Weekly Law Reports (ICLR)/2017/Volume 2/Regina (Miller and another) v Secretary of State for Exiting the European Union (Birnie and others intervening); In re McCord (Lord Advocate and others intervening); In re Agnew and another (Lord Advocate and others intervening) - [2017] 2 WLR 583

Regina (Miller and another) v Secretary of State for Exiting the European Union (Birnie and others intervening); In re McCord (Lord Advocate and others intervening); In re Agnew and another (Lord Advocate and others intervening)

Supreme Court

[2016] EWHC 2768 (Admin)

[2017] UKSC 5

2016 Oct 13, 17, 18; Nov 3

2016 Dec 5, 6, 7, 8; 2017 Jan 24

Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR, Sales LJ

Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Mance, Lord Kerr of Tonaghmore, Lord Clarke of Stone-cum-Ebony, Lord Wilson, Lord Sumption, Lord Reed, Lord Carnwath, Lord Hughes, Lord Hodge JJSC

*Crown — Minister — Exercise of prerogative power — Notification of decision by United Kingdom to withdraw from **European Union** — Whether ministers entitled to give notice in exercise of royal prerogative — Whether requirement of primary legislation to authorise notification — **European** Communities Act 1972 (c 68), ss 1, 2 — EU Treaty, art 50EU*

*Devolution — Northern Ireland — Devolution issue — United Kingdom intending to withdraw from **European Union** — Whether requirement for prior consent of Northern Ireland Assembly and/or majority of people of Northern Ireland — Northern Ireland Act 1998 (c 47), ss 1, 75*

The **European** Communities Act 1972[1] made provision for the enlargement of the **European** Communities, which subsequently became the **European Union**, to include the United Kingdom. The Act provided, in particular by sections 1 and 2, for **European Union** law to be introduced into United Kingdom domestic law as a primary source of law whereby all rights, powers, liabilities, obligations and restrictions which from time to time arose by or under the treaties, were, without further enactment, implemented and given legal effect. In 1973 the United Kingdom became a member **state** of the **European** Communities. In 2007 the member **states** made provision by article 50EU of the EU Treaty[2] for any member **state** to withdraw from the **Union**

in accordance “with its own constitutional requirements” by serving notice of that intention with the consequence that the governing treaties would cease to apply within two years thereafter. Following the enactment of the **European Union** Referendum Act 2015 and the subsequent referendum held in June 2016, the Government proposed to serve notice of withdrawal from the **Union** under article 50EU on the basis that it had power under the Royal Prerogative to do so. The claimants sought judicial review by way of a declaration against the **Secretary** of **State** that notification could not lawfully be made without authorisation from an Act of Parliament, on the ground that, since the prerogative could not be used to change

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domestic law of the United Kingdom and since the effect of withdrawal would be to remove rights currently enjoyed under that law, there was no power under the prerogative to give notification under article 50EU, which was irreversible. The Divisional Court of the Queen’s Bench Division upheld the claimants’ claims. The **Secretary** of **State** appealed. In judicial review proceedings in Northern Ireland a number of applicants challenged the Government’s decision to give notice of withdrawal under article 50EU. The judge refused the applications but, at the direction of the Attorney General for Northern Ireland, referred four issues for the determination of the Supreme Court. On the applicants’ appeals the Court of Appeal in Northern Ireland referred a further issue to the Supreme Court for determination. Those issues raised questions as to (i) the effect of sections 1 and 75 of the Northern Ireland Act 1998[3], (ii) whether primary legislation was required before notice under article 50EU could be given, and (iii) whether consent was required of the Northern Ireland Assembly and/or of a majority of the people of Northern Ireland before notice could be served.

On the appeal and on the references—

Held, (1) dismissing the appeal (Lord Reed, Lord Carnwath and Lord Hughes JJSC dissenting), that the **European** Communities Act 1972 authorised a dynamic process by which, without further primary legislation, **European Union** law became a source of United Kingdom law and took precedence over all domestic sources of law including statutes and, in consequence, so long as the Act remained in force it constituted **European Union** law as an independent and overriding source of domestic law; but that, consistently with the principle of Parliamentary sovereignty, the 1972 Act could be repealed like any other statute; that withdrawal, consequent on notification, from the **European Union** would involve fundamental change to the United Kingdom’s constitutional arrangements with the result that **European Union** rights enjoyed by United Kingdom residents would be affected; that the prerogative powers to make and unmake treaties, which operated on the international plane, could not be exercised in relation to the **European** treaties in the absence of domestic sanction in an appropriate statutory form; that although, with clear wording, Parliament when enacting the 1972 Act could have authorised ministers to withdraw from the **Union**, it had not done so and the provisions of the Act indicated that ministers did not have that power; that having regard to the terms and effect of that Act, ministers could not invoke the prerogative in order to give notice of withdrawal; that the 2016 referendum had not changed the law so as to enable ministers to withdraw without prior legislation; and that, accordingly, ministers required the authority of primary legislation before they could take that course (post, paras *60*, *65*, *81–83*, *87*, *88*, *95*, *124*, *152*).

(2) That, although the devolution statutes had been enacted on the basis that the United Kingdom would be a member of the **European Union**, they did not require the United Kingdom to remain so; that relations with the **European Union**, as with other matters involving foreign affairs, were reserved to the United Kingdom Government

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and Parliament; that the decision to withdraw from the **Union** was not a function of the **Secretary** of **State** for Northern Ireland within the meaning of section 75 of the Northern Ireland Act 1998 and section 1 of that Act did not regulate any change in the constitutional status of Northern Ireland other than the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland; that, in any event, none of the devolved legislatures had a veto as to whether the United Kingdom should withdraw from the **Union**; and that, in so far as they had not been superseded by the court’s judgment on the appeal, the questions

referred would be answered accordingly (post, paras *129–130*, *133–135*, *150*, *152*, *242*, *243*, *282*).

Decision of the Divisional Court of the Queen's Bench Division [2016] EWHC 2768 (Admin); post, p 591, affirmed.

The following cases are referred to in the judgments of the Supreme Court:

Attorney General v De Keyser's Royal Hotel Ltd[1920] AC508, HL(E)

Attorney General v Jonathan Cape Ltd[1976] QB752; [1975] 3WLR606; [1975] 3All ER484

Blackburn v Attorney General[1971] 1WLR1037; [1971] 2All ER1380, CA

Brasserie du Pêcheur SA v Federal Republic of Germany(Joined Cases C-46/93 and C-48/93)EU:C:1996:79; [1996] QB404; [1996] 2WLR506; [1996] All ER (EC)301; [1996] ECRI-1029, ECJ

Bulmer (HP) Ltd v J Bollinger SA[1974] Ch401; [1974] 3WLR202; [1974] 2All ER1226, CA

Burmah Oil Co (Burma Trading) Ltd v Lord Advocate[1965] AC75; [1964] 2WLR1231; [1984] 2All ER348, HL(Sc)

Costa v Ente Nazionale per l'Energia Elettrica (ENEL)(Case 6/64)EU:C:1964:66; [1964] ECR585, ECJ

Council of Civil Service ***Unions*** *v Minister for the Civil Service*[1985] AC374; [1984] 3WLR1174; [1985] ICR14; [1984] 3All ER935, HL(E)

*Friends of the Earth v Canada (Governor in Council)*2008 FC 1183; [2009] 3FCR201

Higgs v Minister of National Security[2000] 2AC228; [2000] 2WLR1368, PC

Imperial Tobacco Ltd v Lord Advocate[2012] CSIH 9; 2012SC297, Ct of Sess

JR's Application for Judicial Review, In re[2016] NICA 20, CA(NI)

Joyce v Director of Public Prosecutions[1946] AC347; [1946] 1All ER186, HL(E)

Köbler v Republick Österreich(Case C-224/01)EU:C:2003:513; [2004] QB848; [2004] 2WLR976; [2004] All ER (EC)23; [2003] ECRI-0239, ECJ

Laker Airways Ltd v Department of Trade[1977] QB643; [1977] 2WLR234; [1977] 2All ER182, CA

Lee v McArthur[2016] NICA 55, CA(NI)

Macarthys Ltd v Smith[1979] 1WLR1189; [1979] ICR785; [1979] 3All ER325, CA

McWhirter v Attorney General[1972] CMLR882, CA

Madzimbamuto v Lardner-Burke[1969] 1AC645; [1968] 3WLR1229; [1968] 3All ER1561, PC

Marleasing SA v La Comercial Internacional de Alimentación SA(Case C-106/89)EU:C:1990:395; [1990] ECRI-4135, ECJ

NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastigen(Case 26/62)EU:C:1963:1; [1963] ECR1, ECJ

Pham v ***Secretary*** *of* ***State*** *for the Home Department (Open Society Justice Initiative intervening)*[2015] UKSC 19; [2015] 1WLR1591; [2015] 3All ER1015, SC(E)

Post Office v Estuary Radio Ltd[1968] 2QB740; [1967] 1WLR1396; [1967] 3All ER679, CA

Proclamations, Case of(1610) 12Co Rep74

R *v* ***Secretary*** *of* ***State*** *for Foreign and Commonwealth Affairs, Ex p Rees-Mogg*[1994] QB552; [1994] 2WLR115; [1994] 1All ER457, DC

R *v* ***Secretary*** *of* ***State*** *for the Home Department, Ex p Fire Brigades* ***Union***[1995] 2AC513; [1995] 2WLR464; [1995] 2All ER244, HL(E)

R *v* ***Secretary*** *of* ***State*** *for the Home Department, Ex p Simms*[2000] 2AC115; [1999] 3WLR328; [1999] 3All ER400, HL(E)

R *v* ***Secretary*** *of* ***State*** *for Transport, Ex p Factortame Ltd (No 2)*(Case C-213/89)EU:C:1990:257; [1991] 1AC603; [1990] 3WLR818; [1991] 1All ER70; [1990] ECRI-2433, ECJ and HL(E)

R *v* ***Secretary*** *of* ***State*** *for Transport, Ex p Factortame Ltd (No 5)*[2000] 1AC524; [1999] 3WLR1062; [1999] 4All ER906, HL(E)

R *(Bancoult) v* ***Secretary*** *of* ***State*** *for Foreign and Commonwealth Affairs (No 2)*[2008] UKHL 61; [2009] AC453; [2008] 3WLR955; [2008] 4All ER1055, HL(E)

R *(Buckinghamshire County Council) v* ***Secretary*** *of* ***State*** *for Transport*[2014] UKSC 3; [2014] 1WLR324;

[2014] PTSR182; [2014] 2All ER109, SC(E)

R *(Morgan Grenfell & Co Ltd) v Special Comr of Income Tax*[2002] UKHL 21; [2003] 1AC563; [2002] 2WLR1299; [2002] 3All ER1, HL(E)

R *(Public Law Project) v Lord Chancellor (Office of the Children's Comr intervening)*[2016] UKSC 39; [2016] AC1531; [2016] 3WLR387SC(E)

Rayner (JH) (Mincing Lane) v Department of Trade and Industry[1990] 2AC418; [1984] 3WLR969; [1989] 3All ER523, HL(E)

Resolution to amend the Constitution, In re[1981] 1SCR753

Rustomjee v The Queen(1876) 2QBD69, CA

Secretary *of* ***State*** *in Council of India v Kamachee Boye Sahaba*(1859) 13Moo PC22, PC

Shindler v Chancellor of the Duchy of Lancaster[2016] EWCA Civ 469; [2016] 3WLR1196, CA

Thoburn v Sunderland City Council[2002] EWHC 195 (Admin); [2003] QB151; [2002] 3WLR247; [2002] 4All ER156, DC

*Turp v Canada (Justice)*2012 FC 893; [2014] 1FCR439

Zamora, The[1916] 2AC77, PC

The following additional cases were cited in argument before the Supreme Court:

A v HM Treasury (JUSTICE intervening)[2010] UKSC 2; [2010] 2AC534; [2010] 2WLR378; [2010] 4All ER745, SC(E)

A v Hayden[1984] HCA67; 156CLR532

AXA General Insurance Ltd v HM Advocate[2011] UKSC 46; [2012] 1AC868; [2011] 3WLR871, SC(Sc)

Agricultural Sector (Wales) Bill, In re[2014] UKSC 43; [2014] 1WLR2622; [2014] 4All ER789, SC(E)

Amministrazione dello Finanze dello Stato v Simmenthal SpA(Case 106/77)[1978] ECR629, ECJ

Assange v Swedish Prosecution Authority (Nos 1 and 2)[2012] UKSC 22; [2012] 2AC471; [2012] 2WLR1275;

[2012] 4All ER1249, SC(E)

Attorney General v National Assembly for Wales Commission[2012] UKSC 53; [2013] 1AC792; [2012] 3WLR1294; [2013] 1All ER1013, SC(E)

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG[1975] AC591; [1975] 2WLR513; [1975] 1All ER810, HL(E)

Bloomsbury International Ltd v Sea Fish Industry Authority[2011] UKSC 25; [2011] 1WLR1546; [2011] 4All ER721, SC(E)

Bobb v Manning[2006] UKPC 22, PC

British Broadcasting Corpn v Johns[1965] Ch32; [1964] 2WLR1071; [1964] 1All ER923, CA

British Medical Association v Greater Glasgow Health Board[1989] AC1211; [1989] 2WLR660; [1989] 1All ER984, HL(Sc)

De Brun, In re[2002] NICA 43, CA(NI)

Downe's Application, In re[2009] NICA 26, CA(NI)

Ealing London Borough Council v Race Relations Board[1972] AC342; [1972] 2WLR71; [1972] 1All ER105, HL(E)

Ecuador (Republic of) v Occidental Exploration and Production Co[2005] EWCA Civ 1116; [2006] QB432; [2006] 2WLR70; [2006] 2All ER225, CA

Feirste v Department of Education Northern Ireland[2011] NIQB 98

Fitzgerald v Muldoon[1976] 2NZLR615

Francovich v Italian Republic(Joined Cases C-6/90 and C-9/90)EU:C:1991:428; [1995] ICR722; [1991] ECRI-5357, ECJ

Garland v British Rail Engineering Ltd[1983] 2AC751; [1982] 2WLR918; [1982] ICR420; [1982] 2All ER402, ECJ and HL(E)

*Grieve v Edinburgh and District Water Trustees*1918SC700, Ct of Sess

H v Lord Advocate (Advocate General for Scotland intervening)[2012] UKSC 24; [2013] 1AC413; [2012]

3WLR151; [2012] 4All ER600, SC(Sc)

Hoffmann-La Roche (F) & Co AG v ***Secretary*** *of* ***State*** *for Trade and Industry*[1975] AC295; [1974] 3WLR104; [1974] 2All ER1128, HL(E)

*Interfact Ltd v Liverpool City Council (****Secretary*** *of* ***State*** *for Culture, Media and Sport intervening)*[2010] EWCA Crim 1486; [2011] QB744; [2011] 2WLR396; [2011] 3All ER206, CA

Jensen v Corpn of the Trinity House of Deptford[1982] 2Lloyd's Rep14, CA

King's Printers v Buchan(1826) 4S567, Ct of Sess

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory[2004] ICJ Rep136

Littrell v United ***States*** *of America (No 2)*[1995] 1WLR82; [1994] 4All ER203, CA

McComb, In re[2003] NIQB 47

*MacCormick v Lord Advocate*1953SC396, Ct of Sess

McKiernon v ***Secretary*** *of* ***State*** *for Social Security*(1989) 2Admin LR133, CA

Moohan v Lord Advocate (Advocate General for Scotland intervening)[2014] UKSC 67; [2015] AC901; [2015] 2WLR141; [2015] 2All ER361, SC(Sc)

Neill's Application for Judicial Review, In re[2006] NICA 5; [2006] NI278, CA(NI)

Padfield v Minister of Agriculture, Fisheries and Foods[1968] AC997; [1968] 2WLR924; [1968] 1All ER694, HL(E)

Parlement Belge, The(1879) 4PD129

Portgual v Australia (Case concerning East Timor)[1995] ICJ Rep90

R *v Brown*[2013] UKSC 43; [2013] 4All ER860, SC(NI)

R *v HM Treasury, Ex p Smedley*[1985] QB657; [1985] 2WLR576; [1985] 1All ER589, CA

R *v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd*[1982] AC517; [1981] 2 WLR 722; [1981] 2All ER93, HL(E)

***R** v Jones (Margaret)*[2006] UKHL 16; [2007] 1AC136; [2006] 2WLR772; [2006] 2All ER741, HL(E)

***R** v Kent Justices, Ex p Lye*[1967] 2QB153; [1967] 2WLR765; [1967] 1All ER560, DC

***R** v London County Council, Ex p Entertainments Protection Association Ltd*[1931] 2KB215, CA

***R** v Lyons (Isidore)*[2002] UKHL 44; [2003] 1AC976; [2002] 3WLR1562; [2002] 4All ER1028; [2003] 1Cr App R359, HL(E)

***R** v **Secretary** of **State** for the Environment, Transport and the Regions, Ex p Spath Holme Ltd*[2001] 2AC349; [2001] 2WLR15; [2001] 1All ER195, HL(E)

***R** v **Secretary** of **State** for the Home Department, Ex p Bentley*[1994] QB349; [1994] 2WLR101; [1993] 4All ER442, DC

***R** v **Secretary** of **State** for the Home Department, Ex p Pierson*[1998] AC539; [1997] 3WLR492; [1997] 3All ER577, HL(E)

***R** (Abbasi) v **Secretary** of **State** for Foreign and Commonwealth Affairs*[2002] EWCA Civ 1598; [2003] UKHRR76, CA

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***R** (Adams) v **Secretary** of **State** for Justice (JUSTICE intervening)*[2011] UKSC 18; [2012] 1AC48; [2011] 2WLR1180; [2011] 3All ER261, SC(E & NI)

***R** (Alvi) v **Secretary** of **State** for the Home Department (Joint Council for the Welfare of Immigrants intervening)*[2012] UKSC 33; [2012] 1WLR2208; [2012] 4All ER1041, SC(E)

***R** (Bancoult) v **Secretary** of **State** for Foreign and Commonwealth Affairs*[2001] QB1067; [2001] 2WLR1219, DC

***R** (Chester) v **Secretary** of **State** for Justice*[2013] UKSC 63; [2014] AC271; [2013] 3WLR1076; [2014] 1All ER683, SC(E & Sc)

***R** (Governors of Brynmawr Foundation School) v Welsh Ministers*[2011] EWHC 519 (Admin)

***R** (Horvath) v **Secretary** of **State** for the Environment, Food and Rural Affairs*(Case C-428/07)EU:C:2009:458; [2009] ECRI-6355, ECJ

***R** (JB (Jamaica)) v **Secretary** of **State** for the Home Department*[2015] UKSC 8; [2015] 1WLR1060; [2015] 3All ER317, SC(E)

***R** (JS) v **Secretary** of **State** for Work and Pensions (Child Poverty Action Group intervening)*[2015] UKSC 16; [2015] 1WLR1449; [2015] PTSR471; [2015] 4All ER939, SC(E)

***R** (Jackson) v Attorney General*[2005] EWHC 94 (Admin); The Times, 31 January 2005, DC; [2005] UKHL 56; [2006] 1AC262; [2005] 3WLR733; [2005] 4All ER1253, HL(E)

***R** (Minter) v Chief Constable of Hampshire Constabulary*[2013] EWCA Civ 697; [2014] 1WLR179, CA

***R** (Nash) v Barnet London Borough Council*[2013] EWHC 1067 (Admin); [2013] PTSRD31

***R** (**States** of Guernsey) v **Secretary** of **State** for the Environment, Food and Rural Affairs*[2016] EWHC 1847 (Admin); [2016] 4WLR145; [2016] ACD105

***R** (Wheeler) v Office of the Prime Minister*[2008] EWHC 1409 (Admin); [2008] ACD70, DC

***R** (XH) v **Secretary** of **State** for the Home Department*[2016] EWHC 1898 (Admin); [2016] ACD117

***R** (Youssef) v **Secretary** of **State** for Foreign and Commonwealth Affairs*[2016] UKSC 3; [2016] AC1457; [2016] 2WLR509; [2016] 3All ER261, CS(E)

Ruiz Zambrano v Office national de l'emploi(Case C-34/09)EU:C:2011:124; [2012] QB265; [2012] 2WLR886; [2011] All ER (EC)491; [2011] ECRI-1179, ECJ

Shergill v Khaira[2014] UKSC 33; [2015] AC359; [2014] 3WLR1; [2014] PTSR907; [2014] 3All ER243, SC(E)

Walker v Baird[1892] AC491, PC

The following cases are referred to in the judgment of the Divisional Court:

Amministrazione delle Finanze dello Stato v Simmenthal SpA(Case 106/77)EU:C:1978:49; [1978] ECR629, ECJ

Anisminic Ltd v Foreign Compensation Commission[1969] 2AC147; [1969] 2WLR163; [1969] 1All ER208, HL(E)

Attorney General v De Keyser's Royal Hotel Ltd[1920] AC508, HL(E)

Burmah Oil Co (Burma Trading) Ltd v Lord Advocate[1965] AC75; [1964] 2WLR1231; [1964] 2All ER348, HL(Sc)

Costa v Ente Nazionale per l'Energia Elettrica (ENEL)(Case 6/64)EU:C:1964:66; [1964] ECR585, ECJ

Fitzgerald v Muldoon [1976] 2 NZLR 615

Laker Airways Ltd v Department of Trade[1977] QB643; [1977] 2WLR234; [1977] 2All ER182, CA

McCord, In re[2016] NIQB 85

Marleasing SA v La Comercial Internacional de Alimentación SA(Case C-106/89)EU:C:1990:395; [1990] ECRI-4135, ECJ

NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen(Case 26/62)EU:C:1963:1; [1963] ECR1, ECJ

Post Office v Estuary Radio Ltd[1968] 2QB740; [1967] 1WLR1396; [1967] 3All ER679, CA

Proclamations, Case of(1610) 12Co Rep74

***R** v Lyons*[2002] UKHL 44; [2003] 1AC976; [2002] 3WLR1562; [2002] 4All ER1028, HL(E)

***R** v **Secretary** of **State** for Foreign and Commonwealth Affairs, Ex p Rees-Mogg*[1994] QB552; [1994] 2WLR115; [1994] 1All ER457, DC

R** v **Secretary** of **State** for the Home Department, Ex p Fire Brigades **Union[1995] 2AC513; [1995] 2WLR464; [1995] 2All ER244, HL(E)

***R** v **Secretary** of **State** for the Home Department, Ex p Pierson*[1998] AC539; [1997] 3WLR492; [1997] 3All ER577, HL(E)

***R** v **Secretary** of **State** for the Home Department, Ex p Simms*[2000] 2AC115; [1999] 3WLR328; [1999] 3All ER400, HL(E)

***R** v **Secretary** of **State** for Transport, Ex p Factortame Ltd*[1990] 2AC85; [1989] 2WLR997; [1989] 2All ER692, HL(E)

***R** (Buckinghamshire County Council) v **Secretary** of **State** for Transport*[2014] UKSC 3; [2014] 1WLR324; [2014] PTSR182; [2014] 2All ER109, SC(E)

***R** (Jackson) v Attorney General*[2005] UKHL 56; [2006] 1AC262; [2005] 3WLR733; [2005] 4All ER1253, HL(E)

Rayner (JH) (Mincing Lane) Ltd v Department of Trade and Industry[1990] 2AC418; [1989] 3WLR969; [1989]

3All ER523, HL(E)

Thoburn v Sunderland City Council[2002] EWHC 195 (Admin); [2003] QB151; [2002] 3WLR247; [2002] 4All ER156, DC

Zamora, The[1916] 2AC77, PC

The following additional cases were cited in argument before the Divisional Court:

AKJ v Comr of Police of the Metropolis[2013] EWCA Civ 1342; [2014] 1WLR285; [2014] 1All ER882, CA

Assange v Swedish Prosecution Authority (Nos 1 and 2)[2012] UKSC 22; [2012] 2AC471; [2012] 2WLR1275; [2012] 4All ER1249, SC(E)

Pham v ***Secretary*** *of* ***State*** *for the Home Department (Open Society Justice Initiative intervening)*[2015] UKSC 19; [2015] 1WLR1591; [2015] 3All ER1015, SC(E)

R *v Lord Chancellor, Ex p Witham*[1998] QB575; [1998] 2WLR849; [1997] 2All ER779, DC

R *v* ***Secretary*** *of* ***State*** *for the Home Department, Ex p Northumbria Police Authority*[1989] QB26; [1988] 2WLR590; [1988] 1All ER556, CA

R *(Bancoult) v* ***Secretary*** *of* ***State*** *for Foreign and Commonwealth Affairs (No 2)*[2008] UKHL 61; [2009] AC453; [2008] 3WLR955; [2008] 4All ER1055, HL(E)

R *(UNISON) v* ***Secretary*** *of* ***State*** *for Health*[2010] EWHC 2655 (Admin); [2011] ACD10

R *(Wheeler) v Office of the Prime Minister*[2008] EWHC 1409 (Admin); [2008] ACD70, DC

Rustomjee v The Queen(1876) 2QBD69, CA

Shindler v Chancellor of the Duchy of Lancaster[2016] EWCA Civ 469; [2016] 3WLR1196, CA

Walker v Baird[1892] AC491, PC

The following additional cases, although not cited, were referred to in the skeleton arguments before the Divisional Court:

A v HM Treasury (JUSTICE intervening)[2010] UKSC 5; [2010] 2AC534; [2010] 2WLR378; [2010] 4All ER829, SC(E)

Attorney General for Canada v Attorney General for Ontario[1937] AC326, PC

Blackburn v Attorney General[1971] 1WLR1037; [1971] 2All ER1380, CA

Brasserie du Pêcheur SA v Federal Republic of Germany(Joined Cases C-46/93 and C-48/93)EU:C:1996:79; [1996] QB404; [1996] 2WLR506; [1996] All ER (EC)301; [1996] ECRI-1029, ECJ

British Broadcasting Corpn v Johns[1965] Ch32; [1964] 2WLR1071; [1964] 1All ER923, CA

Buttes Gas and Oil Co v Hammer (No 3)[1982] AC888; [1981] 3WLR787; [1981] 3All ER616, HL(E)

Council of Civil Service ***Unions*** *v Minister for the Civil Service*[1985] AC374; [1984] 3WLR1174; [1985] ICR14; [1984] 3All ER935, HL(E)

H v Lord Advocate (Advocate General for Scotland intervening)[2012] UKSC 24; [2013] 1AC413; [2012] 3WLR151; [2012] 4All ER600, SC(Sc)

Macarthys Ltd v Smith[1979] 1WLR1189; [1979] ICR785; [1979] 3All ER325, CA

Oxfordshire County Council v Oxford City Council[2006] UKHL 25; [2006] 2AC674; [2006] 2WLR1235; [2006] 4All ER817, HL(E)

R *v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd*[1982] AC617; [1981] 2WLR722; [1981] 2All ER93, HL(E)

R *v* ***Secretary*** *of* ***State*** *for Transport, Ex p Factortame Ltd (No 2)*(Case C-213/89)EU:C:1990:257; [1991] 1AC603; [1990] 3WLR818; [1991] 1All ER70; [1990] ECRI-2433, ECJ and HL(E)

R *(Alvi) v* ***Secretary*** *of* ***State*** *for the Home Department (Joint Council for the Welfare of the Immigrants intervening)*[2012] UKSC 33; [2012] 1WLR2208; [2012] 4All ER1041, SC(E)

R *(Morgan Grenfell & Co Ltd) v Special Comr of Income Tax*[2002] UKHL 21; [2003] 1AC563; [2002] 2WLR1299; [2002] 3All ER1, HL(E)

Shergill v Khaira[2014] UKSC 33; [2015] AC359; [2014] 3WLR1; [2014] PTSR907; [2014] 3All ER243, SC(E)

CLAIM for judicial review

By a claim form issued on 28 July 2016 the claimants, Gina **Miller** and Deir Tozetti Dos Santos, sought judicial review by way of a declaration against the defendant, the **Secretary** of **State** for

Exiting the **European Union**, that notification under article 50(2)EU of the EU Treaty could not lawfully be made without authorisation from an Act of Parliament, on the principal ground that as a matter of United Kingdom constitutional law the Government had no power to do so by exercise of the Crown's prerogative power. The claimants applied for permission to proceed with the claim.

Grahame Pigney and others (the "People's Challenge" group), who included an Englishman of Bangladeshi origin, an Irishman, two Scotsmen resident in France, a Welshman and a Gibraltarian, whose wife was Spanish, with family resident in Spain, were served as the first group of interested parties.

AB, KK, PR and others, children and their carers whose immigration status in the United Kingdom might be affected as a result of notification under article 50EU, were served as the second group of interested parties.

George Birnie and others, British citizens (or those associated with them) exercising their free movement rights under **European Union** law by living in other **European Union** member **states** and having access to public services there, intervened in the claim.

The facts are **stated** in the judgment of the Divisional Court, post, paras *1–4*.

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Lord Pannick QC, *Rhodri Thompson QC*, *Anneli Howard* and *Tom Hickman* (instructed by *Mishcon de Reya LLP*) for the first claimant.

Dominic Chambers QC, *Jessica Simor QC* and *Benjamin John* (instructed by *Edwin Coe LLP*) for the second claimant.

Jeremy Wright QC, *James Eadie QC*, *Jason Coppel QC*, *Tom Cross* and *Christopher Knight* (instructed by *Treasury Solicitor*) for the **Secretary** of **State**.

Helen Mountfield QC, *Gerry Facenna QC*, *Tim Johnston*, *Jack Williams* and *John Halford*, solicitor (instructed by *Bindmans LLP*) for the first interested parties.

Manjit Gill QC, *Ramby De Mello* and *Tony Muman* (instructed by *Bhatia Best, Nottingham*) for the second interested parties.

Patrick Green QC, *Henry Warwick*, *Paul Skinner* and *Matthieu Gregoire* (instructed by *Croft Solicitors, Cheltenham*) for the interveners.

The court took time for consideration.

3 November 2016. The following judgment of the court was given.

Introduction

(a) The question for the court

1 On 1 January 1973 the United Kingdom joined the **European** Communities. This occurred as a result of a process of treaty negotiation by the Government, the enactment of the **European** Communities Act 1972 ("the ECA 1972") to give effect to Community law in the national legal systems of the United Kingdom and then ratification by the United Kingdom and other member **states** of the amended Community treaties. Thus, as a result of the ECA 1972, Parliament by primary legislation gave effect in each jurisdiction of the UK to binding obligations and rights arising under those treaties. In due course the **European** Communities became the **European Union**.

2 On 23 June 2016 a referendum took place under the **European Union** Referendum Act 2015 ("the 2015 Referendum Act"). The question asked in the referendum was "Should the United Kingdom remain a member of the **European Union** or leave the **European Union**?" The answer given in the referendum was that the UK should leave the EU.

3 Withdrawal from the EU under the treaty provisions of the EU is governed by article 50EU of the EU Treaty. That article came into force in 2009 after amendment of the EU Treaty by the Lisbon Treaty 2007.

4 The sole question in this case is whether, as a matter of the constitutional law of the UK, the Crown—acting through the executive government of the day—is entitled to use its prerogative powers to give notice under article 50EU for the UK to cease to be a member of the EU. It is common ground that withdrawal from the EU will have profound consequences in terms of changing domestic law in each of the jurisdictions of the UK.

(b) The common ground that the question is justiciable

5 It is agreed on all sides that this is a justiciable question which it is for the courts to decide. It deserves emphasis at the outset that the court in these proceedings is only dealing with a pure question of law. Nothing we say has any bearing on the question of the merits or demerits of a withdrawal by the

UK from the EU; nor does it have any bearing on government policy, because government policy is not law. The policy to be applied by the executive government and the merits or demerits of withdrawal are matters of political judgment to be resolved through the political process. The legal question is whether the executive government can use the Crown's prerogative powers to give notice of withdrawal. We are not in any way concerned with the use that may be made of the Crown's prerogative power, if such a power can as a matter of law be used in respect of article 50, or what will follow if the Crown's prerogative powers cannot be so used.

(c) The parties to the proceedings to resolve the legal question

6 The **Secretary** of **State** is the appropriate representative of the Crown acting through the Government. If the claimants' case is correct, it will of course cover action by any other government minister. Aspects of the submissions for the Government were presented in turn by the Attorney General, Mr James Eadie QC and Mr Jason Coppel QC.

7 It is not difficult to identify people with standing to bring the challenge since virtually everyone in the UK or with British citizenship will, as we explain at paras 58 and following, have their legal rights affected if notice is given under article 50EU. The claimants and interested parties comprise a range of people whose interests are potentially affected in different ways. The main part of the argument for the claimants was presented by Lord Pannick QC, appearing for the first claimant. His submissions were adopted by those appearing for the other claimant and the interested parties. Certain aspects of the argument for the claimants and the interested parties were presented by other counsel. Mr Dominic Chambers QC, appearing for the second claimant, dealt with the topic of parliamentary sovereignty. Miss Helen Mountfield QC, appearing for one group of interested parties, dealt with the topics of EU citizenship rights, the position of Scotland under the Act of **Union** 1707 and the impact of the devolution legislation. Mr Patrick Green QC, appearing for interveners who are British citizens (or those associated with them) exercising their free movement rights under EU law by living in other EU member **states** and having access to public services there, focused on the impact which notification under article 50EU would have upon them and also dealt in particular with the effect of the **European Union** Act 2011. Mr Manjit Gill QC focused on the position of another group of interested parties for whom he appeared, who are children and their carers whose immigration status in the UK may be affected as a result of notification under article 50EU. Counsel for the Lord Advocate of Scotland and for the Counsel General of Wales were present in court but played no part in the proceedings.

(d) The scheme of the judgment

8 We will answer the question for our decision under the following headings:

(1) Article 50EU (paras 9–17)

(2) The principles of constitutional law: the sovereignty of Parliament and the prerogative powers of the Crown (paras 18–36)

(3) The domestic effect of EU law under the ECA 1972 (paras 37–56)

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(4) Categories of rights arising under the ECA 1972 and EU law (paras 57–66)

(5) UK legislation in relation to the EU subsequent to the ECA 1972 (paras 67–72)

(6) The parties' principal submissions (paras 73–76)

(7) Our decision on the question (paras 77–104)

(8) The Referendum Act 2015 (paras 105–108)

(9) Conclusion and form of declaratory relief (paras 109–111)

(1) Article 50EU of the EU Treaty

(a) The terms of article 50EU

9 Article 50EU **states**:

> "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.
>
> "4. For the purposes of paragraphs 2 and 3, the member of the **European** Council or of the Council representing the withdrawing member **state** shall not participate in the discussions of the **European** Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with article 238(3)(b) of the Treaty on the Functioning of the **European Union**.
>
> "5. If a **state** which has withdrawn from the **Union** asks to rejoin, its request shall be subject to the procedure referred to in article 49."

(b) Common ground: notice is irrevocable and cannot be conditional

10 Important matters in respect of article 50EU were common ground between the parties: (1) a notice under article 50(2)EU cannot be withdrawn, once it is given; and (2) article 50EU does not allow for a conditional notice to be given: a notice cannot be qualified by, for example, saying that it will only take effect if Parliament approves any agreement made in the course of the negotiations contemplated by article 50(2)EU.

(c) The effect of the notice

11 Once a notice is given, it will inevitably result in the complete withdrawal of the UK from membership of the EU and from the relevant treaties at the end of the two-year period, subject only to an agreement on an

extension of time between the UK and the **European** Council (acting unanimously) as set out in article 50(3)EU or the earlier making of a withdrawal agreement between the UK and the **European** Council (acting by a qualified majority and with the consent of the **European** Parliament). The effect of the giving of notice under article 50EU on relevant rights is direct, even though the article 50EU process will take a while to be worked through.

12 A withdrawal agreement under article 50EU, if one is made, may preserve some parts of the relevant treaties or may make completely new provision for various matters. Since the Crown will negotiate the terms of any withdrawal agreement, this means that the Crown is entitled to pick and choose which existing EU rights, if any, to preserve—if it can, persuade the **European** Council to agree—and which to remove. Again, therefore, the effect of the article 50EU negotiation process on relevant rights is direct.

13 The **Secretary** of **State** was at pains to emphasise that, if a withdrawal agreement is made, it is very likely to be a treaty requiring ratification and as such would have to be submitted for review by Parliament, acting separately, under the negative resolution procedure set out in section 20 of the Constitutional Reform and Governance Act 2010 ("the CRAG 2010"). The procedure under section 20 does not involve the enactment of primary legislation. For this reason, the claimants do not accept that the **Secretary** of **State**'s reliance on the CRAG 2010 meets their submission.

14 Moreover, if by virtue of the operation of the procedure under section 20 a decision were taken that a withdrawal agreement should not be ratified, meaning that it did not come into effect as an agreement, the effect would be that the basic two-year period would continue to run under article 50(3)EU so that the EU Treaties would cease to apply to the UK at the expiry of that period (or any agreed extension). Parliament's consideration of any withdrawal agreement under the procedure in the CRAG 2010 would thus be constrained by the knowledge that if it did not approve ratification of it, however inadequate it might believe the withdrawal agreement to be, the alternative would likely eventually to be complete removal of all rights for the UK and British citizens under the EU Treaties when the relevant article 50EU time-period expires.

(d) Is the challenge by the claimants a challenge to the decision to withdraw or giving of the notice?

15 There was some debate about whether the claimants' challenge is properly to be regarded as a

challenge to the making of a decision to withdraw from the EU under article 50(1)EU or a decision to notify the **European** Council under article 50(2)EU.

16 In our view, nothing really turns on this, since it is clear that the two provisions have to be read together. The notification under article 50(2)EU is of a decision under article 50(1)EU. If the Crown has no prerogative power under the constitutional law of the UK to give a notice under article 50(2)EU, then it would appear to follow that under the provisions of article 50(1)EU it cannot, on behalf of the UK, acting solely under its prerogative powers, make a decision to withdraw "in accordance with [the UK's] own constitutional requirements".

17 However, we agree with the submission of Lord Pannick that, whatever the position in relation to any decision under article 50(1)EU, a

decision to give notice under article 50(2)EU is certainly the appropriate target for this legal challenge, since it is the giving of notice which triggers the effects under article 50(2) and (3)EU leading to the **exit** of a member **state** from the EU and from the relevant treaties.

(2) The principles of constitutional law: the sovereignty of Parliament and the prerogative powers of the Crown

(a) The UK constitution

18 The UK does not have a constitution to be found entirely in a written document. This does not mean there is an absence of a constitution or constitutional law. On the contrary, the UK has its own form of constitutional law, as recognised in each of the jurisdictions of the four constituent nations. Some of it is written, in the form of statutes which have particular constitutional importance (as we explain at paras 43–44). Some of it is reflected in fundamental rules of law recognised by both Parliament and the courts. There are established and well-recognised legal rules which govern the exercise of public power and which distribute decision-making authority between different entities in the **state** and define the extent of their respective powers. The UK is a constitutional democracy framed by legal rules and subject to the rule of law. The courts have a constitutional duty fundamental to the rule of law in a democratic **state** to enforce rules of constitutional law in the same way as the courts enforce other laws.

19 In these proceedings, this court is called upon to apply the constitutional law of the UK to determine whether the Crown has prerogative powers to give notice under article 50EU to trigger the process for withdrawal from the EU. The law we were taken to was primarily the law of England and Wales, with some reference to the position in the other jurisdictions in the UK, Scotland and Northern Ireland. Although this court only has jurisdiction to apply the law of England and Wales, we note that no one in these proceedings has suggested that such parts of constitutional law in Scotland and Northern Ireland in relation to the interaction between statute and the Crown's prerogative powers as are relevant to determine the outcome in this case are any different from the law of England and Wales on that topic. Accordingly, for ease of reference and in view of the general constitutional importance of this case we will refer to UK constitutional law.

(b) The sovereignty of the UK Parliament

20 It is common ground that the most fundamental rule of UK constitutional law is that the Crown in

Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme (we will use the familiar shorthand and refer simply to Parliament). Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen. The ECA 1972, which confers precedence on EU law, is the sole example of this.

21 But even then Parliament remains sovereign and supreme, and has continuing power to remove the authority given to other law by earlier primary legislation. Put shortly, Parliament has power to repeal the ECA 1972 if it wishes.

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22 In what is still the leading account, *Introduction to the Study of the Law of the Constitution*, 8th ed (1915), by the constitutional jurist Professor AV Dicey, he explains that the principle of parliamentary sovereignty means that Parliament has:

> "the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law … as having a right to override or set aside the legislation of Parliament." (p 38 of the 8th ed, the last edition by Dicey himself; and see chapter I generally.)

Amongst other things, this has the corollary that it cannot be said that a law is invalid as being opposed to the opinion of the electorate, since as a matter of law:

> "The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors." (pp 57 and 72 of the 8th ed.)

23 The principle of parliamentary sovereignty has been recognised many times in leading cases of the highest authority. Since the principle is common ground in these proceedings it is only necessary to cite the speech of Lord Bingham of Cornhill in ***R*** *(Jackson) v Attorney General* [2006] 1 AC 262, para 9: "The bedrock of the British constitution is … the supremacy of the Crown in Parliament."

(c) The Crown's prerogative powers

24 The extent of the powers of the Crown under its prerogative (often called the royal prerogative) are delineated by UK constitutional law. These prerogative powers constitute the residue of legal authority left in the hands of the Crown. As Lord Reid said in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101: "The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute."

25 An important aspect of the fundamental principle of parliamentary sovereignty is that primary

legislation is not subject to displacement by the Crown through the exercise of its prerogative powers. But the constitutional limits on the prerogative powers of the Crown are more extensive than this. The Crown has only those prerogative powers recognised by the common law and their exercise only produces legal effects within boundaries so recognised. Outside those boundaries the Crown has no power to alter the law of the land, whether it be common law or contained in legislation.

26 This subordination of the Crown (ie the executive government) to law is the foundation of the rule of law in the UK. It has its roots well before the war between the Crown and Parliament in the 17th century but was decisively confirmed in the settlement arrived at with the Glorious Revolution in 1688 and has been recognised ever since.

27 Sir Edward Coke reports the considered view of himself and the senior judges of the time in the *Case of Proclamations* (1610) 12 Co Rep 74, 76 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" and that "the King hath no prerogative, but that which the law of the land allows him".

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28 The position was confirmed in the first two parts of article 1 of the Bill of Rights 1689 (1 Will & Mary, sess 2, c 2):

> "Suspending power—That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall.
>
> "Late dispensing power—That the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall."

29 The legal position was summarised by the Privy Council in *The Zamora* [1916] 2 AC 77, 90:

> "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. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity."

These principles are not only well settled but are also common ground. It is therefore not necessary to explain them further.

(d) The power under the Crown's prerogative to make and unmake treaties

30 Another settled feature of UK constitutional law is that, as a general rule applicable in normal circumstances, the conduct of international relations and the making and unmaking of treaties on behalf of the UK are regarded as matters for the Crown in the exercise of its prerogative powers.

31 As we shall explain in more detail in examining the submission of the **Secretary** of **State** (see paras 77 and following), it is the **Secretary** of **State**'s case that nothing has been done by Parliament in the ECA 1972 or any other statute to remove the prerogative power of the Crown, in the conduct of the international relations of the UK, to take steps to remove the UK from the EU by giving notice under article 50EU for the UK to withdraw from the EU Treaty and other relevant EU Treaties. The **Secretary** of **State** relies in particular on *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 and ***R*** *v* ***Secretary*** *of* ***State*** *for Foreign and Commonwealth Affairs, Ex p Rees-Mogg* [1994] QB 552; he contends that the Crown's prerogative power to cause the UK to withdraw from the EU by giving notice under article 50EU could only have been removed by primary legislation using express words to that effect, alternatively by legislation which has that effect by necessary implication. The **Secretary** of **State** contends that neither the ECA 1972 nor any of the other Acts of Parliament referred to have abrogated this aspect of the Crown's prerogative, either by express words or by necessary implication.

(e) The effect of treaties on the domestic law of the UK

32 The general rule that the conduct of international relations, including the making and unmaking of treaties, is a matter for the Crown in

exercise of its prerogative powers arises in the context of the basic constitutional principle to which we have referred at para 25 above, that the Crown cannot change domestic law by any exercise of its prerogative powers. The Crown's prerogative power to conduct international relations is regarded as wide and as being outside the purview of the courts precisely because the Crown cannot, in ordinary circumstances, alter domestic law by using such power to make or unmake a treaty. By making and unmaking treaties the Crown creates legal effects on the plane of international law, but in doing so it does not and cannot change domestic law. It cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights.

33 The general position was explained by Lord Oliver of Aylmerton giving the leading speech in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499–500:

> "It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign **states** between themselves on the plane of international law. That was firmly established by this House in *Cook v Sprigg* [1899] AC 572, 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in ***Secretary*** *of* ***State*** *in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PC 22, 75: 'The transactions of independent **states**

> between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.' On the domestic plane, the power of the Crown to conclude treaties with other sovereign **states** is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law: see *Blackburn v Attorney General* [1971] 1 WLR 1037. The Sovereign acts 'throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts:' *Rustomjee v The Queen* (1876) 2 QBD 69, 74, per Lord Coleridge CJ.

> "That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the UK, 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 are 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."

We would add that treaties can have certain indirect interpretive effects in relation to domestic law, such as those discussed in ***R*** *v Lyons* [2003] 1 AC

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976, paras 27–28; but this does not affect the basic position that the Crown cannot through the use of its prerogative powers increase or diminish or dispense with the rights of individuals or companies conferred by common law or statute or change domestic law in any way without the intervention of Parliament.

(f) The relevance of the principles to the question in the case

34 A particular feature of the present case is that the legal question for decision arises in a statutory context in which a direct link exists between, on the one hand, rights and obligations arising through action taken on the international plane—by entry into and continued membership of the **European** Communities (now, the EU) and creation of EU law in the relevant treaties and by law-making institutions of the EU—and, on the other, the content of domestic law. This is the result of a combination of principles of EU law, including principles of direct effect of EU law in the national legal systems of member **states**, and the terms of the ECA 1972, which we consider at paras 37 and following below.

35 It is this feature of the legal context which leads the claimants and interested parties to contend, in their subsidiary submission, that the ECA 1972 and other statutes which provide that EU law has effect in domestic law leave no room for the Crown to have any prerogative power to give notice

under article 50EU to withdraw from the EU Treaty and other relevant treaties, since that would offend against the constitutional principle summarised in *The Zamora* [1916] 2 AC 77 by allowing the Crown to alter domestic law by exercise of its prerogative powers and to deprive them of their legal rights under that law.

36 At the same time, it is this feature which leads the **Secretary** of **State** to contend that the Crown's prerogative power to give notice to withdraw from the EU Treaty and the other treaties has not been removed by primary legislation. Hence, it is argued, Parliament must be taken to have recognised that the Crown would have power to give notice under article 50EU in the exercise of its prerogative to conduct international relations on the part of the UK and thereby intended that the Crown should have power to bring about the changes in domestic law about which the claimants complain.

(3) The domestic effect of EU law and the ECA 1972

(a) The forms of EU law and the role of the Court of Justice of the European Union

37 As again the basic picture about how EU law operates is common ground, it is not necessary to give more than a brief explanation. Put very shortly, therefore, EU law as contained in the relevant treaties in some parts contains rights for individuals and in other parts creates law-making institutions which can legislate to make new legally binding norms of EU law from time to time. The principal forms of EU legislation are (1) directives, which require member **states** to introduce changes into their national law in conformity with what is set out in them, and (2) regulations, which have direct effect in the national law of member **states**. Where the treaties create rights for individuals, those rights may be enforced as directly effective in the national courts of member **states**. The same is true of rights set out in regulations. Also, some individual rights set out in directives are

directly effective and may be relied upon in the national courts of member **states**.

38 These directly effective rights under EU law override even domestic primary legislation. Thus, for so long as EU law is accepted and applied by the national courts of a member **state**, it operates as a form of law which is in that sense superior to all domestic law.

39 The Community and EU Treaties created the **European** Court of Justice (now the Court of Justice of the **European Union** ("CJEU")) as the judicial body with authority to interpret and rule upon EU law. The CJEU does so both in proceedings brought by member **states** or by EU institutions and in cases referred to it by national courts under the reference procedure now contained in article 267FEU of the FEU Treaty. Controversial issues of EU law are to be referred by national courts to the CJEU for authoritative determination by that court, and national courts are obliged to apply EU law as interpreted by the CJEU.

40 These basic features of Community law were established well before the UK joined the **European** Communities in 1973. In particular, the superiority of EU law with direct effect was established in the well known judgments of the Court of Justice in *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) [1963] ECR 1and *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* (Case 6/64) [1964] ECR 585. It has been affirmed many times since, for instance in the well known judgment in *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629.

Where EU law does not have direct effect but domestic legislation is introduced by a member **state** to comply with its obligations under a directive or other EU law, then as a matter of EU law a strong interpretive obligation applies so that the domestic legislation must be interpreted so as to be compatible with EU law wherever possible: *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135.

(b) The need for the ECA 1972 and its effect on the law of the UK

41 As a practical matter, by reason of the limits on its prerogative powers referred to at para 25 above, the Crown could not have ratified the accession of the UK to the **European** Communities under the Community treaties unless Parliament had enacted legislation. Legislation by Parliament was needed to give effect to EU law in the domestic law of the jurisdictions in the UK as was required by those treaties and as was necessary to give effect in domestic law to the rights and obligations arising under EU law.

42 It is common ground that only Parliament could create the necessary changes in national law to allow EU law to have the effect at the level of domestic law which the treaties required. As we have explained at para 1 above, this was done by the enactment of the ECA 1972 in contemplation of the UK becoming part of the **European** Communities by accession to the Community treaties so as to allow that to happen. If this legislation had not first been put in place, ratification of the treaties by the Crown would immediately have resulted in the UK being in breach of its obligations under them, by reason of the absence of provision for direct effect of EU law in domestic law.

(c) The ECA 1972 as a constitutional statute

43 In due course, the House of Lords confirmed in ***R*** *v* ***Secretary*** *of* ***State*** *for Transport, Ex p Factortame Ltd* [1990] 2 AC 85 that the ECA 1972 was effective, while it remained on the statute book, to give directly effective EU law superiority even over domestic primary legislation. By virtue of the ECA 1972, the national courts give full effect to EU law as part of the domestic law applied by them.

44 As Laws LJ said in *Thoburn v Sunderland City Council* [2003] QB 151, para 62: “It may be there has never been a statute having such profound effects on so many dimensions of our daily lives.” He described the ECA 1972 as a constitutional statute, having such importance in our legal system that it is not subject to the usual wide principle of implied repeal by subsequent legislation. Its importance is such that it could only be repealed or amended by express language in a subsequent statute or by necessary implication from the provisions of such a statute. Similarly, the ECA 1972 was described as one of a number of constitutional instruments by Lord Neuberger of Abbotsbury PSC and Lord Mance JSC in ***R*** *(Buckinghamshire County Council) v* ***Secretary*** *of* ***State*** *for Transport* [2014] 1 WLR 324, para 207.

(d) The provisions of the ECA 1972

45 The long title to the ECA 1972 **states** that it is: “An Act to make provision in connection with the enlargement of the **European** Communities to include the UK, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar.” (At the time of the UK’s accession in 1973, there were three Communities: the **European** Economic Community, the **European** Coal and Steel Community and the **European** Atomic Energy Community. The EU has succeeded to these three

Communities.)

46 The ECA 1972 has been amended by primary legislation with each change to the Community treaties to extend the scope of competence and modes of law-making within the Communities and, as it eventually became, the EU. The list of treaties set out in the ECA 1972 to define EU law which is given effect in domestic law has been amended on each occasion in advance of ratification of the new treaty, following the same pattern as for the initial accession of the UK to the Communities and for the same reason: the need to provide for domestic effect of EU law in national law in order to satisfy the UK's obligations under each successive treaty so that rights and obligations under the treaty and EU law have effect in domestic law. Since the main provisions of the ECA 1972, as amended, are in essence the same as when that Act was passed, subject to the change in the list of relevant treaties to which we have referred, it is sufficient to set out the relevant provisions of that Act in their current form.

47 Section 1(2) sets out various definitions. It defines "the Treaties" to mean the pre-accession treaties described in Part I of Schedule 1 to the Act, "taken with" further specific treaties entered into since accession which are listed in the subsection "and 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 UK".

48 Section 1(3) stipulates that treaties falling within this general definition are to be identified by a declaration made by Her Majesty by

Order in Council, and for treaties made after or incorporating terms agreed after 22 January 1972 such Order in Council must be approved in draft by resolution of each House of Parliament.

49 Section 2 of the ECA 1972 is headed "General implementation of Treaties". It gives effect to the UK's membership of the EU and makes the changes to domestic law that are required as a result of membership.

50 Section 2(1) provides:

> "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 UK 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."

By virtue of this provision all directly applicable EU law is made part of UK law and is enforceable as such.

51 It is common ground that if the UK withdraws from the Treaties pursuant to a notice given under article 50EU, there will no longer be any enforceable EU rights in relation to which this provision will have any application. Section 2(1) would be stripped of any practical effect.

52 Section 2(2) confers power to implement any EU law obligation of the UK into domestic law, as follows:

> "Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision— (a) for the purpose of implementing any EU obligation of the UK, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the UK under or by virtue of the treaties to be exercised; or (b) 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 …"

This provides for subordinate legislation to be promulgated to address those parts of EU law that are not directly applicable in domestic law, in particular to satisfy the requirements of Directives that are intended to be implemented by national measures. If the UK withdraws from the Treaties pursuant to a notice given under article 50EU, this provision would in due course inevitably be deprived of any practical application.

53 Section 2(4) provides, in relevant part:

> "The provision that may be made under subsection (2) above includes … any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section …"

By this provision, as was recognised by the House of Lords in *Ex p Factortame Ltd* [1990] 2 AC 85, Parliament legislated to give force and effect to EU law as set out in sections 2(1) and (2) in priority to all primary legislation, past or future.

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54 Section 3(1) requires the national courts in the UK to follow the rulings of the CJEU in the interpretation of EU law, as follows:

> "For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the **European** Court, be for determination as such In accordance with the principles laid down by and any relevant decision of the **European** Court)."

(e) The right of withdrawal from the EU

55 As we have mentioned at para 3, it was only with the coming into effect of the Lisbon Treaty in 2009 that an express right for a member **state** to leave the EU was set out in the form of article 50EU. We received brief submissions on the question whether, under international law as it stood before then (and in particular as it stood in 1972 and 1973, when the ECA 1972 was enacted and took effect), it would have been possible for the UK to withdraw front the Community treaties after it had acceded to them on 1 January 1973. The Attorney General maintained that under customary international law the UK would have been entitled to give unilateral notice to withdraw. The claimants and interested parties pointed to article 59 of the Vienna Convention on the Law of Treaties between **States** and International Organisations or between International Organisations 1986, A/CONF.129/15, which indicated that withdrawal could only have been achieved by agreement with the other parties.

56 In the end, this difference is not significant for present purposes and does not have to be resolved. Neither side suggested that either interpretation of international law would assist us in addressing the question of law which we have to decide. Since on either view of international law the UK would in principle have been capable of seeking to withdraw from the relevant treaties, whether by giving unilateral notice or by making and ratifying an agreement to do so, when enacting the ECA 1972 Parliament must be taken to have had that possibility in mind. The question would still have arisen whether Parliament intended that this should be something that the Crown would be able to do through exercise of its prerogative powers without Parliament's intervention.

(4) Categories of rights arising under the ECA 1972 and EU law

57 The parties presented a broad schematic account of three different categories of rights arising under EU law. For the purposes of analysis in this case it is helpful to use this scheme, although it is, of necessity, rather simplified. The analysis focuses on rights, but it is important to bear in mind that there are other substantial areas of EU law such as the schemes of regulation which take effect as part of the law of the UK.

(a) Category (i): rights capable of replication in the law of the UK

58 The first category of rights is those which are in principle capable of replication in domestic law if the UK does withdraw from the EU ("category (i) rights"). One example discussed at the hearing is the rights of workers under the Working Time Directive. Even if the UK had no

obligation under EU law to maintain such rights in domestic law, Parliament could choose to do so. The **Secretary** of **State** points to the fact that in many cases EU Directives and other EU laws have been implemented by domestic legislation, whether primary or subordinate, which will continue to apply, unless repealed, as free-standing enforceable domestic legislation when the UK leaves the EU. The **Secretary** of **State** also points to the Government's proposal for a Great Repeal Bill, according to which EU law rights would be re-enacted as ordinary rights in primary legislation.

59 We note that although the rights might be re-enacted using the same language, there would be some differences. For example, national courts would have no obligation to make, and individuals would not be able to seek, a reference to the CJEU to obtain an interpretation of the rights by that court. Of course, Parliament might choose not to replicate all existing EU law rights in domestic law.

(b) Category (ii): rights enjoyed in other member states of the EU

60 The second category of rights is those enjoyed by British citizens and companies in relation to their activities in other member **states**, as provided for by EU law, for example pursuant to rights of free movement of persons and of capital and rights of freedom of establishment ("category (ii) rights"). If a British citizen resides in another member **state** pursuant to EU rights of free movement, EU law requires the authorities and courts of that member **state** to respect and give effect to those rights. It also prohibits the authorities in the UK from placing impediments in the way of the exercise of such rights.

(c) Category (iii): rights that could not be replicated in UK law

61 The third category of rights is those which have an effect in the domestic law of the UK and which would be lost upon withdrawal from the EU and which could not be replicated in domestic legislation ("category (iii) rights"). Mr Eadie, on behalf of the **Secretary** of **State**, characterised these as rights flowing from the membership of "the EU club". These include the right to stand for selection or, later, for election to the **European** Parliament and the right to vote in such elections: see para 69 below. The right to seek a reference to the CJEU is another example. So is the right to seek to persuade the **European** Commission to take regulatory action in relation to matters within the UK, such as to investigate a violation of EU competition law or of EU environmental protection legislation occurring within the UK and grant a remedy in relation to it.

(d) The effect of withdrawal of the rights

62 The point of discussion of these categories of rights at the hearing was to examine the extent to which withdrawal of the UK from the relevant EU Treaties would affect rights in domestic law and would undo or modify the legal effects as brought about by Parliament through the enactment of the ECA 1972. The claimants contend that Parliament by the ECA 1972 intended to give effect to each of these categories of right. They do so to emphasise the extent of the change which would be brought about by withdrawal pursuant to article 50EU, in order to reinforce their argument that the Crown could not effect such changes by the exercise of its prerogative powers. The **Secretary** of **State** maintains that whatever the

extent of the changes upon withdrawal, Parliament has left the Crown with prerogative power to give notice under article 50EU. He also argues that the claimants exaggerate the extent and the degree to which categories (i) to (iii) were created by Parliament by the ECA 1972. The **Secretary** of **State** accepts that category (iii) rights would be lost upon withdrawal, but he sought to minimise the extent of loss of category (i) rights and disputed that category (ii) rights were the product of enactment of the ECA 1972.

63 Since the **Secretary** of **State** accepts that category (iii) rights include rights applicable in domestic law which are at least in part the product of the ECA 1972 and will be lost upon withdrawal from the EU, which is sufficient for the claimants' argument, these issues can be dealt with shortly.

64 As to category (i) rights, we consider that the claimants are correct in their submission that it is the ECA 1972 which is the principal legislation under which these rights are given effect in domestic law of the UK: and that it is no answer to their case to say that some of them might be preserved under new primary legislation, yet to be enacted, when withdrawal pursuant to article 50EU takes

place. The objection remains that the Crown, through exercise of its prerogative powers, would have deprived domestic law rights created by the ECA 1972 of effect. We also consider that the removal of the ability to seek authoritative rulings of the CJEU regarding the scope and interpretation of such rights would itself amount to a material change in the domestic law of the UK.

65 As regards category (ii) rights, the prohibition against impediments to the exercise of these rights is part of EU law with direct applicability in the domestic law of the UK, as the **Secretary** of **State** accepts. However, the **Secretary** of **State** submits that the main content of these rights (say, the ability of a British citizen to rely on his or her rights of free movement when in another member **state**) is not the product of the ECA 1972. Rather, it is the product of the operation of EU law in combination with the domestic law of that member **state**, just as the free movement rights of a national of that member **state** in England and Wales would be the product of EU law in combination with the domestic law of England and Wales. The **Secretary** of **State** says, further, that the effect of EU law on other member **states** for the benefit of British citizens was brought about by ratification of the relevant EU Treaties by the Crown on behalf of the UK on the international plane and the reciprocal ratification of those treaties by other member **states**, also on the international plane.

66 In a highly formalistic sense, this may be accurate. But in our view, it is a submission which is divorced from reality. As explained at paras 41–42 above, the enactment of the ECA 1972 was a necessary step before ratification of the relevant treaties could occur, as Parliament knew. As Parliament contemplated, it was only if it enacted the ECA 1972 (and then amended it to refer to later EU Treaties) that ratification of those treaties could occur. The reality is that Parliament knew and intended that enactment of the ECA 1972 would provide the foundation for the acquisition by British citizens of rights under EU law which they could enforce in the courts of other member **states**. We therefore consider that the claimants are correct to say that withdrawal from the EU pursuant to article 50EU would undo the category (ii) rights which Parliament intended to bring into effect, and did in fact bring into effect, by enacting the ECA 1972. Although these are not rights enforceable in the national courts of the UK, they are none the less rights of major importance created by Parliament. Accordingly, the

claimants are entitled to say that it would be surprising if they could be removed simply through action by the Crown under its prerogative powers.

(5) UK legislation in relation to the EU subsequent to the ECA 1972

(a) The European Communities (Amendment) Act 2008

67 As mentioned at para 46 above, the ECA 1972 has been amended on a number of occasions to give effect to new EU Treaties as they have been made and ratified by the UK. This includes amendment of the ECA 1972 by the **European** Communities (Amendment) Act 2008 ("the 2008 Act") to allow for ratification of the Lisbon Treaty. However, the material provisions of the ECA 1972 set out at paras 47–54 above have remained unchanged since 1972, save for additions to the list of EU Treaties in section 1(2).

68 Section 6 of the 2008 Act provided for parliamentary control of ministers before they took any action in relation to certain decisions to increase the powers of the EU institutions. It did not provide for any similar parliamentary control in relation to a decision to give notice under article 50EU.

(b) The European Parliamentary Elections Act 2002

69 The **European** Parliamentary Elections Act 2002 ("the 2002 Act") makes provision in relation to elections to the **European** Parliament. Section 1 (as amended by section 16(2) of the 2011 Act) provides that there shall be 73 members of the **European** Parliament elected for the UK in respect of 12 electoral regions. Section 8 **states** who is entitled to vote in **European** parliamentary elections. It is common ground that these provisions will lose their effect if the UK withdraws from the EU.

70 At the time the UK decided to join the **European** Communities the **European** Parliament was in place, with members selected from parliamentarians in each member **state** (but not yet elected), and there was at that stage a requirement that proposals should be drawn up for elections by direct universal suffrage: see Part 5 of the Treaty of Rome 1957. In 1972 and 1973 it was the right to seek selection to be a member of the Parliament which constituted the relevant category (iii) rights already in place, and there was an expectation that they would be added to by further Community legislation to create an elected Parliament. The **European** Parliament became a body elected on a general franchise in 1979. The domestic legislation to give effect to this was the **European** Parliamentary Elections Act 1978, which has been superseded by the 2002 Act.

(c) The European Union Act 2011

71 The **European Union** Act 2011 ("the EUA 2011") enacted certain restrictions on treaties and decisions relating to the EU. Section 2 provides that "A treaty which amends or the EU Treaty or FEU Treaty is not to be ratified unless", amongst other things, the treaty is approved by Act of Parliament and in certain cases a referendum is held. Section 3 provides that similar conditions would have to be fulfilled in relation to amendment of the FEU Treaty under the simplified revision procedure under article 48(6)EU. Section 4 sets out cases where a referendum would be required, focusing on cases where there would be an extension of the competences or powers of EU institutions.

(d) The European Union Referendum Act 2015

72 The 2015 Referendum Act provided, in section 1, for the holding of a referendum on the question "Should the United Kingdom remain a member of the **European Union** or leave the **European Union**?" Section 1(1) simply **stated**: "A referendum is to be held on whether the United Kingdom should remain a member of the **European Union**." The remainder of the Act made provision in relation to the holding of that referendum. We set out at para 105 the position of the **Secretary** of **State** in relation to this Act.

(6) The parties' principal submissions

73 The arguments advanced to the court by all parties were transcribed and made available on the Internet free of charge. It is therefore possible to summarise the arguments briefly.

74 The claimants' primary submissions are as follows:

(1) The question in this case is to be approached on the basis that it is a fundamental principle of

the UK constitution that the Crown's prerogative powers cannot be used by the executive government to diminish or abrogate rights under the law of the UK (whether conferred by common law or statute), unless Parliament has given authority to the Crown (expressly in or by necessary implication from the terms of an Act of Parliament) to diminish or abrogate such rights.

(2) No words can be found under which Parliament has given any such authority either expressly or by necessary implication in the ECA 1972 or subsequent legislation relating to the EU.

(3) The giving of a notice under article 50(2)EU would pre-empt any ability of Parliament to decide on whether statutory rights should be changed. The notice would automatically abrogate in due course category (iii) rights and the rights under the 2002 Act; it would remove the category (i) rights as enacted by Parliament in the ECA 1972; and it would remove from Parliament decisions on the maintenance of category (ii) rights.

(4) Ratification by Parliament of a withdrawal treaty made pursuant to article 50(2)EU (if any such treaty was agreed between the UK and the EU) would not cure the pre-emption, as the effect of giving the article 50(2)EU notice would in effect inevitably remove the real decision from Parliament.

(5) Parliament had not given authority by the 2015 Referendum Act for the Crown to give notice of withdrawal under article 50EU.

75 The claimants' alternative submission is that, if they are wrong in their primary contention that the Crown is prevented under the principles of the constitutional law of the UK from giving notice under article 50EU without express authority from Parliament, any power under the Crown's prerogative to do so has been removed by the ECA 1972 or by subsequent legislation in relation to the EU; in addition, Mr Green argued in the further alternative that any relevant power under the Crown's prerogative was removed by the EUA 2011.

76 The **Secretary** of **State** submits as follows:

(1) Parliament could choose to leave (or not to abrogate) prerogative power in the hands of the Crown, even if its use would result in a change to common law and statutory rights,

(2) It was clear from *Ex p Rees-Mogg* [1994] QB 552 that, unless express words could be found in a statute, Parliament could not be taken to have

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abrogated the Crown's prerogative powers in relation to the EU Treaties so that notice under article 50(2)EU could be given with the consequences that followed in the form of either a withdrawal treaty or automatic departure. Alternatively, applying the guidance in *De Keyser's Royal Hotel* [1920] AC 508 in the context of the EU Treaties, Parliament could not be taken to have abrogated such prerogative power unless by express words in a statute (or possibly by necessary implication from a statute).

(3) No words could be found in the ECA 1972 or any other statute which abrogated that power expressly or by necessary implication.

(4) In particular, it is notable that neither the 2008 Act nor the EUA 2011 restricted the Crown's prerogative power to give a notice under article 50(2)EU, even though that provision had come into existence by the time they were enacted. On the contrary, both Acts implicitly recognised that such prerogative power existed as no restriction was placed on the power of the Crown to invoke that right exercisable under the EU Treaty, as amended by the Lisbon Treaty.

(5) Nor were there any express words in any UK legislation that abrogated the Crown's prerogative power to withdraw from the treaties as distinct from amending them. That was because the intention of Parliament, in particular as appears from the EUA 2011, was directed at restricting the increase in the powers of the EU and its encroachment on parliamentary sovereignty, not at restricting the ability to withdraw from the EU and thereby restoring parliamentary sovereignty.

(6) As it is likely that any withdrawal treaty would contain a provision requiring ratification, the withdrawal treaty would in any event have to be approved by Parliament by way of the negative resolution procedure in the CRAG 2010 before that occurred; if it contained provisions requiring application in domestic law, primary legislation would also need to be introduced to allow that. This would be consistent with the proper sequencing of the respective functions of the Crown and of Parliament, as had invariably happened in the past: once an EU treaty had been made, domestic law was brought into line by Parliament through legislation and then the treaty was ratified.

(7) Although the 2015 Referendum Act does not itself confer statutory power on the **Secretary** of **State** to give notice under article 50(2)EU, the implication from the fact that the 2015 Referendum Act is silent on the issue whether legislation is required before notice could be given under that article supported the contention that Parliament accepted the continued existence of the prerogative powers of the Crown to give such notice; it certainly contains no restriction on such prerogative power as may still exist.

(7) Our decision on the legal question

(a) The nub of the contention of the Secretary of State

77 Rather than begin with our consideration of the claimants' primary submission, to which we turn at para 95, we will consider first the **Secretary** of **State**'s submission on the interpretation of the ECA 1972. He maintains that under section 2(1) of the ECA 1972 the content of EU rights is defined by reference to the EU Treaties, This means that Parliament intended there to be a continuing condition for the existence of any EU rights to be given effect in domestic law under section 2(1), in the shape of

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the continued membership of the EU on the part of the UK; and that whether that condition is satisfied or not was intended by Parliament to depend entirely upon the action of the Crown on the plane of international law.

78 If the **Secretary** of **State**'s contention as to the proper meaning of section 2(1) of the ECA 1972 is correct, there is no violation of the principle in the *Case of Proclamations* 12 Co Rep 74 summarised in *The Zamora* [1916] 2 AC 77 as set out at paras 27–29 above. Parliament would then itself have provided that the EU rights in domestic law should be vulnerable to removal by executive action on the plane of international law through the use of the Crown's prerogative powers.

79 This would be a function of the principle of Parliamentary sovereignty, as Parliament can produce any effect it likes in law and so in theory can, if it chooses, legislate in such a way that aspects of the application of a statutory regime may be left to be filled in by reference to formal steps taken by the executive government. *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 is an example of this. In that case, on the proper interpretation of the legislation in question in its particular context, the extent of application of the legislative regime was to be determined by reference to the concept of the UK's territorial waters, as they happened to be defined from time to time by the Crown by making relevant claims regarding their extent in the conduct of international relations under its prerogative powers.

80 Under the approach advocated by the **Secretary** of **State**, the resolution of the issue would depend upon whether the claimants could point to an intention on the part of Parliament as expressed in the ECA 1972 to remove the Crown's prerogative power to take action to withdraw the UK from the Community treaties once they were ratified. If Parliament had done nothing in the ECA 1972 to qualify the Crown's pre-existing prerogative power to conduct international relations, that power would on this approach have continued after the promulgation of that Act.

81 However, in our judgment the **Secretary** of **State** goes too far in his suggestion that the constitutional principle summarised in *The Zamora* drops out of the picture and that the approach to statutory interpretation in relation to abrogation of the Crown's prerogative powers as set out in *De Keyser's Royal Hotel* leads to the conclusion that under the ECA 1972 the Crown retained prerogative power to take steps to withdraw the UK from the Community treaties and now, therefore, has power under the Crown's prerogative to give notice under article 50EU.

(b) The approach to the interpretation of the ECA 1972 as a constitutional statute

82 Statutory interpretation, particularly of a constitutional statute which the ECA 1972 is for the reasons given at paras 43–44 above, must proceed having regard to background constitutional principles which inform the inferences to be drawn as to what Parliament intended by legislating in the terms it did. This is part of the basic approach to be adopted by a court engaging in the process of statutory interpretation. Where background constitutional principles are strong, there is a presumption that Parliament intended to legislate in conformity with them and not to undermine them.

One reads the text of the statute in the light of constitutional principle. In the particular context of the primary legislation which falls for interpretation, can it be inferred that a Parliament aware of such constitutional principle and respectful of it intended none the less to produce effects at variance with it?

83 There are several examples of this approach to statutory interpretation. There is a strong presumption against Parliament being taken to have intended to give a statute retrospective effect, even if the language used in the statute might appear to create such effect. There is a similar presumption as to the territorial effect of statutes. There is a strong presumption that Parliament does not intend to preclude access to the ordinary courts for determination of disputes: see, for example, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. Another example, debated at some length at the hearing, is the principle of legality, ie the presumption that Parliament does not intend to legislate in a way which would defeat fundamental human rights: see ***R*** *v* ***Secretary*** *of* ***State*** *for the Home Department, Ex p Pierson* [1998] AC 539, 573G, 575B–G (Lord Browne-Wilkinson) and ***R*** *v* ***Secretary*** *of* ***State*** *for the Home Department, Ex p Simms* [2000] 2 AC 115, 131D–G (Lord Hoffmann). All these presumptions can be overridden by Parliament if it so chooses, but the stronger the constitutional principle the stronger the presumption that Parliament

did not intend to override it and the stronger the material required, in terms of express language or clear necessary implication, before the inference can properly be drawn that in fact it did so intend. Similarly, the stronger the constitutional principle, the more readily can it be inferred that words used by Parliament were intended to carry a meaning which reflects the principle.

84 We emphasise this feature of the case because the **Secretary** of **State**'s submission, in our view, glossed over an important aspect of this starting point for the interpretation of the ECA 1972 and proceeded to a contention that the onus was on the claimants to point to express language in the statute removing the Crown's prerogative in relation to the conduct of international relations on behalf of the UK. The **Secretary** of **State**'s submission left out part of the relevant constitutional background. It was omitted, despite the **Secretary** of **State** making recourse to this approach to statutory interpretation a keystone of his own submission that the conduct of international relations is a matter for the Crown in the exercise of its prerogative powers. He made it so in order to argue that express (or at any rate especially clear) language would need to be found in the ECA 1972 before it could be inferred that Parliament intended to remove the Crown's prerogative power to take steps to remove the UK from the **European** Communities and the Community treaties. Despite this, the **Secretary** of **State**'s submission on section 2(1) of the ECA 1972 gave no value to the usual constitutional principle that, unless Parliament legislates to the contrary, the Crown should not have power to vary the law of the land by the exercise of its prerogative powers.

85 In our view, the **Secretary** of **State**'s submission is flawed at this basic level. That view is reinforced by reference to two constitutional principles.

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(c) The principle that the Crown cannot use its prerogative powers to alter domestic law

86 First, the powerful constitutional principle that the Crown has no power to alter the law of the land by use of its prerogative powers is the product of an especially strong constitutional tradition in the UK (and the democracies which follow that tradition: see for example the New Zealand decision in *Fitzgerald v Muldoon* [1976] 2 NZLR 615, 622). It evolved through the long struggle (to which we have referred at para 26) to assert parliamentary sovereignty and constrain the Crown's prerogative powers. It would be surprising indeed if, in the light of that tradition, Parliament, as the sovereign body under our constitution, intended to leave the continued existence of all the rights it introduced into domestic law by enacting section 2(1) of the ECA 1972 (and, in the case of category (ii) rights, which it passed the ECA 1972 to bring into existence) subject to the choice of the Crown in the exercise of its prerogative powers as to whether to allow the Community treaties to continue in place or to take the UK out of them. As Lord Browne-Wilkinson put it in ***R*** *v* ***Secretary*** *of* ***State*** *for the Home Department, Ex p Fire Brigades* ***Union*** [1995] 2 AC 513, 552E:

> "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."

87 In this context, it is also relevant to bear in mind the profound effects which Parliament intended to produce in domestic law by enactment of the ECA 1972, which has led to its identification as a statute of special constitutional significance. The wide and profound extent of the legal changes in

domestic law created by the ECA 1972 makes it especially unlikely that Parliament intended to leave their continued existence in the hands of the Crown through the exercise of its prerogative powers. Parliament having taken the major step of switching on the direct effect of EU law in the national legal systems by passing the ECA 1972 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.

88 Moreover, the status of the ECA 1972 as a constitutional statute is such that Parliament is taken to have made it exempt from the operation of the usual doctrine of implied repeal by enactment of later inconsistent legislation: see *Thoburn's* case [2003] QB 151, paras 60–64, and section 2(4) of the ECA 1972. It can only be repealed in any respect if Parliament makes it especially clear in the later repealing legislation that this is what it wishes to do. Since in enacting the ECA 1972 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 none the less intended that its legal effects could be removed by the Crown through the use of its prerogative powers.

[2017] 2 WLR 583 at 612

(d) The Crown's prerogative power operates only on the international plane

89 The second principle is the well settled limitation on the constitutional understanding that the conduct of international relations is a matter for the Crown in the exercise of its prerogative powers. The **Secretary** of **State** has overstated that constitutional understanding as his submission overlooks the inter-relationship between that principle and the constitutional principle summarised in *The Zamora* which was highlighted by Lord Oliver in the *JH Rayner* case [1990] 2 AC 418 in the passage quoted at para 33 above. It is precisely because the exercise of the Crown's prerogative powers in the conduct of international relations has no effect in domestic law that the courts accept that this is a field of action left to the Crown and recognise the strength of the understanding that it is not readily to be inferred that Parliament intended to interfere with it. But the justification for a presumption of non-interference with the Crown's prerogative in the conduct of international affairs is substantially undermined in a case such as this, where the **Secretary** of **State** is maintaining that he can through the exercise of the Crown's prerogative bring about major changes in domestic law.

90 For this reason, it is our view that the decision in *Ex p Rees-Mogg* on which the **Secretary** of **State** sought to place considerable weight, does not provide guidance in the present case. In that case a strong Divisional Court addressed the question whether section 2(1) and (2) of the ECA 1972 had by implication abrogated the prerogative power of the Crown to amend or add to the EEC Treaty, so as to disable the Crown from ratifying the Protocol on Social Policy as an addition to that Treaty: [1994] QB 552, 567A–568E. The court answered that question in the negative, drawing a contrast with section 6 of the **European** Parliamentary Elections Act 1978 which, as amended by the **European** Communities (Amendment) Act 1986, **stated** that no treaty which provided for any increase in the powers of the **European** Parliament should be ratified unless it had been approved by an Act of Parliament. At pp 567G–568E the court said:

> "We find ourselves unable to accept this far reaching argument [for the claimant]. 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 EEC Treaty.

"Would the ratification of the Protocol on Social Policy alter the content of domestic law? The Protocol itself makes clear that it was not intended to apply to the UK. Nor is the UK party to the agreement which is annexed to the Protocol. The Protocol is not one of the Treaties (which for this purpose includes protocols: see section 1(4)) included within the definition of 'the Treaties' in section 1(2) of the Act of 1972. For it is specifically excluded by section 1(1) of the Act of 1993. *It follows that the Protocol is not one of the Treaties covered under section 2(1)* of *the Act of 1972* by *which alone Community treaties have force in domestic*

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law. It does not become one of the treaties covered by section 2(1) merely because, by the **Union** Treaty, it is annexed to the EEC Treaty: see section 1(3) of the Act of 1972.

"Mr Pannick [counsel for the claimant] argues that under paragraph 1 of the Protocol, the UK has agreed to authorise the other eleven member **states** to have recourse to the Community institutions for the purpose of giving effect to the Agreement. But this is an obligation on the international plane, not the domestic plane. He further argues that the Protocol may have indirect effect on our domestic law, because some of the matters covered by the Agreement are covered elsewhere in Community law. Thus article 6 of the Agreement, which enshrines the principle of equal pay for equal work, follows the language of article 119 of the EEC Treaty. Accordingly a decision of the **European** Court of Justice on the meaning of article 6 might affect, so it is said, the application of article 119 so as to influence the development of UK domestic law.

"But in our view, this possible indirect effect is far too slender a basis on which to support Mr Pannick's argument. *We conclude that the Government would not, by* ratifying *the Protocol, be altering or affecting the content of domestic law without parliamentary approval*. For the above reasons we would reject Mr Pannick's … argument." (Emphasis added.)

91 In our judgment, the nub of the court's reasoning, as is apparent from the passages which we have highlighted, is that ratification of the Protocol on Social Policy by the Crown would not alter or affect the content of domestic law by virtue of section 2(1) of the ECA 1972. Accordingly, there was no good reason to infer that Parliament had intended by enactment of that Act to affect the usual position, properly applicable in relation to that Protocol, that the Crown has untrammelled prerogative powers to make treaties in the conduct of the UK's international relations. Contrary to

the **Secretary** of **State**'s submission, the judgment cannot properly be read as saying, let alone holding, that express words would be required to fetter the Crown's treaty-making power in relation to EU law, since the court looked to see if there was sufficient ground to hold that Parliament had by implication curtailed or fettered the Crown's prerogative in that regard. That question arose in the context of the making of a Protocol to extend, not remove, EU rights. It is clear from the judgment that it was the fact that the ratification of the Protocol would not alter domestic law which led to the court's conclusion. The court did not have to consider an argument as to whether the Crown's prerogative powers had been unaffected by the ECA 1972. In the very different context of the present case, the question is whether the Crown has power under its prerogative to *withdraw* from the relevant EU Treaties where such withdrawal will, on the **Secretary** of **State**'s argument, have a major effect on the content of domestic law. It is clear that the court in *Ex p Rees Mogg* did not touch on that question.

(e) Our conclusion as to Parliament's intention

92 Interpreting the ECA 1972 in the light of the constitutional background referred to above, we consider that it is clear that Parliament intended to legislate by that Act so as to introduce EU law into domestic law

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(and to create the category (ii) rights) in such a way that this could not be undone by exercise of Crown prerogative power. With the enactment of the ECA 1972, the Crown has no prerogative power to effect a withdrawal from the Community treaties on whose continued existence the EU law rights introduced into domestic law depend (rights in categories (i) and (iii)) and on whose continued existence the wider rights of British citizens in category (ii) also depend. The Crown therefore has no prerogative power to effect a withdrawal from the relevant treaties by giving notice under article 50EU of the EU Treaty.

93 That this was the intention of Parliament and is the effect of the ECA 1972 appears from the following provisions of that Act, read in the light of the relevant constitutional background:

(1) The long title indicates that Parliament intended that the ECA 1972 was to give effect to the enlargement of the **European** Communities by the addition of the UK as a member **state**. It is inconsistent with that major constitutional purpose of the Act that the Crown should have power to undo that enlargement by exercise of its prerogative powers.

(2) The heading of section 2 indicates that it is to provide for the implementation of the relevant "Treaties". The "Treaties" referred to are defined in section 1(2) and the most important of them are expressly listed there. It is inconsistent with that specific declared statutory objective that the Crown should have power under its prerogative to remove the UK from those treaties so that they cannot be implemented.

(3) In our view point (2) refutes the **Secretary** of **State**'s own textual argument on section 2(1), to the effect that where it refers to all rights, powers, liabilities etc "from time to time created or arising by or under the Treaties" and to all remedies and procedures "from time to time provided for by or under the Treaties", it imports an implied condition that the UK remains a member of the EU and is bound by "the Treaties" and the Crown has not withdrawn from "the Treaties" through the exercise of its prerogative power. It is on the basis that there is such an implied condition that the **Secretary** of **State** seeks to say that Parliament has chosen to allow the Crown's prerogative powers to withdraw the UK from the relevant EU Treaties to continue in being. But such a condition is contrary to the express wording of section 2. There is nothing in the constitutional background to

warrant reading the words in that way. On the contrary, the constitutional background strongly reinforces the claimants' own suggested interpretation of the provision. Read according to their natural meaning and in their proper context, the words quoted above refer only to EU law rights, remedies and procedures etc that exist in the treaties themselves or by virtue of EU legislation passed from time to time.

(4) This interpretation of section 2(1) shows that Parliament intended to introduce into domestic law EU rights which were in place and would continue to be in place in relation to the UK under the relevant treaties. The fact that Parliament uses the label "enforceable EU right" ("enforceable Community right" in the version of section 2(1) as originally enacted) reinforces the view that this is what Parliament meant to achieve. This reading of the provision is again inconsistent with the existence of any power under the Crown's prerogative to undo those rights by effecting the withdrawal of the UK from the relevant treaties.

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(5) Section 2(2) also indicates that Parliament believed and intended that it was legislating to give effect to EU law in domestic law and that the effect of its legislation should not be capable of being undone by the Crown through the exercise of its prerogative powers. Section 2(2) confers a power to make subordinate legislation to implement "any EU obligation" of the UK and to enable "any rights enjoyed or to be enjoyed by the UK under or by virtue of the Treaties" to be exercised. Read in context and in light of the relevant constitutional background, these words refer only to EU obligations and EU rights which arise from time to time by virtue of the "Treaties" and do not import by implication any condition that such obligations and rights are only to be treated as such for so long as the Crown has not exercised its prerogative powers to withdraw the UK from the treaties.

(6) Further, section 2(2) **states** in sub-paragraph (b) that this statutory power may be exercised to make subordinate legislation for "the purpose of dealing with matters arising out of or related to any such obligation or rights". On the **Secretary** of **State**'s argument, this would appear to include making subordinate legislation to deal with the removal of any such EU obligation or EU rights as a result of withdrawal from the EU by virtue of exercise of the Crown's prerogative powers; but the subsection also says that the person exercising the power to make subordinate legislation "may have regard to the objects of the EU" (or "the objects of the Communities", as the subsection **stated** as originally enacted). This would make little sense if Parliament had intended that the ECA 1972 should be interpreted as the **Secretary** of **State** contends.

(7) In our view, section 3(1), relating to the ability to seek references from the CJEU under what is now article 267FEU and the obligation of national courts to determine questions as to the validity, meaning or effect of any EU instrument in accordance with the jurisprudence of the CJEU, is most naturally to be read in context as presupposing the continued applicability of EU law and the EU Treaties in relation to the UK unless and until Parliament legislates for withdrawal. As with section 2(1) and (2), Parliament cannot be taken to have legislated potentially in vain by this provision, as would be the case if the Crown could itself choose to withdraw the UK from the EU without the need for further legislation and thereby strip it of any effect whatever.

(8) Finally, we have already drawn attention to the significance of the fact that the principal EU Treaties which are given effect in domestic law are specifically listed in section 1(2). Section 1(3) provides for parliamentary control before any ancillary treaty can be made and regarded as a "Treaty" for the purposes of the Act, and hence given effect in domestic law. The Crown cannot simply make and ratify ancillary treaties in the exercise of its prerogative powers and thereby create legal effects in domestic law. It is not compatible with this degree of parliamentary control—listing the main "Treaties" in the ECA 1972 itself and providing for a high degree of parliamentary control by way of approval by resolution of both Houses before an ancillary treaty qualifies as a "Treaty" for

the purposes of the Act—that Parliament at the same time intended that the Crown should be able to change domestic law by the simple means of using its prerogative power to withdraw the UK from the treaties. 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.

94 In our judgment, the clear and necessary implication from these provisions taken separately and cumulatively is that Parliament intended EU rights to have effect in domestic law and that this effect should not be capable of being undone or overridden by action taken by the Crown in exercise of its prerogative powers. We therefore reject the **Secretary** of **State**'s submission that Parliament did not intend to abrogate the Crown's prerogative powers and had not done so through the ECA 1972. Parliament also intended that British citizens should have the category (ii) rights and that, likewise, they should not be capable of being undone by the Crown by exercise of its prerogative powers. We arrive at this conclusion and reject the **Secretary** of **State**'s submission by interpreting the ECA 1972 as a statute which introduces EU rights into domestic law and must be taken to cover the field. The ECA 1972 cannot be regarded as silent on the question of what happens to EU rights in domestic law if the Crown seeks to take action on the international plane to undo them. Either the Act reserves power to the Crown to do that, including by giving notice under article 50EU, or it does not. In our view, it clearly does not.

(f) *The claimants' principal argument*

95 We have reached this conclusion by examining and rejecting the submission advanced by the **Secretary** of **State**. We now turn, as we indicated at para 77 above, to the claimants' principal contention that as a matter of general constitutional principle derived from the sovereignty of Parliament and the case law beginning with the *Case of Proclamations* 12 Co Rep 74, to which we have referred at paras 27–29 above, that the contention of the **Secretary** of **State** was misconceived. It was their submission that the Crown could not change domestic law and nullify rights under the law unless Parliament had conferred upon the Crown authority to do so either expressly or by necessary implication by an Act of Parliament. The ECA 1972, in their submission, contained no such authority.

96 If the issue is approached in this way on the basis of the claimants' primary submission, it follows from the detailed analysis that we have set out that the ECA 1972 confers no such authority on the Crown, whether expressly or by necessary implication. Absent such authority from the ECA 1972 or the other statutes, the Crown cannot through the exercise of its prerogative powers alter the domestic law of the UK and modify rights acquired in domestic law under the ECA 1972 or the other legal effects of that Act. We agree with the claimants that, on this further basis, the Crown cannot give notice under article 50(2)EU.

(g) The decisions in De Keyser, Fire Brigades Union and Laker Airways

97 The interpretation of the ECA 1972 we have set out and the conclusions we have reached are fully in line with the guidance given in *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508. That case establishes that Crown prerogative powers may be impliedly abrogated by primary legislation: pp 526 (Lord Dunedin), 539 (Lord Atkinson), 554 (Lord

Moulton), 561–562 (Lord Sumner) and 575–576 (Lord Parmoor). It also provides an example of one kind of case where that will be found to have occurred, ie where a matter formerly dealt with under the Crown's prerogative powers has been directly regulated by statute. In that case, the taking of property by the Crown during wartime had previously been permitted in exercise of the Crown's prerogative powers without any obligation to pay compensation, but the legislation in issue required the payment of compensation in relation to such a taking. The House of Lords held that the Crown's prerogative power to take without paying compensation had thereby been impliedly removed by the legislation. But the House of Lords did not decide that this is the only kind of situation in which an implied abrogation may be found. ***R*** *v* ***Secretary*** *of* ***State*** *for the Home Department, Ex p Fire Brigades* ***Union*** [1995] 2 AC 513 shows that it is not; see also the speech of Lord Parmoor at p 576. Whether there is an implied abrogation is a matter of interpretation of the particular statute in each case, in its specific context and having regard to the subject matter it is dealing with.

98 In fact, the way in which sections 2(1), 2(2) and 3(1) of the ECA 1972 would be stripped of effect by exercise of the Crown's prerogative powers if the **Secretary** of **State**'s interpretation of that Act were correct provides an even stronger illustration than that which led the House of Lords in the *Fire Brigades* ***Union*** case to hold that the Crown's prerogative had been impliedly abrogated by the statute in issue there. That case concerned the Criminal Injuries Compensation Scheme 1990, which had originally been introduced under the Crown's prerogative powers. Parliament enacted legislation to put such a scheme on a statutory footing, applying certain rates of compensation as set out in the statute. The statutory scheme was not brought immediately into effect, but according to the statute the **Secretary** of **State** had to keep under review whether he should make an order to bring it into effect. Instead, however, he decided to exercise the Crown's prerogative to make changes to the compensation scheme introduced through the use of the Crown's prerogative powers by specifying tariff compensation rates which were lower than those set out in the statutory provisions. The House of Lords held that this was unlawful, as the Crown's prerogative power to change the scheme had been impliedly abrogated by the statute to the extent that he was not entitled to exercise it, as he had sought to do, in a manner which in practice meant he debarred himself from exercising the statutory power (to bring the statutory scheme into effect) for the purposes and on the basis which Parliament intended: see pp 552D–554G (Lord Browne-Wilkinson), 568G–573C (Lord Lloyd of Berwick) and 575B–578F (Lord Nicholls of Birkenhead). The new tariff scheme was not introduced as a temporary stopgap, but as a long-term replacement for the existing scheme and its statutory embodiment. As Lord Nicholls said at p 576A–B:

> "The executive cannot exercise the prerogative power in a way which would derogate from the due fulfilment of a statutory duty. To that extent, the exercise of the prerogative power is curtailed so long as the statutory duty continues to exist."

99 The effect of the decision in the *Fire Brigades* ***Union*** case was that Parliament could not be taken to have legislated in vain. Even though the statutory compensation scheme had not yet been brought into force, the

Secretary of **State** was under a duty to consider bringing it into force at some point. He could not use the Crown's prerogative powers to create a new prerogative scheme which was incompatible with the statutory scheme and was intended to stand in place of it, even though the statutory scheme was not yet in effect. In the present case, on the other hand, sections 2(1)(2) and 3(1) of the ECA 1972 set out legal duties already in force which require effect to be given to EU law. In the

present case, contrary to the submission of the **Secretary** of **State**, the inference that Parliament intended to abrogate the Crown's prerogative powers that would allow those provisions to be stripped of practical effect is even stronger.

100 It is finally necessary to refer to *Laker Airways Ltd v Department of Trade* [1977] QB 643, on which the claimants relied. In that case the Court of Appeal found that the Crown's prerogative powers in relation to the making of treaties had been impliedly abrogated by a statutory scheme for the licensing of air carriers. The claimant carrier had been licensed under the statute to provide an airline service between London and New York, but the Crown proposed to cancel the designation of the claimant as an approved carrier under the relevant treaty arrangement with the USA, which designation was necessary to allow it to operate its service. The court held that this would be unlawful. As Lord Denning MR said, at p 707B: "such a procedure was never contemplated by the statute." Roskill LJ applied the guidance in *De Keyser's Royal Hotel* [1920] AC 508 and held that Parliament should be taken to have intended to fetter the prerogative of the Crown in the relevant respect by its legislation: pp 719B–722H. Lawton LJ likewise held that the legislation regulated all aspects of the revocation of licences and by necessary implication should be construed so as to prevent the **Secretary** of **State** from achieving that effect through the exercise of the Crown's prerogative powers: pp 727B–728D. The analysis of all three judges depended on what Parliament had intended in the primary legislation and was in line with the approach in *De Keyser's Royal Hotel*.

101 Lawton LJ discussed the **Secretary** of **State**'s submission that there was nothing in the legislation which curbed the Crown's prerogative powers in the sphere of international relations, and that indeed the legislation recognised that the Crown had such powers. Lawton LJ said: "This is so; but 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." He held that this was in reality what the **Secretary** of **State** was doing: p 728A. The claimants argued that this short passage supported their primary submission. The context in which Lawton LJ said this was in his discussion regarding the proper interpretation of the primary legislation in issue. It therefore is to be viewed as providing additional support for our analysis rejecting the **Secretary** of **State**'s submission, since Lawton LJ clearly regarded reference to background constitutional principles as relevant to his interpretation of the legislation.

(h) The Act of Union 1707, the devolution statutes and other statutes

102 In the light of the conclusion we have reached by consideration of the terms of the ECA 1972 and basic constitutional principles, we do not find it necessary to address the supplementary submissions made by Miss Mountfield on the effect of the Act of **Union** of 1707. Nor is it necessary or appropriate to consider various alternative arguments put

forward by the claimants, interested parties and other interveners. They relied upon the 2002 Act, but that came well after the enactment of the material provisions in the ECA 1972 and cannot affect their meaning; and in so far as the 2002 Act was relied upon as further legislation abrogating prerogative powers if the submissions based on the ECA 1972 did not succeed, the question does not arise. The claimants also relied upon the EUA 2011 and the various devolution Acts, but the same points apply.

103 In parallel with these proceedings in England and Wales there have been proceedings in the High Court in Northern Ireland concerned with the distinct question whether the Northern Ireland Act 1998 abrogates the Crown's prerogative powers in relation to the giving of notice under article 50EU. We were informed that the issues being argued in the case before us were not the subject

of argument and would not be decided in the Northern Ireland proceedings.

104 When the draft of our judgment was in the course of preparation Maguire J handed down his judgment in the Northern Ireland proceedings: *In re McCord* [2016] NIQB 85. We do not say anything about the proper interpretation or effect of the Northern Ireland Act 1998; the parties before us deliberately withdrew from their arguments submissions based on that Act and the "Good Friday Agreement" on the basis that those issues were for the decision of the High Court in Northern Ireland. However, in relation to certain observations made in the judgment which relate to the extent of the Crown's prerogative powers, the interpretation of the ECA 1972 and the effect of giving notice under article 50EU, we infer that the observations reflected the way the case appears to have been argued based on the premise that such issues were primarily for determination by us. We would simply say:

(1) At para 67 the judge notes that it is implicit in the argument of the applicants in the case before him that, were it not for the displacement of the prerogative by the Northern Ireland Act 1998, the use of prerogative power to give notice under article 50EU would be unobjectionable and affirms that position as the appropriate starting point for his analysis. But it is not the appropriate starting point, because a prior question is the effect of the ECA 1972 on domestic law and the Crown's prerogative powers.

(2) At para 70 the judge refers to the *Case of Proclamations*, but only for the principle that "the King hath no prerogative, but that which the law of the land allows him". The judgment does not however address the principle that the Crown cannot through its prerogative power change any part of the law of the land; nor is reference made to the Bill of Rights: see paras 28–29 above. Further, counsel for the applicants in the Northern Ireland case argued that there was no need to establish an intention on the part of the legislature to limit the prerogative (see para 82), which was very different from the submission presented to us. We therefore do not find it surprising that the judge was able to reject the overly broad submission made to him. It follows that when the judge gave consideration to the case law, he did so without having the proper starting point identified.

(3) Finally, at paras 104–108 it is evident that the judge did not have the benefit of the careful analysis of the effect of article 50EU addressed to us. It is therefore again unsurprising that his conclusion at para 105 that notification under article 50EU will only "probably" ultimately lead to changes in UK law was arrived at without knowledge it had been accepted before us on all sides that it necessarily will have that effect. The same must

be said of his observation that at the point when the application of EU law in the UK changes "the process necessarily will be one controlled by parliamentary legislation, as this is the mechanism for changing the law in the UK". Before us the **Secretary** of **State**'s positive case was that, if the Crown is entitled to give a notice under article 50EU, then when it takes effect to withdraw the UK front the EU the effect of existing EU law under the relevant EU Treaties will cease and sections 2(1)(2) and 3(1) of the ECA 1972 will be stripped of their effect in domestic law without any requirement of further primary legislation.

(8) The 2015 Referendum Act

105 The **Secretary** of **State**'s case regarding his ability to give notice under article 50EU was based squarely on the Crown's prerogative power. His counsel made it clear that he does not contend that the 2015 Referendum Act supplied a statutory power for the Crown to give notice under article 50EU. He is right not to do so. Any argument to that effect would have been

untenable as a matter of statutory interpretation of the 2015 Referendum Act.

106 That Act falls to be interpreted in light of the basic constitutional principles of parliamentary sovereignty and representative parliamentary democracy which apply in the UK, which lead to the conclusion that a referendum on any topic can only be advisory for the lawmakers in Parliament unless very dear language to the contrary is used in the referendum legislation in question. No such language is used in the 2015 Referendum Act.

107 Further, the 2015 Referendum Act was passed against a background including a clear briefing paper to parliamentarians explaining that the referendum would have advisory effect only. Moreover, Parliament must have appreciated that the referendum was intended only to be advisory as the result of a vote in the referendum in favour of leaving the EU would inevitably leave for future decision many important questions relating to the legal implementation of withdrawal from the EU.

108 We emphasise that the **Secretary** of **State**'s position on this part of the argument and the observations in the preceding paragraphs relate to a pure legal point about the effect *in law* of the referendum. This court does not question the importance of the referendum as a political event, the significance of which will have to be assessed and taken into account elsewhere.

(9) Conclusion and form of declaratory relief

109 As we have set out at para 5, it is agreed on all sides that the legal question we have examined and answered, as to whether the Crown can use its prerogative powers to give notice under article 50EU, is justiciable. Since it is a justiciable issue, the court must plainly be entitled to grant appropriate declaratory relief. The **Secretary** of **State** accepts this as well. It is appropriate for the precise form of the declaratory relief to be granted to be addressed once the parties have seen this judgment.

110 This case came on before us as a "rolled up" hearing, for the questions of permission to seek judicial review and, if granted, the substantive merits of the claim to be considered at one hearing. We formally grant permission.

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111 For the reasons we have set out, we hold that the **Secretary** of **State** does not have power under the Crown's prerogative to give notice pursuant to article 50EU of the EU Treaty for the UK to withdraw from the EU.

Permission to proceed.

Claim allowed.

Declaration accordingly.

Certificate under section 12 of the Administration of Justice Act 1969, as amended, for application for permission to appeal to be made directly to Supreme Court.

APPEAL

On 8 November 2016 the Supreme Court (Lord Neuberger of Abbotsbury PSC, Lord Mance and Lord Kerr of Tonaghmore JJSC) granted the **Secretary** of **State** permission to appeal, pursuant to which he appealed. The issue before the Supreme Court, as **stated** in the statement of facts and issues agreed between the parties, was whether the Government had power to give notice, pursuant to article 50EU of the EU Treaty, of the United Kingdom's intention to withdraw from the **European Union** without an Act of Parliament providing prior authorisation to do so.

On the hearing of the appeal, the same interested parties and interveners as had appeared in the Divisional Court appeared before the court. Pursuant to permission given by the court on 17 November 2016 the Lord Advocate, the Counsel General for Wales, the Independent Workers **Union** of Great Britain and Lawyers for Britain Ltd intervened on the appeal.

The facts are **stated** in the judgment of the majority.

REFERENCES by Maguire J and the Court of Appeal in Northern Ireland

By notices of application the applicant, Raymond McCord, and the applicants, Steven Agnew and others, brought proceedings against the **Secretary** of **State** for **Exiting** the **European Union** and the **Secretary** of **State** for Northern Ireland seeking judicial review of the Government's decision to give notice, pursuant to article 50EU of the EU Treaty, of the United Kingdom's intention to withdraw from the **European Union** without an Act of Parliament providing prior authorisation to do so. On 28 October 2016 Maguire J refused the applications [2016] NIQB 85 but, on the direction of the Attorney General for Northern Ireland, made a devolution reference to the Supreme Court under the Northern Ireland Act 1998 in relation to four of the issues arising in the second application.

On the applicants' appeal the Court of Appeal in Northern Ireland referred a further issue to the Supreme Court for determination.

The questions referred for determination were as follows. (1) Did any provision of the Northern Ireland Act 1998, read together with the Belfast Agreement and the British-Irish Agreement, have the effect that primary legislation was required before notice could be given? (2) If the answer was "yes", was the consent of the Northern Ireland Assembly required before the relevant legislation was enacted? (3) If the answer was "no", did any

provision of the Northern Ireland Act 1998, read together with the Belfast Agreement and the British-Irish Agreement, operate as a restriction on the exercise of the prerogative power to give notice? (4) Did section 75 of the Northern Ireland Act 1998 prevent exercise of the power to give notice in the absence of compliance by the Northern Ireland Office with its obligations under that section? (5) Did the giving of notice without the consent of the people of Northern Ireland impede the operation of section 1 of the Northern Ireland Act 1998?

The Attorney General for Northern Ireland appeared as notice party on the hearing of the references.

The facts are **stated** in the judgment of the majority.

Jeremy Wright QC, A-G, Lord Keen QC, Advocate General for Scotland, James Eadie QC, Jason Coppel QC, Guglielmo Verdirame, Tom Cross and *Christopher Knight* (instructed by *Treasury Solicitor*) for the **Secretary** of **State** for **Exiting** the **European Union**.

Lord Pannick QC, Rhodri Thompson QC, Anneli Howard, Tom Hickman and *Professor Dan Sarooshi* (instructed by *Mishcon de Reya LLP*) for the first claimant.

Dominic Chambers QC, Jessica Simor QC and *Benjamin John* (instructed by *Edwin Coe LLP*) for the second claimant.

Helen Mountfield QC, Gerry Facenna QC, Professor Robert McCorquodale, Tim Johnston, David Gregory and *Jack Williams* (instructed by *Bindmans LLP*) for the first interested parties.

Manjit Gill QC, Ramby De Mello and *Tony Muman* (instructed by *Bhatia Best, Nottingham*) for the second interested parties.

Patrick Green QC, Henry Warwick, Paul Skinner and *Matthieu Gregoire* (instructed by*Croft Solicitors*) for the first interveners.

James Wolffe QC, Lord Advocate, Martin Chamberlain QC, Douglas Ross QC, Duncan Hamilton, Christine O'Neill, Emily MacKenzie (instructed by *Scottish Government Legal Directorate, Edinburgh*) for the Lord Advocate.

Richard Gordon QC and *Tom Pascoe* (instructed by *Welsh Government Legal Services Department, Cardiff*) for the Counsel General of Wales.

John F Larkin QC, A-G for Northern Ireland (of the Northern Irish Bar) and *Conleth Bradley SC* (of the Irish Bar) (instructed by *Office of the Attorney General for Northern Ireland, Belfast*) for the Attorney General for Northern Ireland.

Ronan Lavery QC and *Conan Fegan* (both of the Northern Irish and English Bars) (instructed by *McIvor Farrell, Belfast*) for the applicant in the first application.

David Scoffield QC, Professor Christopher McCrudden (of the Northern Irish and English Bars) and *Professor Gordon Anthony* (of the Northern Irish Bar) (instructed by *Jones Cassidy Brett, Belfast*) for the applicants in the second application.

Tony McGleenan QC and *Paul McLaughlin* (both of the Northern Irish Bar) (instructed by *Crown Solicitor's Office, Belfast*) for the **Secretary** of **State** for Northern Ireland.

The court took time for consideration.

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24 January 2017. The following judgments were handed down.

LORD NEUBERGER OF ABBOTSBURY PSC, **BARONESS HALE OF RICHMOND DPSC**, **LORD MANCE**, **LORD KERR OF TONAGHMORE**, **LORD CLARKE OF STONE-CUM-EBONY**, **LORD WILSON**, **LORD SUMPTION**, **LORD HODGE JJSC**

Introductory

1 On 1 January 1973, the United Kingdom became a member of the **European** Economic Community ("the EEC") and certain other associated **European** organisations. On that date, EEC law took effect as part of the domestic law of the United Kingdom, in accordance with the **European** Communities Act 1972 which had been passed ten weeks earlier. Over the next 40 years, the EEC expanded from nine to 28 member **states**, extended its powers or "competences", merged with the associated organisations, and changed its name to the **European** Community in 1993 and to the **European Union** in 2009.

2 In December 2015, the UK Parliament passed the **European Union** Referendum Act, and the ensuing referendum on 23 June 2016 produced a majority in favour of leaving the **European Union**. UK government ministers (whom we will call "ministers" or "the UK government") thereafter announced that they would bring UK membership of the **European Union** to an end. The question before this court concerns the steps which are required as a matter of UK domestic law before the process of leaving the **European Union** can be initiated. The particular issue is whether a formal notice of withdrawal can lawfully be given by ministers without prior legislation passed in both Houses of Parliament and assented to by HM The Queen.

3 It is worth emphasising that nobody has suggested that this is an inappropriate issue for the courts to determine. It is also worth emphasising that this case has nothing to do with issues such as the wisdom of the decision to withdraw from the **European Union**, the terms of withdrawal, the timetable or arrangements for withdrawal, or the details of any future relationship with the **European Union**. Those are all political issues which are matters for ministers and Parliament to resolve. They are not issues which are appropriate for resolution by judges, whose duty is to decide issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society.

4 Some of the most important issues of law which judges have to decide concern questions relating to the constitutional arrangements of the United Kingdom. These proceedings raise such issues. As already indicated, this is not because they concern the United Kingdom's membership of the

European Union; it is because they concern (i) the extent of ministers' power to effect changes in domestic law through exercise of their prerogative powers at the international level, and (ii) the relationship between the UK Government and Parliament on the one hand and the devolved legislatures and administrations of Scotland, Wales and Northern Ireland on the other.

5 The main issue on this appeal concerns the ability of ministers to bring about changes in domestic law by exercising their powers at the international level, and it arises from two features of the United Kingdom's constitutional arrangements. The first is that ministers generally enjoy a power freely to enter into and to terminate treaties without recourse to

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Parliament. This prerogative power is said by the **Secretary** of **State** for **Exiting** the **European Union** to include the right to withdraw from the treaties which govern UK membership of the **European Union** ("the EU Treaties"). The second feature is that ministers are not normally entitled to exercise any power they might otherwise have if it results in a change in UK domestic law, unless statute, ie an Act of Parliament, so provides. The argument against the **Secretary** of **State** is that this principle prevents ministers withdrawing from the EU Treaties, until effectively authorised to do so by a statute.

6 Most of the devolution issues arise from the contention that the terms on which powers have been statutorily devolved to the administrations of Scotland, Wales and Northern Ireland are such that, unless Parliament provides for such withdrawal by a statute, it would not be possible for formal notice of the United Kingdom's withdrawal from the EU Treaties to be given without first consulting or obtaining the agreement of the devolved legislatures. And, in the case of Northern Ireland, there are certain other arguments of a constitutional nature.

7 The main issue was raised in proceedings brought by Gina **Miller** and Deir dos Santos ("the claimants") against the **Secretary** of **State** for **Exiting** the **European Union** in the Divisional Court of England and Wales. Those proceedings came before Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR and Sales LJ. They ruled against the **Secretary** of **State** in a judgment given on 3 November 2016: ***R (Miller) v Secretary of State for Exiting the European Union*** [2016] EWHC 2768 (Admin); ante, p 591. This decision now comes to this court pursuant to an appeal by the **Secretary** of **State**.

8 The claimants are supported in their opposition to the appeal by a number of people, including (i) a group deriving rights of residence in the UK under EU law on the basis of their relationship with a British national or with a non-British EU national exercising EU Treaty rights to be in the United Kingdom, (ii) a group deriving rights of residence from persons permitted to reside in the UK because of EU rights, including children and carers, (iii) a group mostly of UK citizens residing elsewhere in the **European Union**, (iv) a group who are mostly non-UK EU nationals residing in the United Kingdom, and (v) the Independent Workers **Union** of Great Britain. The **Secretary** of **State**'s case is supported by Lawyers for Britain Ltd, a group of lawyers.

9 Devolution arguments relating to Northern Ireland were raised in proceedings brought by Steven Agnew and others and by Raymond McCord against the **Secretary** of **State** for **Exiting** the **European Union** and the **Secretary** of **State** for Northern Ireland. Those arguments were rejected by Maguire J in a judgment given in the Northern Ireland High Court on 28 October 2016: *In re McCord* [2016] NIQB 85. On application by the Attorney General for Northern Ireland, Maguire J referred four of the issues in the *Agnew* case to this court for determination. Following an appeal against Maguire J's decision, the Northern Ireland Court of Appeal has also referred one issue to this Court.

10 The Attorney General for Northern Ireland supports the **Secretaries** of **State**'s case that no statute is required before ministers can give notice of withdrawal. In addition, there are interventions on devolution issues by the Lord Advocate on behalf of the Scottish government and the Counsel

General for Wales on behalf of the Welsh government; they also rely on the Sewel Convention (as explained in paras 137–139 below). They support the argument that a statute is required before ministers can give notice of withdrawal, as do the advocates for Mr McCord and for Mr Agnew.

11 We are grateful to all the advocates and solicitors involved for the clarity and skill with which the respective cases have been presented orally and in writing, and for the efficiency with which the very substantial documentation was organised. We have also been much assisted by a number of illuminating articles written by academics following the handing down of the judgment of the Divisional Court. It is a tribute to those articles that they have resulted in the arguments advanced before this court being somewhat different from, and more refined than, those before that court.

12 As mentioned in paras 7 and 9 above, the appellant in the English and Welsh appeal is the **Secretary** of **State** for **Exiting** the **European Union**, and the Northern Irish proceedings were brought against the **Secretary** of **State** for **Exiting** the **European Union** and the **Secretary** of **State** for Northern Ireland. For the sake of simplicity, we will hereafter refer to either or both **Secretaries** of **State** simply as "the **Secretary** of **State**".

The United Kingdom's Relationship with the European Union 1971–2016

The relationship between the UK and the EU 1971–1975

13 From about 1960, the UK government was in negotiations with the then member **states** of the EEC with a view to the United Kingdom joining the EEC and associated **European** organisations. In October 1971, when it had become apparent that those negotiations were likely to be successful, and following debates in each House, the House of Lords and the House of Commons each resolved to "approve … Her Majesty's Government's decision of principle to join the **European** Communities on the basis of the arrangements which have been negotiated". In the course of the debate in the House of Commons (Hansard (HC Debates), 28 October 1971, col 2202), the Prime Minister, Mr Heath, said that he did not think that "any Prime Minister has … in time of peace … asked the House to take a positive decision of such importance as I am asking it to take", and that he could not "over-emphasise tonight the importance of the vote which is being taken, the importance of the issue, the scale and quality of the decision and the impact that it will have equally inside and outside Britain". In a debate in the House of Commons in January 1972 (Hansard (HC Debates), 20 January 1972, col 704) in which the earlier resolution was effectively re-affirmed, Mr Rippon, the Chancellor of the Duchy of Lancaster, said "I do not think Parliament in negotiations on a treaty has ever been brought so closely into the process of treaty-making as on the present occasion", adding that "we all accept the unique character of the Treaty of Accession".

14 On 22 January 1972, two days after that later debate, ministers signed a Treaty of Accession which provided that the United Kingdom would become a member of the EEC on 1 January 1973 and would accordingly be bound by the 1957 Treaty of Rome, which was then the main Treaty in relation to the EEC, and by certain other connected treaties. As with most international treaties, the 1972 Accession Treaty was not binding unless and until it was formally ratified by the United Kingdom.

15 A Bill was then laid before Parliament, and after it had been passed by both Houses, it received Royal assent on 17 October 1972, when it became the **European** Communities Act 1972. The following day, 18 October 1972, ministers ratified the 1972 Accession Treaty on behalf of the United Kingdom, which accordingly became a member of the EEC on 1 January 1973.

16 The long title of the 1972 Act described its purpose as "to make provision in connection with the enlargement of the **European** Communities to include the United Kingdom …" Part I of the 1972 Act consisted of sections 1 to 3, which contained its "General Provisions", and they are of central importance to these proceedings.

17 Section 1(2) of the 1972 Act contained some important definitions. "The Communities" meant the EEC and associated communities (now amended to "the EU" meaning the **European Union**). And "the Treaties" and "the Community Treaties" (now amended to "the EU Treaties") were the treaties described in Schedule 1 (which were the existing treaties governing the rules and powers of the EEC at that time), the 1972 Accession Treaty itself, and "any other treaty entered into by any of the Communities, with or without any of the member **states**, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom". The use of a capital T in "the Treaties" and in "the EU Treaties" was significant. It meant that future treaties which were concerned with changing the membership or redefining the rules of the EEC could only become "Treaties" and "EU Treaties" and have effect in UK law as such if they were added to section 1(2) by an amending statute. By contrast, "ancillary" treaties covered other treaties entered into by the **European Union** or by the United Kingdom as a Treaty ancillary to the EU Treaties. By virtue of section 1(3), even such an ancillary Treaty did not take effect in UK law unless and until it was declared to do so by an Order in Council which had first to be "approved" in draft form "by resolution of each House of Parliament".

18 Section 2 of the 1972 Act was headed "General Implementation of Treaties". Section 2(1) of the 1972 Act was in these terms:

> "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 …"

19 Section 2(2) of the 1972 Act provided that "Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision— (a) for the purpose of implementing any Community [now EU] obligation of the United Kingdom" (which is defined as any obligation "created or arising by or under the Treaties") or "enabling any rights … enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised", and (b) for ancillary purposes, including "the operation from time to time of subsection (1)". Subsection (2) has since been amended, but nothing hangs on the amendments for present purposes. Schedule 2 to the 1972 Act contained "Provisions as to Subordinate Legislation" in relation to the powers conferred by section 2(2).

20 Section 2(4) provided as follows:

> "The provision that may be made under subsection (2) above includes … any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section …"

21 Section 3 of the 1972 Act provided, among other things, for any question as to the meaning and effect of the Treaties, or as to the validity, meaning or effect of any "Community instrument" (now "EU instrument") to be treated as a question of EU law by the UK courts, and it further provided for such determination to be made in accordance with principles laid down by the **European** Court of Justice ("the Court of Justice") or, if necessary, to be referred to the Court of Justice.

22 Part II of the 1972 Act, which contained sections 4 to 12, and incorporated Schedules 3 and 4, set out a number of statutory repeals and amendments which were needed to enable UK domestic law to comply with the requirements of EU law, that is the law from time to time laid down in the EU Treaties, Directives and Regulations, as interpreted by the Court of Justice.

23 Following a manifesto commitment made during a general election in 1974, the UK government decided to hold a referendum on whether the United Kingdom should remain in the EEC. To that end, it laid a Bill before Parliament which was duly enacted as the Referendum Act 1975. The referendum pursuant to that Act took place on 5 June 1975, and a majority of those who voted were in favour of remaining in the EEC.

The relationship between the UK and the EU after 1975

24 In the past 40 years, over 20 treaties relating to the EEC, the **European** Community and the **European Union** were signed on behalf of the member **states**, in the case of the United Kingdom by ministers. After being signed, each such Treaty was then added to the list of "Treaties" in section 1(2) of the 1972 Act through the medium of an amendment made to that statute by a short appropriately worded statute passed by Parliament, and the Treaty was then ratified by the United Kingdom. Some of these Treaties were concerned with redefining and expanding the competences of the EEC, the **European** Community and the **European Union** and changing the constitutional role of the **European** Parliament within the **European** Community or **Union**. They included the Single **European** Act signed in 1986, Titles II, III and IV of the Maastricht Treaty on **European Union** of 7 February 1992 ("the EU Treaty"), the 1997 Amsterdam Treaty, the 2001 Treaty of Nice, and the Treaty of Lisbon amending the EU Treaty and the Treaty on the Functioning of the **European Union** ("TFEU"), both signed in Lisbon on 13 December 2007—see respectively section 1(2)(j), added by the **European** Communities (Amendment) Act 1986; section 1(2)(k), added by the **European** Communities (Amendment) Act 1993; section 1(2)(o), added by the **European** Communities (Amendment) Act 1998; section 1(2)(p), added by the **European** Communities (Amendment) Act 2002; and section 1(2)(s), added by the **European Union** (Amendment) Act 2008.

25 The Treaty of Lisbon introduced into the EU Treaties for the first time an express provision entitling a member **state** to withdraw from the

European Union. It did this by inserting a new article 50EU into the EU Treaty. This article ("article 50") provides as follows:

> "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 …
>
> "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."

26 In these proceedings, it is common ground that notice under article 50(2) (which we shall call "Notice") cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn. Especially as it is the **Secretary** of **State**'s case that, even if this common ground is mistaken, it would make no difference to the outcome of these proceedings, we are content to proceed on the basis that that is correct, without expressing any view of our own on either point. It follows from this that once the United Kingdom gives Notice, it will inevitably cease at a later date to be a member of the **European Union** and a party to the EU Treaties.

27 After 1975, in addition to the amending statutes referred to in para 24 above, statutes were enacted to give effect to changes in the way that members of the **European** Parliament were selected. The first was the **European** Assembly Elections Act 1978, which contained in section 6 a stipulation that no new treaty providing for an increase in the powers of the **European** Assembly (as it then was) should be ratified unless approved by an Act of Parliament. This provision was re-enacted as section 12 of the **European** Parliamentary Elections Act 2002. Section 1 of the 2002 Act provided for a specific number of Members of the **European** Parliament ("MEPs") for specified regions of the United Kingdom. Section 8 of the 2002 Act **stated** that a person was entitled to vote in elections to the **European** Parliament if he or she satisfied certain residence requirements, and section 10 identified the (very limited) categories of people who were disqualified from standing as MEPs.

28 In addition to adding the Treaty of Lisbon and the FEU Treaty to section 1(2) of the 1972 Act, the 2008 Act, referred to at the end of para 24 above, contained certain restrictions on the UK government's agreement to changes in the rules of the **European Union**. Section 5 provided that any treaty which amended the EU Treaty or the FEU Treaty by altering the competences of the **European Union**, or which altered the decision-making processes of the **European Union** or its institutions in such a way as to dilute the influence of individual member **states**, should not be ratified by ministers "unless approved by Act of Parliament". Section 6 of the 2008 Act **stated** that ministers should not support any decision under certain specified articles of the EU Treaty and of the FEU

Treaty unless both Houses of Parliament had approved a motion sanctioning that course.

29 Subject to an immaterial exception, the **European Union** Act 2011 repealed and replaced sections 5 and 6 of the 2008 Act. Part 1of the 2011 Act included section 1 which was "Introductory", sections 2 to 10, which imposed "Restrictions" both "relating to amendments of the EU Treaty and FEU Treaty" and "relating to other decisions under EU Treaty and FEU Treaty", and sections 11 to 13, which related to the conduct of referendums. Sections 2 to 5 imposed restrictions on the ratification by the United Kingdom of any treaty which amended or replaced the EU Treaty or FEU Treaty, and also on ministers approving certain specified types of EU decisions under the so-called simplified revision procedure. Those restrictions were that (a) a statement relating to the Treaty or decision had to be laid before Parliament, (b) the Treaty or decision had to be approved by statute, and, (c) in broad terms, where the Treaty or decision increased the competences of the **European Union**, it had to be approved in a UK-wide referendum. Section 6 provided that ministers should not, without prior approval both in a statute and in a UK-wide referendum, vote in favour of certain decisions, including those which resulted in a dilution in the influence of individual member **states** in relation to a number of different articles of the EU Treaty and FEU Treaty including in particular article 50(3). Sections 7 to 10 of the 2011 Act contained further restrictions on ministers voting in favour of certain measures under the EU Treaty and FEU Treaty without the prior approval of Parliament.

30 Section 18 of the 2011 Act provided as follows:

> "Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the **European** Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act."

31 Following a manifesto commitment in the 2015 general election to hold a referendum on the issue of EU membership, the UK government laid before Parliament a Bill which became the 2015 Act. Section 1 provided that "a referendum is to be held" on a date no later than 31 December 2017 "on whether the United Kingdom should remain a member of the **European Union**", and it specified the question which should appear on the ballot papers. The remaining sections were concerned with questions such as entitlement to vote, the conduct of the referendum, rules about campaigning and financial controls.

32 The referendum duly took place throughout the United Kingdom on 23 June 2016, and it

resulted in a majority in favour of leaving the **European Union**. Ministers have made it clear that the UK government intends to implement the result of the referendum and to give Notice by the end of March 2017.

33 On 7 December 2016, following a debate, the House of Commons resolved "[to recognise] … that this House should respect the wishes of the United Kingdom as expressed in the referendum on 23 June; and further [to call] on the Government to invoke article 50EU by 31 March 2017".

The main issue: the 1972 Act and prerogative powers

Summary of the arguments on the main issue

34 The **Secretary** of **State**'s case is based on the existence of the well-established prerogative powers of the Crown to enter into and to withdraw from treaties. He contends that ministers are entitled to exercise this power in relation to the EU Treaties, and therefore to give Notice without the need for any prior legislation. Following the giving of Notice by the end of March 2017, ministers intend that a "Great Repeal Bill" will be laid before Parliament. This will repeal the 1972 Act and, wherever practical, it will convert existing EU law into domestic law at least for a transitional period. Under article 50, withdrawal will occur not more than two years after the Notice is given (unless that period is extended by unanimous agreement among the other member **states**), and it is intended that the Great Repeal Bill will come into force at that point.

35 As was made clear by Lord Browne-Wilkinson in***R v Secretary of State*** *for the Home Department, Ex p Fire Brigades* ***Union*** [1995] 2 AC 513, 552, ministers' intentions are not law, and the courts cannot proceed on the assumption that they will necessarily become law. That is a matter for Parliament to decide in due course. The issues before us must be resolved in accordance with the law as it stands, as the **Secretary** of **State** rightly accepted.

36 The claimants' case in that connection is that when Notice is given, the United Kingdom will have embarked on an irreversible course that will lead to much of EU law ceasing to have effect in the United Kingdom, whether or not Parliament repeals the 1972 Act. As Lord Pannick QC put it for Mrs **Miller**, when ministers give Notice they will be "pulling … 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". In particular, he said, some of the legal rights which the claimants enjoy under EU law will come to an end. This, he submitted, means that the giving of Notice would pre-empt the decision of Parliament on the Great Repeal Bill. It would be tantamount to altering the law by ministerial action, or executive decision, without prior legislation, and that would not be in accordance with our law.

37 Following opening remarks made by HM Attorney General, Mr Eadie QC in his submissions on behalf of the **Secretary** of **State**, did not challenge much if any of the factual basis of these assertions, but he did challenge the conclusions that were said to derive from them. He argued that the fact that significant legal changes will follow from withdrawing from the EU Treaties does not prevent the giving of Notice, because the prerogative power to withdraw from treaties was not excluded by the terms of the 1972 Act, and that, in any event, "acts of the Government in the exercise of the prerogative can alter domestic law". More particularly, he contended that the 1972 Act gave effect to EU law only in so far as the EU Treaties required it, and that that effect was therefore contingent upon the United Kingdom remaining a party to those treaties. Accordingly, he said, in the 1972 Act Parliament had effectively stipulated that, or had sanctioned the result

whereby, EU law should cease to have domestic effect in the event that minsters decided to withdraw from the EU Treaties.

38 Mr Eadie also relied on the fact that, while statutes enacted since 1972 have imposed Parliamentary controls over the exercise of prerogative

powers in relation to the EU Treaties, they have not touched the prerogative power to withdraw from them. Implicitly, therefore, he contended, Parliament has recognised that the power to withdraw from such treaties exists and is exercisable without prior legislation. Mr Eadie also suggested that the 2015 Act was enacted on the assumption that the result of the referendum would be decisive. Mr Eadie's reliance on the legislation since 1972 was largely for the purpose of supporting his argument on the effect of the 1972 Act, but he did raise an argument that the legislation from 1972 to 2015 should be looked at as a whole. Also, in answer to a question from the court, he adopted a suggestion that, even if Parliamentary authority would otherwise have been required, the 2015 Act and the subsequent referendum dispensed with that requirement, but he did not develop that argument, in our view realistically.

39 Before addressing these arguments, it is right to consider some relevant constitutional principles and in particular the Royal prerogative.

The constitutional background

40 Unlike most countries, the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions. Reflecting its development and its contents, the UK constitution was described by the constitutional scholar, Professor AV Dicey, as "the most flexible polity in existence"—*Introduction to the Study of the Law of the Constitution*, 8th ed (1915), p 87.

41 Originally, sovereignty was concentrated in the Crown, subject to limitations which were ill-defined and which changed with practical exigencies. Accordingly, the Crown largely exercised all the powers of the **state** (although it appears that even in the 11th century the King rarely attended meetings of his Council, albeit that its membership was at his discretion). However, over the centuries, those prerogative powers, collectively known as the Royal prerogative, were progressively reduced as Parliamentary democracy and the rule of law developed. By the end of the 20th century, the great majority of what had previously been prerogative powers, at least in relation to domestic matters, had become vested in the three principal organs of the **state**, the legislature (the two Houses of Parliament), the executive (ministers and the Government more generally) and the judiciary (the judges). It is possible to identify a number of seminal events in this history, but a series of statutes enacted in the twenty years between 1688 and 1707 were of particular legal importance. Those statutes were the Bill of Rights 1689 (1 Will & Mary, Sess 2, c 2) and the Act of Settlement 1701 in England and Wales (12 & 13 Will 3, c 2), the Claim of Right 1689 in Scotland, and the Acts of **Union** 1706 (6 Anne c 11) and 1707 in England and Wales and in Scotland respectively. (Northern Ireland joined the United Kingdom pursuant to the Acts of **Union** 1800 in Britain and Ireland (30 & 40 Geo 3, c 67)).

42 The independence of the judiciary was formally recognised in these statutes. In the broadest sense, the role of the judiciary is to uphold and further the rule of law; more particularly, judges impartially identify and apply the law in every case brought before the courts. That is why and how

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these proceedings are being decided. The law is made in or under statutes, but there are areas where the law has long been laid down and developed by judges themselves: that is the common law. However, it is not open to judges to apply or develop the common law in a way which is inconsistent with the law as laid down in or under statutes, ie by Acts of Parliament.

43 This is because Parliamentary sovereignty is a fundamental principle of the UK constitution, as was conclusively established in the statutes referred to in para 41 above. It was famously summarised by Professor Dicey as meaning that Parliament has "the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament"—op cit, p 38. The legislative power of the Crown is today exercisable only through Parliament. This power is initiated by the laying of a Bill containing a proposed law before Parliament, and the Bill can only become a statute if it is passed (often with amendments) by Parliament (which normally but not always means both Houses of Parliament) and is then formally assented to by HM The Queen. Thus, Parliament, or more precisely the Crown in Parliament, lays down the law through statutes—or primary legislation as it is also known—and not in any other way.

44 In the early 17th century *Case of Proclamations* (1610) 12 Co Rep 74, 76 Sir Edward Coke CJ said 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". Although this statement may have been controversial at the time, it had become firmly established by the end of that century. In England and Wales, the Bill of Rights 1689 confirmed that "the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall" and that "the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall". In Scotland, the Claim of Right 1689 was to the same effect, providing that "all Proclamationes asserting ane absolute power to Cass [ie to quash] annull and Dissable lawes … are Contrair to Law". And article 18 of the Acts of **Union** of 1706 and 1707 provided that (with certain irrelevant exceptions) "all … laws" in Scotland should "remain in the same force as before … but alterable by the Parliament of Great Britain".

45 The Crown's administrative powers are now exercised by the executive, ie by ministers who are answerable to the UK Parliament. However, consistently with the principles established in the 17th century, the exercise of those powers must be compatible with legislation and the common law. Otherwise, ministers would be changing (or infringing) the law, which, as just explained, they cannot do. A classic statement of the position was given by Lord Parker of Waddington in *The Zamora*[1916] 2 AC 77, 90:

> "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. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are
>
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>
> made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity."

46 It is true that ministers can make laws by issuing regulations and the like, often known as secondary or delegated legislation, but (save in limited areas where a prerogative power survives domestically, as exemplified by the cases mentioned in paras 52 and 53 below) they can do so only if authorised by statute. So, if the Regulations are not so authorised, they will be invalid, even if they have been approved by resolutions of both Houses under the provisions of the relevant enabling Act—for a recent example see ***R*** *(Public Law Project) v Lord Chancellor (Office of the Children's Comr intervening)* [2016] AC 1531.

The Royal prerogative and Treaties

47 The Royal prerogative encompasses the residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation. In *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101, Lord Reid explained that the Royal prerogative is a source of power which is "only available for a case not covered by statute". Professor HWR Wade summarised the position in his introduction to the first edition of what is now *Wade & Forsyth, Administrative Law* (1961), p 13:

> "the residual prerogative is now confined to such matters as summoning and dissolving Parliament, declaring war and peace, regulating the armed forces in some respects, governing certain colonial territories, making treaties (though as such they cannot affect the rights of subjects), and conferring honours. The one drastic internal power of an administrative kind is the power to intern enemy aliens in time of war."

48 Thus, consistently with Parliamentary sovereignty, a prerogative power however well-established may be curtailed or abrogated by statute. Indeed, as Professor Wade explained, most of the powers which made up the Royal prerogative have been curtailed or abrogated in this way. The statutory curtailment or abrogation may be by express words or, as has been more common, by necessary implication. It is inherent in its residual nature that a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute. This is what happened in the two leading 20th century cases on the topic, *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 and *Fire Brigades* ***Union*** cited above. As Lord Parmoor explained in *De Keyser*, at p 575, when discussing the prerogative power to take a subject's property in time of war:

> "The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject."

49 In *Burmah Oil* cited above, at p 101, Lord Reid described prerogative powers as a "relic of a past age", but that description should not be understood as implying that the Royal prerogative is

either anomalous or anachronistic. There are important areas of governmental activity which, today as in the past, are essential to the effective operation of the **state** and which are not covered, or at least not completely covered, by statute. Some of them, such as the conduct of diplomacy and war, are by their very nature at least normally best reserved to ministers just as much in modern times as in the past, as indeed Lord Reid himself recognised in *Burmah Oil*, at p 100.

50 Consistently with paras 44–46, and the passage quoted from Professor Wade in para 47 above, it is a fundamental principle of the UK constitution that, unless primary legislation permits it, the Royal prerogative does not enable ministers to change statute law or common law. As Lord Hoffmann observed in ***R*** *(Bancoult) v* ***Secretary*** *of* ***State*** *for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, para 44, "since the 17th century the prerogative has not empowered the Crown to change English common or statute law". This is, of course, just as true in relation to Scottish, Welsh or Northern Irish law. Exercise of ministers' prerogative powers must therefore be consistent both with the common law as laid down by the courts and with statutes as enacted by Parliament.

51 Further, ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation. Thus, ministers could not exercise prerogative powers at the international level to revoke the designation of Laker Airways under an aviation Treaty as that would have rendered a licence granted under a statute useless: *Laker Airways Ltd v Department of Trade* [1977] QB 643—see especially at pp 718–719 and 728 per Roskill and Lawton LJJ respectively. And in *Fire Brigades* ***Union*** cited above, at pp 551–552, Lord Browne-Wilkinson concluded that ministers could not exercise the prerogative power to set up a scheme of compensation for criminal injuries in such a way as to make a statutory scheme redundant, even though the statute in question was not yet in force. And, as already mentioned in para 35 above, he also **stated** that it was inappropriate for ministers to base their actions (or to invite the court to make any decision) on the basis of an anticipated repeal of a statutory provision as that would involve ministers (or the court) pre-empting Parliament's decision whether to enact that repeal.

52 The fact that the exercise of prerogative powers cannot change the domestic law does not mean that such an exercise is always devoid of domestic legal consequences. There are two categories of case where exercise of the prerogative can have such consequences. The first is where it is inherent in the prerogative power that its exercise will affect the legal rights or duties of others. Thus, the Crown has a prerogative power to decide on the terms of service of its servants, and it is inherent in that power that the Crown can alter those terms so as to remove rights, albeit that such a power is susceptible to judicial review: *Council of Civil Service* ***Unions*** *v Minister for the Civil Service* [1985] AC 374. The Crown also has a prerogative power to destroy property in wartime in the interests of national defence (although at common law compensation was payable: *Burmah Oil* cited above). While the exercise of the prerogative power in such cases may

affect individual rights, the important point is that it does not change the law, because the law has always authorised the exercise of the power.

53 The second category comprises cases where the effect of an exercise of prerogative powers is to change the facts to which the law applies. Thus, the exercise of the prerogative to declare war will have significant legal consequences: actions which were previously lawful may become treasonable (as in*Joyce v Director of Public Prosecutions* [1946] AC 347), and some people will become enemy aliens, whose property is liable to confiscation. Likewise, in *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 the Crown's exercise of its prerogative to extend UK territorial waters resulted in the criminalisation of broadcasts from ships in the extended area, which had previously been lawful. These are examples where the exercise of the prerogative power alters the status of a

person, thing or activity so that an existing rule of law comes to apply to it. However, in such cases the exercise has not created or changed the law, merely the extent of its application.

54 The most significant area in which ministers exercise the Royal prerogative is the conduct of the United Kingdom's foreign affairs. This includes diplomatic relations, the deployment of armed forces abroad, and, particularly in point for present purposes, the making of treaties. There is little case law on the power to terminate or withdraw from treaties, but, as a matter of both logic and practical necessity, it must be part of the Treaty-making prerogative. As Lord Templeman put it in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476, "The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty".

55 Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts—see *Civil Service **Unions*** case cited above, at pp 397–398. Lord Coleridge CJ said that the Queen acts "throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority"—*Rustomjee v The Queen* (1876) 2 QBD 69, 74. This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign **states** have effect in international law and are not governed by the domestic law of any **state**. As Lord Kingsdown expressed it in ***Secretary of State** in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PC 22, 75, treaties are "governed by other laws than those which municipal courts administer". The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.

56 It is only on the basis of these two propositions that the exercise of the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter UK domestic law. Thus, in *Higgs v Minister of National Security* [2000] 2 AC 228, 241, Lord Hoffmann pointed out that the fact that treaties are not part of domestic law was the "corollary" of the Crown's Treaty-making power. In *JH Rayner* [1990] 2 AC 418, 500, Lord Oliver of Aylmerton put it thus:

> "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 are concerned, it is res inter alios acta [ie something done between others], 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."

57 It can thus fairly be said that the dualist system is a necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers. Professor

Campbell McLachlan in *Foreign Relations Law* (2014), para 5.20, neatly summarises the position in the following way:

> "If treaties can have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged."

58 While ministers have in principle an unfettered power to make treaties which do not change domestic law, it had become fairly standard practice by the late 19th century for treaties to be laid before both Houses of Parliament at least 21 days before they were ratified, to enable Parliamentary objections to be heard. In 1924, following an indication by the previous government that it did not regard itself as bound by the practice, Arthur Ponsonby, the Parliamentary Under-**Secretary** of **State** for Foreign Affairs, assured the House of Commons that ministers would in future adhere to this practice, which became known as the Ponsonby Convention. The convention was superseded and formalised by section 20 of the Constitutional Reform and Governance Act 2010. However, by virtue of section 23(1) of that Act, this section does not apply to new EU Treaties, because they are governed by the more specific statutory controls discussed in paras 28 and 29 above.

59 With that background, we turn to analyse the effect of the 1972 Act and the arguments as to whether, in the absence of prior authority from Parliament in the form of a statute, the giving of Notice by ministers would be ineffective under the United Kingdom's constitutional requirements, as it would otherwise impermissibly result in a change in domestic law.

The status and character of the 1972 Act

60 Many statutes give effect to treaties by prescribing the content of domestic law in the areas covered by them. The 1972 Act does this, but it does considerably more as well. It authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but

actually takes precedence over all domestic sources of UK law, including statutes. This may sound rather dry or technical to many people, but in constitutional terms the effect of the 1972 Act was unprecedented. Indeed, it is fair to say that the legal consequences of the United Kingdom's accession to the EEC were not fully appreciated by many lawyers until the *Factortame* litigation in the 1990s—see the House of Lords decisions in ***R*** *v* ***Secretary*** *of* ***State*** *for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603 and *(No 5)*[2000] 1 AC 524. Of course, consistently with the principle of Parliamentary sovereignty, this unprecedented **state** of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute. For that reason, we would not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal.

61 In one sense, of course, it can be said that the 1972 Act is the source of EU law, in that, without

that Act, EU law would have no domestic status. But in a more fundamental sense and, we consider, a more realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law. The legislative institutions of the EU can create or abrogate rules of law which will then apply domestically, without the specific sanction of any UK institution. It is true that the UK government and UK-elected members of the **European** Parliament participate in the EU legislative processes and can influence their outcome, but that does not diminish the point. Further, in the many areas of EU competence which are subject to majority decision, the approval of the United Kingdom is not required for its legislation to take effect domestically. It is also true that EU law enjoys its automatic and overriding effect only by virtue of the 1972 Act, and thus only while it remains in force. That point simply reflects the fact that Parliament was and remains sovereign: so, no new source of law could come into existence without Parliamentary sanction—and without being susceptible to being abrogated by Parliament. However, that in no way undermines our view that it is unrealistic to deny that, so long as that Act remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice are direct sources of UK law.

62 The 1972 Act did two things which are relevant to these appeals. First, it provided that rights, duties and rules derived from EU law should apply in the United Kingdom as part of its domestic law. Secondly, it provided for a new constitutional process for making law in the United Kingdom. These things are closely related, but they are legally and conceptually distinct. The content of the rights, duties and rules introduced into our domestic law as a result of the 1972 Act is exclusively a question of EU law. However, the constitutional processes by which the law of the United Kingdom is made is exclusively a question of domestic law.

63 Under the terms of the 1972 Act, EU law may take effect as part of the law of the United Kingdom in one of three ways. First, the EU Treaties themselves are directly applicable by virtue of section 2(1). Some of the provisions of those Treaties create rights (and duties) which are directly applicable in the sense that they are enforceable in UK courts. Secondly, where the effect of the EU Treaties is that EU legislation is directly applicable in domestic law, section 2(1) provides that it is to have direct effect in the

United Kingdom without the need for further domestic legislation. This applies to EU Regulations (which are directly applicable by virtue of article 288FEU of the FEU Treaty). Thirdly, section 2(2) authorises the implementation of EU law by delegated legislation. This applies mainly to EU Directives, which are not, in general, directly applicable but are required (again by article 288) to be transposed into national law. While this is an international law obligation, failure of the United Kingdom to comply with it is justiciable in domestic courts, and some Directives may be enforced by individuals directly against national governments in domestic courts. Further, any serious breach by the UK Parliament, government or judiciary of any rule of EU law intended to confer individual rights will entitle any individual sustaining damage as a direct result to compensation from the UK government: *Brasserie du Pêcheur SA v Federal Republic of Germany* (Joined Cases C-46/93 and C-48/93) [1996] QB 404 (provided that, where the breach consists in a court decision, the breach is not only serious but also manifest: *Köbler v Republik Österreich* (Case C-224/01) [2004] QB 848).

64 Thus, EU law in EU Treaties and EU legislation will pass into UK law through the medium of section 2(1) or the implementation provisions of section 2(2) of the 1972 Act, so long as the United Kingdom is party to the EU Treaties. Similarly, so long as the United Kingdom is party to the EU Treaties, UK courts are obliged (i) to interpret EU Treaties, Regulations and Directives in accordance with decisions of the Court of Justice, (ii) to refer unclear points of EU law to the Court of Justice, and (iii) to interpret all domestic legislation, if at all possible, so as to comply with EU law (see *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135). And, so long as the United Kingdom is party to the EU Treaties, UK citizens are able to recover damages from the UK government in cases where a decision of one of the organs of the

state based on a serious error of EU law has caused them loss.

65 In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is, as was said on behalf of the **Secretary** of **State** echoing the illuminating analysis of Professor Finnis, the "conduit pipe" by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law.

66 Section 18 of the 2011 Act, set out in para 30 above, was enacted in order to make it clear that the primacy of EU law over domestic legislation did not prevent it being repealed by domestic legislation. But that simply confirmed the position as it had been since the beginning of 1973. The primacy of EU law means that, unlike other rules of domestic law, EU law cannot be implicitly displaced by the mere enactment of legislation which is inconsistent with it. That is clear from the second part of section 2(4) of the 1972 Act and *Ex p Factortame Ltd (No 2)* [1991] 1 AC 603. The issue was informatively discussed by Laws LJ in*Thoburn v Sunderland City Council* [2003] QB 151, paras 37–47.

67 The 1972 Act accordingly has a constitutional character, as discussed by Laws LJ in *Thoburn* cited above, paras 58–59, and by Lord Reed JSC and Lord Neuberger of Abbotsbury PSC and Lord Mance JSC in ***R*** *(Buckinghamshire County Council) v* ***Secretary*** *of* ***State*** *for Transport* [2014] 1 WLR 324, paras 78–79 and 206–207 respectively. Following the coming into force of the 1972 Act, the normal rule is that any domestic

legislation must be consistent with EU law. In such cases, EU law has primacy as a matter of domestic law, and legislation which is inconsistent with EU law from time to time is to that extent ineffective in law. However, legislation which alters the domestic constitutional status of EU institutions or of EU law is not constrained by the need to be consistent with EU law. In the case of such legislation, there is no question of EU law having primacy, so that such legislation will have domestic effect even if it infringes EU law (and that would be true whether or not the 1972 Act remained in force). That is because of the principle of Parliamentary sovereignty which is, as explained above, fundamental to the United Kingdom's constitutional arrangements, and EU law can only enjoy a status in domestic law which that principle allows. It will therefore have that status only for as long as the 1972 Act continues to apply, and that, of course, can only be a matter for Parliament.

68 We should add that, for these reasons, we do not accept the suggestion that, as a source of law, EU law can properly be compared with delegated legislation. The 1972 Act effectively operates as a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to the EU law-making institutions (so long as Parliament wills it), rather than a statutory delegation of the power to make ancillary Regulations—even under a so-called Henry the Eighth clause, as explained in the *Public Law Project* case, cited above, paras 25 and 26. The 1972 Act cannot be said to constitute EU legislative institutions the delegates of Parliament: they make laws independently of Parliament, and indeed they were doing so before the 1972 Act was passed. If EU law had the same status in domestic law as delegated legislation, the *Factortame* litigation referred to above would have had a different outcome. A statutory provision which provides that legislative documents and decisions made by EU institutions should be an independent and pre-eminent source of UK law is thus quite different from a statutory provision which delegates to ministers and other organs of the executive the right to make Regulations and the like. The exceptional nature of the effect of the 1972 Act is well illustrated by the passages quoted by Lord Reed JSC in para 182 below from the decisions of the Court of Justice in *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastigen*(Case 26/62) [1963] ECR 1, 12 and *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* (Case 6/64)

[1964] ECR 585, 593. They demonstrate that rules which would, as Lord Reed JSC says, normally be incompatible with UK constitutional principles, became part of our constitutional arrangements as a result of the 1972 Act and the 1972 Accession Treaty for as long as the 1972 Act remains in force.

The Divisional Court's analysis of the effect of the 1972 Act

69 Although article 50EU operates on the plane of international law, it is common ground that, because the EU Treaties apply as part of UK law, our domestic law will change as a result of the United Kingdom ceasing to be party to them, and rights enjoyed by UK residents granted through EU law will be affected. The Divisional Court concluded that, because ministers cannot claim prerogative powers to take an action which would result in a change in domestic law, it was not open to ministers to withdraw from the EU Treaties, and therefore to serve Notice, without authorisation in a

statute. In that connection, the Divisional Court identified three categories of right:

(1) Rights capable of replication in UK law;

(2) Rights derived by UK citizens from EU law in other member **states**;

(3) Rights of participation in EU institutions that could not be replicated in UK law.

70 Many current EU rights fall within the first category. They include, for instance, the rights of UK citizens to the benefit of employment protection such as the Working Time Directive, to equal treatment and to the protection of EU competition law, and the right of non-residents to the benefit of the "four freedoms" (free movement of people, goods and capital, and freedom to provide services). Some of these rights have already been embodied in UK law by domestic legislation pursuant to section 2(2) of the 1972 Act, and they will not cease to have effect upon the United Kingdom's withdrawal from the **European Union** (unless the domestic legislation giving effect to them is repealed in accordance with the law), although the Court of Justice will no longer have any binding role in relation to their scope or interpretation. Other rights, arising under EU Regulations or directly under the EU Treaties, will cease to have effect upon withdrawal (save in relation to rights and liabilities already accrued), but many could be replicated in a new statute—eg the proposed Great Repeal Bill. But, as the Divisional Court pointed out, the need for such replication would only arise because withdrawal from the EU Treaties would have abrogated domestic rights created by the 1972 Act of effect, and again the Court of Justice would no longer have any binding role in relation to them.

71 The second category may appear to be irrelevant for present purposes as the rights within it arise from the incorporation of EU law into the law of other member **states**, and not from UK legislation. However, some rights falling within one category may be closely linked with rights falling within another category. For example, the rights under Council Regulation (EC) No 2201/2003, *concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* (known as "Brussels II Revised"), would be undermined if a domestic judgment governing the residence of a child could not be enforced outside the UK.

72 The rights in the third category will cease when the United Kingdom is no longer a member of the **European Union**, as they are by their very nature dependent on continued membership. They include the right to stand for selection or later election to the **European** Parliament, and the right to vote in **European** elections, as well as the right to invite the commission to take regulatory action. However, they have the character of what Mr Eadie described as "club membership rights", and are of a different nature from the other more "freestanding" rights in the first and second categories.

73 Given that it is clear that some rights in the first category will be lost on the United Kingdom withdrawing from the EU Treaties, it is unnecessary to consider whether, for the purpose of their present arguments, the claimants can rely on the loss of rights in the second and third categories. If they cannot succeed in their argument based on loss of rights in the first category, then invoking loss of rights in the other categories would not help them; and if they can succeed on the basis of loss of rights in the first category, they would not need to invoke loss of rights in the other categories.

[2017] 2 WLR 583 at 641

Does the 1972 Act preclude the use of prerogative power to withdraw?

74 While accepting that some rights will be lost on withdrawal from the EU Treaties, the **Secretary** of **State**'s case is that the loss of these rights in such circumstances is provided for, and has therefore effectively been sanctioned, by Parliament in the 1972 Act itself. In this connection, Mr Eadie pointed out that the 1972 Act does not simply incorporate the EU Treaties into UK law in the same way as, say, the Carriage of Goods by Sea Act 1971 incorporates the Hague Rules. By contrast, he said, section 2 of the 1972 Act is "ambulatory": in other words, it gives effect to whatever may from time to time be the international obligations of the United Kingdom under or pursuant to the EU Treaties.

75 He pointed out that changes in EU law are brought into domestic law through the medium of section 2 of the 1972 Act and that, once the United Kingdom ceases to be bound by the EU Treaties, there will be no rights and remedies etc to which section 2(1) can apply, and no EU obligations which require delegated legislation under section 2(2), and that the possibility of withdrawal from EU Treaties is therefore effectively provided for in the wording of section 2. It is his case that, by providing that EU law rights, remedies etc "from time to time provided for by or under the Treaties" were "to be given legal effect or used in the United Kingdom", section 2(1) accommodated the possibility of ministers withdrawing from the Treaties without Parliamentary authority. He also contended that it was self-evident that Parliament cannot have intended that the variable content of EU law should continue to be part of domestic law after the UK withdraws from the EU Treaties.

76 We accept the proposition that the ambit of the rights and remedies etc which are incorporated into domestic law through section 2 of the 1972 Act varies with the United Kingdom's obligations from time to time under the EU Treaties. This proposition is reflected in the language of subsections (1) and (2) of section 2, which are quoted in paras 18 and 19 above. However, this proposition is also limited in nature. Thus, the provisions of new EU Treaties are not automatically brought into domestic law through section 2: only once they have been statutorily added to "the Treaties" and "the EU Treaties" in section 1(2) can section 2 give effect to new EU Treaties. And section 2 can only apply to those rights and remedies which are capable of being "given legal effect or used" or "enjoyed" in the United Kingdom.

77 We also accept that Parliament cannot have intended that section 2 should continue to import the variable content of EU law into domestic law, or that the other consequences of the 1972 Act

described in paras 62–64 above should continue to apply, after the United Kingdom had ceased to be bound by the EU Treaties. However, while acknowledging the force of Lord Reed JSC's powerful judgment, we do not accept that it follows from this that the 1972 Act either contemplates or accommodates the abrogation of EU law upon the United Kingdom's withdrawal from the EU Treaties by prerogative act without prior Parliamentary authorisation. On the contrary: we consider that, by the 1972 Act, Parliament endorsed and gave effect to the United Kingdom's membership of what is now the **European Union** under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties.

[2017] 2 WLR 583 at 642

78 In short, the fact that EU law will no longer be part of UK domestic law if the United Kingdom withdraws from the EU Treaties does not mean that Parliament contemplated or intended that ministers could cause the United Kingdom to withdraw from the EU Treaties without prior Parliamentary approval. There is a vital difference between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the **European Union**. The former involves changes in EU law, which are then brought into domestic law through section 2 of the 1972 Act. The latter involves a unilateral action by the relevant constitutional bodies which effects a fundamental change in the constitutional arrangements of the United Kingdom.

79 So far as the interpretation of subsections (1) and (2) of section 2 of the 1972 Act is concerned, any right available under EU law to the United Kingdom to withdraw from the EU Treaties does not, as Mr Eadie rightly accepted, fall within the subsection, as it is not one which would be given "legal effect or used in", or which would be "enjoyed by the United Kingdom". Further, the fact that section 2(1) envisages EU law rights and procedures applying "as in accordance with the Treaties" "from time to time" and "without further enactment" takes matters no further. Subsection 2(1) and (2) are concerned to ensure that the variable content of EU law as it stands from time to time, is given effect in domestic law, and there was no practical alternative to such an arrangement in a dualist system. However, it does not follow from this that prerogative powers may be used to withdraw from the Treaties and so cut off the source of EU law entirely.

80 One of the most fundamental functions of the constitution of any **state** is to identify the sources of its law. And, as explained in paras 61 to 66 above, the 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning. This proposition is indeed inherent in the **Secretary** of **State**'s metaphor of the 1972 Act as a conduit pipe by which EU law is brought into the domestic UK law. Upon the United Kingdom's withdrawal from the **European Union**, EU law will cease to be a source of domestic law for the future (even if the Great Repeal Bill provides that some legal rules derived from it should remain in force or continue to apply to accrued rights and liabilities), decisions of the Court of Justice will (again depending on the precise terms of the Great Repeal Bill) be of no more than persuasive authority, and there will be no further references to that court from UK courts. Even those legal rules derived from EU law and transposed into UK law by domestic legislation will have a different status. They will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law.

81 Accordingly, the main difficulty with the **Secretary** of **State**'s argument is that it does not answer the objection based on the constitutional implications of withdrawal from the EU. As we have said, withdrawal is fundamentally different from variations in the content of EU law arising from further EU Treaties or legislation. A complete withdrawal represents a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law. It will constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act. And, if Notice is given,

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this change will occur irrespective of whether Parliament repeals the 1972 Act. It would be inconsistent with long-standing and fundamental principle for such a far reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source in question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources.

82 The point may be illustrated by reference to the formula which Lord Reed JSC uses to make the argument about the variable content of EU law. That formula is "All such [members of a specified category] as [satisfy a specified condition] shall be [dealt with in accordance with a specified requirement]". In the present case, the "specified condition" is a continuing obligation under the EU Treaties, and it must be satisfied by EU laws, which are the relevant "members of [the] specified category", in order for the "specified requirement", namely that those EU laws are binding domestically, to apply. The membership of the specified category has a variable content which is contingent on the decisions of non-UK entities, and the contingency may change that content. That much may well be accommodated by the 1972 Act. But the very formula is not itself variable: it is a fixed rule of domestic law, enacted by Parliament. It is nothing to the point that there was, for UK purposes, no content in the specified category until the 1972 Accession Treaty was ratified (on the day after the 1972 Act received the royal assent). As mentioned in para 77 above, by the 1972 Act, Parliament endorsed and gave effect to the UK's future membership of the **European Union**, and this became a fixed domestic starting point. The question is whether that domestic starting point, introduced by Parliament, can be set aside, or could have been intended to be set aside, by a decision of the UK executive without express Parliamentary authorisation. We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue.

83 While the consequential loss of a source of law is a fundamental legal change which justifies the conclusion that prerogative powers cannot be invoked to withdraw from the EU Treaties, the Divisional Court was also right to hold that changes in domestic rights acquired through that source as summarised in para 70 above, represent another, albeit related, ground for justifying that conclusion. Indeed, the consequences of withdrawal go further than affecting rights acquired pursuant to section 2 of the 1972 Act, as explained in paras 62–64 above. More centrally, as explained in paras 76–79 above, section 2 of that Act envisages domestic law, and therefore rights of UK citizens, changing as EU law varies, but it does not envisage those rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties.

84 Mr Eadie also argued that exercise of prerogative powers can change domestic law. While there are circumstances (as described in paras 52–53 above) where the exercise of prerogative powers can affect domestic legal rights, they plainly do not apply in the present case. The rights which flow through the conduit pipe of the 1972 Act are contingent on the possibility of their being removed or changed in accordance with decisions taken by EU

institutions, as is recognised by the expression from "time to time" in section 2(1). However, as implied in para 79 above, far from helping the **Secretary** of **State**'s case, the presence of those words in section 2 highlights their absence from the definition of "Treaties" and "EU Treaties" in section 1(2). When one reads the two subsections together, the clear implication is that the continued existence of the conduit pipe, as opposed to the contents which flow through it, can be changed only if Parliament changes the law.

85 In the course of his attractively presented submissions, Mr Eadie sought to meet these points with the argument that the 1972 Act (as amended from time to time) effectively incorporates the EU Treaties, and that the claimants cannot point to any provision in the Act which **states** that the prerogative powers in relation to those treaties are to be abrogated. Given that there is nothing in the 1972 Act which expressly or by necessary implication abrogated ministers' prerogative powers to withdraw from the Treaties to which it applied, he contended that it followed that the prerogative to withdraw from the EU Treaties was not precluded by the 1972 Act. In this connection, he relied on dicta in *De Keyser* cited above (including Lord Parmoor's reference to "directly regulated by statute" in the passage quoted in para 48 above) which suggested that prerogative powers should not be treated as abrogated unless a statute expressly, or by necessary implication, provided for their abrogation. Mr Eadie also relied on***R v Secretary of State*** *for Foreign and Commonwealth Affairs, Ex p Rees-Mogg* [1994] QB 552, in which the Divisional Court held that ministers could ratify a protocol to the EU Treaty without Parliamentary approval. In the course of his reasons for rejecting an argument based on the proposition that prerogative powers could not be used to alter the law, Lloyd LJ, at p 567H appears to have concluded that ministers' prerogative powers exist generally in relation to the EU Treaties, apparently on the basis that a prerogative power can be fettered by statute only in express terms.

86 However, as explained above, the EU Treaties not only concern the international relations of the United Kingdom, they are a source of domestic law, and they are a source of domestic legal rights many of which are inextricably linked with domestic law from other sources. Accordingly, the Royal prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form. It follows that, rather than the **Secretary** of **State** being able to rely on the absence in the 1972 Act of any exclusion of the prerogative power to withdraw from the EU Treaties, the proper analysis is that, unless that Act positively created such a power in relation to those Treaties, it does not exist. And, once one rejects the contention that section 2 accommodates a ministerial power to withdraw from the EU Treaties (as to which see paras 79 and 84 above), it is plain that the 1972 Act did not create such a power of withdrawal, as the **Secretary** of **State** properly accepts.

87 We accept, of course, that it would have been open to Parliament to provide expressly that the constitutional arrangements and the EU rights introduced by the 1972 Act should themselves only prevail from time to time and for so long as the UK government did not decide otherwise, and in particular did not decide to withdraw from the EU Treaties. But we cannot accept that the 1972 Act did so provide. As Lord Hoffmann explained in ***R v***

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Secretary *of* ***State*** *for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost", and so "Fundamental rights cannot be overridden by general … words" in a statute, "because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process". Had the Bill which became the 1972 Act spelled out that ministers would be free to withdraw the United Kingdom from the EU Treaties, the implications of what Parliament was being asked to endorse would have been clear, and the courts would have so decided. But we must take the legislation as it is, and we cannot accept that, in Part I of the 1972 Act, Parliament "squarely confront[ed]" the notion that it was clothing ministers with the far reaching and anomalous right to use a Treaty-making power to remove an important source of domestic law and important domestic rights.

88 In our judgment, far from indicating that ministers had the power to withdraw from the EU Treaties, the provisions of the 1972 Act, particularly when considered in the light of the unusual nature of those Treaties and the Act's unusual legislative history, support the contrary view. As the Divisional Court said, the long title of the 1972 Act **stated** that its purpose was to make provision in

connection with the “enlargement” of what is now the **European Union**, which is not easy to reconcile with a prerogative power to achieve the opposite. Similarly, the side-note to section 2, “General implementation of Treaties”, points away from a prerogative to terminate any implementation. In addition, there is the fact that the 1972 Act required ministers not to commit the United Kingdom to any new arrangement, whether it increased or decreased the potential volume and extent of EU law, without first being approved by Parliament—by statute in the case of a new EU Treaty and by an approved Order in Council in the case of a Treaty ancillary to any existing EU Treaty. It would scarcely be compatible with those provisions if, in reliance on prerogative powers, ministers could unilaterally withdraw from the EU Treaties, thereby reducing the volume and extent of EU law which takes effect domestically to nil without the need for Parliamentary approval.

89 For these reasons, we disagree with Lloyd LJ’s conclusion in *Ex p Rees-Mogg* in so far as he held that ministers could exercise prerogative powers to withdraw from the EU Treaties. It is only right to add that his ultimate decision was none the less correct for the reason he gave on p 568, namely that ratification of the particular protocol in that case would not in any significant way alter domestic law.

90 The EU Treaties as implemented pursuant to the 1972 Act were and are unique in their legislative and constitutional implications. In 1972, for the first time in the history of the United Kingdom, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts. And, as explained in paras 13–15 above, before (i) signing and (ii) ratifying the 1972 Accession Treaty, ministers, acting internationally, waited for Parliament, acting domestically, (i) to give clear, if not legally binding, approval in the form of resolutions, and (ii) to enable the Treaty to be effective by passing the 1972 Act. Bearing in mind this unique history and the constitutional principle of Parliamentary sovereignty, it seems most improbable that those two parties had the intention or expectation that ministers, constitutionally the junior

partner in that exercise, could subsequently remove the graft without formal appropriate sanction from the constitutionally senior partner in that exercise, Parliament.

91 The improbability of the **Secretary** of **State**’s case is reinforced by the point that, if, as he contends, prerogative powers could be invoked in relation to the EU Treaties despite the provisions of the 1972 Act, it would have been open to ministers to take such a course on or at any time after 2 January 1973 without authorisation by Parliament. It would also follow that ministers could have taken that course even if there had been no referendum or indeed, at least in theory, even if any referendum had resulted in a vote to remain. Those are implausible propositions.

92 To meet this criticism, it was suggested that, if ministers had invoked their prerogative powers to withdraw from the EU Treaties in such circumstances, their decision may have been judicially reviewable. That is rather a bold suggestion, given that it has always been considered that, because they only operate on the international plane, prerogative Treaty-making powers are not subject to judicial review—see para 55 above. It was also suggested that it should not cause surprise if ministers could exercise prerogative powers to withdraw from the EU Treaties, as they would be accountable to Parliament for their actions. This seems to us to be a potentially controversial argument constitutionally. It would justify all sorts of powers being accorded to the executive, on the basis that ministers could always be called to account for their exercise of any power. There is a substantial difference between (i) ministers having a freely exercisable power to do something whose exercise may have to be subsequently explained to Parliament and (ii) ministers having no power to do that thing unless it is first accorded to them by Parliament. The major practical difference between the two categories, in a case such as this where the exercise of the power is irrevocable, is that the exercise of power in the first category pre-empts any

Parliamentary action. When the power relates to an action of such importance to the UK constitution as withdrawing from the Treaties, it would clearly be appropriate for the power to be in the second category. The fact that ministers are free to issue a declaration of war without first obtaining the sanction of Parliament does not assist the **Secretary** of **State**'s case. Such a declaration, while plainly of fundamental significance in practice, does not change domestic laws or domestic sources of law, although it will lead to new laws—provided Parliament decides that it should.

93 Thus, the continued existence of the new source of law created by the 1972 Act, and the continued existence of the rights and other legal incidents which flow therefrom, cannot as a matter of UK law have depended on the fact that to date ministers have refrained from having recourse to the Royal prerogative to eliminate that source and those rights and other incidents.

Subsidiary arguments as to the effect of the 1972 Act

94 The **Secretary** of **State** relied on the fact that it was inevitable that Parliament would be formally involved in the process of withdrawal from the **European Union**, in that primary legislation, not least the Great Repeal Bill referred to in para 34 above, would be required to enable the United Kingdom to complete its withdrawal in an orderly and coherent manner.

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That seems very likely indeed, but it misses the point. If ministers give Notice without Parliament having first authorised them to do so, the die will be cast before Parliament has become formally involved. To adapt Lord Pannick's metaphor, the bullet will have left the gun before Parliament has accorded the necessary leave for the trigger to be pulled. The very fact that Parliament will have to pass legislation once the Notice is served and hits the target highlights the point that the giving of the Notice will change domestic law: otherwise there would be no need for new legislation.

95 It was also argued on behalf of the **Secretary** of **State** that, when ministers are participating in EU law-making processes and are therefore involved in making EU law, and hence domestic law, they are thereby exercising prerogative powers, and that the giving of Notice would be an equally legitimate exercise of those powers. We readily accept, without formally deciding, that ministerial activity in the EU law-making process is effected under the Royal prerogative. However, it does not follow from this that ministers should be entitled to exercise a prerogative power to leave the **European Union**. When taking part in EU decision-making, UK ministers are carrying out the very functions which were envisaged by Parliament when enacting the 1972 Act. Withdrawing from the EU Treaties involves ministers doing the opposite, namely, unilaterally dismantling the very system which they set up in a co-ordinated way with Parliament, as explained in paras 13–15 above. Consistently with this, article 16EU of the EU Treaty stipulates that "a representative of each member **state** at ministerial level" can commit member **states** by voting on the **European** Council, whereas article 50EU provides that withdrawal must be effected by a member **state** "in accordance with [its] constitutional requirements".

96 It was further pointed out that unilateral actions by other member **states** could remove EU law-based rights enjoyed by EU nationals (including UK citizens) living in the United Kingdom—eg if another member **state** withdrew from the **European Union**. We agree, but cannot accept that it has any relevance to the present dispute, which concerns the domestic constitutional arrangements which apply if the UK government wishes to withdraw from the EU Treaties. The fact that it is inevitable that to the extent that they depend on a particular foreign government, EU rights can be abrogated by the withdrawal from EU Treaties by that foreign government gives no guidance as to what is required by the United Kingdom's constitutional arrangements before ministers can cause the United Kingdom to withdraw from those Treaties.

97 Mr Eadie identified two instances which, he contended, showed that there were circumstances in which the UK government could withdraw from treaties without prior Parliamentary sanction, even if such withdrawal changed domestic law. The first was the United Kingdom's withdrawal in 1972 from the **European** Free Trade Agreement, EFTA. That is of no assistance to the **Secretary** of **State**. For, in stark contrast with UK membership of the **European Union** as a result of the 1972 Act, no directly effective rights had been created as a result of UK membership of EFTA. Moreover, the decision to withdraw from EFTA was an inevitable corollary of joining the EEC, and the formal notice withdrawing from EFTA was only served after both Houses of Parliament had "approve[d]" the "decision of principle to join the **European** Communities" as explained in para 13 above; it was thus an aspect of the exercise which the Prime Minister and the

Chancellor of the Duchy of Lancaster respectively described in the House of Commons in October 1971 and January 1972.

98 The second instance given by Mr Eadie was that of bilateral double taxation treaties ("DTTs"), which were entered into with other **states** by the UK government under section 788 of the Income and Corporation Taxes Act 1988 ("section 788"), now replaced by section 2 of the Taxation (International and Other Provisions) Act 2010 ("TIOPA"). This point was hardly mentioned in the oral argument before us, perhaps because discussions in some of the articles referred to in para 11 above have shown that the DTTs are an unsatisfactory analogy. By section 788 and now by TIOPA, Parliament provided in primary legislation that arrangements agreed by ministers in a DTT at international level will have effect in national law, but only if those arrangements are specified in an Order in Council which is approved by the House of Commons. Thus, unlike EU law which becomes part of UK law automatically as a result of the 1972 Act, the arrangements under a DTT do not take effect automatically as a result of section 788 or, now, TIOPA, but only through a specific Order in Council which has to be approved by Parliament. The conduit pipe metaphor which applies to the 1972 Act in relation to EU law is inapposite for section 788 and TIOPA in relation to DTTs.

99 Before concluding on the effect of the 1972 Act, it is worth mentioning two points. First, eminent judges have taken it for granted that it is a matter for Parliament whether the United Kingdom withdraws from the EU Treaties. In *Blackburn v Attorney General* [1971] 1 WLR 1037, 1040, Lord Denning MR said that "If her Majesty's Ministers sign this treaty and Parliament enacts provisions to implement it" he did "not envisage that Parliament would afterwards go back on it and try to withdraw from it", but "if Parliament should do so" then the courts would consider it. In*Macarthys Ltd v Smith* [1979] ICR 785, 789, Lord Denning MR (albeit in a dissenting judgment) made "a constitutional point", and referred to the possibility of "our Parliament deliberately pass[ing] an Act—with the intention of repudiating the Treaty". In *Pham v **Secretary** of **State** for the Home Department* [2015] 1 WLR 1591, para 80, having **stated** that "EU law [is] part of domestic law because Parliament has so willed", Lord Mance JSC said that "the question how far Parliament has so willed is thus determined by construing the 1972 Act". In *Shindler v Chancellor of the Duchy of Lancaster* [2016] 3 WLR 1196, para 58, Lord Dyson MR said that "Parliament agreed to join the EU by exercising sovereign powers untrammelled by EU law and I think it would expect to be able to leave the EU in the exercise of the same untrammelled sovereign power".

100 Secondly, if, as the **Secretary** of **State** has argued, it is legitimate to take account of the fact that Parliament will, of necessity, be involved in its legislative capacity as a result of UK withdrawal from the EU Treaties, it would militate in favour of, rather than against, the view that Parliament should have to sanction giving Notice. An inevitable consequence of withdrawing from the EU Treaties will be the need for a large amount of domestic legislation. There is thus a good pragmatic argument that such a burden should not be imposed on Parliament by exercise of prerogative

powers and without prior Parliamentary authorisation. We do not rest our decision on that point, but it serves to emphasise the major constitutional change which withdrawal from the **European Union** will involve, and

therefore the constitutional propriety of prior Parliamentary sanction for the process.

Conclusion on the effect of the 1972 Act

101 Accordingly, we consider that, in light of the terms and effect of the 1972 Act, and subject to considering the effect of subsequent legislation and events, the prerogative could not be invoked by ministers to justify giving Notice: ministers require the authority of primary legislation before they can take that course.

102 We turn, then, to deal with the impact of legislation and events after 1972.

Legislation and events after 1972: from 1973 to 2014

103 With one exception, the legislation and events between 1973 and 2014 were relied on in argument by the **Secretary** of **State** rather than by the claimants. We will first discuss the **Secretary** of **State**'s points in this connection and we will then turn to the claimants' point.

104 We start by addressing the fact that the EU Treaties contained no provision entitling a member **state** to withdraw at the time of the 1972 Act, and that such a provision, article 50, was introduced by the FEU Treaty in 2008. Although its invocation will have the inevitable consequence which Lord Pannick described (as mentioned in para 36 above), article 50EU operates only on the international plane, and is not therefore brought into UK law through section 2 of the 1972 Act, as explained in para 79 above. Accordingly, the **Secretary** of **State** can derive no domestic authority from the fact that the EU Treaties now include provision for unilateral withdrawal. In any event, article 50EU only entitles a member **state** to withdraw from the EU Treaties "in accordance with its own constitutional requirements", which returns one to the issue in the current proceedings.

105 It was suggested that, by incorporating the FEU Treaty, including its introduction of article 50, into section 1(2) of the 1972 Act in 2008, it cannot have been the intention of Parliament to "strip" ministers of their ability to exercise their powers under article 50. That is not the issue. Nobody doubts but that, under the FEU Treaty and the EU Treaty, ministers can give Notice under article 50(2); the question we have to decide is whether they can do so under prerogative powers or only with Parliamentary authority.

106 So far as the 2008 Act and the 2011 Act are concerned, Mr Eadie rightly did not go so far as to suggest that they conferred power on ministers to withdraw if that power did not exist under the 1972 Act. More subtly, he submitted that these later statutes implicitly, but clearly, recognised the existence of the prerogative power to withdraw from the EU Treaties, unconstrained by Parliamentary control.

107 He pointed out that the two statutes specified in detail the prerogative powers which Parliament intended to control in relation to the EU Treaties, and that they did not include the power to withdraw from those treaties under article 50(2). That omission was said to be particularly striking

because, as explained in para 29 above, the 2011 Act covered another aspect of article 50, as it required legislation and a referendum before ministers could vote in favour of a decision under article 50(3) to

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depart from the need for unanimity in any decision to extend the two-year period in the event of another member **state** seeking to withdraw from the EU Treaties. But it did not seek to control the giving of notice by ministers under article 50(2), for all its fundamental and irreversible consequences.

108 We do not accept this argument. The fact that a statute says nothing about a particular topic can rarely, if ever, justify inferring a fundamental change in the law. As explained in *Ex p Simms* [2000] 2 AC 115, 131 cited in para 87 above, "Fundamental rights cannot be overridden by general … words" in a statute, "because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process." If this is true of general expressions in a statute it must a fortiori be a principle which applies to omissions in a statute.

109 Even if this principle admits of exceptions, they must be rare, and there is no justification for the view that the absence of any reference to article 50(2) in the 2008 and 2011 Acts is such an exception. Those statutes were not attempting to codify the legislative restrictions on the use of the prerogative in relation to the EU Treaties. The restrictions imposed by the two statutes were largely prompted by the fact that the FEU Treaty had both increased the competences of the EU and included provisions which enabled EU institutions to short-circuit some of the EU's decision-making processes by replacing some of the previous requirements for unanimity or consensus with majority voting or involvement of the **European** Parliament. (It is fair to add that the restrictions also applied to certain policy issues such as the inclusion of the UK in the Schengen area and the UK's adoption of the Euro, but that does not undermine the point).

110 As explained in paras 5–6 of the Explanatory Notes to the 2011 Act, Part 1 of that Act was intended to impose specific restrictions, which in summary terms were as follows. It required "a referendum [to] be held before the UK could agree to an amendment" of the EU Treaty or FEU Treaty, and "before the UK could agree to certain decisions already provided for by EU Treaty and FEU Treaty … if these would transfer power or competence from the UK to the EU". Further, a referendum and "in addition, … an Act of Parliament would be required before the UK could agree to a number of other specified decisions provided for in EU Treaty and FEU Treaty". Also, "certain other decisions would require a motion to be agreed … in both Houses of Parliament before the UK could vote in favour of specified decisions in [EU institutions]".

111 In other words, expressed in broad terms, Part 1 of the 2011 Act was aimed at preventing ministers, without prior Parliamentary approval (plus, in many cases prior approval in a referendum), from supporting any decisions made by the **European Union** or its institutions which would extend EU competences and the like, or which would dilute the effect of UK voting rights in the EU or any EU institutions. It cannot be inferred from the fact that it was thought necessary to deal with such issues that Parliament intended or assumed that there were no legal limits to the prerogative powers that ministers might exercise in other types of case. Part 1 of the 2011 Act was concerned with decisions of EU institutions in which ministers played a part, not with unilateral decisions of ministers. More broadly, the absence of any Parliamentary controls on article 50(2) in the 2011 Act is entirely consistent with the notion that Parliament assumed that ministers could not withdraw from the EU Treaties without a statute authorising that

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course—and that if and when Parliament had to consider the issue, it would decide whether and if so on what terms, if any, to give such authorisation.

112 If prerogative powers are curtailed by legislation, they may sometimes be reinstated by the repeal of that legislation, depending on the construction of the statutes in question. But if, as we have concluded, there never had been a prerogative power to withdraw from the EU Treaties without statutory authority, there is nothing to be curtailed or reinstated by later legislation. The prerogative power claimed by the **Secretary** of **State** can only be created by a subsequent statute if the express language of that statute unequivocally shows that the power was intended to be created—see per Lord Hobhouse of Woodborough in ***R*** *(Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, para 45. Mr Eadie was right to concede that, however one approaches them, the 2008 and 2011 Acts did not show that.

113 Mr Eadie further submitted that, rather than looking at the question whether ministers could give Notice without statutory authorisation in historical terms starting in 1972, it should be addressed by viewing the effect of the present **state** of the legislation as a whole, without regard to what the position might have been at some earlier stage. We do not agree. A statute cannot normally be interpreted by reference to a later statute, save in so far as the later statute intends to amend the earlier statute or the two statutes are *in pari materia*, ie they are given a collective title, are required to be construed as one, have identical short titles, or "deal with the same subject matter on similar lines"—see *Bennion on Statutory Interpretation*, 6th ed (2013), p 154, section 28(13). None of these tests can possibly be said to be satisfied by the 2008 Act or the 2011 Act in relation to the 1972 Act, not least because the later statutes are concerned with a different issue from the 1972 Act. In any event, even if the two later statutes were in pari materia with the 1972 Act, for the reasons given in paras 110–112 above we do not consider that they would together yield the interpretation for which the **Secretary** of **State** contends.

114 The one feature of the post-1972 history on which the claimants relied was the effect of the 2002 Act. As explained in para 27 above, that Act gave most people of the United Kingdom the right to vote in elections for MEPs, and (albeit by inference) the right to stand for election as an MEP. On the face of it, these are free-standing rights outside the ambit of the 1972 Act, in that they are domestically granted in primary legislation passed by Parliament. The **Secretary** of **State** cannot argue that these rights are in any sense ambulatory. And they are rights which will inevitably be lost if the United Kingdom withdraws from the EU Treaties and ceases being a member of the **European Union**.

115 There is therefore some force in the argument that, even if formal Parliamentary sanction to the giving of Notice was not needed on the grounds discussed in paras 74–101 above, it would none the less be needed because withdrawal from the EU Treaties would deprive UK citizens of the rights given them by Parliament through the 2002 Act. However, there is also force in the **Secretary** of **State**'s response that the rights given by the 2002 Act are simply rights of institutional participation which are contingent on continued UK membership of the **European Union**. The same sort of arguments might perhaps arise in relation to statutory provisions such as section 4(2) of the Communications Act 2003, which requires

OFCOM, the UK telecommunications regulator, to carry out its statutory functions "in accordance with the six Community requirements", which are set out in the ensuing subsections and give effect to, and are mandated by, an EU Directive. Given our conclusion that, in the light of the terms and effect of the 1972 Act, ministers cannot give Notice without prior sanction from the UK Parliament, we can limit ourselves to saying that we consider that the arguments based on the 2002 Act do nothing to undermine and may be regarded as reinforcing that conclusion.

Legislation and events after 1972: the 2015 Act and the referendum

116 We turn to the 2015 Act and the ensuing referendum. The Attorney General submitted that the traditional view as to the limits of prerogative power should not apply to a ministerial decision authorised by a majority of the members of the electorate who vote in a referendum provided for by Parliament. In effect, he said that, even though it was Parliament which required the referendum, the response to the referendum result should be a matter for ministers, and that it should not be constrained by the legal limitations which would have applied in the absence of the referendum.

117 The referendum is a relatively new feature of UK constitutional practice. There have been three national referendums: on EEC membership in 1975, on the Parliamentary election voting system in 2011 and on EU membership in 2016. There have also been referendums about devolution in Scotland, Wales and Northern Ireland and about independence in Scotland. In 2000, it was considered worth having a legislative framework for the conduct of referendums "held in pursuance of any provision made by or under an Act of Parliament"—see Part VII of the Political Parties, Elections and Referendums Act.

118 The effect of any particular referendum must depend on the terms of the statute which authorises it. Further, legislation authorising a referendum more often than not has provided for the consequences on the result. Thus, the authorising statute may enact a change in the law subject to the proviso that it is not to come into effect unless approved by a majority in the referendum. The Scotland Act 1978 provided for devolution, but stipulated that the minister should bring the Act into force if there was a specified majority in a referendum, and if there was not he was required to lay an order repealing the Act. The Parliamentary Voting System and Constituencies Act 2011 had a provision requiring the alternative vote system to be adopted in Parliamentary elections, but by section 8 **stated** that the minister should bring this provision into force if it was approved in a referendum, but, if it was not, he should repeal it. Section 1 of the Northern Ireland Act 1998 ("the NI Act") provided that if a referendum were to result in a majority for the province to become part of a united Ireland, the **Secretary** of **State** should lay appropriate proposals before Parliament.

119 All these statutes stipulated what should happen in response to the referendum result, and what changes in the law were to follow, and how they were to be effected. The same is true of the provisions in Part 1 of the 2011 Act. By contrast, neither the 1975 Act nor the 2015 Act, which authorised referendums about membership of the **European** Community or **European Union**, made provision for any consequences of either possible outcome. They provided only that the referendum should be held, and they did so in substantially identical terms. The way in which the proposed

referendum was described in public statements by ministers, however, differed in the two cases. The 1975 referendum was described by ministers as advisory, whereas the 2016 referendum was described as advisory by some ministers and as decisive by others, but nothing hangs on that for present purposes. Whether or not they are clear and consistent, such public observations, wherever they are made, are not law: they are statements of political intention. Further, such statements are, at least normally, made by ministers on behalf of the UK government, not on behalf of Parliament.

120 It was suggested on behalf of the **Secretary** of **State** that, having referred the question whether to leave or remain to the electorate, Parliament cannot have intended that, upon the electorate voting to leave, the same question would be referred straight back to it. There are two problems with this argument. The first is that it assumes what it seeks to prove, namely that the referendum was intended by Parliament to have a legal effect as well as a political effect. The second problem is that the notion that Parliament would not envisage both a referendum and legislation being required to approve the same step is falsified by sections 2, 3 and 6 of the 2011 Act, which, as the Explanatory Notes (quoted in para 111 above) acknowledge, required just that—

albeit in the more elegant way of stipulating for legislation whose effectiveness was conditional upon a concurring vote in a referendum.

121 Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation.

122 What form such legislation should take is entirely a matter for Parliament. But, in the light of a point made in oral argument, it is right to add that the fact that Parliament may decide to content itself with a very brief statute is nothing to the point. There is no equivalence between the constitutional importance of a statute, or any other document, and its length or complexity. A notice under article 50(2) could no doubt be very short indeed, but that would not undermine its momentous significance. The essential point is that, if, as we consider, what would otherwise be a prerogative act would result in a change in domestic law, the act can only lawfully be carried out with the sanction of primary legislation enacted by the Queen in Parliament.

123 This is why the **Secretary** of **State** rightly accepted that the resolution of the House of Commons on 7 December 2016, calling on ministers to give Notice by 31 March 2017, cannot affect the legal issues before this court. A resolution of the House of Commons is an important political act. No doubt, it makes it politically more likely that any necessary legislation enabling ministers to give Notice will be enacted. But if, as we have concluded, ministers cannot give Notice by the exercise of prerogative powers, only legislation which is embodied in a statute will do. A resolution of the House of Commons is not legislation.

124 Thus, the referendum of 2016 did not change the law in a way which would allow ministers to withdraw the United Kingdom from the **European Union** without legislation. But that in no way means that it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance.

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125 It is instructive to see how the issue was addressed in ministers' response to the 12th Report of Session 2009–2010 of the House of Lords Select Committee on the Constitution (*Referendums in the United Kingdom* (HL Paper 99)). The Committee included the following recommendation in para 197: "because of the sovereignty of Parliament, referendums cannot be legally binding in the UK, and are therefore advisory. However, it would be difficult for Parliament to ignore a decisive expression of public opinion." The UK Government's response as recorded in the Committee's 4th Report of Session 2010–2011 (HL Paper 34) was "The Government agrees with this recommendation. Under the UK's constitutional arrangements Parliament must be responsible for deciding whether or not to take action in response to a referendum result."

The References from Northern Ireland and the devolution questions

Introductory

126 As mentioned above, four devolution questions have been referred to this court by the High Court of Justice in Northern Ireland on the direction of the Attorney General for Northern Ireland, and one has been referred by the Court of Appeal in Northern Ireland on the appeal from Maguire J. The five devolution questions are:

(i) Does any provision of the NI Act, read together with the Belfast Agreement and the British-Irish Agreement, have the effect that primary legislation is required before Notice can be given?

(ii) If the answer is "yes", is the consent of the Northern Ireland Assembly required before the relevant legislation is enacted?

(iii) If the answer to question (i) is "no", does any provision of the NI Act read together with the Belfast Agreement and the British-Irish Agreement operate as a restriction on the exercise of the prerogative power to give Notice?

(iv) Does section 75 of the NI Act prevent exercise of the power to give Notice in the absence of compliance by the Northern Ireland Office with its obligations under that section?

(v) Does the giving of Notice without the consent of the people of Northern Ireland impede the operation of section 1 of the NI Act?

127 Following the hearing, our attention was drawn to the decision of the Northern Irish Court of Appeal in *Lee v McArthur* [2016] NICA 55 handed down on 22 December 2016. That decision suggests that the High Court may not have had jurisdiction to have made the reference in these proceedings as sought by the Attorney General for Northern Ireland. Given that the issues raised in that reference were fully debated, and that no party to these proceedings has sought belatedly to rely on the decision of the Court of Appeal, we think it appropriate to deal with the reference.

128 The NI Act is the product of the Belfast Agreement and the British-Irish Agreement, and is a very important step in the programme designed to achieve reconciliation of the communities of Northern Ireland. It has established institutions and arrangements which are intended to address the unique political history of the province and the island of Ireland. Yet there is also a relevant commonality in the devolution settlements in Northern Ireland, Scotland and Wales (i) in the statutory constraint on the executive and legislative competence of the devolved governments and legislatures

that they must not act in breach of EU law ("the EU constraints"); and (ii) in the operation of the Sewel Convention. (The EU constraints are to be found in sections 29(2)(d), 54 and 57(2) of the Scotland Act 1998; sections 108(6)(c) and 80(8) of the Government of Wales Act 2006; and sections 6(2)(d) and 24(1) of the NI Act).

Questions (i), (iii), (iv) and (v)

129 Because we have concluded that primary legislation is required to authorise the giving of Notice, the third question is superseded. The first question is for a similar reason less significant than it otherwise might have been but we address it briefly. When enacting the EU constraints in the NI Act and the other devolution Acts, Parliament proceeded on the assumption that the United Kingdom would be a member of the **European Union**. That assumption is consistent with the view that Parliament would determine whether the United Kingdom would remain a member of the **European Union**. But, in imposing the EU constraints and empowering the devolved institutions to observe and implement EU law, the devolution legislation did not go further and require the United Kingdom to remain a member of the **European Union**. Within the United Kingdom, relations with the **European Union**, like other matters of foreign affairs, are reserved or excepted in the cases of

Scotland and Northern Ireland, and are not devolved in the case of Wales—see section 30(1) of, and paragraph 7(1) of Schedule 5 to, the Scotland Act 1998; section 108(4) of, and Part 1 of Schedule 7 to, the Government of Wales Act 2006; and section 4(1) of, and paragraph 3 of Schedule 2 to, the NI Act.

130 Accordingly, the devolved legislatures do not have a parallel legislative competence in relation to withdrawal from the **European Union**. The EU constraints are a means by which the UK Parliament and government make sure that the devolved democratic institutions do not place the United Kingdom in breach of its EU law obligations. The removal of the EU constraints on withdrawal from the EU Treaties will alter the competence of the devolved institutions unless new legislative constraints are introduced. In the absence of such new restraints, withdrawal from the EU will enhance the devolved competence. We consider the effect of the alteration of competence in our discussion of the Sewel Convention in paras 136 to 151 below.

131 Mr Scoffield QC, who appeared for Mr Agnew, is unquestionably right, however, to claim that the NI Act conferred rights on the citizens of Northern Ireland. Sections 6(2)(d) and 24(1), in imposing the EU constraints, have endowed the people of Northern Ireland with the right to challenge actions of the Executive or the Assembly on the basis that they are in breach of EU law. A recent example of the exercise of such a right is found in the case of *In re JR's Application for Judicial Review* [2016] NICA 20, where the lifetime ban on men who have had sex with other men from giving blood in Northern Ireland was challenged as being contrary to EU law.

132 As already explained, it is normally impermissible for statutory rights to be removed by the exercise of prerogative powers in the international sphere. It would accordingly be incongruous if constraints imposed on the legislative competence of the devolved administrations by specific statutory provisions were to be removed, thereby enlarging that competence, other than by statute. A related incongruity arises by virtue of

the fact that observance and implementation of EU obligations are a transferred matter and therefore the responsibility of the devolved administration in Northern Ireland. The removal of a responsibility imposed by Parliament by ministerial use of prerogative powers might also be considered a constitutional anomaly. In light of our conclusion that a statute is required to authorise the decision to withdraw from the **European Union**, and therefore the giving of Notice, it is not necessary to reach a definitive view on the first referred question. The EU constraints and the provisions empowering the implementation of EU law are certainly consistent with our interpretation of the 1972 Act but we refrain from deciding whether they impose a discrete requirement for Parliamentary legislation.

133 Section 75(1) of the NI Act obliges a public authority in carrying out its functions in relation to Northern Ireland to "have due regard to the need to promote equality of opportunity". By section 75(2), this duty includes an obligation to have regard to the desirability of promoting good relations between persons of different religious belief, political persuasion or radial group. Section 75(3) defines "public authority" for the purpose of the section and, unlike section 76(7), does not include within the definition a Minister of the Crown. Thus, the **Secretary** of **State** does not fall within its ambit. Further, in our view, and in agreement with the Attorney General for Northern Ireland, the decision to withdraw from the **European Union** and to give Notice is not a function carried out by the **Secretary** of **State** for Northern Ireland in relation to Northern Ireland within the meaning of section 75. Because we have held that there is no prerogative power to give Notice, the fourth question is superseded. But in so far as the **Secretary** of **State** may have a role in the measures taken by the UK Parliament to give Notice, we are satisfied that section 75 imposes no obligation on him in that context.

134 We also answer the fifth question in the negative. Section 1 of the NI Act is headed "Status of Northern Ireland" and it provides:

> "(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.
>
> "(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the **Secretary** of **State** shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland."

135 In our view, this important provision, which arose out of the Belfast Agreement, gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland. It neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the **European Union**. Contrary to the submission of Mr Lavery QC for Mr McCord, this section cannot support any legitimate expectation to that effect.

[2017] 2 WLR 583 at 657

The Sewel Convention and question (ii)

136 That leaves the second question, which raises in substance the application of the Sewel Convention. The convention was adopted as a means of establishing co-operative relationships between the UK Parliament and the devolved institutions, where there were overlapping legislative competences. In each of the devolution settlements the UK Parliament has preserved its right to legislate on matters which are within the competence of the devolved legislature. Section 5 of the NI Act empowers the Northern Ireland Assembly to make laws, but subsection (6) **states** that "this section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland". Section 28(7) of the Scotland Act 1998 provides that the section empowering the Scottish Parliament to make laws: "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland". Substantially identical provision is made for Wales in section 107(5) of the Government of Wales Act 2006.

137 The practical benefits of achieving harmony between legislatures in areas of competing competence, of avoiding duplication of effort, of enabling the UK Parliament to make UK-wide legislation where appropriate, such as establishing a single UK implementing body, and of avoiding any risk of legal challenge to the vires of the devolved legislatures were recognised from an early date in the devolution process. The convention takes its name from Lord Sewel, the Minister of **State** in the Scotland Office in the House of Lords who was responsible for the progress of the Scotland Bill in 1998. In a debate in the House of Lords (Hansard (HL Debates), 21 July 1998, col 791) on the clause which is now section 28 of the Scotland Act 1998, he **stated** in July 1998 that,

while the devolution of legislative competence did not affect the ability of the UK Parliament to legislate for Scotland, "we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament". That expectation has been fulfilled.

138 The convention was embodied in a Memorandum of Understanding between the UK government and the devolved governments originally in December 2001 (Cm 5240). Para 14 of the current Memorandum of Understanding, which was published in October 2013, **states**:

> "the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government."

139 Thus, the UK government undertook not to seek or support relevant legislation in the UK Parliament without the prior consent of the devolved legislature. That consent is given by a legislative consent motion which the devolved government introduces into the legislature. Para 2 of the Memorandum of Understanding **stated** that it was a statement of political intent and that it did not create legal obligations.

140 Over time, devolved legislatures have passed legislative consent motions not only when the UK Parliament has legislated on matters which fall within the legislative competence of a devolved legislature, but also when the UK Parliament has enacted provisions that directly alter the

legislative competence of a devolved legislature or amend the executive competence of devolved administrations. Thus, as the Lord Advocate showed in a helpful schedule, legislative consent motions were passed by the Scottish Parliament before the enactment of both the Scotland Act 2012 and the Scotland Act 2016. Similarly, the Welsh Assembly passed a legislative consent motion in relation to the Wales Act 2014, and in November 2016 the Welsh government laid a legislative consent motion before the Assembly in relation to the current Wales Bill 2016. But legislation which implements changes to the competences of EU institutions and thereby affects devolved competences, such as the 2008 Act which incorporated the Treaty of Lisbon amending the EU Treaty and the FEU Treaty into section 1(2) of the 1972 Act, has not been the subject of legislative consent motions in any devolved legislature.

141 Before addressing the more recent legislative recognition of the convention, it is necessary to consider the role of the courts in relation to constitutional conventions. It is well established that the courts of law cannot enforce a political convention. In*In re Resolution to amend the Constitution* [1981] 1 SCR 753, the Supreme Court of Canada addressed the nature of political conventions. In the majority judgment the Chief Justice (Laskin) and Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ **stated**, at pp 774–775:

> "The very nature of a convention, as political in inception and as depending on a consistent course of political recognition by those for whose benefit and to whose

> detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement."

142 In a dissenting judgment on one of the questions before the court, the Chief Justice and Estey and McIntyre JJ developed their consideration of conventions, at p 853:

> "a fundamental difference between the legal, that is the statutory and common law rules of the constitution, and the conventional rules is that, while a breach of the legal rules, whether of statutory or common law nature, has a legal consequence in that it will be restrained by the courts, no such sanction exists for breach or non-observance of the conventional rules. The observance of constitutional conventions depends upon the acceptance of the obligation of conformance by the actors deemed to be bound thereby. When this consideration is insufficient to compel observance no court may enforce the convention by legal action. The sanction for non-observance of a convention is political in that disregard of a convention may lead to political defeat, to loss of office, or to other political consequences, but will not engage the attention of the courts which are limited to matters of law alone. Courts, however, may recognise the existence of conventions …"

143 Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ made the same point at pp 882–883:"It is because the sanctions of convention rest with institutions of government other than courts … or with public opinion and ultimately, with the electorate, that it is generally said that they are political."

144 Attempts to enforce political conventions in the courts have failed. Thus in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, the Judicial Committee of the Privy Council had to consider a submission that legal effect should be given to the convention which applied at that time that the UK Parliament would not legislate without the consent of the Government of Southern Rhodesia on matters within the competence of the Legislative Assembly. In its judgment delivered by Lord Reid the Board **stated**, at p 723, that:

> "That was a very important convention but it had no legal effect in limiting the legal power of Parliament. It is often said that it would be unconstitutional for the UK Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid."

More recently, the political nature of the Sewel Convention was recognised by Lord Reed in a decision of the Inner House of the Court of Session, *Imperial Tobacco Ltd v Lord Advocate* 2012 SC 297, para 71.

145 While the UK government and the devolved executives have agreed the mechanisms for implementing the convention in the Memorandum of Understanding, the convention operates as a political restriction on the activity of the UK Parliament. Article 9 of the Bill of Rights, which provides that "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament", provides a further reason why the courts cannot adjudicate on the operation of this convention.

146 Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question (as in the Crossman diaries case—*Attorney General v Jonathan Cape Ltd* [1976] QB 752), but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world. As Professor Colin Munro has **stated** (1975) 91 LQR 218, 228, "the validity of conventions cannot be the subject of proceedings in a court of law".

147 The evolving nature of devolution has resulted in the Sewel Convention also receiving statutory recognition through section 2 of the Scotland Act 2016, which inserted subsection (8) into section 28 of the Scotland Act 1998 (which empowers the Scottish Parliament to make laws). Thus subsections (7) and (8) now **state**:

> "(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.
>
> "(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

A substantially identical provision (clause 2) is proposed in the Wales Bill 2016–2017, which is currently before the UK Parliament.

148 As the Advocate General submitted, by such provisions, the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising

the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement. That follows from the nature of the content, and is acknowledged by the words ("it is recognised" and "will not normally"), of the relevant subsection. We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts.

149 In the Scotland Act 2016, the recognition of the Sewel Convention occurs alongside the provision in section 1 of that Act. That section, by inserting section 63A into the Scotland Act 1998, makes the Scottish Parliament and the Scottish government a permanent part of the United Kingdom's constitutional arrangements, signifies the commitment of the UK Parliament and government to those devolved institutions, and declares that those institutions are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum. This

context supports our view that the purpose of the legislative recognition of the convention was to entrench it as a convention.

150 The Lord Advocate and the Counsel General for Wales were correct to acknowledge that the Scottish Parliament and the Welsh Assembly did not have a legal veto on the United Kingdom's withdrawal from the **European Union**. Nor in our view has the Northern Ireland Assembly. Therefore, our answer to the second question in para 126 above is that the consent of the Northern Ireland Assembly is not a legal requirement before the relevant Act of the UK Parliament is passed.

151 In reaching this conclusion we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.

Conclusion

152 Accordingly, (i) we dismiss the **Secretary** of **State**'s appeal against the decision of the English and Welsh Divisional Court, (ii) we invite the parties to the reference from the Northern Irish Court of Appeal to agree or, failing agreement, to make written submissions as to the order to be made on the appeal from that Court, and (iii) we answer the second and fifth questions referred by the courts of Northern Ireland as indicated respectively in paras 150 and 134 above, and we do not answer the first, third and fourth questions as they have been superseded.

LORD REED JSC (dissenting)

Introduction

153 Article 50EU of the Treaty of **European Union** ("TEU") provides:

"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
>
> *[2017] 2 WLR 583 at 661*
>
> 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** …
>
> "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."

154 The cases before the court arise from disputes as to the "constitutional requirements" which govern a decision by the United Kingdom to withdraw from the **European Union** under article 50(1): a decision which must be taken before notification can be given under article 50(2). In the case brought by Mrs **Miller** and Mr Dos Santos (whom I shall refer to as the **Miller** claimants), the **Miller** claimants maintain that the Crown cannot lawfully give notification under article 50(2) unless an Act of Parliament authorises it to do so. The **Secretary** of **State** for **Exiting** the **European Union**, on the other hand, maintains that the decision is one which can lawfully be taken by the Crown in the exercise of prerogative powers. The Divisional Court decided the case in favour of the **Miller** claimants, and the case now comes before this court as an appeal against that decision.

155 A number of interested parties and interveners have taken part in the **Miller** appeal. They include the Lord Advocate and the Counsel General for Wales, who as well as presenting arguments in support of those advanced by the **Miller** claimants, have also argued that, in the event that an Act of Parliament is required, the consent of the Scottish Parliament and the National Assembly for Wales is also required, in accordance with a convention known as the Sewel Convention.

156 Two other cases are also before the court. In the first, an application for leave to apply for judicial review brought by Mr Agnew and others, a number of devolution issues have been referred to this court by the High Court of Northern Ireland. Put shortly, the court is asked to decide whether provisions of the Northern Ireland Act 1998 ("the Northern Ireland Act") have the effect that an Act of Parliament is required before notification is given under article 50(2); if so, whether the consent of the Northern Ireland Assembly is required before such an Act of Parliament is enacted, in accordance with the Sewel Convention; and, in any event, whether the Northern Ireland Act prevents or constrains the exercise of the power to give notice.

157 In the second case, an application for leave to apply for judicial review brought by Mr McCord, another devolution issue has been referred to this court by the Court of Appeal of Northern Ireland. The court is asked to decide whether the giving of notification under article 50(2) in the exercise of prerogative powers, without the consent of the people of Northern Ireland, would impede the operation of section 1 of the Northern Ireland Act, which provides that Northern Ireland shall not cease to be part of the United Kingdom without the consent of a majority of the people of Northern Ireland.

158 I shall begin by considering the **Miller** appeal.

The argument of the Secretary of State in the Miller appeal

159 Each side of the argument in the **Miller** appeal is based on a principle of the British constitution. Counsel on each side cited a library's worth of authority, but I need mention only a few of the most important cases, as the essence of the relevant principles is clear and well known. The **Secretary** of **State** relies on the principle that, as a matter of law, the conduct of the UK's foreign relations falls within the prerogative power of the Crown, advised by its Ministers. This prerogative power includes the power to negotiate international treaties, to amend them, and to withdraw from them. The exercise of that Treaty-making power is not justiciable by the courts, unless statute has made it so. As Lord Oliver of Aylmerton said in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499–500 ("the *Tin Council* case"):

> "On the domestic plane, the power of the Crown to conclude treaties with other sovereign **states** is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law: see *Blackburn v Attorney General* [1971] 1 WLR 1037. The Sovereign acts 'throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts:' *Rustomjee v The Queen* (1876) 2 QBD 69, 74, per Lord Coleridge CJ."

Blackburn v Attorney General [1971] 1 WLR 1037, to which Lord Oliver referred, concerned the UK's entry into the **European** Communities, as the EU was then known. The action was an attempt to prevent the Crown from acceding to the Treaty of Rome. Lord Denning MR **stated**, at p 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."

160 The compelling practical reasons for recognising this prerogative power to manage international relations were identified by Blackstone in *Commentaries on the Laws of England* (1765), Book I, Chapter 7, "Of the King's Prerogative", p 250:

> "This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and despatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the

> exigencies of **state** will afford."

The value of unanimity, strength and dispatch in the conduct of foreign affairs are as evident in the 21st century as they were in the 18th.

161 Confiding foreign affairs to the Crown, in the exercise of the prerogative, does not, however, secure their effective conduct at the expense of democratic accountability. Ministers of the Crown are politically

accountable to Parliament for the manner in which this prerogative power is exercised, and it is therefore open to Parliament to require its exercise to be debated and even to be authorised by a resolution or legislation: as it has done, for example, in relation to the ratification of certain treaties under the **European Union** Amendment Act 2008, the Constitutional Reform and Governance Act 2010 and the **European Union** Act 2011. The Crown can, in addition, seek Parliamentary approval before exercising the prerogative power if it so chooses. There is however no legal requirement for the Crown to seek Parliamentary authorisation for the exercise of the power, except to the extent that Parliament has so provided by statute: that follows from the general principle set out in *Blackburn v Attorney General* and the *Tin Council* case. Since there is no statute which requires the decision under article 50(1) to be taken by Parliament, it follows that it can lawfully be taken by the Crown, in the exercise of the prerogative. There is therefore no legal requirement for an Act of Parliament to authorise the giving of notification under article 50(2). So runs the **Secretary** of **State**'s argument.

162 In support of this argument, the **Secretary** of **State** points out that there has been considerable Parliamentary scrutiny of Ministers' conduct and their plans in relation to article 50. That scrutiny has included inquiries by the House of Commons Select Committee on **Exiting** the EU and by the House of Lords **European Union** Committee, as well as Parliamentary questions and debates. The latter have included a debate in the House of Commons on 7 December 2016, following which the following motion was agreed (Hansard (HC Debates), col 336):

> "That this House recognises that leaving the EU is the defining issue facing the UK; notes the resolution on parliamentary scrutiny of the UK leaving the EU agreed by the House on 12 October 2016; recognises that it is Parliament's responsibility to properly scrutinise the Government while respecting the decision of the British people to leave the **European Union**; confirms that there should be no disclosure of material that could be reasonably judged to damage the UK in any negotiations to depart from the **European Union** after article 50EU has been triggered; and calls on the Prime Minister to commit to publishing the Government's plan for leaving the EU before article 50EU is invoked, consistently with the principles agreed without division by this House on 12 October; recognises that this House should respect the wishes of the United Kingdom as expressed in the referendum on 23 June; and further calls on the Government to invoke article 50EU by 31 March 2017."

The **Secretary** of **State** submits that it is for Parliament, not the courts, to determine the nature and extent of its involvement.

163 The **Secretary** of **State** also emphasises, in response to the argument of the **Miller** claimants, that the giving of notification under article 50(2) does not in itself alter any laws in force in the UK: it merely initiates a process of negotiation. If, at the end of those negotiations, a withdrawal agreement is reached, the procedures for Parliamentary approval laid down in the Constitutional Reform and Governance Act 2010 are likely to apply. Parliament will in any event be invited to legislate before the EU treaties cease to apply to the UK, so as to address the issues then arising in relation to rights and obligations under EU law which are

currently given effect in the

[2017] 2 WLR 583 at 664

UK through the **European** Communities Act 1972 as amended ("the 1972 Act").

The argument of the Miller claimants

164 The **Miller** claimants, on the other hand, rely on decided cases concerned with the use of prerogative powers in other situations. They argue that those cases establish the existence of legal constraints on the exercise of those powers, and that those constraints are applicable in the admittedly different situation with which we are now concerned. They argue that the effect of those constraints is that Ministers cannot lawfully give notification under article 50(2) unless an Act of Parliament authorises them to do so.

165 The starting point of this argument is the *Case of Proclamations* (1610) 12 Co Rep 74, which concerned the question whether James I could, by proclamation, prohibit the construction of new buildings in and around London, and prohibit the manufacture of starch from wheat. Coke CJ **stated** 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" (p 75). Those three categories were exhaustive of English law: "the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them" (ibid). It followed that "the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law" (ibid).

166 The same approach can be seen in more recent cases. For example, in *The Zamora* [1916] 2 AC 77 an issue arose as to whether the courts were bound, by an Order in Council made under prerogative powers, to decide that a neutral ship found during wartime to have a contraband cargo on board, while ostensibly bound for a neutral port, was lawful prize: an issue which, under established legal principles, depended on whether the ship or its cargo was in reality destined for the enemy. Lord Parker of Waddington **stated**, at p 90:

> "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 … No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity."

167 These cases were not concerned with the prerogative power to conduct foreign relations. It is however consistent with those cases that, although the Crown can undoubtedly enter into treaties in the exercise of prerogative powers, it cannot, by doing so, alter domestic law. That is known as the dualist approach to international law, in distinction to the monist approach adopted by many other countries, under which treaties automatically take effect in the domestic legal system. In support of the principle that treaties cannot alter domestic law, the **Miller** claimants rely on the explanations of the relationship between international and domestic law given by Lord Templeman and Lord Oliver in the *Tin Council* case. The case concerned the question whether a Minister of the Crown was liable under English law for the debts of an international organisation which had been established by a Treaty to which the UK was party. Rejecting the contention

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that the Minister was liable, Lord Templeman said [1990] 2 AC 418, 476–477: "A treaty is a contract between the governments of two or more sovereign **states**. International law regulates the relations between sovereign **states** and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be

incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual." Lord Oliver said much the same, at p 500:

> "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 are 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."

Similar observations were made by Lord Hoffmann in the Privy Council case of *Higgs v Minister of National Security* [2000] 2 AC 228, 241, concerned with the impact of the American Convention on Human Rights on the domestic law of the Bahamas, where he **stated** that "treaties cannot alter the law of the land".

168 The principle that the Crown cannot alter the common law or statute by an exercise of the prerogative was developed in the case of *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, which concerned the requisitioning of a hotel during the First World War for use as the headquarters of the Royal Flying Corps. After the war, a dispute arose over the basis on which the compensation to be paid to the owners should be assessed. There was a statutory scheme for requisitioning, which included a statutory right to compensation, but Ministers argued that the Crown was in any event entitled to requisition the hotel under prerogative powers, in which event compensation was payable ex gratia rather than being assessed in accordance with the statutory scheme. That argument was rejected by the House of Lords on the basis that "if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules" (per Lord Dunedin, at p 526). As Lord Dunedin reasoned, at p 526:

> "Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which
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> *[2017] 2 WLR 583 at 666*
>
> before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed."

The case thus established that, to the extent that a matter has been regulated by Parliament, the Crown cannot regulate it differently under the prerogative. The cases of *Laker Airways Ltd v Department of Trade* [1977] QB 643 and ***R v Secretary of State for the Home Department, Ex p Fire Brigades Union*** [1995] 2 AC 513 are cited by the **Miller** claimants as more recent examples of the application of the same principle, although in the former case only Roskill LJ relied on it (contrast Lord Denning MR at pp 705G– 706A and Lawton LJ at p 728A), while the decision in the latter case was based on a different principle (see per Lord Browne-Wilkinson at p 553G and Lord Lloyd of Berwick at p 573C–D).

169 In the light of these decided cases, and others to the same effect, the **Miller** claimants argue that giving notification under article 50(2) will alter domestic law and destroy statutory rights. That is because it will

result in the EU treaties ceasing to apply to the UK, in accordance with article 50(3), from the date of the entry into force of the withdrawal agreement or, failing that, from the expiry of a period of two years after notification, or any longer period which may be agreed with the **European** Council. Since the EU treaties have been given effect in domestic law by the 1972 Act, so as to create rights enforceable before our national courts, it would offend against the principle established in the *Case of Proclamations,* and explained more recently in the *Tin Council* case, for that alteration in domestic law to be effected under the prerogative. This argument assumes that, once notification is given under article 50(2), the process of withdrawal from the EU cannot be stopped. It is common ground in all the cases before the court that it should proceed on that assumption. In any event, even if the process might be stopped, it is common ground that Ministers' power to give notice under article 50(2) has to be tested on the basis that it may not be stopped. In those circumstances, that is the basis on which this court is proceeding.

170 Furthermore, since the 1972 Act makes provision for the effect of the EU treaties in domestic law, and notification under article 50(2) will sooner or later result in the treaties ceasing to have effect in domestic law, it is argued that there is a conflict between the exercise of the prerogative to give notification and the statutory scheme. Following *De Keyser,* that conflict should be resolved in favour of the statute, by holding that the prerogative must be constrained.

The referendum

171 Both sides of the argument proceed on the basis that the referendum on membership of the EU, held under the **European Union** Referendum Act 2015 ("the 2015 Act"), which resulted in a vote to leave the EU, does not provide the answer. The **Secretary** of **State**'s argument proceeds on the basis that the Crown has taken the decision under article 50(1), accepting the result of the referendum. The **Miller** claimants argue that only Parliament can take that decision. Both the **Secretary** of **State** and the **Miller** claimants proceed on the basis that the referendum result was not itself a decision by the UK to withdraw from the EU, in

accordance with the UK's constitutional requirements, and that the 2015 Act did not itself authorise notification under article 50(2). In these circumstances, there is no issue before the court as to the legal effect of the referendum result. Nor is this an appropriate occasion on which to consider the implications for our constitutional law of the developing practice of holding referendums before embarking on major constitutional changes: a matter on which the court has heard no argument.

Other arguments

172 In addition to the arguments advanced by the parties to the **Miller** appeal, the court also has before it the submissions presented on behalf of the interested parties and interveners. They largely provide further elaboration of the arguments presented on behalf of the principal parties. Without intending any discourtesy, I do not think it is necessary to set out their arguments in full, and would generally wish only to acknowledge the assistance which they have provided. It is however appropriate to note the submissions made by the Lord Advocate (which share common ground with those of the first interested party and the fourth interveners), and by the Counsel General for Wales.

173 One argument advanced by the Lord Advocate and by Ms Mountfield QC on behalf of the first interested party is that the UK's withdrawal from the EU will alter the UK's rule of recognition: that is to say, the rule which identifies the sources of law in our legal system and imposes a duty to give effect to laws emanating from those sources. The status of the EU institutions as a recognised source of law will inevitably be revoked, sooner or later, following notification under article 50(2). Since that will be a fundamental alteration in the UK's constitution, it can only be effected by Parliamentary legislation. An Act of Parliament is therefore argued to be necessary before notification can be given.

174 The Lord Advocate also cites material from Scottish sources which is consistent with the principle derived by the **Miller** claimants from English case law, such as the *Case of Proclamations* and the *Tin Council* case. This includes the provision of the Claim of Right Act 1689:

> "That all Proclamationes asserting ane absolute power to Cass annull and Dissable lawes … are Contrair to Law."

This provision is analogous to the corresponding provisions in articles 1 and 2 of the Bill of Rights 1689, to which the **Miller** claimants refer:

> "That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall. That the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall."

As Lord Denning MR noted, however, in *McWhirter v Attorney General* [1972] CMLR 882, 886, the Bill of Rights did not restrict the Crown's prerogative powers in relation to foreign affairs: "the Crown retained, as fully as ever, the prerogative of the treaty-making power." The same appears to be true of the Claim of Right. The Lord Advocate also cites article 18 of the **Union** with England Act 1707. This provision, like the corresponding provision in the **Union** with Scotland Act 1706, **states** that

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laws in use in Scotland are to be "alterable by the Parliament of Great Britain".

175 The Lord Advocate and the Counsel General for Wales have also advanced submissions concerning the Sewel Convention. That convention was originally **stated** by Lord Sewel, when Parliamentary Under-**Secretary** of **State** at the Scottish Office, in the House of Lords during the passage of the Scotland Bill. He said that "we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament": Hansard (HL Debates), 21 July 1998, col 791. The convention was later embodied in a Memorandum of Understanding between the UK Government and the devolved governments (Cm 5240, 2001). Para 14 of the current Memorandum of Understanding, which was published in October 2013, **states**:

> "The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature."

Para 2 **states**:

> "This Memorandum is a statement of political intent, and should not be interpreted as a binding agreement. It does not create legal obligations between the parties."

In relation to Scotland, the convention was given statutory recognition in section 28(8) of the Scotland Act 1998 (as amended by section 2 of the Scotland Act 2016), which has to be read together with section 28(7):

> "(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.
>
> "(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

Summary of conclusions

176 It may be helpful to summarise at this stage the conclusions which I have reached in relation to the **Miller** appeal, before explaining the reasons why I have arrived at them.

177 I entirely accept the importance in our constitutional law of the principle of Parliamentary supremacy over our domestic law, established in the *Case of Proclamations,* the *Tin Council* case, and other similar cases such as *The Zamora.* That principle does not, however, require that Parliament must enact an Act of Parliament before the UK can leave the EU. That is because the effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU Treaties to the UK, and therefore on the UK's membership of the EU. The Act imposes no requirement, and manifests no intention, in respect of the UK's membership of the EU. It does not, therefore, affect the Crown's exercise of prerogative powers in respect of UK membership. For essentially

the same reason, the supposed analogy with *De Keyser* appears to me to be misplaced. Further, since the effect of EU law in the UK is entirely dependent on the 1972 Act, no alteration in the fundamental rule governing the recognition of sources of law has resulted from membership of the EU, or will result from notification under article 50. It follows that Ministers are entitled to give notification under article 50, in the exercise of prerogative powers, without requiring authorisation by a further Act of Parliament.

178 Given that conclusion, the argument in relation to the Sewel Convention does not arise: the convention concerns Parliamentary legislation, not the exercise of prerogative powers.

The European Communities Act 1972

179 The issue which lies at the heart of these cases is the effect of the 1972 Act, as amended. Section 2(1) provides:

> "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 effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly …"

180 The expression "the Treaties" is defined by section 1(2). Put shortly, it includes the pre-accession treaties (described in Part I of Schedule 1), taken with other treaties listed in section 1(2), and "any other treaty entered into by the EU … with or without any of the member **states**, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom". In relation to the treaties in the latter categories, section 1(3) lays down a procedure to be followed:

> "If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the EU Treaties as herein defined, the Order shall be conclusive that it is to be so regarded; but a treaty entered into by the United Kingdom after the 22nd January 1972, other than a pre-accession treaty to which the United Kingdom accedes on terms settled on or before that date, shall not be so regarded unless it is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament."

The term "Treaty" is defined by section 1(4) as including "any international agreement, and any protocol or annex to a treaty or international agreement".

181 Section 1(2) is prospective in scope: it is not confined to treaties existing when the 1972 Act was originally enacted, but envisages treaties being entered into in the future. At the time of accession, the Treaties were relatively few in number, and included the Treaty of Rome. Since then, many other treaties, including the Maastricht Treaty and the Treaty of Lisbon, have been added, either by the amendment of section 1(2) so as to add to the list of specified treaties, or by the making of Orders of Council approved by resolutions of both Houses, under section 1(3).

182 Returning to section 2(1), it is important to understand why it was necessary. It follows from the UK's dualist approach to international law that the Treaties could only be given effect in our domestic law by means of

an Act of Parliament. This was so notwithstanding the doctrine of EU law, established by the **European** Court of Justice in *Van Gend en Loos* (Case 26/62) [1963] ECR 1, 12, that the Treaty of Rome was "more than an agreement which merely creates mutual obligations between the contracting **states**", and that "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." This doctrine was reiterated in *Costa v ENEL* (Case 6/64) [1964] ECR 585, 593: "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member **states** and which their courts are bound to apply."

183 This doctrine is incompatible with the dualist approach of the UK constitution, and ultimately with the fundamental principle of Parliamentary sovereignty. This was explained by Lord Denning MR in two cases decided around the time when the UK joined the **European** Communities. The first, *Blackburn v Attorney General* [1971] 1 WLR 1037, was as explained earlier an attempt to prevent the Crown from acceding to the

Treaty of Rome by signing the Treaty of Accession. Having been referred to *Costa v ENEL,* Lord Denning MR observed, at p 1039:

> "Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament. and then only to the extent that Parliament tells us."

The second case, *McWhirter v Attorney General*, was decided after the UK had signed the Treaty of Accession but before the 1972 Act had been enacted. Lord Denning MR **stated**, at p 886:

> "Even though the Treaty of Rome has been signed, it has no effect, so far as these courts are concerned, until it is made an Act of Parliament. Once it is implemented by an Act of Parliament, these courts must go by the Act of Parliament. Until that day comes, we take no notice of it."

As will appear, section 2(1) enables EU law to be given direct effect in our domestic law, but within a framework established by Parliament, in which Parliamentary sovereignty remains the fundamental principle.

184 Considering section 2(1) in greater detail, it is a long and densely-packed provision, whose syntax is complex, and whose meaning is not immediately clear. It requires to be read with care. Its essential structure can be expressed in this way: All such [*members of a specified category*] as [*satisfy a specified condition*] shall be [*dealt with in accordance with a specified requirement*]. Rules in that form can be used in many contexts: for example, all such prisoners as are charged with conduct contrary to good order and discipline shall be brought before the Governor; all such incoming passengers as are displaying symptoms of ebola shall be placed in quarantine.

185 Two features of such rules should be noted. First, the rule is conditional in nature: the application of the requirement which it imposes depends on there being members of the specified category that satisfy the relevant condition. In the examples just given, for example, the relevant conditions are being charged with conduct contrary to good order and

discipline; and displaying symptoms of ebola. Secondly, although a rule in that form contemplates the possibility that the condition may be satisfied, the form of the rule does not convey any intention that the condition *will* be satisfied. In the examples just given, for example, the rule does not convey an intention that there will be prisoners who are charged, or passengers who display symptoms of ebola. The intention of the rule-maker, so far as it can be derived from the rule, would not therefore be thwarted or frustrated if, either immediately, or at some point in the future, there were no members of the relevant category which satisfied the relevant condition.

186 In section 2(1), the relevant category is:"rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and … remedies and procedures from time to time provided for by or under the Treaties."The words "from time to time", which appear twice, mean that section 2(1) is concerned not only with the Treaties, and the Regulations and other legal instruments made under them, as they stood at the time of accession, but also with the Treaties and instruments made under them as they may change over time in the future. This recognises the fact that the "rights, powers, liabilities, obligations and restrictions … created or arising by or under the Treaties", and the "remedies and procedures … provided for by or under the Treaties", alter from time to time, as a result of changes to the Treaties or to

the laws made under the procedures laid down in the Treaties.

187 This is relevant in the present context, since it demonstrates that Parliament has recognised that rights given effect under the 1972 Act may be added to, altered or revoked without the necessity of a further Act of Parliament (something which is also apparent from section 1(3)). In response to this point, the majority of the court draw a distinction, described as "a vital difference", between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes resulting from withdrawal by the UK from the **European Union**. There is no basis in the language of the 1972 Act for drawing any such distinction. Under the arrangements established by the Act, alterations in the UK's obligations under the Treaties are automatically reflected in alterations in domestic law. That is equally the position whether the alterations in the UK's obligations under the Treaties result from the Treaties' ceasing to apply to the UK, in accordance with article 50, or from changes to the Treaties or to legislation made under the Treaties. The Act simply creates a scheme under which the effect given to EU law in domestic law reflects the UK's international obligations under the Treaties, whatever they may be. There is nothing in the Act to suggest that Parliament's intention to ensure an exact match depends on the reason why they might not match.

188 The requirement imposed by section 2(1) is: "shall be *recognised and available in law, and be enforced, allowed and followed accordingly*." This phrase gives effect in domestic law to all such rights, powers and so forth as satisfy the relevant condition.

189 The condition which must be satisfied, in order for that requirement to apply, is set out in the following phrase: "All such … as *in accordance with the Treaties are without further legal enactment to be given legal effect or used in the United Kingdom*." This phrase is of particular

importance to the resolution of the **Miller** appeal. It follows from this phrase that rights, powers and so forth created or arising by or under the Treaties are not automatically given effect in domestic law. Legal effect is given only to such rights, powers and so forth arising by or under the Treaties as "in accordance with the Treaties" are without further enactment to be given legal effect "in the United Kingdom". In this respect, once more, the 1972 Act creates a scheme under which the effect given to EU law in domestic law exactly matches the UK's international obligations, whatever they may be.

190 The words "without further enactment" reflect the EU law concept of direct effect, established by *Van Gend en Loos* and *Costa v ENEL* as explained above (and, in so far as it may be regarded as distinct, the concept of direct applicability, established by article 189 of the Treaty of Rome and now **stated** in article 288 of the Treaty on the Functioning of the **European Union** (TFEU): see section 18 of the **European Union** Act 2011). Accordingly, where "in accordance with the Treaties", rights, powers and so forth are to be directly applicable or directly effective in the law of the UK, section 2(1) achieves that effect. But there is no obligation "in accordance with the Treaties" to give effect in the UK to EU rights, powers and so forth merely because they are directly effective under EU law: such an obligation arises only if and for so long as the Treaties apply to the UK. The extent to which the effect given by section 2(1) to rights, powers and so forth arising under EU law is dependent on the Treaties cannot therefore be confined to the question whether the rights, powers and so forth are, under the Treaties, directly effective: it also depends, more fundamentally, on whether the Treaties impose any obligations on the UK to give effect to EU law.

191 Whether rights, powers and so forth are to be given legal effect in the UK, in accordance with the Treaties, therefore depends on whether the Treaties apply to the UK. As the majority of the court **state** at para 77, "Parliament cannot have intended that section 2 should continue to import the variable content of EU law into domestic law, or that the other consequences of the 1972 Act described in paras 62–64 above should continue to apply, after the United Kingdom had ceased to be bound by the EU Treaties." If the Treaties do not apply to the UK, then there are no rights, powers and so forth which, in accordance with the Treaties, are to be given legal effect in the UK.

192 This point is illustrated by the fact that, when the 1972 Act came into force on 17 October 1972, the Treaty of Accession had not yet been ratified or entered into force, with the consequence that the Treaties did not apply to the UK. In consequence, section 2(1) initially had no practical application, there being at that time no rights, powers and so forth which, in accordance with the Treaties, were to be given legal effect in the UK. It was not until 1 January 1973, when the Treaty of Accession came into force, following its ratification by the Crown in the exercise of its prerogative powers, that the condition to which section 2(1) subjected the domestic effect of EU law was satisfied.

193 The **Miller** claimants respond to this point by arguing that the effect of the 1972 Act was to require the Crown to ratify the Treaty of Accession. This is not, in the first place, an answer to the point that the effect of section 2(1) was contingent on the Treaty's entering into force. Furthermore, although it is fair to say that the 1972 Act was enacted in

anticipation that ratification was likely to occur that is far from saying that ratification was required by statute.

194 In the first place, as explained in para 159 above, it is a basic principle of our constitution that the conduct of foreign relations, including the ratification of treaties, falls within the prerogative powers of the Crown. That principle is so fundamental that it can only be overridden by express provision or necessary implication, as is accepted in the majority judgment at para 48. No such express provision exists in the 1972 Act. Nor do its provisions override that principle as a matter of necessary implication. As Lord Hobhouse of Woodborough explained in ***R*** *(Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, para 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."

195 Secondly, it is not difficult to contemplate circumstances in which ratification might not have occurred. The passage of the 1972 Act was hard fought (as the former minister Ken Clarke's memoir, *Kind of Blue* (2016), pp 66ff, makes clear), and the possibility of a future Labour Government taking the UK out of the **European** Communities was apparent. When the Labour Government subsequently came to power, in 1974, it proceeded to hold a referendum in accordance with its manifesto commitment. If the Conservative Government had fallen and the Opposition had come to power while the Treaty of Accession remained unratified, the incoming Labour Government would have been unlikely to ratify it without holding a referendum. Indeed, the Opposition continued to oppose ratification following the Parliamentary passage of the 1972 Act, using an adjournment debate on the date of Royal Assent to criticise ratification as being against the wish of the British people (Hansard (HC Debates), 17 October 1972, cols 58–59). The Government won the division by 31 votes; but if it had lost it, would it have been acting unlawfully if it had decided to respect the will of the House of Commons by not ratifying the Treaty? Would it have been legally bound by the 1972 Act to ratify the Treaty regardless? These questions can only be answered in the negative. The point can also be illustrated by considering what would have happened if some crisis had occurred in the UK's diplomatic relations with one of its intended partners in the **European** Communities. If,

for example, some dispute comparable in gravity to the then current dispute with Iceland, or the subsequent dispute with Argentina, had occurred with one of the other parties to the Treaty of Rome or the Treaty of Accession, is it likely that the UK would then have ratified the Treaty of Accession?

196 The seemingly less ambitious suggestion in the majority judgment at para 78, that it was not "contemplated", when the 1972 Act was being passed, that Ministers would not ratify the Treaties or that, having ratified them, would at some point repudiate them, meets the same objection. That ratification was contemplated is clear, but that tells you nothing about

whether the operation of the 1972 Act is conditional on continued membership. What individual members of Parliament contemplated, or expected to happen, is on ordinary principles not relevant to the construction of the Act. In any event it is likely to have varied a good deal. The possibility of the UK being taken out of the **European** Communities if there were a change of government was apparent.

197 Referring to the structure of section 2(1) of the 1972 Act as set out at para 184 above, it is said at para 82 of the majority judgment that "the membership of the specified category [viz, the rights, powers and so forth arising under EU law to which domestic effect must be given] has a variable content which is contingent on the decisions of non-UK entities". Section 2(1) says nothing, however, which either expressly or impliedly limits the contingency, to which the duty to give domestic effect to EU law is subject, to decisions by non-UK entities. The contingency is that the rights, powers and so forth are "such … as in accordance with the Treaties are without further legal enactment to be given legal effect or used in the United Kingdom". It follows from that contingency that the effect given to EU law in our domestic law is conditional on the Treaties' application to the UK. That condition was not satisfied when the Act came into force, because the Treaties did not then apply to the UK. The content of the specified category was therefore zero. The satisfaction of the condition, some months later, depended on the decision of a UK entity: it depended on the Crown's exercise of prerogative powers. The content would return to zero if the condition ceased to be satisfied as the result of the UK's invoking article 50EU. That would be so whether the decision to invoke article 50EU had, or had not, been authorised by an Act of Parliament. It is, indeed, accepted by the majority that the condition would cease to be satisfied if the Crown invoked article 50EU after being authorised to do so by statute. So the contingency cannot be limited to decisions by non-UK entities. The only issue in dispute is whether the action by the Crown, as a result of which the contingency will cease to be satisfied, must be authorised by an Act of Parliament. On that issue, section 2(1) is silent. Neither expressly nor by implication does it require such action to be authorised by Parliament. The fact that section 2(1) is itself a fixed rule of domestic law enacted by Parliament does not affect that conclusion, since a fixed rule which is conditional will necessarily operate only for as long as the condition is satisfied. Nor does it support a conclusion that Parliament has, by necessary implication, deprived the Crown of its prerogative powers: from what words, one might ask, is that implication derived?

The amendment of the 1972 Act by section 2 of the European Union (Amendment) Act 2008

198 I have discussed the position as it stood in 1972. But the real question in the **Miller** appeal concerns the position following the signing of the Treaty of Lisbon in 2007, and its entry into force in 2009. That is because it was the Treaty of Lisbon which inserted article 50EU into the EU Treaty.

199 Parliament addressed the Treaty of Lisbon in the **European Union** (Amendment) Act 2008 ("the 2008 Act"). Section 2 of that Act provides:

> "At the end of the list of treaties in section 1(2) of the **European** Communities Act 1972 (c 68) add— '; and (s) the Treaty of Lisbon

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> Amending the Treaty on **European Union** and the Treaty Establishing the **European** Community signed at Lisbon on 13 December 2007 (together with its Annex and protocols), excluding any provision that relates to, or in so far as it relates to or could be applied in relation to, the Common Foreign and Security Policy'…"

Section 2 of the 2008 Act thus added the Lisbon Treaty (other than the parts dealing with the Common Foreign and Security Policy) to the Treaties listed in section 1 of the 1972 Act, to which section 2(1) of that Act refers.

200 It follows that the words "such … as in accordance with the Treaties are without further legal enactment to be given legal effect or used in the United Kingdom", in section 2(1) of the 1972 Act, must be read as meaning "such … as in accordance with the Treaties, including article 50EU of the EU Treaty, are without further legal enactment to be given legal effect or used in the United Kingdom". The contingency to which the effect of EU law in our domestic law has been subject since the amendment of the 1972 Act by the 2008 Act therefore includes the potential operation of article 50. It is entirely "in accordance with the Treaties" for article 50EU to operate, with the result that, when a withdrawal agreement comes into force, or the time allowed under article 50(3) expires, there may be no rights which, "in accordance with the Treaties", are to be given legal effect in the UK.

201 This conclusion is not inconsistent with the statement by the majority of the court, at para 104, that article 50EU is not given effect in domestic law by section 2 of the 1972 Act. The majority may be right about that, although the point has not been argued, and the opposite view may be arguable (see, for example, Robert Craig, "Casting Aside Clanking Medieval Chains: Prerogative, Statute and article 50 after the EU Referendum" (2016) 79 MLR 1041, where it is argued that section 2(1) of the 1972 Act has given article 50EU domestic effect as a power exercisable by Ministers, superseding the prerogative but also supplying the Parliamentary authorisation desiderated by the **Miller** claimants). Whether article 50EU has direct effect in domestic law does not however affect the question whether its operation forms part of the contingency on which the direct effect given to EU law by the 1972 Act is dependent.

202 The result of section 2 of the 2008 Act is thus that the effect given by section 2(1) of the 1972 Act to EU law, which was always conditional on the Treaties' applying to the UK, is now subject to the exercise of the power conferred by article 50EU to initiate a particular procedure under which the Treaties will cease to apply to the UK.

203 The **Miller** claimants respond to these points by arguing that section 2(1) of the 1972 Act impliedly requires the power of withdrawal under article 50EU to be exercised by Parliament. In so far as that argument is based on the common law principles established by such authorities as the *Case of Proclamations, The Zamora,* the *Tin Council* case and the *De Keyser* case, I shall discuss those principles later. One can however note at present that, as previously mentioned, there is nothing in section 2(1) which demonstrates that Parliament intended to depart from the fundamental principle that powers relating to the UK's participation in Treaty arrangements are exercisable by the Crown. As the majority of the court rightly **state** at para 108, the fact that a statute says nothing about a

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particular topic can rarely, if ever, justify inferring a fundamental change in the law. Nor would withdrawal under article 50EU be inconsistent with the 1972 Act, any more than a failure to ratify the Treaty of Accession. The result would simply be that there were no rights answering to the description in section 2(1): there would be no rights "such … as in accordance with the Treaties are without further legal enactment to be given legal effect or used in the United Kingdom".

204 This is a point of general importance. If Parliament chooses to give domestic effect to a Treaty containing a power of termination, it does not follow that Parliament must have stripped the Crown of its authority to exercise that power. In the present context, the impact of the exercise of the power on EU rights given effect in domestic law is accommodated by the 1972 Act: the rights simply cease to be rights to which section 2(1) applies. Withdrawal under article 50EU alters the application of the 1972 Act, but is not inconsistent with it. The application of the 1972 Act after a withdrawal agreement has entered into force (or the applicable time limit has expired) is the same as it was before the Treaty of Accession entered into force. As in the 1972 Act as originally enacted, Parliament has created a scheme under which domestic law tracks the obligations of the UK at the international level, whatever they may be.

Other post-1972 legislation

205 Other post-1972 legislation is of only secondary importance. It is however relevant in so far as it demonstrates, first, that Parliament has legislated on the basis that the 1972 Act did not restrict the exercise of the foreign affairs prerogative in relation to other aspects of the EU treaties, and secondly, that Parliament is perfectly capable of making clear its intention to restrict the exercise of the prerogative when it wishes to do so.

206 Several examples can be given. The earliest is section 6(1) of the **European** Parliamentary Elections Act 1978 (as amended by section 3 of the **European** Communities (Amendment) Act 1986), which provided: "No treaty which provides for any increase in the powers of the **European** Parliament shall be ratified by the United Kingdom unless it has been approved by an Act of Parliament." That provision was later re-enacted in section 12 of the **European** Parliamentary Elections Act 2002 ("the 2002 Act").

207 A further example is the 2008 Act, which imposed numerous restrictions on the exercise of prerogative powers in relation to provisions of the Lisbon Treaty. Section 5 is particularly significant. It provided:

> "(1) A treaty which satisfies the following conditions may not be ratified unless approved by Act of Parliament.
>
> "(2) Condition 1 is that the Tteaty amends— (a) the Treaty on **European Union** (signed at Maastricht on 7 February 1992), (b) the Treaty on the Functioning of the **European Union** (the Treaty establishing (what was then called) the **European** Economic Community, signed at Rome on 25 March 1957 (renamed by the Treaty of Lisbon)), or (c) the Treaty establishing the **European** Atomic Energy Community (signed at Rome on 25 March 1957).
>
> "(3) Condition 2 is that the treaty results from the application of article 48(2) to (5) of the Treaty on **European Union** (as amended by the
>
> *[2017] 2 WLR 583 at 677*
>
> Treaty of Lisbon) (Ordinary Revision Procedure for amendment of founding Treaties, including amendments affecting EU competence)."

Section 5 therefore prohibited the ratification of treaties unless approved by an Act of Parliament, where the treaties amended the EU Treaty or the FEU Treaty, and resulted from the application of article 48(2) to (5) EU Treaty.

208 Article 48EU was a provision introduced by the Lisbon Treaty to provide a simplified procedure for the conclusion of treaties amending the EU Treaty or the FEU Treaty. Paragraphs (2) to (5) provided, so far as material:

> "2. The Government of any member **state**, the **European** Parliament or the commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the **Union** in the Treaties …
>
> "3. If the **European** Council, after consulting the **European** Parliament and the commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the **European** Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of **State** or Government of the member **states**, of the **European** Parliament and of the commission … The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the member **states** as provided for in paragraph 4.
>
> "The **European** Council may decide by a simple majority, after obtaining the consent of the **European** Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments …
>
> "4. A conference of representatives of the governments of the member **states** shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the member **states** in accordance with their respective constitutional requirements.
>
> "5. If, two years after the signature of a treaty amending the Treaties, four fifths of the member **states** have ratified it and one or more member **states** have encountered difficulties in

> proceeding with ratification, the matter shall be referred to the **European** Council."

209 The FEU Treaty establishes numerous rights which are given effect in the UK by section 2(1) of the 1972 Act. Those rights could be altered by a treaty concluded by the UK Government and the governments of the other member **states**, under article 48(2) FEU. Section 5 of the 2008 Act required an Act of Parliament before such a Treaty could be ratified. If the **Miller** claimants' arguments are correct, an Act of Parliament was already necessary before the UK Government could exercise the Treaty-making prerogative so as to alter those rights. Section 5 of the 2008 Act was, however, understood as introducing a requirement for legislation where none previously existed: that was the mischief intended to be addressed. For example, the House of Lords Select Committee on the Constitution **stated**:

> "Clause 5 of the Bill seeks to create a new requirement for prior parliamentary authorisation of ratification. It would apply to amendments
>
> *[2017] 2 WLR 583 at 678*
>
> of the founding treaties—the Treaty on **European Union**, the Treaty on the Functioning of the **European Union** and the Treaty Establishing the **European** Atomic Energy Community—when those amendments are made by the 'ordinary revision procedure'. Before examining clause 5 in more detail, it must be noted that the need for express parliamentary approval before the Government ratifies a treaty amending the founding Treaties of the EU has been recognised in one important respect for some time." (**European Union** (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution, 6th Report, Session 2007–2008, HL Paper 84, paras 23–24).

The latter sentence referred not to the 1972 Act, but to section 12 of the 2002 Act, discussed at para 206 above.

210 It is also relevant to note section 6(1) of the 2008 Act, which imposed restrictions on the UK's participation in several procedures laid down in the Lisbon Treaty: "A Minister of the Crown may not vote in favour of or otherwise support a decision under any of the following unless Parliamentary approval has been given in accordance with this section …" The section went on to require Parliamentary approval in the form of a resolution of both Houses. The provisions of the Lisbon Treaty to which section 6 applied did not include article 50EU of the EU Treaty.

211 The Constitutional Reform and Governance Act 2010 ("the 2010 Act") is also relevant. It codifies the previous Ponsonby Rule (a convention that treaties, with limited exceptions, would be laid before Parliament before they were ratified), and sets out detailed procedures for Parliamentary scrutiny of new treaties. It does not apply to treaties which are covered by section 5 of the 2008 Act or by the **European Union** Act 2011 ("the 2011 Act"), to which I turn next. A withdrawal agreement under article 50(3) would be likely to fall within its scope, but it would have no application to a decision to withdraw from a Treaty or to commence the process of withdrawal.

212 The 2011 Act repealed section 12 of the 2002 Act and sections 5 and 6 of the 2008 Act (subject to an immaterial exception), replacing them with a more elaborate system of Parliamentary control. The evident aim was to introduce stronger Parliamentary controls, in relation to matters falling within the scope of the legislation, than were present under the existing law. The power to amend article 50(3), concerning the extension of the two year period for negotiation, or to adopt the ordinary legislative procedure in relation to

that provision, was brought within the scope of these controls by sections 4 and 6, read with Schedule 1. Article 50(1) and (2), concerning the decision to withdraw and its notification, were not.

213 As explained earlier, section 5 of the 2008 Act was enacted on the basis that the Crown could exercise its Treaty-making power so as to alter EU rights given effect in domestic law by the 1972 Act, without necessarily requiring further authorisation by an Act of Parliament. One can also infer from this body of legislation, as the Divisional Court did in the case of ***R*** *v* ***Secretary*** *of* ***State*** *for Foreign Affairs, Ex p Rees-Mogg* [1994] QB 552, discussed in paras 235–237 below, that since Parliament has repeatedly placed express restrictions on the exercise of the prerogative in relation to the EU treaties, the absence of a particular restriction in the 1972 Act tends

to support the conclusion that no such restriction was intended to arise by implication.

214 It is also necessary to consider the 2015 Act. For the reasons explained in para 171 above, I do not propose to consider the legal implications of the referendum result. It is, however, proper to take note of the judgment of Lord Dyson MR, with whom the other members of the court agreed, in *Shindler v Chancellor of the Duchy of Lancaster* [2016] 3 WLR 1196. That was a case in which a challenge was brought to the franchise rules applicable to the referendum. Having referred to the provision in article 50(1) that any member **state** may decide to withdraw from the EU "in accordance with its own constitutional requirements", Lord Dyson MR **stated**, at paras 13 and 19:

> "13. The 2015 Act contains part of the constitutional requirements of the UK as to how it may decide to withdraw from the EU …

> "19 … In short, by passing the 2015 Act, Parliament decided that one of the constitutional requirements that had to be satisfied as a condition of a withdrawal from the EU was a referendum."

It follows that, in enacting the 2015 Act, Parliament considered withdrawal from the EU, and made the holding of a referendum part of the process of taking the decision under article 50(1). It laid down no further role for itself in that process. In the absence of any provision requiring Parliamentary authorisation of the decision, it is difficult, against the background of such provisions being laid down in the Acts of 1978, 2002, 2008, 2010 and 2011, to regard such a requirement as being implicit.

Using the prerogative to alter the law, or take away statutory rights?

215 In the light of the foregoing discussion, one can return to the arguments advanced by the **Miller** claimants on the basis of authorities concerned with the common law limits of prerogative powers. The first argument, summarised at paras 165–167 and 169 above, is that the giving of notification under article 50(2) will result in the alteration of the law and the destruction of statutory rights, and therefore cannot be effected in the exercise of prerogative powers, applying the principles established in such cases as the *Case of Proclamations, The Zamora,* the *Tin Council* case, and *Higgs v Minister of National Security,* and reflected also in the Bill of Rights and the Claim of Right.

216 The argument that the 1972 Act created statutory rights which cannot be taken away without a further Act of Parliament starts from a premise which requires examination. The 1972 Act did not create statutory rights in the same sense as other statutes, but gave legal effect in the UK to a body of law now known as EU law. As explained at paras 186–187 above, section 2(1) recognises that the rights arising under that body of law can be altered from time to time, as a result of changes to the Treaties or to the laws made under the procedures laid down in the Treaties, without the necessity of a further Act of Parliament. Such alterations result not only in the creation of EU rights which are consequently given effect in domestic law by the 1972 Act, but also in the repeal and restriction of EU rights previously created, and given effect under domestic law. The successive Regulations imposing fishing quotas are an example. To give another example, if Greece were to decide to leave the EU while the UK remained a member, the Treaties

would cease to apply to Greece either when a withdrawal agreement entered into force, or in any event after two years had expired. Greek citizens living in the UK would then cease to enjoy the EU rights which continued to be enjoyed here, for example, by French citizens. As these examples illustrate, rights given direct effect by section 2(1) of the 1972 Act are inherently contingent, and can be altered without any further Act of Parliament. This is a very different situation from any contemplated by the judges in the cases relied on, or by the Scottish and English Parliaments at the time of the Glorious Revolution or the Acts of **Union**.

217 As noted earlier, the majority of the court respond to this point by drawing a distinction between changes which result from the UK's giving notice under article 50, for which a further Act of Parliament is argued to be necessary, and changes which result from any other alteration in the Treaties or in the instruments made under the Treaties, for which no further Act of Parliament is necessarily required. That distinction cannot be derived from the principle established by the *Case of Proclamations.* It has to be based on an interpretation of the 1972 Act: the matter which was discussed at paras 179–214 above. For the reasons there explained, I see no basis in the 1972 Act for drawing any such distinction. The Act simply creates a scheme under which domestic law reflects the UK's international obligations, whatever they may be.

218 It is equally questionable whether notification under article 50EU will alter "the law of the land", in the sense in which judges have used that expression. That can be illustrated by reflecting on the effect of notification, and on the ability of Parliament to maintain in force the EU rights currently given effect under section 2(1) of the 1972 Act. The giving of notification does not in itself alter EU rights or the effect given to them in domestic law. Nor does it impinge on Parliament's competence to enact legislation during the intervening period before the treaties cease to have effect. Parliament can enact whatever provisions it sees fit in order to address the consequences of withdrawal from the EU, including provisions designed to protect rights which are currently derived from EU law. Parliament cannot, however, replicate EU law. It cannot establish those elements of it which involve reciprocal arrangements with the other member **states**, or which involve the participation of EU institutions. Nor can it create rights which have the distinguishing characteristics of EU rights, such as priority over subsequent legislation, and authoritative interpretation by the Court of Justice. The fact that notification alters no law, and that Parliament retains full competence to legislate so as to protect rights before withdrawal occurs, illustrates how different this situation is from those addressed in the cases relied upon. Equally, the fact that the enactment of EU law lies beyond the ability of Parliament illustrates how different it is from "the law of the land" as usually understood.

219 More fundamentally, however, the argument that withdrawal from the EU would alter domestic law and destroy statutory rights, and therefore cannot be undertaken without a further Act of Parliament, has to be rejected even if one accepts that the 1972 Act creates statutory rights and that withdrawal will alter the law of the land. It has to be rejected because it ignores the conditional basis on which the 1972 Act gives effect to EU law. If Parliament grants rights on the basis, express or implied, that they will expire in certain circumstances, then no further legislation is needed if those

circumstances occur. If those circumstances comprise the UK's withdrawal from a Treaty, the rights are not revoked by the Crown's exercise of prerogative powers: they are revoked by the operation of the Act of Parliament itself.

220 In so far as the **Miller** claimants place reliance on rights under EU law as given effect in the legal systems of other member **states**, such as the right of UK citizens to live and work in Greece, there is no rule which prevents prerogative powers being exercised in a way which alters rights arising under foreign law.

221 In so far as the **Miller** claimants place reliance on statutes creating rights in respect of EU institutions, such as the right to vote in elections to the **European** Parliament under the **European** Parliamentary Elections Act 2002, such statutory rights are obviously conditional on the UK's continued membership of the EU. Parliament cannot have intended them to operate on any other basis. If they cease to be effective following the UK's withdrawal from the EU, that is inherent in the nature of the right which Parliament conferred. The only logical alternative is to hold that Parliament has created a right to remain in the EU, and none of the arguments goes that far.

Using the prerogative to revoke a source of law?

222 As explained at para 173 above, it is argued that the 1972 Act created "an entirely new, independent and overriding source of domestic law" (as it is put in the majority judgment at para 80). Since the identification of a country's sources of law is one of the most fundamental functions of its constitution, it follows that the Crown cannot lawfully revoke a source of law in the exercise of prerogative powers. So runs the argument.

223 As put by counsel, this argument is based on the concept of the rule of recognition: that is to say, the foundational rule in a legal system which identifies the sources of law in that system and imposes a duty to give effect to laws emanating from those sources. The Lord Advocate and Ms Mountfield QC argue that the rule would be altered by withdrawal from the EU, and therefore, sooner or later, by the giving of notification under article 50.

224 The UK's entry into the EU did not, however, alter its rule of recognition, and neither would its withdrawal. That is because EU law is not a source of law of the relevant kind: that is to say, a source of law whose validity is not dependent on some other, more fundamental, source of law, but depends on the ultimate rule of recognition. The true position was explained by Lord Mance JSC in *Pham v **Secretary** of **State** for the Home Department* [2015] 1 WLR 1591, para 80:

> "For a domestic court, the starting point is, in any event, to identify the ultimate legislative authority in its jurisdiction according to the relevant rule of recognition. The search is simple in a country like the United Kingdom with an explicitly dualist approach to obligations undertaken at a supranational level. **European** law is certainly special and represents a remarkable development in the world's legal history. But, unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and **European** law as part of domestic law because Parliament
>
> *[2017] 2 WLR 583 at 682*
>
> has so willed. The question how far Parliament has so willed is thus determined by construing the 1972 Act."

225 As Lord Mance JSC rightly explained, it follows from the UK's dualist approach to international law that

EU law is not one of the sources of law identified by the UK's rule of recognition. That was recognised in the cases of *Blackburn v Attorney General* and *McWhirter v Attorney General,* as explained in para 183 above. As a source of law, EU law, like legislation enacted by the devolved legislatures, or delegated legislation made by Ministers, is entirely dependent on statute (which is not, of course, to say that EU law has the same effects, as devolved or delegated legislation). It derives its legal authority from a statute, which itself derives its authority from the rule of recognition identifying Parliamentary legislation as a source of law. The recognition of its validity does not alter any fundamental principle of our constitution.

226 The fact that the 1972 Act has a prospective effect, in giving effect to laws made from time to time by the EU institutions, does not affect this analysis. Nor does the limited primacy given to EU law by the 1972 Act alter the position, since that primacy itself derives from the 1972 Act. That was recognised by Lord Bridge of Harwich in ***R*** *v* ***Secretary*** *of* ***State*** *for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603:

> "*Under the terms of the Act of 1972* it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law." (p 659: Emphasis supplied.)

The source of law which is validated by the rule of recognition therefore remains Parliament, not the EU. Since the effect of EU law is dependent on an Act of Parliament, the rule of recognition is unchanged.

227 Parliament has itself made it clear that EU law has not altered the UK's rule of recognition. Section 18 of the 2011 Act provides:

> "Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the **European** Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act."

Since EU law has no status in UK law independent of statute, it follows that the only relevant source of law has at all times been statute.

228 This understanding underpins the discussion of the constitutional status of EU law in ***R*** *(Buckinghamshire County Council) v* ***Secretary*** *of* ***State*** *for Transport* [2014] 1 WLR 324. The issue raised by a conflict between an EU Directive and long-established constitutional principles of domestic law was identified as "the extent, if any, to which these principles may have been implicitly qualified or abrogated by the **European** Communities Act 1972" (para 78). The issue, in other words, was one of domestic law, turning on the interpretation of the 1972 Act. It was said, at para 79:

> "Contrary to the submission made on behalf of the claimants, that question cannot be resolved simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law, since the application of
>
> *[2017] 2 WLR 583 at 683*
>
> that doctrine in our law itself depends upon the 1972 Act. If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom."

The implication is that EU law is not itself an independent source of domestic law, but depends for its effect in domestic law on the 1972 Act: an Act which does not confer effect upon it automatically and without qualification, but has to be interpreted and applied in the wider context of the constitutional law of the UK. Accordingly, although no-one can doubt the importance of EU law, the effect given to it by the 1972 Act has not altered any fundamental constitutional principle in respect of the identification of sources of law.

229 The majority of the court respond that this analysis is unrealistic. Although it is accepted that the effect of EU law in domestic law is dependent on the 1972 Act, they argue that for EU law to cease to have effect in our domestic law would be a major change in the UK's constitution. As I understand it, the argument is concerned with the effect of the 1972 Act. Whether the 1972 Act has that effect depends on its interpretation, which simply takes one back to the issues discussed at paras 179–214 above.

230 A further reason for rejecting the argument that the 1972 Act created a new source of law, which cannot be revoked without further legislation, is one that applies even if it is accepted that the 1972 Act created a new source of law (in some sense or other). Since the 1972 Act gives effect to EU law only as long as the Treaties apply to the UK, as explained at paras 189–204 above, that source of law is inherently contingent on the UK's continued membership of the EU. EU law's ceasing to have effect as a result of the UK's withdrawal from the Treaties is something which follows from the 1972 Act itself, and does not require further legislation.

The analogy with the De Keyser case

231 Although the majority judgment does not adopt the **Miller** claimants' argument based on a supposed analogy with the *De Keyser* case [1920] AC 508, it is nevertheless necessary to address it. As explained earlier, that case established that where Parliament has regulated a matter by statute, the Crown cannot have recourse to a prerogative power in respect of the same matter. The argument by analogy asserts that, since notification under article 50EU will eventually render the 1972 Act redundant, it follows that notification cannot be given in the exercise of prerogative powers. I am unable to accept that argument, for a number of reasons.

232 First, the *De Keyser* principle denies that prerogative power can be exercised where a parallel statutory scheme exists. It does not follow from that principle that a prerogative power cannot be exercised where the eventual consequence will be that a statutory provision will cease to have a practical application. The latter proposition cannot be derived from *De Keyser,* but must be derived from some other source. The only obvious candidate is Parliament's intention in enacting the statutory provisions in question: an intention, it has to be argued, to impose a limitation on the exercise of the prerogative power. That simply takes one back to the argument as to whether an intention to strip the Crown of its prerogative

powers in respect of adherence to the EU treaties can be derived from the 1972 Act: an argument which was addressed at paras 201–204 above.

233 Secondly, the 1972 Act does not, in any event, regulate withdrawal from the EU: it recognises the existence of article 50, as explained in paras 198–202 above, but it says nothing about how or by whom a decision to invoke article 50EU should be taken.

234 Thirdly, the difference between the present situation and that with which the *De Keyser* principle is concerned is also evident at the level of remedies. In *De Keyser* itself, the remedy was a declaration that the owners were entitled to compensation under the statutory scheme. The remedy flowed from the logic of the

principle: Ministers were obliged to comply with the statutory scheme. No comparable remedy can be granted in the present case, since there is no statutory scheme governing the operation of article 50.

Ex p Rees-Mogg

235 Finally, in relation to the **Miller** claimants' arguments, it should be noted that this is not the first time that the courts have had to address these arguments. In ***R*** *v* ***Secretary*** *of* ***State*** *for Foreign Affairs, Ex p Rees-Mogg* [1994] QB 552, one of counsel's arguments in support of a challenge to the ratification of the Maastricht Treaty was recorded by Lloyd LJ as follows, at p 567:

> "He submits that by ratifying the Protocol on Social Policy, the Government would be altering Community law under the EEC Treaty … It is axiomatic that Parliament alone can change the law. Mr Pannick accepts, of course, that treaties are not self-executing. They create rights and obligations on the international plane, not on the domestic plane. He accepts also that the treaty-making power is part of the Royal Prerogative … But the EEC Treaty is, he says, different. For section 2(1) of the **European** Communities Act 1972 provides …

> "If the Protocol on Social Policy is ratified by all member **states**, it will become part of the EEC Treaty, which is one of the Treaties referred to in section 2(1): see the definition of 'the Treaties' in section 1(2) of the Act of 1972. Accordingly the Protocol will have effect not only on the international plane but also, by virtue of section 2(1) of the Act of 1972, on the domestic plane as well. By enacting section 2(1), Parliament must therefore have intended to curtail the prerogative power to amend or add to the EEC Treaty. There is no express provision to that effect. But that is, according to the argument, the necessary implication … Where Parliament has by statute covered the very same ground as was formerly covered by the Royal Prerogative, the Royal Prerogative is to that extent, by necessary implication, held in abeyance: see *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508; *Laker Airways Ltd v Department of Trade* [1977] QB 643, 718,720, per Roskill LJ."

So one sees here the same arguments: that the prerogative power in relation to treaties cannot be used to alter rights in domestic law; that the effect of section 2(1) of the 1972 Act is to transform rights arising under the EU treaties into rights in domestic law; that section 2(1) therefore impliedly curtailed the prerogative power in relation to the EU treaties; and the supposed analogy with the *De Keyser* principle.

236 The Divisional Court rejected this argument, at p 567:

> "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 EEC Treaty."

The court also rejected the challenge on the basis that the protocol in question was not, in any event, one of "the Treaties" to which the 1972 Act applied (p 568). Contrary to counsel's submission in the present case, it is plain that these two reasons for rejecting the challenge to ratification were independent of one another. The first reason was that section 2(1) did not impliedly curtail the Crown's Treaty-making power. The second was that the protocol in question did not in any event fall within the ambit of section 2(1).

237 I agree with the Divisional Court's reasoning in the passage which I have cited, and in particular with the final sentence: even apart from the inference which might be drawn from examples of express provisions restricting the exercise of prerogative powers in relation to EU law, there is in any event insufficient ground to hold that Parliament has by implication curtailed or fettered the Crown's prerogative powers in relation to the Treaties.

What if there had been no referendum, or a vote to remain?

238 Finally, in relation to the **Miller** appeal, it is argued by the majority at para 91 that the **Secretary** of **State**'s contentions cannot be correct since, if they were, it would have been open to Ministers to invoke prerogative powers to withdraw from the EU even if there had been no referendum, or indeed even if any referendum had resulted in a vote to remain.

239 There are two answers to this point. First, it does not necessarily follow from my conclusions that Ministers could properly have invoked article 50EU whenever they pleased, or, more specifically, in the event of a vote to remain. As Lord Carnwath JSC makes clear at para 266 below, there has been no discussion in this appeal of the question whether there might be any circumstances in which the exercise of the prerogative power in question might be open to review, such as if the referendum held under the 2015 Act had resulted in a vote to remain, and I express no view on that point.

240 Secondly, and more fundamentally, controls over the exercise of ministerial powers under the British constitution are not solely, or even primarily, of a legal character, as Lord Carnwath JSC explains in his judgment. Courts should not overlook the constitutional importance of ministerial accountability to Parliament. Ministerial decisions in the exercise of prerogative powers, of greater importance than leaving the EU, have been taken without any possibility of judicial control: examples include the declarations of war in 1914 and 1939. For a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is to base legal

doctrine on an assumption which is foreign to our constitutional traditions. It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary.

Conclusion in relation to the Miller appeal

241 For all the foregoing reasons, I would have allowed the **Secretary** of **State**'s appeal in the **Miller** case.

The Northern Irish cases

242 Given my disagreement with the decision of the majority of the court as to the necessity for an Act of Parliament before article 50EU can be invoked, it follows that I would also have dealt with the devolution issues raised in the Northern Irish cases differently. So far as those cases raise issues which are distinct from those arising in the **Miller** appeal, however, I agree with the way in which the majority have dealt with them. Nothing in the Northern Ireland Act bears on the question whether the giving of notification under article 50EU can be effected under the prerogative or requires authorisation by an Act of Parliament. More specifically, neither section 1 nor section 75 of the Northern Ireland Act 1998 has any relevance in the present context. Nor does a political convention, such as the Sewel Convention plainly is in its application to Northern Ireland, give rise to a legally enforceable obligation.

LORD CARNWATH JSC (dissenting)

243 For the reasons given by Lord Reed JSC, I would have allowed the appeal by the **Secretary** of **State** in the main proceedings. In view of the importance of the case, and the fact that we are differing from the Divisional Court and the majority in this court, I shall add some comments of my own from a slightly different legal perspective. I agree with the majority judgment in respect of the Northern Irish cases and the other devolution issues.

Constitutional principles

244 At the heart of the case is the classic statement of principle by Lord Oliver in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 500 ("the *Tin Council* case"):

> "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 …"

245 In the *Tin Council* case Lord Oliver was speaking only of the "making of treaties", not withdrawal. Lord Templeman had earlier made clear that the prerogative enables the Government to "negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty." (p 476F–H). However, there was no discussion

of how the classic statement might need modification or development in the context of termination or withdrawal.

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In principle the same basic rule should apply. Just as the Executive cannot without statutory authority create new rights or obligations in domestic law by entering into a Treaty, so it cannot by termination of a Treaty take away rights or obligations which currently exist. However, that tells one nothing about the process by which this result is to be achieved, nor at what stage of that process the intervention of Parliament is required.

246 Precedents are hard to find. Counsel have taken us on an interesting journey through cases and legal sources from four centuries and different parts of the common law world. The only example we were shown of withdrawal from a Treaty was a recent decision of the Canadian Federal Court: *Turp v Canada (Justice)*[2014] 1 FCR 439. That was an unsuccessful challenge by the executive to the use of its prerogative powers to withdraw from the Kyoto Protocol on Climate Change, against the background of a statute (passed against the opposition of government) requiring the preparation of plans giving effect to the Protocol. On its face it is a striking example of the use of the prerogative to frustrate the apparent intention of Parliament as expressed in legislation. However, the authority is of limited assistance in the present context, since it had been held in a previous case (*Friends of the Earth v Canada (Governor in Council)* [2009] 3 FCR 201) that the obligations under the statute were not justiciable in the domestic courts.

247 In the end the search through the authorities tells one little that is not sufficiently expressed by the classic rule. It also confirms the lack of any direct precedent for withdrawal from a Treaty previously given effect in domestic law, let alone one which has played such a vital part in the development of our laws over more than 40 years. However, lack of precedent is not a reason for inventing new principles, nor is there a need to do so. The existing principles correctly applied provide a clear and coherent framework for effective resolution of all the competing considerations, including the referendum result.

The balance of power

248 In considering that framework it is important to recognise the sensitivity in our constitution of the balance between the respective roles of Parliament, the Executive and the courts. The Divisional Court saw this principally in binary terms: the Executive versus Parliament. Under the general heading, “the sovereignty of Parliament and the prerogative powers of the Crown”, they referred on the one hand to “the most fundamental rule that the Crown in Parliament is sovereign” (para 20), and on the other to the “general rule” that “the conduct of international relations and the making and unmaking of treaties” are “matters for the Crown in the exercise of its prerogative powers” (para 30), the balance between the two being as explained by Lord Oliver in the *Tin Council* case: paras 32–33.

249 Although the *Tin Council* principles as such are not in doubt, they are only part of the story. It is wrong to see this as a simple choice between Parliamentary sovereignty, exercised through legislation, and the “untrammelled” exercise of the prerogative by the Executive. Parliamentary sovereignty does not begin or end with the *Tin Council* principles. No less fundamental to our constitution is the principle of Parliamentary accountability. The Executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law. That account is

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made through ordinary Parliamentary procedures. Subject to any specific statutory restrictions (such as under the Constitutional Reform and Governance Act 2010), they are a matter for Parliament alone. The courts may not inquire into the methods by which Parliament exercises control over the Executive, nor their adequacy.

The FBU case

250 Defining the proper boundaries between the respective responsibilities of Parliament, the Executive and the courts lay at the heart of the dispute in the *FBU* case *(**R** v **Secretary** of **State** for the Home Department Ex p Fire Brigades **Union*** [1995] 2 AC 513). That case concerned statutory provisions (under the Criminal Justice Act 1988) providing for compensation for criminal injuries, intended to replace a previous non-statutory scheme established under the prerogative. Section 171 provided that the new scheme should come into force on "such day as the **Secretary** of **State** may by order … appoint". No such date was appointed, but instead after some years the **Secretary** of **State** announced that a new non-statutory scheme would be introduced, which was inconsistent with the scheme provided for by the Act. The House of Lords held by 3–2 that this action was an abuse of power and so unlawful. In the leading judgment Lord Browne-Wilkinson noted that the new scheme was to be brought into effect, at p 552:

> "at a time when Parliament has expressed its will that there should be a scheme based on the tortious measure of damages, such will being expressed in a statute which Parliament has neither repealed nor (for reasons which have not been disclosed) been invited to repeal …

> "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 even though the old scheme has been abandoned. It is not for the executive … to **state** as it did in the White Paper [*Compensating victims of violent crimes: Changes to the criminal injuries compensation scheme* (1993) (Cm 2424)] (para 38) that the provisions in the Act of 1988 'will accordingly be repealed when a suitable legislative opportunity occurs.' It is for Parliament, not the executive, to repeal legislation …"

He concluded, at p 554:

> "By introducing the tariff scheme he debars himself from exercising the statutory power for the purposes and on the basis which Parliament intended. For these reasons, in my judgment the decision to introduce the tariff scheme at a time when the statutory provisions and his power under section 171(1) were on the statute book was unlawful and an abuse of the prerogative power."

The minority, by contrast, regarded the majority's decision (in Lord Keith's words—p 544) as "a most improper intrusion into a field which lies peculiarly within the province of Parliament".

251 In a recent article ("A dive into deep constitutional waters: article 50, the Prerogative and Parliament" (2016) 79 MLR 1064–1089), Professor Gavin Phillipson considers some lessons from that decision for the present case. As he points out (ibid, p 1082), the apparently fundamental

difference of approach between majority and minority came down ultimately to a narrow issue of statutory construction of section 171: whether the section imposed no duty owed to the public (p 544F, per Lord Keith), or rather, as the majority thought (p 551D, per Lord Browne Wilkinson), it imposed a continuing obligation on

the **Secretary** of **State** to consider whether to bring the statutory scheme into force, which was frustrated by implementation of the inconsistent non-statutory scheme.

252 Professor Phillipson also draws attention to the important observations by Lord Mustill on the balance between the three organs of the **state**, and in particular the means by which Parliament exercises control of the Executive, not restricted to legislative control. Although **stated** in a minority judgment, the underlying principles are not I believe controversial. Lord Mustill said, p 567:

> "It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended. Concurrently with this judicial function *Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate*. *Ideally, it is these latter methods which should be used to check executive errors and excesses; for it is the task of Parliament and the executive in tandem, not of the courts, to govern the country.*" (Emphasis added.)

253 Lord Mustill went on to comment on the development over the previous 30 years of court procedures to fill gaps where the exercise of such "specifically Parliamentary remedies" has been perceived as falling short, and "to avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers". He thought these judicial developments were welcome but not without risks, at p 567:

> "As the judges themselves constantly remark, it is not they who are appointed to administer the country. Absent a written constitution much sensitivity is required of the parliamentarian, administrator and judge if the delicate balance of the unwritten rules evolved (I believe successfully) in recent years is not to be disturbed …"

254 Professor Phillipson comments 79 MLR 1064, 1089:

> "the British constitution works most effectively when parliamentary and judicial forms of control and accountability, rather than being framed as antagonistic alternatives, or mutually exclusive directions of travel, work *together*, but with clearly defined, differentiated and mutually complementary roles."

255 That observation is particularly pertinent having regard to the debate which took place on the opposite side of Parliament Square on the last day of the hearing in the Supreme Court. That led to the motion, passed by a large majority of the House of Commons, the terms of which have been set out by Lord Reed JSC (para 162). In particular, it recognised that it is "Parliament's responsibility to properly scrutinise the Government while respecting the decision of the British people to leave the **European Union**", and ended by "call(ing) on the Government to invoke article 50EU by 31 March 2017". Of course the House of Commons is not the same as "the Queen in Parliament", whose will is represented exclusively by primary legislation. However, the motion lends support to the view that, at least at this initial stage of service of a notice under article 50(2), the formality of a Bill is unnecessary to enable Parliament to fulfil its ordinary responsibility for scrutinising the government's conduct of the process of withdrawal.

Application of the principles to the present case

256 The logical starting point for consideration of the present case is the power which is in issue: that is, the power under article 50EU of the Lisbon Treaty to initiate the procedure for withdrawal by a decision in accordance with our "constitutional requirements", followed by service of a notice. The existence of that power in international law is not in doubt. The issues for the court are, first, who has the right under UK constitutional principles to exercise it, and, secondly, subject to what constitutional requirements. As to the first, under *Tin Council* principles the position is clear. In the absence of any statutory provision to the contrary, the power to make or withdraw from an international Treaty lies with the Executive, exercising the prerogative power of the Crown. As to the second, it is necessary to consider whether that power is subject to any restrictions by statute, express or implied, or in the common law.

257 In agreement with Lord Reed JSC, and for the same reasons, I find no such restrictions in the EU statutes. I agree with Mr Eadie that this issue must be considered by reference to the statutory scheme as it exists at the time the power in question is to be exercised. The 1972 Act of course provided the framework for what followed. But I find it illogical to search in that Act for a presumed Parliamentary intention in respect of withdrawal, at a time when the Treaty contained no express power to withdraw, and there was no reason for Parliament to consider it. The 1972 Act did not remove the Crown's Treaty-making prerogative in respect of **European** matters, whether expressly or by implication (as under the *De Keyser* principle: majority judgment para 48). No-one doubts the power of the Executive in 2008 to enter into the Lisbon Treaty, including article 50.

258 The critical issue is how Parliament dealt with that matter for the purposes of domestic law. In the 2008 Act Parliament recognised the Lisbon Treaty (including article 50) by its inclusion in the treaties listed in section 1 of the 1972 Act. Thereafter it became (by virtue of 1972 Act section 2(1)) part of the statutory framework "in accordance with" which, and therefore subject to which, any rights and obligations derived from EU law by virtue of that Act were to be enjoyed in domestic law. Unlike other powers in the Treaty, the 2008 Act did not impose any restriction on the exercise of article 50EU by the Executive. That position was confirmed by the 2011

Act, which made specific reference to article 50(3) but placed no restriction on article 50(2). There the matter rests today.

259 Turning to the common law, the *Tin Council* rule is simple and uncontroversial: the prerogative 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". Judged by that test the answer again is clear. Service of an article 50(2) notice will not, and does not purport to, change any laws or affect any rights. It is merely the start of an essentially political process of negotiation and decision-making within the framework of that article. True it is that it is intended to lead in due course to the removal of EU law as a source of rights and obligations in domestic law. That process will be conducted by the Executive, but it will be accountable to Parliament for the course of those negotiations and the contents of any resulting agreement. Furthermore, whatever the shape of the ultimate agreement, or even in default of agreement, there is no suggestion by the **Secretary** of **State** that the process can be completed without primary legislation in some form.

260 This analysis was in substance adopted by Maguire J in the *McCord* proceedings, in line with the submissions of the Attorney General for Northern Ireland (repeated in this court). He said [2016] NIQB 85 at [105]:

> "In the present case, it seems to the court that there is a distinction to be drawn between what occurs upon the triggering of article 50(2) and what may occur thereafter. As the Attorney General for Northern Ireland put it, the actual notification does not in itself alter the law of the United Kingdom. Rather, it is the beginning of a process which ultimately will probably lead to changes in United Kingdom law. On the day after the notice has been given, the law will in fact be the same as it was the day before it was given. The rights of individual citizens will not have changed—though it is, of course, true that in due course the body of EU law as it applies in the United Kingdom will, very likely, become the subject of change. But at the point when this occurs the process necessarily will be one controlled by parliamentary legislation, as this is the mechanism for changing the law in the United Kingdom."

261 The Divisional Court (para 17) took a different approach. They in effect adopted the analysis proposed by Lord Pannick, taking account of the agreed (albeit possibly controversial) assumption that the article 50(2) notice is irrevocable. On that footing, even if it has no immediate effect, it will lead inexorably to actual withdrawal at latest two years later (subject to agreement to defer). Lord Pannick drew the analogy of a trigger being pulled (written case para 11–12):

> "it is the giving of the notice which triggers the legal effects under article 50(3). Those effects are that once notification is given, 'The 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 two years from notification, unless an extension of time is unanimously agreed by the **European** Council and the member **state** concerned. Notification is … 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."

262 Lord Pannick's trigger/bullet analogy is superficially attractive, but (with respect) fallacious. A real bullet

does not take two years to reach its target. Nor is its progress accompanied by an intense period of negotiations over the form of protection that should be available to the victim by the time it arrives. The treaties will indeed cease to apply, and domestic law will change; but it is clearly envisaged that the final form of the changes will be governed by legislation. As the **Secretary** of **State** has explained, the intention is that the legislation will where possible reproduce existing **European**-based rights in domestic law, but otherwise ensure that there is no legal gap.

263 Although there is no evidence from any government witness on the intended role of Parliament, we were shown without objection or contradiction the statement made by the **Secretary** of **State** to Parliament on 10 October 2016 (Hansard (HC Debates), cols 40–41). Having described the "mandate" for Britain to leave the **European Union** as "clear, overwhelming and unarguable", he explained the government's plans for a "great repeal Bill":

> "We will start by bringing forward a great repeal Bill that will mean the **European** Communities Act 1972 ceases to apply on the day we leave the EU …
>
> "The great repeal Act will convert existing **European Union** law into domestic law, wherever practical. That will provide for a calm and orderly **exit**, and give as much certainty as possible to employers, investors, consumers and workers …
>
> "In all, there is more than 40 years of **European Union** law in UK law to consider, and some of it simply will not work on **exit**. We must act to ensure there is no black hole in our statute book. It will then be for this House—I repeat, this House—to consider changes to our domestic legislation to reflect the outcome of our negotiation and our **exit**, subject to international treaties and agreements with other countries and the EU on matters such as trade."

264 On the assumption that such a Bill becomes law by the time of withdrawal, there will be no breach of the rule in its classic form. The extent to which existing laws are changed or rights taken away will be determined by the legislation. Ultimately of course that result depends on the will of Parliament; it is not in the gift of the executive. But there is no basis for making the opposite assumption. Lord Pannick's argument in effect requires the classic rule to be reformulated: "the prerogative does not extend to any act which will necessarily lead to the alteration of the domestic law, or of rights under it, whether or not that alteration is sanctioned by Parliament". We were shown no authority to support a rule as so **stated**, nor any principled basis for the court to invent it. In any event, that process, like the service of the article 50EU notice, will be subject to Parliamentary scrutiny in whatever way Parliament chooses. It will be for Parliament and the Executive acting in partnership to determine the timing and content of the legislative programme.

Pre-empting the will of Parliament

265 One possible answer to the analysis in the previous paragraph is that it would involve the Executive unlawfully "frustrating" or "pre-

empting" the will of Parliament. This point is touched on in the majority judgment by reference in particular to the Lord Browne-Wilkinson's statements in the *FBU* case [1995] 2 AC 513 (see para 250 above). They are said to establish the principle that ministers cannot "frustrate" the purpose of a statute "for example by emptying it of content or preventing its effectual operation"; and that it is—

> "inappropriate for ministers to base their actions (or to invite the court to make any decision) on the basis of an anticipated repeal of a statutory provision as that would involve ministers (or the court) pre-empting Parliament's decision whether to enact that repeal." (majority judgment para 51)

266 As I understand the majority judgment, however, this line of argument does not ultimately form part of their reasoning, in my view rightly so. In the first place, the *FBU* case was case about abuse, not absence, of power. There was no doubt as to the existence of the prerogative power. But it was held to be an abuse to use it for a purpose inconsistent with the will of Parliament, as expressed in a statute which had it neither repealed nor been invited to repeal. Such issues do not arise in this case. The **Miller** respondents base their case unequivocally on absence of a prerogative power to nullify the statutory scheme set up by the 1972 Act, rather than abuse (see Lord Pannick's response to Lord Reed JSC: Day 2 Transcript, p 158, lines 8–25).

267 Further, Lord Browne-Wilkinson was not purporting to lay down any general principle about the relevance of future legislation in relation to the exercise of the prerogative. His comments were directed to the facts of the particular case, in which the new scheme was being introduced without any reference at all to Parliament. Similar arguments in the present case would have to be seen in a quite different context, which (as Lord Pannick accepts) would include the 2015 Act and the referendum result. It is one thing, as in the *FBU* case, to use the prerogative to introduce a scheme which is directly contrary to an extant Act, and which Parliament has had no chance to consider. It is quite another to use it to give effect to a decision the manner of which has been determined by Parliament itself, and in the implementation of which Parliament will play a central role. In such circumstances talk of frustrating or pre-empting the will of Parliament would be wide of the mark. Conversely, it would be wrong to assume (as the majority appears to do: para 91) that the courts would necessarily have been powerless in the (politically inconceivable) event of the Executive initiating

withdrawal entirely of its own motion, or even in defiance of a referendum vote to remain.

Protection of individual interests

268 I would not wish to leave the case without acknowledging the important submissions made by the other respondents and interveners, particularly as to the scale and significance of the interests which will be affected by withdrawal. It is not clear, however, how a requirement for statutory authority for the article 50(2) notice will do anything to safeguard those interests, nor indeed to advance the process of Parliamentary scrutiny which will ultimately be critical to their protection.

269 I take as representative the cases for the first and second interested parties, presented by Ms Mountfield QC and Mr Gill QC. Their submissions provide vivid illustrations of the variety of ways in which individual and group interests will be profoundly affected by implementation of the decision to leave the EU. Ms Mountfield for example provides a detailed breakdown of "fundamental" and "non-replicable" EU citizenship rights. The list starts with the "fundamental status" of EU citizenship (Citizens' Directive 2004/38/EC Preamble), leading to more specific rights, such as the right to move, reside, work and study throughout the member **states**, the right to vote in **European** elections, the rights to diplomatic protection, and the right to equal pay, and to non-discriminatory healthcare free at the point of use. She categorises the government's case as an assertion of—"untrammelled prerogative power to do away with the entire corpus of **European** law rights currently enjoyed under UK law, and render a whole suite of constitutional statutes meaningless, without any Parliamentary authority in the form of a statute." While there is no reason to question her account of the profound effect of the prospective changes, I do not for the reasons already given accept that this can be describe as "untrammelled" use of executive power, nor that the control of Parliament will be improperly bypassed. Nor does she explain how that impact will be mitigated by a statute which does no more than authorise service of the notice.

270 Similar arguments are made by Mr Gill for the second interested parties (the AB parties). They are representative, among others, of the very large numbers of EEA nationals and their children living in this country, whose rights to continued residence will be threatened unless adequate arrangements are made to protect them. Mr Gill refers in particular to the important right under the Citizens' Directive for those who have lived in the UK for five years to apply for citizenship in the following year, a right which will be lost on withdrawal. Section 7 of the Immigration Act 1988 provides that a person shall not require leave to enter or remain in the United Kingdom "in any case in which he is entitled to do so by virtue of an enforceable EU right".

271 Typical is Mrs KK, a Polish national resident and working here since 2014, married to a third country national, with a Polish national child born in the UK in 2015. She feels "in a complete **state** of limbo" having received no assurance from the **Secretary** of **State** as to what her status will be during and after the withdrawal negotiations, nor how her husband and child will be affected. Such people, says Mr Gill, will have made life-changing decisions and moved permanently to the UK with the ultimate intention of acquiring permanent residence. They may also find themselves exposed to criminal liability under the Immigration Act 1971 if their status is removed. Mr Gill recognises that Parliament may prior to actual withdrawal put in place a statutory protection mechanism; but that depends on the will of Parliament, which, he says, the **Secretary** of **State** cannot lawfully pre-empt. It is, he submits, a misuse of the prerogative to "foist" such a situation on Parliament; the rights to remain "must be addressed by Parliament before the giving of the article 50(2) notice."

272 There are two problems with that submission. First, it is difficult to talk of the Executive "foisting" on Parliament a chain of events which flows directly from the result of the referendum which it authorised in the 2015 Act. Secondly, however desirable it would be for issues of detail such as

those affecting his clients to be addressed at this stage, it is wholly inconsistent with the structure of article 50. That assumes the initiation of the process by a simple notice under article 50(2), to be followed by detailed negotiations leading if possible to an agreement on the terms of withdrawal. The details of the protections available for Mr Gill's clients must depend, at least in part, on the outcome of those negotiations.

273 No doubt for this reason such an extreme argument is not adopted by the other respondents. They accept that, at this stage of the article 50EU process, they cannot reasonably expect anything more than bare statutory authorisation for the service of the notice. That is realistic. But it also underlines the point that successful defence of the Divisional Court's order will do nothing to resolve the many practical issues which will need to be addressed over the coming period, nor to protect the rights of those directly affected. Those problems, and the need for Parliament to address them, will remain precisely the same with or without statutory authorisation for the article 50EU notice. If that is what the law requires, so be it. But some may regard it as an exercise in pure legal formalism.

Conclusion

274 Shortly after the 1972 Act came into force, Lord Denning MR famously spoke of the **European** Treaty as "like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back …": *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418F. That process is now to be reversed. Hydrologists may be able to suggest an appropriate analogy. On any view, the legal and practical challenges will be enormous. The respondents have done a great service in bringing these issues before the court at the beginning of the process. The very full debate in the courts has been supplemented by a vigorous and illuminating academic debate conducted on the web (particularly through the UK Constitutional Law Blog site). Unsurprisingly, given the unprecedented nature of the undertaking there are no easy answers. In the end, in respectful disagreement with the majority, I have reached the clear conclusion that the Divisional Court took too narrow a view of the constitutional principles at stake. The article 50EU process must and will involve a partnership between Parliament and the Executive. But that does not mean that legislation is required simply to initiate it. Legislation will undoubtedly be required to implement withdrawal, but the process, including the form and timing of any legislation, can and should be determined by Parliament not by the courts. That involves no breach of the constitutional principles which have been entrenched in our law since the 17th century, and no threat to the fundamental principle of Parliamentary sovereignty.

LORD HUGHES JSC (dissenting)

275 Some observers, who have not been provided with the very detailed arguments which have been debated before us (or the something over 20,000 pages of documents which supported those arguments) might easily think that the principal question in this case is: "Does the 2016 referendum result not conclude the issue, and mean that the country is bound to leave the EU?" In fact, that is not the principal question. No-one suggests that the referendum by itself has the legal effect that a Government notice to leave

the EU is made lawful. Specifically, that is not the contention of the Government, speaking through the **Secretary** of **State** for **exiting** the EU. The referendum result undoubtedly has enormous political impact, but it is not suggested by the Government that it has direct legal effect.

276 The principal question in this case is not whether the UK ought or ought not to leave the EU. That is a matter for political judgment, which is where the referendum comes in. Courts do not make political judgments. The question in this case is not *whether*, but *how*, the UK may lawfully set about leaving the EU, if that is the political decision made. It is about the legal mechanics of leaving.

277 As the foregoing judgments show, this case is capable of stimulating discussion on a number of legally interesting topics. There are also supplementary questions arising out of the legal positions of Scotland, Northern Ireland and Wales. But, at some risk of over-simplifying, the main question centres on two very well understood constitutional rules, which in this case apparently point in opposite directions. They are these:

Rule 1 the executive (government) cannot change law made by Act of Parliament, nor the common law; and

Rule 2 the making and unmaking of treaties is a matter of foreign relations within the competence of the government.

278 Nobody questions either of these two rules. Mrs **Miller** relies on the first. The government relies on the second. The government contends that Rule 2 operates to recognise its power, as the handler of foreign relations, to unmake the **European** Treaties. Mrs **Miller** contends that Rule 1 shows that the power to handle foreign relations stops short at the point where UK statute law is changed.

279 Mrs **Miller**'s case is that because there was an Act of Parliament (the **European** Communities Act 1972) to give effect to our joining the (then) EEC and to make **European** rules part of UK law, there has to be another Act of Parliament to authorise service of notice to leave. This is the effect, she says, of Rule 1. Thus, she says, Rule 2 is true, but does not apply.

280 The government's case is that the **European** Communities Act 1972, which did indeed make **European** rules into laws of the UK, will simply cease to operate if the UK leaves. The Act was only ever designed to have effect whilst we were members of the EU. It agrees that as a government it cannot alter the law of the UK which statute has made, but it says that if it serves notice to leave the EU, and in due course we leave, it would not be altering the statute; the statute would simply cease to apply because there would no longer be rules under treaties to which the UK was a party. Thus, it says, Rule 1 does not apply and Rule 2 does.

281 Which of these arguments is correct depends in the end on the true reading of the **European** Communities Act 1972. Clearly, either reading is possible. The majority judgment gives cogent expression to the conclusion that it is Mrs **Miller**'s reading which is correct. For my part, for the reasons which Lord Reed JSC very clearly sets out, I would have preferred the view that this Act was only ever to be operative for so long as the UK was a member of (first) the EEC, and now the EU. It is not helpful, particularly because this is a minority view, to repeat the analysis which Lord Reed JSC expounds. I agree with his

judgment. In short, because of Rule 1 the Act was necessary to convert the UK's international obligations under the various **European** treaties into law with domestic effect. Without the Act, those **European** rules
[2017] 2 WLR 583 at 697
would have had effect between **states** at the international level but would not have been part of domestic UK law and so would not have bound UK citizens individually. But the Act is couched in terms which give legal effect to the obligations and rules which arise under the treaties. If the UK leaves the EU, there are no longer any treaties to which this country is a party. It seems to me to follow that the Act will cease to import any of the rules which presently it does. The Act is not changed; it does, however, cease to operate because there are no longer any Treaty rules for it to bite upon.

282 Thus I would, for myself, have allowed the appeal of the **Secretary** of **State** from the decision of the (English) Divisional Court. I agree that on either view of the principal **Miller** appeal, the devolution questions raised should all be answered "no", for the reasons set out in the majority judgment. I likewise agree with the majority's treatment of the Sewel convention.

283 It remains only to add that the arguments before us made it clear that whatever the outcome of the **Miller** appeal, much the same legislative programme will be required in Parliament, upon the UK's departure from the EU, to deal with the multifarious legal rules presently operative via the 1972 Act. The issues before this court do not touch this exercise, which will be a matter in any event for Parliament. The court is concerned only with the necessary procedure for the service of an article 50EU notice to leave.

Appeal dismissed.

Answers accordingly.

Diana Procter, Barrister

1 **European** Communities Act 1972, s 1, as amended: see post, Supreme Court judgments, paras *17*, *180*.

S 2: see post, Supreme Court judgments, paras *18–20*.

2 EU Treaty, art 50EU: see post, Supreme Court judgments, para *25*.

3 Northern Ireland Act 1998, s 1: see post, Supreme Court judgments, para *134*.

S 75, as amended: “(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity … (2) … a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. (3) In this section ‘public authority’ means— (a) any department, corporation or body listed in Schedule 2 to the Parliamentary Commissioner Act 1967 (departments, corporations and bodies subject to investigation) and designated for the purposes of this section by order made by the **Secretary** of **State**; (b) any authority (other than the Equality Commission, the board of governors of a grant-aided school, the Comptroller and Auditor General, a general health care provider or an independent provider of health and social care) listed in Schedule 3 to the Public Services Ombudsman Act (Northern Ireland) 2016 (listed authorities); (cc) the Chief Constable of the Police Service of Northern Ireland and the Police Ombudsman for Northern Ireland; (cd) the Director of Public Prosecutions for Northern Ireland; (d) any other person designated for the purposes of this section by order made by the **Secretary** of **State**.”