50 TEU.[14]

71. Mr Pigney also submits that the executive commencing the process of withdrawal from the EU will contravene the Acts of Union, which permit changes to private law in Scotland to be made only by the UK Parliament (Skeleton Argument, §51-53). That is a misinterpretation of the effect of the Acts of Union – Scots private law is not only a matter for the UK Parliament – and in any event (a) commencing the process of withdrawal from the EU will not itself alter Scots private law and (b) the extent to which private law rights arising from EU law will continue in existence in Scotland after the UK has left the EU will depend upon decisions to be taken by the UK Parliament and the Scottish Parliament in the light of the outcome of negotiations to be conducted pursuant to Article 50(3).

d. International Obligations

72. The AB Parties continue to assert that Parliamentary approval must be provided for notification under Article 50 in order to comply with the UK's international law obligations under the UN Convention on the Rights of the Child (Skeleton Argument, §§18-28). The Secretary of State does not accept that an unincorporated treaty has any relevant impact in the circumstances of this case. However, more significant is the failure of the AB Parties to provide any explanation as to why any duty to consider the best interest of children requires the decision to withdraw to be taken by Parliament. Unsurprisingly, nothing in the UN Convention says or implies any such thing. The argument adds nothing to the content of this litigation.

[14] The Secretary of State does not address the observations of Mr Pigney concerning the Belfast Agreement (Skeleton Argument, §44). The relevance or otherwise of the Belfast Agreement to Article 50 TEU is to be considered by the High Court of Northern Ireland on 4-5 October 2016.

Conclusion

73. It is submitted that the claim should be dismissed.

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30 September 2016