

Tuesday, 6 December 2016

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(10.15 am)

THE PRESIDENT: Please.

Submissions by MR EADIE (continued)

MR EADIE: My Lords, my Lady, good morning. Apologies for a plethora of notes on your desk. Can I suggest that they get tucked in at the beginning of the black 11KBW file you have been in and out of yesterday, and just explain what they are.

THE PRESIDENT: Yes.

MR EADIE: You should, either there or separately, have cross-referenced versions of both of our cases, somewhere, in response to a question that Lady Hale was asking yesterday. Then you have a note, applicants' note on the Constitutional Reform and Governance Act. That is designed to show you all the bits and pieces that preceded that Act and you will see that in that note at paragraph 1(2) and (3), or paragraphs (1), (2) and (3); you have documents that are already in the bundles, otherwise we haven't given you the copies of the remaining documentation referred to, but we have given you the internet link if you want it.

We can easily provide you those if you wish, but rather than flooding you with paper, we have given you those. I hope that's helpful. At the end of that note,

1 we have answered the query that Lord Carnwath raised in  
2 relation to section 23 of CRAG in its original form, and  
3 we have sought to answer Lord Mance's question about the  
4 scrutiny process in Parliament in paragraph 4 of that  
5 note.

6 That is the note on CRAG. You should also have  
7 a note on the Great Repeal Bill; I say a note, it is  
8 a statement that was made to Parliament by the Secretary  
9 of State for exiting the European Union.

10 LADY HALE: I am afraid I seem to have two copies of your  
11 note on EFTA and no copy of any note on the repeal bill.

12 THE PRESIDENT: I have two copies on the next steps of  
13 leaving the European Union.

14 LADY HALE: We will do a swap then.

15 MR EADIE: That still won't get there.

16 THE PRESIDENT: Anyway, don't worry, we will sort this.

17 MR EADIE: So you have a note on CRAG, I am hoping -- does  
18 my Lady have that one?

19 Then a statement by the Secretary of State on the  
20 Great Repeal Bill, versions of the case that are  
21 cross-referenced and then a note on EFTA which I will  
22 come to.

23 LADY HALE: I now do, because I have done a swap with  
24 my Lord.

25 MR EADIE: I am grateful.

1 LORD MANCE: One point from my side on the different subject  
2 of in pari materia which you touched on. It seemed to  
3 me there might be some further material to be looked at  
4 in that connection, and in particular, there are other  
5 cases which we have not got in the bundle, Ashworth v  
6 Ballard in 1999, citing Lord Mansfield, I think. We  
7 could give you these, but Brown v Bennett was the  
8 particular one that is actually a decision of my Lord,  
9 Lord Neuberger's in [2002] 1 WLR, which has quite a full  
10 discussion.

11 MR EADIE: Can we make sure you have copies and we will look  
12 at those overnight if we may.

13 LORD MANCE: Yes.

14 MR EADIE: My Lords, my Lady I have still got a bit to get  
15 through, I am afraid.

16 Submission three I was on, on the principal  
17 submissions on the statutory scheme. Submission three  
18 is a broad submission which is that it is fundamentally  
19 inaccurate, we submit, to conclude that by the 1972 Act,  
20 Parliament intended to legislate, and I am quoting from  
21 the divisional court, "so as to introduce EU law into  
22 domestic law in such a way that this could not be undone  
23 by the exercise of prerogative power".

24 That is the issue we were talking about yesterday.

25 In relation to that point, we submit first that it

1 did not do so expressly; secondly, therefore, that if  
2 there is such a restriction, if there is such  
3 an intention in Parliament to be found from the  
4 1972 Act, it can only be by implication; and if you are  
5 approaching the matter as a matter of implication, we  
6 submit that the implication is impossible if the later  
7 scheme of the legislation is taken into account.

8 In any event, any implication just viewing the  
9 1972 Act in isolation would have to be based on the fact  
10 that it introduced or recognised rights created under  
11 treaties, and the implication that is said to flow from  
12 that is that therefore you can not drain the Act of  
13 significance; it is that point.

14 We respectfully submit that nothing flows from that  
15 fact, that it recognised or introduced those rights in  
16 that way, once it is clear, as it is, that the rights in  
17 question are created on the international plane, and  
18 that they depend upon the continuing relationship  
19 between the sovereign states, which were parties to the  
20 European Economic Community as it then was. The  
21 consequence of that is that the 1972 Act is merely, we  
22 submit, providing the mechanism for transposing, and  
23 I dealt with that yesterday.

24 It does not and was not intended to touch the  
25 exercise of the powers on the international plane.

1       Indeed, the relevant provisions of the Act are not  
2       directed to that level, international action, at all.  
3       They are directed solely to the transposition into  
4       domestic law issue. For that reason, the 1972 Act does  
5       not even authorise the Government to make the  
6       United Kingdom a member.

7                Instead, its fundamental nature is to operate on the  
8       clear understanding and application of the dualist  
9       principle, and it on any view recognised rights of  
10      a very particular kind; rights having existence as  
11      a result of international processes in which  
12      Her Majesty's Government participates in the exercise of  
13      sovereign powers. So it is premised on the  
14      continuation, the active continuation of that sort of  
15      action, by the Government on the international plane.  
16      On any view, that aspect of the foreign affairs  
17      prerogative was not merely to continue but was  
18      an integral part of that legislation.

19               It is that that led to the submission I made  
20      yesterday about the rights being in that way inherently  
21      limited. The Government could on any view, exercising  
22      those powers in that way consistently with the scheme of  
23      the Act, have removed rights, have removed a swathe of  
24      rights introduced into domestic law through the Act.

25               So the case has to be against us that prerogative

1 powers continue to be available, and recognised as  
2 continuing to be available, for all purposes to do with  
3 our participation in the functioning of the EU, but  
4 somehow nevertheless implicitly excluded the power to  
5 withdraw.

6 Just before I come directly to, is withdrawal  
7 different in scale or in kind; and it is a matter we  
8 have given some further thought to overnight in light of  
9 the fact that my Lord, Lord Wilson was interested in it  
10 yesterday, can I just divert briefly back into  
11 a question that Lord Mance raised yesterday about the  
12 Fire Brigades Union case.

13 LADY HALE: Is this part of your third concluding  
14 submission?

15 MR EADIE: It is, I am afraid. The third submission is the  
16 big broad one, which is that there is no basis for  
17 concluding that the 1972 Act had that effect.

18 LADY HALE: I just need to know for my note.

19 MR EADIE: My Lady, yes, so we are not quite diverting, but  
20 not quite creating a separate point.

21 On FBU and the Fire Brigades Union, and whether or  
22 not there is some broader principle in there, we  
23 respectfully submit that there is not a broader  
24 principle in there. We know, I am not going go back to  
25 it now, that in Fire Brigades Union, the home

1 secretary's exercise of prerogative power, you will  
2 recall, was to bring in a new criminal injuries  
3 compensation scheme. That was held to be unlawful  
4 precisely because it precluded him from exercising his  
5 statutory authority under section 171 of the  
6 Criminal Justice Act of 1988, which was a duty to  
7 consider when to bring in a new statutory scheme; and  
8 they set out in the judgment the terms of section 17  
9 which makes that entirely clear.

10 LORD SUMPTION: It is also authority, isn't it, for the  
11 proposition that you cannot anticipate legislation, even  
12 though the Government commands a majority in the House  
13 of Commons and announces its intention of introducing  
14 it?

15 MR EADIE: My Lord, for the basic proposition that you have  
16 to assume -- take the law as it is currently.

17 LORD SUMPTION: Exactly, so you don't dispute that the Great  
18 Repeal Bill is not something that we can take into  
19 account in any of the matters we have to decide?

20 MR EADIE: It is not a matter that relevantly goes to  
21 a question of interpretation.

22 LORD SUMPTION: No.

23 MR EADIE: It may be relevant to the broader constitutional  
24 issues as to whether or not Parliament is going to be  
25 involved and if so, how.

1 LORD SUMPTION: It is valuable to know, but it has no legal  
2 significance.

3 MR EADIE: We don't attach great legal significance to it,  
4 or indeed any legal significance to it in that way, so I  
5 accept the proposition --

6 LORD CARNWATH: Can I be clear, do you say it is irrelevant  
7 that at some time between your notice and the end of the  
8 two-year period, there is going to be legislation  
9 dealing with all the things the repeal bill -- is that  
10 wholly irrelevant?

11 MR EADIE: I am going to come to develop that under my  
12 submissions on parliamentary sovereignty. We say it is  
13 relevant as a fact, it is relevant as a matter of fact  
14 that Parliament has been involved, continues to be  
15 involved; there have already been opposition motions and  
16 there are going to be further opposition motions as  
17 I understand it tomorrow or the next day; and there is  
18 inevitably going to be parliamentary involvement in the  
19 scheme of legislation.

20 LORD CLARKE: What question is that relevant to?

21 MR EADIE: It is relevant to the constitutional  
22 significance, amongst other things, of (a) the 2015 Act  
23 and (b) to the fact that if we are withdrawing, which we  
24 are, the giving of Article 50 notice will not, as it  
25 were, inevitably will not, involve a leaving without



1 further parliamentary involvement.

2 LORD CARNWATH: It is a point that comes out more in the  
3 Attorney General for Northern Ireland's case, that --  
4 there will be no legislation, where the assumption,  
5 I would have thought, is that there will be legislation  
6 to deal with all these very complex matters.

7 MR EADIE: There will have to be, on any view there will  
8 have to be.

9 LORD CARNWATH: Arguably it might be an abuse of process to  
10 go ahead without that anticipation, so it may come in in  
11 that sense.

12 MR EADIE: But it also demonstrates dualism in action; it  
13 is, as it were, the implementation of the decision taken  
14 by the virtue of the prerogative power in exercising the  
15 Article 50 notice; the idea that Parliament will not be  
16 involved cannot possibly be sustained.

17 THE PRESIDENT: The argument that Parliament can't be  
18 involved cannot be won, because Parliament can always be  
19 involved if it wants to be. As you say, it is getting  
20 involved and if they chose to bring the whole question  
21 of an Article 50 notice to them by actually deciding to  
22 debate and indeed to legislate, for example, that no  
23 Article 50 notice could be served, that is something  
24 they can do.

25 MR EADIE: It is really a different way of putting the same

1 point that the Attorney made in opening: Parliament can  
2 look after itself.

3 THE PRESIDENT: Exactly, but that is not the issue which we  
4 are deciding.

5 MR EADIE: That is not the issue which you are deciding, but  
6 the fact that Parliament is going to get involved is not  
7 just that point, that they could get involved if they  
8 wanted to because they always can, but it is that in  
9 dealing with the domestic consequences of the action on  
10 the international plane, Parliament will have to  
11 legislate, it will have to legislate to deal with, but  
12 that is the usual constitutional way in which things  
13 work.

14 LORD SUMPTION: But we cannot decide, I think you accept,  
15 that any of the issues before us, on the assumption that  
16 by the time that the withdrawal actually occurs, the  
17 European Communities Act would have been repealed or  
18 significantly modified; that may well be a practical  
19 possibility, but it is not something that we can assume  
20 in point of law.

21 MR EADIE: You cannot assume that, because it may not  
22 happen, apart from anything else.

23 LORD CARNWATH: But we cannot assume that it will not  
24 happen. For my part I am not -- having seen (Inaudible)  
25 for myself, I am not accepting the suggestion that it is

1           completely irrelevant.

2   MR EADIE:   And I am not accepting that and I am not sure --

3   LORD CARNWATH:   I think he probably was.

4   MR EADIE:   If that was the impression given, I am not.  But

5           it is -- I am perfectly content --

6   LORD SUMPTION:   You seem to have given two diametrically

7           opposed answers in the last five minutes to the same

8           question, but we will obviously have to work out which

9           answer we accept.

10   LORD CARNWATH:   We will have the transcript.

11   MR EADIE:   Let me help you.  We do not accept that it is

12           legally irrelevant, but we do accept the point, my Lord,

13           which is that you cannot proceed on the assumption that

14           Parliament will necessarily legislate to introduce or to

15           pass the Great Repeal Bill, because that depends on what

16           Parliament decides to do.

17   LORD REED:   The debate that you have been having with two of

18           my colleagues perhaps illustrates another point, which

19           is that when you are talking about a constitution in

20           which there are a number of important institutions, the

21           court being only one of them, thinking in terms of the

22           law, that is only part of the picture, and the court has

23           to be conscious of what competence it properly has to

24           exercise in this field, and what matters are properly

25           matters to be resolved by the political institutions,

1 including obviously the Government and Parliament.

2 MR EADIE: Yes. We accept that. And assert it, as you  
3 know; it was part of the point I built on, and I am  
4 going to come back to, about the significance of the  
5 2015 Act, and the Lord Bingham quote from Robinson, and  
6 Lord Dyson's proper description of the 2015 Act as being  
7 constitutional, a point of significance, we submit.

8 LORD REED: It also relates, I think, to the way in which --  
9 this sort of constitutional issue is unusual in this  
10 jurisdiction. In the time I have been here, we have had  
11 this case and Axa, I think are really the only cases  
12 that have raised major constitutional questions; but  
13 there are lessons one can gain by looking more widely  
14 afield, if one thinks in terms of constitutions as  
15 requiring the collaboration of a number of actors, with  
16 each having a limited realm within which it operates.

17 MR EADIE: My Lord, yes, we agree with that as well, and it  
18 applies not merely to the relationship between courts  
19 and Parliament and the proper function of the court in  
20 determining those sorts of issues, but it also raises  
21 the point I made yesterday, which is that our  
22 constitution is built and it is entirely consistent with  
23 parliamentary sovereignty that it is built, on the  
24 premise that the Government itself, particularly in the  
25 sphere of foreign affairs, exercises its own

1 prerogatives. So it has significance in both of those  
2 ways. I suppose the final point to add in relation to  
3 that, to emphasise the point I made yesterday, is that  
4 it goes to the manner in which you go about answering  
5 questions as to the current state of the constitution;  
6 namely by asking what the position is today, not what  
7 the position was 40 years ago.

8 THE PRESIDENT: I see. We had better let you proceed with  
9 your argument as you had planned to.

10 MR EADIE: I will try not to give too many inconsistent  
11 answers in the same five minutes if possible.

12 I was trying to deal with Lord Mance's points  
13 yesterday about Fire Brigades Union, whether it stood  
14 for a broader principle. The point that I was making  
15 was that it doesn't, we respectfully submit. It does  
16 involve the court concluding that the home secretary  
17 could not exercise his prerogative power in the  
18 circumstances in which the legislation said what it did  
19 in section 171(1). We would invite you, without going  
20 back to it, to read or to reread Lord Browne-Wilkinson  
21 on that issue at 554 F, Lord Lloyd at 502 E, and Lord  
22 Nicholls at 506.

23 They all effectively concluded that it would be  
24 an abuse of his statutory power under section 171 for  
25 the Secretary of State to announce that he would not

1       introduce the statutory scheme, and to introduce the  
2       prerogative scheme instead. Lord Nicholls specifically  
3       held -- that was Lord Lloyd's analysis and Lord Nicholls  
4       specifically held that it imposed that section, a duty  
5       to keep under consideration when to introduce  
6       a statutory scheme, and by introducing the new scheme,  
7       he had set his face against that. So in short there was  
8       a specific statutory duty to which the home secretary  
9       was subject, and from which he had disabled himself from  
10      exercising.

11       So there is no broad principle of frustration of  
12      rights or changes to domestic law; the straightforward,  
13      if you will is a -- principle is a straightforward  
14      public law principle, and the House in that case was  
15      only divided on the interpretation of the facts, had the  
16      Secretary of State in fact disabled himself.

17       So to be analogous, the ECA in our context would  
18      have to contain a provision to the effect that the  
19      foreign secretary either must ratify or should keep  
20      under review when to ratify. There is nothing indeed in  
21      the ratification at all in our particular context. That  
22      is what we say and I wanted to go back on  
23      Fire Brigades Union in that way.

24       Can I then turn to scale, and I don't mean to  
25      diminish the force of the point that Lord Wilson puts to

1 me. It is a genuine and real one that the other side  
2 takes. So scale or difference in kind, however you  
3 choose to put the point, you are actually withdrawing,  
4 you are not just altering in a small way, as it were,  
5 the corpus of rights in and out; you are actually  
6 withdrawing, is the force of the point against us.

7 Our answers to that are these. Firstly, we say, the  
8 ECA does not touch withdrawal. The fact that it is,  
9 that it creates rights which are contingent on the shape  
10 of the corpus of EU rights and that they can be removed  
11 as well as added to, may not provide a complete answer  
12 but it is a step along the way because it shows that  
13 Parliament was contemplating removal of rights. We also  
14 submit, as you know, that it was contingent on the  
15 international relationship between the UK and the other  
16 EU member states remaining the same. For that reason,  
17 the process of withdrawal, the giving, commencing of  
18 that process by giving notice, is not inconsistent, we  
19 submit, with legislative intent.

20 You have got our point about the basic structure of  
21 the Act and its dualist features, focusing purely on  
22 transposition, not on controlling those international  
23 powers.

24 That is the view of the ECA in isolation, in answer  
25 to that point, and as you know, our case is you don't

1 view it in isolation properly; you take into account  
2 also the scheme of legislation in its entirety, so the  
3 subsequent pieces of legislation. We know, I took you  
4 to them yesterday, that the later legislation absolutely  
5 plainly does address and consider what powers to take  
6 back into parliamentary control of whatever kind, and  
7 what powers to leave in the hands of the Government.

8 It specifically considered, as we saw, in the 2008  
9 and 2011 acts, Article 50, which is the very process of  
10 withdrawal, and we saw yesterday that it made provision  
11 for Article 50(3) as one of the rights, and all of that.

12 That is the second of the answers. The first is  
13 viewing 1972 on its own; the second is look at the later  
14 legislation; and third is, if the concern  
15 constitutionally is scale or a different kind of thing,  
16 a different kind of change, then the constitutional  
17 answer for that is the 2015 Act and the referendum.

18 That rather leads into the point that was also made  
19 yesterday about joint effort, have we got mirror-images,  
20 joint effort and matters of that kind. Again, three  
21 short points if I may on that.

22 Firstly, on any view, there has been a joint effort,  
23 and there will continue to be a joint effort at this end  
24 of the scale. In other words at the withdrawal point,  
25 2015 Act again, the referendum and the continued



1 involvement of Parliament in the necessary process of  
2 implementing the withdrawal.

3 Secondly and strictly, what will happen on exit will  
4 reflect closely what happened on entry. The decision to  
5 enter involved an international act, the signing of the  
6 accession treaty, domestic legislation to come into  
7 force on entry, the ECA, and the final international  
8 act, ratification.

9 THE PRESIDENT: Yes, but the difference in this case and why  
10 the 2015 Act is very important for your case is because  
11 an irrevocable step is going to be taken in the form of  
12 the Article 50 notice -- because of the Article 50  
13 notice that cannot be gone back on, which is what we are  
14 assuming, and that is the difference, that is why the  
15 2015 Act is very important for this argument.

16 MR EADIE: Exactly so. Exactly so.

17 But it reflects at least a symmetry, and to some  
18 extent it chimes with the point that my Lord, Lord Reed  
19 was making, there are various ways the constitution can  
20 react; and we know as Lord Mance pointed out yesterday  
21 that on entry, or before we signed up to the treaty of  
22 accession, I think it was, there were parliamentary  
23 motions.

24 I am going to take you to the Canadian case that  
25 Lord Carnwath mentioned yesterday in due course, but we

1 see that that is exactly reflected in that case when we  
2 come to it; but there were parliamentary motions, as it  
3 were, before the international act was taken. But those  
4 parliamentary motions are non-binding legally, as it  
5 were. They have no legal effect. They are simply  
6 parliamentary authorities to do the thing, but they  
7 don't sound in law, they are not primary legislation,  
8 they are not secondary legislation; they are simply  
9 Parliament's choice as to how to give its permission and  
10 the extent to which it wants to get involved.

11 So if you do the contrast in terms of symmetry  
12 between then and now, it might be thought that now is  
13 a fortiori, and now is a fortiori in terms of  
14 withdrawal, because the giving of Article 50 notice was  
15 preceded by primary legislation, namely the 2015 Act.

16 So we do respectfully submit that there is real  
17 symmetry -- there is real symmetry there.

18 LORD MANCE: Doesn't that beg the question as to whether the  
19 2015 Act expected parliamentary consideration of the  
20 position in the light of the result of the referendum?

21 MR EADIE: On any view the 2015 Act involved -- my case, as  
22 you know, is that the 2015 Act in effect involved  
23 Parliament deciding to put to the final decision of the  
24 people the in/out question, and we do respectfully  
25 submit, therefore, that -- whether it said things or

1       didn't say things, or whether it was silent or not, it  
2       still carries real constitutional significance, as  
3       having been passed at a point in time when they knew  
4       full well that the only way of achieving one of the  
5       things or one of the possibilities on the binary  
6       question was to give Article 50 notice. That was the  
7       only way in which withdrawal could be effected. You had  
8       to take a step on the international plane, how would  
9       that work, what would need to be done? You would have  
10      to give Article 50 notice. That is the mandated  
11      process.

12   LORD WILSON: Of course the referendum doesn't say anything  
13      about when the notice should be.

14   MR EADIE: It doesn't, and it might be thought not to do so  
15      deliberately, because it might be thought that that is  
16      one of the paradigmatic decisions which would involve  
17      the exercise of expert and experienced judgment from  
18      those who would thereafter have the carriage of the  
19      negotiations. That is the very political debate that  
20      has been raging for the last few weeks or months.

21   LORD MANCE: Is it realistic to regard an Article 50 notice  
22      as an entirely limited notification, the UK is going to  
23      withdraw, because the scheme of Article 50 obviously  
24      contemplates that that will lead to, at the very least,  
25      a framework agreement as to the future. Is it realistic

1 to suppose that the notice will simply be a notice which  
2 gives no clue as to what the nature of the direction  
3 intended is, what the nature of the agreement wished for  
4 is?

5 MR EADIE: Well, it certainly won't delve into what the  
6 possible agreement might look like; it won't delve into  
7 how the Government might or might not choose to  
8 negotiate. I think all parties here are proceeding on  
9 the basis that it will be --

10 LORD SUMPTION: It will simply implicate the terms of  
11 Article 50, won't it?

12 MR EADIE: A one line. It will just comply with Article 50.

13 LORD MANCE: Everything else occurs subsequently.

14 MR EADIE: Yes, and to some extent that flows into the point  
15 that is made on the other side, which is to accept that  
16 if the Supreme Court decides against our arguments here,  
17 then the solution in legal terms is the one-line act.  
18 It may be that would lead to all sorts of parliamentary  
19 complications and possible additions and amendments and  
20 so on, but that is the solution and that is of obvious  
21 significance, all of those points are of obvious  
22 significance both in relation to the timing of the  
23 giving of that notice and in relation to the in fact  
24 that negotiations will have to happen.

25 How are those matters going to occur? Back to

1 Lord Reed's point about the delicacy of the balance and  
2 which part of the Government has which functions under  
3 our constitution; no one is suggesting that the  
4 negotiations will or could happen in any other way than  
5 by the Government negotiating on the UK's behalf to  
6 achieve the best deal it can.

7 If the outcome of that is an agreement, it is very  
8 likely that that agreement will be subject to the CRAG  
9 process; again, that takes one back to the balance,  
10 between what Parliament has chosen to control and what  
11 it has not.

12 So that was the second point with a bit of diversion  
13 on joint effort, and how that symmetry might or might  
14 not properly be viewed. But to some extent there is  
15 a broader point, which is the third of the points on  
16 joint effort, which is to the extent that there is  
17 a symmetry(?), we don't accept there is but to the  
18 extent there is a symmetry(?), that might be thought to  
19 some extent inevitable or at least acceptable, because  
20 it takes two elements to recognise international law  
21 rights in the way set up by the 1972 Act.

22 You need the general conduit, the general permission  
23 and you need the creation of those rights on the  
24 international plane. I am not sure you can have a stool  
25 with two legs, but if you could, take away one of them

1           and the stool falls, is the third short point in  
2           relation to that.

3   LORD REED: I don't know quite whether you would put it this  
4           way, you might not. It occurs to me that a lawyer's way  
5           of looking at the 2015 Act might be to ask, does it mean  
6           that the result of a referendum gives some -- has some  
7           legal consequences for Government. For example it  
8           requires them to act on the result of a referendum or,  
9           alternatively, does it have a parallel impact on the  
10          legal position of Parliament?

11                 Another way of looking at it might be to say that  
12          holding a referendum is a political event, that the  
13          significance of the outcome depending on things like the  
14          size of the turnout, the size and majority one way or  
15          another, is inevitably a matter of political judgment,  
16          which courts are not equipped to do, and that therefore  
17          the outcome of the -- when Parliament passes the  
18          2015 Act, it is setting in train a political process,  
19          the outcome of which has to be assessed by the political  
20          actors in our constitution?

21   MR EADIE: That is certainly a -- both of those are  
22          certainly potential ways of looking at the 2015 Act.  
23          Can I answer the question, not so much directly but to  
24          accept that those are both possible and one can approach  
25          the 2015 Act in a variety of different ways, and we have

1           been thinking for obvious reasons, particularly in the  
2           light of the questions yesterday, we have been thinking  
3           about the true nature and significance for the 2015 Act.

4           Another, a third way if you will, is to look at it,  
5           it might be thought, in this way: you know, just before  
6           I get to this point, that our primary case is and  
7           remains that the legal significance of the 2015 Act is  
8           entirely consistent with the scheme of the legislation  
9           as a whole.

10          So it recognises that the prerogative exists  
11          alongside and indeed is the premise for all of the  
12          scheme of legislation which governs. So the  
13          significance of the 2015 Act is that it is silent,  
14          consistently silent, and leaves the prerogative in  
15          place; and does so in circumstances where it is  
16          perfectly clear how that prerogative would have to be  
17          exercised, and that it would have to be exercised using  
18          Article 50. That was the only mechanism for doing so;  
19          that is our prime case, you know.

20          You also know that our prime case involves placing  
21          reliance upon it inter alia to meet points about scale,  
22          and the size of the change and so on, in constitutional  
23          terms, in the rather broader terms in which I opened it  
24          yesterday. You know that we accepted and positively  
25          relied upon, as an accurate description, the description

1 given by Lord Dyson in the Shindler case, of it being  
2 part of the constitutional requirements or arrangements.  
3 We respectfully submit that was right.

4 But the alternative way of looking at it is to say  
5 this: let's suppose for the sake of argument, and it is  
6 an alternative submission obviously, but suppose for the  
7 sake of argument that you were against us on the 1972  
8 Act, because you thought, well, you have to look at the  
9 1972 Act in isolation; in isolation if we looked at it  
10 the day after it came in, we would say, per Lord Wilson  
11 if I am allowed to take the question that was put  
12 without ascribing a view at this stage; if you looked at  
13 it on that day and in that way, you would say it is too  
14 big a thing to leave, to withdraw for the Government to  
15 do, Parliament having introduced all these rights, just  
16 too big a step, you can't do it. So the implication is  
17 you cannot do it under 1972.

18 What that effectively means for the prerogative,  
19 because the prerogative plainly continued to exist  
20 before and after the 1972 Act; I will come back to Lord  
21 Sumption's question yesterday about whether it was  
22 a prior question in a moment; but it continued to exist  
23 before and after. So what that would involve is  
24 a conclusion by the court, as it were, as a legal  
25 construct, that the necessary implication of the Act,



1           because of all those big things, is to hold or to put  
2           a constraint upon the exercise of the prerogative in  
3           a particular way. We know full well that the  
4           prerogative would have to continue to be exercised in  
5           the foreign affairs sphere in other particular ways,  
6           because that is integral to section 2.

7   THE PRESIDENT: I understand.

8   MR EADIE: But the concern would be: you cannot withdraw, it  
9           is too big a step; so there is, as it were, a clamp put  
10          on.

11           The other way of viewing the 2015 Act is to say:  
12          given that that is a legal construct, given that that is  
13          a court imposing, as it were, through a process  
14          of implication on Parliament an intention, that must be  
15          inherently subject to change if the legislation changes.

16           Take, by way of example, suppose a year after CRAG  
17          with all its nuanced schemes of control about  
18          ratification, CRAG had been repealed. What would be the  
19          effect? The effect would be that the prerogative powers  
20          on ratification could continue to be exercised, but now  
21          no longer subject to the constraints that Parliament had  
22          seen fit to impose in CRAG. You can approach, we  
23          respectfully submit as our alternative submission, the  
24          2015 Act in a similar way. You can say: well, there is  
25          the 2015 Act, even if by necessary implication if you

1 viewed it in isolation, I am leaving entirely out of  
2 account the latest legislation, but even if that is the  
3 prima facie conclusion on 1972, that must be inherently  
4 susceptible to change. The 2015 Act comes in and its  
5 legal effect is to leave or to remove, if you will, by  
6 the same process, by exactly the same process of  
7 implication, that which you impose by necessary  
8 implication now comes off by virtue of the same process.

9 THE PRESIDENT: Another possible interpretation of that line  
10 of argument is that when you get to that point, when you  
11 get to the 2015 Act, you may say to yourself, picking up  
12 Lord Reed's point about the balance between various  
13 parts of the Government, it is not for the court to say  
14 what the effect of the 2015 Act is, where Parliament has  
15 been very carefully silent, but to say that is a matter  
16 for Parliament. And therefore if you are right about  
17 the -- not if you are right, if it is the case that the  
18 1972 Act has got what you call a clamp, the question  
19 whether the 2015 Act, which is studiously silent on what  
20 its effect is to be, when there is a referendum, should  
21 be left to Parliament and not to us, and therefore it  
22 brings you back to saying it should go to Parliament.

23 MR EADIE: Yes, and what this debate demonstrates is that  
24 there are, perhaps because of its silence, subtle ways  
25 in which one can give, as it were, the legal punch line.

1 LORD CLARKE: Of course, it didn't have to be silent, did  
2 it? I mean Parliament could have.

3 THE PRESIDENT: It could have said it was advisory or it  
4 could have done what it did in the alternative vote  
5 legislation and in the legislation relating to future  
6 changes to the European constitution, it could have --  
7 can I finish -- it could therefore have said what it  
8 did. Lord Clarke's point, which I think is a fair one,  
9 is that if Parliament means it to have a legal effect,  
10 as in those two statutes, it says so, whereas it doesn't  
11 say so in the 2015 --

12 MR EADIE: My answer to Lord Clarke's point, I am grateful  
13 to my Lord, can I accept that the Lord Reed political  
14 and our remove the clamp are pretty much different ends  
15 to the same thing, although they do involve, in my  
16 remove the clamp thing, the interposition of the court  
17 in what might be thought to be in a constitutionally  
18 difficult or inappropriate manner, so that is the  
19 distinction between those two legal punch lines.

20 To come to my Lord, Lord Clarke's point, true it is,  
21 and I will let my learned friends develop this if they  
22 want to, that in relation to the AV, alternative voting  
23 referendum, there was the legal consequence set out, but  
24 that was because there needed to be. It needed to be  
25 set out in that way, because they had to, as it were,

1           prescribe what would happen as the next step, and the  
2           law needed to be changed, and so they set it up in that  
3           way. Whereas here, we submit, nothing more is needed to  
4           give effect, by way of express statutory language or  
5           express statutory provision, to give effect to the  
6           outcome of the referendum, if the answer was to  
7           withdraw.

8   LORD MANCE: Is that a conclusion which you arrive at as  
9           a matter of construction of the 2015 Act, or are you  
10          suggesting a principle along the lines that my Lord,  
11          Lord Neuberger has just suggested, namely that the Act  
12          is effectively an unusual form of legislation, if  
13          I interpose an adjective, which it is not open to the  
14          courts to construe.

15   MR EADIE: Am I allowed to say either or both?

16   LORD MANCE: I would just like to know what your authority  
17          is for the proposition that certain pieces of  
18          legislation are not susceptible to construction in this  
19          court or indeed in any court.

20   MR EADIE: My Lord, you can approach the thing as a matter  
21          of interpretation, but you are not in truth interpreting  
22          a provision of legislation; you are trying to discover  
23          its true constitutional nature and effect, is I think  
24          the way I would answer.

25   LORD MANCE: That is a matter of interpretation, albeit in

1 a constitutional context. Is there any legislation  
2 which Parliament passes which is not susceptible to  
3 interpretation in a court? It would be a rather unusual  
4 piece of legislation, wouldn't it?

5 MR EADIE: Well, you are, of course, able to interpret the  
6 provisions of the legislation. This is simply  
7 a self-restraining or a self-denying consequence of  
8 a characterisation of the act of the kind indicated.

9 LORD MANCE: But we would only arrive at that self-denying  
10 approach if we concluded that that was Parliament's  
11 intention. That is a matter of interpretation which is  
12 the court's function, isn't it?

13 MR EADIE: I am not seeking to say this is non-justiciable,  
14 I am not running a non-justiciability argument, but  
15 there is, we respectfully submit -- the political route,  
16 the political outcome as it were, we respectfully  
17 submit, is not shut down by a principle that says the  
18 courts must be able to interpret legislation, true it  
19 is. We accept that.

20 THE PRESIDENT: Your point is more that when you are  
21 interpreting legislation, you have to look at the nature  
22 of the legislation and take into account when -- which  
23 has to be taken into account when deciding what its  
24 effect is, not merely what it says, but what its effect  
25 is.

1 MR EADIE: It sits against -- all legislation sits within  
2 the framework of our constitution, and the framework of  
3 our constitution brings with it doctrines of separation  
4 of powers and proper functions of courts and proper  
5 functions of legislature and proper functions of  
6 Government.

7 LORD MANCE: You are going back to the basic consequence  
8 issue you were seeking to draw; it was that the 2015 Act  
9 removes any limitation on the prerogative, if there was  
10 any which was imposed by the 1972 Act. I would have  
11 thought, that although that is an important  
12 constitutional point, it is nonetheless a point which it  
13 is for courts to consider and adjudicate upon.

14 MR EADIE: Certainly at that stage it would be. But at that  
15 stage -- that is why I said either or both, because the  
16 political answer says ultimately, as its punch line:  
17 this is for Parliament to decide and not for courts to  
18 trespass on as part of our constitutional arrangements;  
19 this one ascribes a legal effect and is therefore of  
20 course for the courts to determine.

21 That is the third submission, which has gone on for  
22 a very long time and contains lots of little submissions  
23 within it. Apologies for the numbering.

24 The fourth submission is a shorter one, you will be  
25 delighted to hear, which is that the reasoning and

1 conclusion of the divisional court about the statutory  
2 scheme has the most serious implications for the usual  
3 and long-established exercise by Government of the  
4 foreign affairs prerogatives. We have dealt with that  
5 in our case particularly at paragraph 61, but you will  
6 understand immediately why I say that, because if there  
7 is some principle that says whenever you exercise the  
8 foreign affairs prerogative, if the consequence is or  
9 perhaps may be to have an impact on or even to alter  
10 domestic legal rights, you cannot do it, then that is  
11 a consequence which is extremely troubling for obvious  
12 reasons.

13 It would be to introduce a much more stringent  
14 scheme of control, for example, by reference to a new  
15 and newly discovered principle than the scheme that  
16 Parliament has seen fit to enact, even in CRAG, with its  
17 controls on ratification and the things that need to be  
18 done in relation to that. Because the consequence of  
19 the divisional court's reasoning on the back of this, if  
20 it has an impact on domestic law point, is that you need  
21 primary legislation.

22 LORD MANCE: That treats the European Communities Act as  
23 typical of other types of statute, doesn't it? Your  
24 example of the territorial waters and the radio  
25 licensing is simply an example of a piece of legislation

1           which created an ambulatory -- had an ambulatory scope  
2           by definition. The double taxation treaties also appear  
3           to be on one view in precisely the same category; they  
4           are simply treaties which by definition only implement  
5           international agreements to the extent that such  
6           international agreements are there, so that they are  
7           variable.

8           The argument against you on the European Communities  
9           Act is that it is a very special measure, which not  
10          merely is silent on the question of withdrawal but by  
11          its silence actually excludes withdrawal. It assumes,  
12          it proceeds on the basis that a new legal order is now  
13          part of the United Kingdom legal order.

14       MR EADIE: My Lord, it does, and we have addressed that head  
15          on and in terms in all the submissions that I have been  
16          making, but the reason for the -- well, the significance  
17          that we attach, and I will come to this directly, that  
18          we attach to the double taxation treaties -- the Post  
19          Office v Estuary Radio is slightly different, but double  
20          taxation treaties and the EFTA note -- is to indicate  
21          that this model, this way of doing things with its  
22          potential effect upon rights immediate and direct, as  
23          a result of international action, is not some  
24          constitutional anathema, but is actually a perfectly  
25          acceptable and accepted part of our constitutional



1 arrangements.

2 Can I come directly to the fifth of my topics, then,  
3 with that lead-in, which is: is there a background  
4 constitutional principle of the kind that the divisional  
5 court identified? Of course that lies at the heart of  
6 the case against me; it lay at the heart of the  
7 divisional court's reasoning because as we saw, as you  
8 have seen, they do not in truth, despite that  
9 description, treat this as a background principle.

10 It was in effect dispositive of the case on their  
11 reading of it, and it was dispositive because it had the  
12 effect of reversing De Keyser, of turning legislative  
13 silence against me, if you will. The question was: no  
14 longer has Parliament expressed or by necessary  
15 implication taken away a pre-existing prerogative. The  
16 question was now: has it expressly allowed you to create  
17 a state of affairs on the international plane that has  
18 an impact on current domestic legal rights.

19 Can I turn directly in that sphere, and it is the  
20 first of the points I wanted to make, back to the  
21 question Lord Sumption asked me yesterday which is: is  
22 there is a prior question to be asked, do we need  
23 therefore to get into any of the legislative scheme, any  
24 of that; because the prior question is can you ever have  
25 a prerogative; did the prerogative ever exist in a way

1           that allowed you to impact on domestic legal rights. If  
2           the answer to that question is no, then all of the  
3           statutory scheme and all of that analysis rather falls  
4           away.

5   LORD SUMPTION: Not just domestic legal rights but domestic  
6           law.

7   MR EADIE: Domestic law, again, my Lord, I am grateful, but  
8           it is the same effective point that I am going to try  
9           and address if I may.

10           That is the thrust of the question that was put, and  
11           our first submission is that of course one has to  
12           consider the nature of the prerogative with which you  
13           are dealing. But the prerogative with which we are  
14           dealing is and always has been recognised as a general  
15           power with specific elements. The general power is the  
16           power in the Government to conduct foreign affairs. The  
17           specific elements are all the things that are necessary  
18           to do that.

19           So the Government can enter into, it can ratify, it  
20           can withdraw from treaties, it can take whatever steps  
21           it wants to take on the international plane to vote in  
22           international institutions, to participate in the  
23           process of making international law, or law on the  
24           international plane, eg in the EU. All of those are  
25           specific aspects of the general prerogative, frequently

1 recognised from Blackstone onwards, as being  
2 a prerogative power available to the Government.

3 THE PRESIDENT: Yes.

4 MR EADIE: It has, as we know, been subject to specific  
5 limitations, I have taken you to them, in CRAG and in  
6 the EU legislation, but it is in nature a general power.  
7 That is the first point, part of the answer.

8 The second part is that when specific limitations of  
9 that kind are imposed, they are imposed in the  
10 legislative scheme that you have seen, both general and  
11 specific, on a particular step on the  
12 international plane. For example, ratification, in  
13 CRAG, which is all it seeks to do. They are not imposed  
14 on some ratifications but not others, depending upon the  
15 consequent impact on domestic law. That simply is not  
16 how it works.

17 Thirdly, the Lord Oliver quote from the Tin Council  
18 case, the JH Rayner case, is not authority, we submit,  
19 against there being a general power. His point was, and  
20 was only, that the making of a treaty is not capable  
21 without parliamentary intervention, as he put it, of  
22 changing domestic law to incorporate that treaty. It is  
23 not and was not that the treaty-making prerogative is  
24 limited to circumstances where it can be exercised  
25 without affecting domestic law; that was not the way he

1 cast the principle at all. All of that, we respectfully  
2 submit, leads to the question truly being whether the  
3 general power has been limited or excluded or controlled  
4 by Parliament.

5 That must be, we respectfully submit, the right  
6 question to ask and that is the right question, the  
7 right question in principle, I mean, because that is the  
8 way the world works: broad principle of prerogative,  
9 foreign affairs, specific elements, Parliament taking,  
10 as it were, bites out of it. That is the right answer  
11 therefore in principle. You look to the legislation to  
12 see whether control has been imposed. But we also know  
13 that is the right question, at least, to ask, because of  
14 the De Keyser line of authorities.

15 In each, the question for the court could have been  
16 framed, and the answer that the court gave could have  
17 been framed as being: well, the prerogative could never  
18 have existed to deprive the individual of his rights,  
19 and we know that in De Keyser itself; one can take other  
20 examples, Laker, FBU, particularly Laker, FBU is the  
21 criminal compensation scheme so it may be rather  
22 different in this respect but Laker, De Keyser,  
23 Burmah Oil, they all involved interferences with  
24 domestic legal rights.

25 The answer given by their Lordships was not the

1 one-line answer that says: frightfully sorry, you cannot  
2 have this, because the prerogative power to affect legal  
3 rights in this way never existed. What did they do?  
4 They look to see whether the interposition of the  
5 statutory scheme -- they look first of all in  
6 *Burmah Oil*, the common law exercise, to see whether the  
7 nature of the prerogative was not you cannot take  
8 away -- you could, that was the premise on which they  
9 proceeded. That was the nature of the prerogative.

10 The question for them was whether in truly defining  
11 that prerogative as a matter of common law, that right  
12 to take away had to be accompanied by a concomitant  
13 right to compensate. That was the nature of the common  
14 law analysis, and you get to *De Keyser*, and the question  
15 is not has the right ever existed to affect domestic  
16 law; of course the right existed to take it away.

17 The question was in *De Keyser*, on the assumptions on  
18 which their Lordships were operating: has statute  
19 intervened to require the right of compensation; answer,  
20 yes, it has, because the 1842 Act and the 1914 Act did  
21 so. But they were analysing that in precisely the way  
22 that I have indicated.

23 They were not saying: you start with the prior  
24 question and if it affects rights, you stop. They were  
25 acknowledging that the exercise of the prerogative could

1 indeed affect rights; and the question then was the  
2 secondary one, if you will, that -- the important one,  
3 which is whether or not Parliament had imposed  
4 constraints upon the exercise of that general power.

5 Here, as we know, I am not going to keep repeating  
6 the points, Parliament has set up rights, in our context  
7 of its particular kind, with its two necessary  
8 ingredients, the two-legged stool, one goes, it all  
9 falls down. The legislative premise on which that  
10 legislation operates is that the prerogative continues,  
11 and Parliament well appreciates the continuation of the  
12 suite of powers that exists within the generally  
13 expressed power to exercise foreign affairs and conduct  
14 foreign affairs. That is precisely why it legislated to  
15 control the individual ingredients as it did.

16 It didn't interpose control, and nor should the  
17 court interpose, as it were, some overarching form of  
18 control on this by saying: if ever any of these  
19 ingredients act so as to have an impact on domestic  
20 legal rights, that is the end of it. They were well  
21 aware that because of the structure that they created,  
22 and there had been parliamentary intervention, the way  
23 in which that structure worked was that if we exercised  
24 certain powers, it would have direct impacts.

25 That is my best attempt, as it were, at an answer to

1 my Lord, Lord Sumption's question of yesterday. That is  
2 the third point.

3 Second point is it is clear that the exercise of  
4 prerogative in a variety of spheres can have effect on  
5 domestic law in a variety of different ways. Again,  
6 I am not going to take you to them, given the time, but  
7 I have made already the points about De Keyser and  
8 Burmah Oil. There, the taking of property was lawful,  
9 through the exercise of prerogative power directly  
10 interfering with those rights to property. The only  
11 question was, could that impact on domestic rights which  
12 occurred through the prerogative, no statutory basis;  
13 was that then subject to statutory conditions?

14 So those are examples. Post Office v Estuary Radio,  
15 I have mentioned it on lots of different occasions,  
16 I described it yesterday, can I just give you the  
17 reference to that. That involved altering the extent of  
18 territorial waters, and the result of that was to alter  
19 directly rights and obligations under domestic law, and  
20 indeed to create a broader category of criminal offence,  
21 if you will, because the criminal offence applied more  
22 broadly to a broader set of waters.

23 LORD SUMPTION: None of these cases are cases where the  
24 exercise of the prerogative actually alters the contents  
25 of domestic law. The De Keyser and Burmah Oil cases are

1 cases where the law had always been that you can take  
2 property for certain purposes; so there was no change of  
3 that, it was simply an exercise of an existing legal  
4 right. The Post Office v Estuary Radio case was  
5 a different kind of case in which the prerogative had  
6 simply been exercised so as to create a fact, and the  
7 fact was that the territorial waters now extended to  
8 a place where the broadcasts were being transmitted  
9 from, therefore needed a licence.

10 So neither of them is actually a case, a kind of  
11 case, which raises the problem that we have, where the  
12 effect of withdrawal from the treaties will be actually  
13 to alter the current constitutional rules of the  
14 United Kingdom as to what the sources of our law are by  
15 removing one of those sources.

16 MR EADIE: My Lord, I accept that they are at least arguably  
17 different in kind to the kind of thing that is  
18 contemplated by the ECA and our particular legislation  
19 that we are considering, and that needs to be viewed on  
20 its own terms, so I am going to come to that as my third  
21 point.

22 The point I am making here is a slightly lesser one  
23 which I fully accept broadens out the point, so it  
24 becomes a question of whether or not the law can be  
25 altered or affected directly by actions of the



1 prerogative; and true it may be that sometimes that  
2 effect is created by altering a legal fact, and  
3 sometimes that legal effect is created, because the  
4 right in question under domestic law is inherently  
5 limited anyway or is contingent upon the exercise of the  
6 prerogative, eg the right to property being contingent  
7 upon the ability of Government to take and blow up your  
8 oil wells if the Japanese are advancing.

9         So I fully accept that they are different and we  
10 have another example, just to mention, which is the  
11 Vienna Convention on Diplomatic Relations. I know my  
12 Lord's point would be similar if not the same, and you  
13 know the structure of that, and we set it out in our  
14 case at paragraph 40(b), but the structure of that was  
15 to create, as it were, on the international plane  
16 an ability or a power within Government, because it  
17 could only be Government that exercised it, a power  
18 conferred by the convention itself on diplomatic  
19 relations in that case to say who was allowed to be or  
20 who was to be treated as being the head of mission, and  
21 who, if anyone, should be deemed to be persona non grata  
22 thereafter.

23         Those were rights, as it were, on the  
24 international plane that Government had. They were not  
25 brought into domestic law. The structure of domestic

1 law was rather to create a series of rights and  
2 immunities for those who benefited from the  
3 characterisation that those international steps would  
4 give them.

5 LORD WILSON: So it was a joint effort.

6 MR EADIE: It was and we are back to that and I am not going  
7 to repeat the submissions in relation to that.

8 But it is another example, it is a joint effort, but  
9 it is also another example of a step on the  
10 international plane taken in the exercise of the  
11 prerogative, removing a right that as of yesterday and  
12 before the Government said that you were *persona non*  
13 *grata*, you enjoyed as a matter of English law.

14 Now, of course that is not a direct analogy because  
15 it involves all sorts of specialisms, no doubt, to do  
16 with diplomatic relations --

17 LORD WILSON: Yesterday you referred to Lord Millett's  
18 article, and some of us have read it overnight. He in  
19 particular reminds us of the case of Joyce,  
20 Lord Haw-Haw, who was found guilty of treason, and  
21 Lord Millett says that is only because in the exercise  
22 of the prerogative in 1939 this country waged war on  
23 Germany.

24 MR EADIE: True.

25 LORD WILSON: In fact he was prosecuted under the Treason

1 Act 1352, so, Mr Eadie, was it not his guilt, his  
2 conviction, a joint effort?

3 MR EADIE: My Lord, it was a joint effort in that sense, and  
4 I think my Lord, Lord Sumption would say in answer to  
5 Lord Millett, were he here, and was giving the  
6 Lord Haw-Haw example: that is just simply creating, as  
7 it were, a state of affairs.

8 LORD SUMPTION: It is not a legal fact.

9 MR EADIE: An international fact because you have declared  
10 war. I accept that there are limitations on lots of  
11 these analogies, and we need perhaps to come directly to  
12 our legislation, but what they do illustrate is that you  
13 need care, care, care before jumping too readily on a  
14 big, broad (Inaudible) however superficially attractive  
15 it may seem, that says: you cannot alter the law, you  
16 cannot affect the law.

17 Those statements are all made in their own  
18 particular context, and if anything, what this  
19 particular debate illustrates is that the context needs  
20 to be taken into account in all of these arguments.

21 LORD MANCE: The position is, and I don't suppose that  
22 anyone in court doubts this, you can legislate on the  
23 basis that domestic rights will depend upon what the  
24 international situation is from time to time. Whether  
25 we are at war or whether the territorial waters extend

1 three miles, 12 miles or whatever, that can all be  
2 altered if you legislate on that basis.

3 I think the ultimate question here is whether the  
4 legislation was enacted on that basis. I was looking  
5 overnight at the motions again. If we are looking at  
6 the broad constitutional position, one must bear in mind  
7 that the actual decision to join the EU was initially  
8 one which the Government took, but it put it before  
9 Parliament on a motion where the issue which was, I have  
10 just opened them, again, we have the debates here -- the  
11 issue was whether or not Parliament approved of joining  
12 the EU, or the EC as it was, or the EEC, so that -- and  
13 the speeches demonstrate that there were pros and cons,  
14 and the consequences of doing so were fully thought  
15 through. So in a sense one looks at the ECA, perhaps  
16 the 1972 Act against that background as well.

17 MR EADIE: My Lord, I am entirely content for you to look at  
18 it as against that background, recognising, as I am sure  
19 my Lord does, that those motions, as it were, were  
20 political acts if you will. They were -- they did not  
21 constitute legislative permission, they were not akin to  
22 the Bahamas, Barbados, all of that legislation we read  
23 yesterday, and if you want to look for the analogue,  
24 a joint effort, the mirror, how have we done it, the  
25 analogue is 2015.

1           I know my Lord puts to me, well, is that question  
2           begging; we respectfully submit, it is in one sense but  
3           it truly isn't in another. It is just as interesting,  
4           just as important, constitutionally, it might be thought  
5           more so, and it may be that is what gives particular  
6           significance to the basis on which Parliament acted; if  
7           you are going to look, as it were, as part of the  
8           context of the ECA to the non-binding legislative  
9           motions, how can it possibly be said that you should not  
10          look in addressing the issues that you have today, both  
11          at the 2015 Act, and indeed the very statements that  
12          were made, the debates, as you rightly put it, in  
13          relation to the motion's pros and cons, why should you  
14          not look at those and the statements to Parliament.

15       LORD MANCE: I suppose the difference might be that the --  
16          sorry, that the 1971 motions were, or are, background to  
17          the 1972 Act, whereas the Referendum Act, as has been  
18          pointed out, rather leaves us in the air on one view as  
19          to what its significance is, whether in law it should go  
20          back to Parliament or whether it is simply left to the  
21          executive.

22       MR EADIE: To some extent it does, because it is silent --  
23          it doesn't do the alternative voting thing, but there  
24          are perfectly good and sensible reasons for that, and if  
25          one is comparing, as it were, constitutional force, that

1 point, it might be thought, is more than counterbalanced  
2 by the fact that this was after real controversy and  
3 a general election and a variety of different statements  
4 about its nature and effect, an act of primary  
5 legislative authority by Parliament.

6 THE PRESIDENT: I suppose you can say, if we were to be  
7 considering the case on the basis that the 1972 Act did  
8 contain a clamp, as you have put it, and then ask  
9 ourselves what is the effect of the 2015 Act, if we are  
10 faced with a choice between saying either that it, as it  
11 were, takes away the clamp as you suggest, or, as the  
12 alternative is, goes back to Parliament to decide what  
13 the effect of the 2015 Act is, then really we are saying  
14 the effect of the referendum is nothing, because it  
15 leaves us in precisely the same position that if it had  
16 not taken place, as far as we are concerned, because it  
17 is going back to Parliament.

18 MR EADIE: It is going back to Parliament. Those are the  
19 alternative analyses.

20 LORD CLARKE: So it would have the political effect -- the  
21 referendum, even on that basis, would have the political  
22 effect which we have discussed.

23 MR EADIE: It would and --

24 LORD CLARKE: That is a very, very significant factor in  
25 political terms; the question is what legal effects.

1 MR EADIE: Quite, and that is the nature of the debate  
2 before you, but my learned friend's case, let's make no  
3 mistake about it, involves putting the self-same  
4 question back to Parliament. It accepts that a one-line  
5 Act would do it. The self-same question goes back: is  
6 that truly to be taken as a sensible intention of  
7 Parliament? It would be simply to advise them so they  
8 could consider the same question, but they could have  
9 done that anyway.

10 LORD SUMPTION: Go back on a completely different basis  
11 politically, which was no doubt the intention.

12 MR EADIE: Then we just get into the debate about politics  
13 and law again.

14 LORD SUMPTION: Indeed.

15 LORD REED: We are not being asked simply to send it back to  
16 Parliament. I mean, Parliament approving a motion  
17 wouldn't do. What we are being asked to do is to compel  
18 the Government to introduce a bill in Parliament, which  
19 Parliament hasn't itself asked for.

20 MR EADIE: That is true. That was part of our concern about  
21 remedy, and it is a concern that has been considered in  
22 a number of cases, Wheeler and those other cases that  
23 considered that sort of issue. But it would require on  
24 my learned friend's case not just parliamentary  
25 involvement, as my Lord, Lord Reed rightly points out,

1 primary legislation; the reason it requires primary  
2 legislation is because you are being asked to declare  
3 positively unlawful the exercise of the prerogative  
4 power to give Article 50 notice as the first step in  
5 that process.

6 The more general effects for good or ill, relevant  
7 or more or less relevant, were my second point. The  
8 third point is the -- is our particular context and our  
9 particular context does involve the prerogatives  
10 exercise. We are still on the question of whether there  
11 is some principle that you cannot have an impact into  
12 domestic law or you cannot alter the law of the land by  
13 prerogative power.

14 We know that it is absolutely integral to the scheme  
15 of the Act that the Government will be using its  
16 prerogative precisely to do that. It will be  
17 participating on the international plane in the process  
18 of EU law-making. The rights to which section 2 gives  
19 effect, from time to time, are those that are created,  
20 its word, on the international plane by the Government  
21 exercising that power. They are not rights that are  
22 created by Parliament, as it were, legislating for those  
23 rights. So it is integral to the scheme of legislation,  
24 of this legislation, that the Government can, through  
25 those processes, operate to change the law.



1 LORD HUGHES: Can you set out the mechanics, Mr Eadie, for  
2 us if you are right. The various rights and laws, let's  
3 call them laws, which come into English law via the 1972  
4 Act, what will be effect of those, whatever they may be,  
5 competition, safety standards, compensation for air  
6 delay, goodness knows what else, all the things that are  
7 directly applicable; what is the effect of those if you  
8 are right on those if you are right, when the notice in  
9 due course expires? Do they simply lapse?

10 MR EADIE: Then they lapse.

11 LORD HUGHES: They simply lapse?

12 MR EADIE: They do.

13 THE PRESIDENT: That is the directly applicable ones.

14 MR EADIE: Yes, that is the point being put to me --

15 LORD HUGHES: The directly applicable ones. There is a  
16 separate question, obviously, about those that have been  
17 transposed by the Privy Council under section 2 -- what  
18 happens to those?

19 MR EADIE: The directly effective ones, they lapse.

20 LORD HUGHES: They simply lapse?

21 MR EADIE: Yes.

22 LORD HUGHES: Whereupon you say, as I understand it, it is  
23 obvious that a good deal of legislative activity of one  
24 kind or another is going to be necessary.

25 MR EADIE: Yes.

1 LORD HUGHES: Right.

2 MR EADIE: We say -- I will come back to it, but the same  
3 answer applies because it is dependent on the  
4 fundamental continuance of the relationship between the  
5 United Kingdom and the other members of the EU and our  
6 membership of that organisation. The same essential  
7 answer applies in relation to those rights that are  
8 conferred, as it were, separately under domestic law.  
9 The right to vote in European parliamentary elections is  
10 the paradigm example, which would lapse for the same  
11 reason. The legislation would technically remain upon  
12 the books, but we would no longer be members of the  
13 club, as it were, and therefore not in a position to  
14 elect the members of the committee.

15 LADY HALE: Forgive me.

16 LORD HUGHES: Would they lapse, you say, because they do not  
17 in truth derive their force from the 1972 Act, but from  
18 the international order which is given legal effect by  
19 it?

20 MR EADIE: From the twin effects of both of those  
21 together --

22 LORD HUGHES: The joint effort. Thank you.

23 MR EADIE: Exactly.

24 LORD SUMPTION: Do they lapse in relation to things that  
25 have already happened? Suppose, for instance, you take

1 EU competition law and ignore the fact that since 2002  
2 we have replicated it in English statutes. There are  
3 various torts which arose directly from EU competition  
4 law. In respect of the period before the lapse, would  
5 they continue to be treated as torts?

6 MR EADIE: I think they would, because that would be  
7 a process of the common law having taken them in. There  
8 are complexities, make no mistake but --

9 LORD SUMPTION: The question is really very difficult, isn't  
10 it.

11 MR EADIE: Yes, there are complexities around precisely how  
12 it is all going to work. You have the lapsing point  
13 from the direct effect; you have a situation from when  
14 you leave the club, the right which is created  
15 elsewhere, the vote in parliamentary elections becomes  
16 pointless. You have another swathe of legislation where  
17 the mechanism for transposition is for the  
18 United Kingdom Government on the international plane,  
19 anticipating in those processes to agree, for example,  
20 directives, but those directives then impose on the  
21 international plane on the UK Government an obligation  
22 of result, namely to pass domestic law, sometimes using  
23 section 2(2) of the ECA itself, to replicate or to  
24 create the result.

25 That would be therefore domestic legislation,

1 secondary legislation, achieving the result that the  
2 directive sets. That legislation would, if everything  
3 else was left, stay in place, and there may be also  
4 difficult questions that my Lord, Lord Sumption raised,  
5 what happens if, inspired, as it were, by European law,  
6 the common law has moved to a particular place.

7 But I think my answer, until someone shouts at me,  
8 would be that the common law can develop by reference to  
9 whatever principles and inspiration it wishes. Once it  
10 has acknowledged something, it will be for it to  
11 continue to recognise it or to take it away because the  
12 inspiration had gone and that fundamentally undermines  
13 it in the view of the court. That would be a matter for  
14 you. It is no doubt those complexities that led to  
15 the --

16 LORD CLARKE: Years of future excitement.

17 MR EADIE: It leads to the eternal optimism that might be  
18 thought to underpin the statement on the Great Repeal  
19 Bill, and the pause that then occurs when working out  
20 how that is going to be delivered, because there may be  
21 real complexities involved in that exercise, which I am  
22 sure will involve years of entertainment to come.

23 LADY HALE: In a sense you have moved on to it, because  
24 there are vast swathes of domestic law which have been  
25 enacted in domestic law as a result of EU obligations,

1 vast swathes of it. Much of that will not simply be  
2 deprived of effect. Unlike the EU elections of course,  
3 that will be deprived of effect, because we are no  
4 longer members of the club, so we are not entitled to  
5 vote. But that is not true of a great deal of the  
6 health and safety, the employment legislation, the  
7 Equality Act, much of that which is basically inspired  
8 by EU law, although usually goes further than required  
9 by EU law.

10 Now, that law will remain in place, presumably, but  
11 it will be affected by, for example, the fact that those  
12 who are beneficiaries of those laws will not be able to  
13 ask this court or indeed any other court to refer  
14 a question to the Luxembourg court in order to ensure  
15 that our law continues to keep pace with EU law, so it  
16 will be modified, won't it.

17 MR EADIE: My Lady, I accept that, you are right and my  
18 answer to the CJEU point is the same answer that I give  
19 in relation to the election to the European Parliament  
20 point. It is the same point, but the constitutional  
21 significance of the first part of my Lady's question is  
22 to be thought perhaps about, which is that it is  
23 undoubtedly true, and my Lady said swathes and swathes,  
24 and we respectfully agree. Most of European law  
25 nowadays is made through directives and regulations

1 directly transposing that. They will remain.

2 The question therefore will be, back to joint effort  
3 perhaps but this time in relation to implementation: how  
4 is the Government going to shape the new domestic law?  
5 The answer to that question, almost inevitably it might  
6 be thought, is policy area by policy area. It might  
7 well be thought to be a potentially deeply surprising  
8 proposition that in some way, shape or form, although we  
9 are focusing very hard for obvious reasons on the  
10 directly effective law, that come the brave new world,  
11 that is truly going to be a point of any significance.

12 They will look at, I don't know, farming and they  
13 will say: here we have, in relation to farming,  
14 regulations that directly affected section 2(1), we have  
15 a swathe of directives and a bunch of other framework  
16 agreements that sit on top of it. They are not going to  
17 suddenly say: we leave in place the regulations because  
18 they happen to be in place. The directive lapsed and so  
19 all that goes out of the window. They are going to say:  
20 what are we going to do now about farming?

21 What that tends to indicate in broader  
22 constitutional terms is the breadth and extent in the  
23 real world of inevitable future parliamentary  
24 involvement in the process.

25 LORD HODGE: I wonder if I can take you back to the point

1           that you were making a moment ago where you said it was  
2           integral to the 1972 Act that the Government would use  
3           prerogative powers to alter the law. That is correct in  
4           the sense that the Government's involvement in the  
5           law-making institutions of the EU will give rise to the  
6           new source of law that Parliament has recognised.

7   MR EADIE:   Yes.

8   LORD HODGE:  But Parliament, by recognising a new source of  
9           law, has authorised the use of the prerogative in this  
10          area as one member state among others, and it is rather  
11          like the double taxation treaties there. In the 2010  
12          Act, Parliament authorised the alteration of the law by  
13          orders in council.

14  MR EADIE:  My Lord, it does.

15  LORD HODGE:  Which is very different, I think, from the  
16          alteration of the law by the withdrawal from the  
17          treaties altogether.

18  MR EADIE:  My respectful submission is it is not a complete  
19          answer, and I don't advance it as such, but it is  
20          a thoroughly good indication. If the proposition is  
21          that it is absolutely constitutionally anathema for the  
22          Government to act on the international plane, forget  
23          about the institutions, which is a separate point and us  
24          participating in them, but if that is the proposition,  
25          we don't agree because it is integral that that is what

1           they do. That is the structure of the Act.

2           As I say, that is not a complete answer because  
3           I have to go the stage further, which I imagine is one  
4           my Lord, Lord Wilson was interested in, scale and  
5           withdrawal, is that a different beast to the beast that  
6           is our continued exercise of that sort of power. It is  
7           the same point that I think my Lord, Lord Hodge is  
8           putting. We respectfully submit it is different, of  
9           course, and we recognise that, but it is important in  
10          trying to work out to what extent Parliament intended in  
11          1972 to shut its face against us withdrawing.

12          It is relevant as a step along that road to  
13          acknowledge that Parliament had already accepted that as  
14          part of our continuing membership, we could on the  
15          international plane take steps which would have the  
16          direct effect of removing rights.

17   LORD HODGE: But only through the operation of the EU  
18          institutions.

19   MR EADIE: Certainly but still, nevertheless, the only way  
20          we can act through those institutions is by exercising  
21          the prerogative powers; that is really the point.

22          I think my Lord, Lord Mance put to me yesterday, it is  
23          through the institutions, we are not acting alone and  
24          that is true; but you cannot, as it were, take the first  
25          step in withdrawal, by definition that is a matter for



1           you to act alone in. So I am not sure there is that  
2           much in the EU institutions point, although of course it  
3           is accurate to say that.

4           To some extent it can also be said if Parliament has  
5           authorised the making of EU legislation, then it has  
6           also authorised, as we know, by the same logic,  
7           Article 50, because it specifically considered that and  
8           introduced that and dealt with that. My Lords, I had  
9           better move on if I am going to finish within the time,  
10          if I may.

11          Fourth proposition, the cases on which the  
12          divisional court relied do not, we respectfully submit,  
13          establish anything like the breadth of principle which  
14          they base their judgment upon. In particular, if I can  
15          just mention three, JH Rayner, the Tin Council case,  
16          again, I am not going to go back to it in the time, I am  
17          sure you have all read it; core authorities 3, tab 43,  
18          page 1778 to 1779 is really that little segment of Lord  
19          Oliver, and you need to read it all, that segment. It  
20          is about a page, a page and a half, and you don't just  
21          take the sentence that says: you cannot use the  
22          prerogative to alter the law of the land.

23          The basic point that was being made by Lord Oliver  
24          was to recognise the existence of prerogative powers to  
25          make and unmake treaties on the international plane;

1 that is really what we are talking about; but then to  
2 deal with a separate and distinct aspect of  
3 transposition. Treaties are not self-executing,  
4 absolutely self-evident, and we accept that proposition.

5 So it doesn't provide, as it were, a freestanding  
6 constitutional principle. Bear in mind, the reason I am  
7 going through all this is because what they did is treat  
8 the constitutional principle as in effect reversing  
9 De Keyser. The question is whether any statements by  
10 Lord Oliver can properly be taken as having that effect,  
11 and we respectfully submit not.

12 The Case of Proclamations and Zamora likewise; it is  
13 uncontroversial that the prerogative cannot be used  
14 simply to countermand laws passed by Parliament, but  
15 that is in truth pure De Keyser and Rees-Mogg, or,  
16 indeed, as a general proposition, common law rights.  
17 But one needs to exercise some caution, as we have  
18 already seen, in a variety of different and perhaps more  
19 or less subtle ways, and sometimes one can say it is  
20 altering a fact, and sometimes one can say it is doing  
21 something in a slightly special context, and context is  
22 all, of course.

23 But as a general proposition one needs to be  
24 careful, because it depends whether the executive can  
25 truly act to alter the law; it depends upon, as indeed

1 Lord Oliver's statement of principle indicated in terms,  
2 parliamentary intervention. The question we have been  
3 debating for the last day and a bit is what is the  
4 nature of the parliamentary intervention that we have  
5 had in our case.

6 We also do not accept that there is any principle  
7 corresponding to that identified by the divisional  
8 court, to the effect that the prerogative to make or  
9 withdraw from treaties cannot be exercised so as to have  
10 the effect of altering domestic law. There is not any  
11 authority for that proposition. None of the cases that  
12 they cite are authority for that proposition.

13 All of the authorities that are cited against us in  
14 support of the proposition that the prerogative may not  
15 be exercised in a manner which is inconsistent with  
16 domestic law, domestic law rights, concern a situation  
17 where the exercise of the prerogative conflicts with  
18 some separate or pre-existing law. None of them decide  
19 that the Government may not withdraw from a treaty where  
20 this will impact upon the domestic law, and we know that  
21 there are circumstances in which that can be done.

22 The fifth point is that this is not a wholly  
23 unprecedented or aberrant situation and we know that  
24 because it is, we submit, orthodox, both in the UK and  
25 in international law, that it is possible for the

1 prerogative to be exercised to withdraw from treaties,  
2 even if this might have a more or less direct impact on  
3 to domestic law.

4 Perhaps in that context, it may be worth just  
5 showing you briefly the case which my Lord, Lord  
6 Carnwath was interested in yesterday, which is the Turp  
7 case in the Canadian context, volume 26 if you would,  
8 tab 308.

9 LORD CARNWATH: MS?

10 MR EADIE: 8950, I am so sorry.

11 Again it has similarities, this case; it is not in  
12 any sense directly our situation but it does have some  
13 interesting points of similarity. In a nutshell, if  
14 I can just summarise the nature of the facts and then  
15 show you the relevant paragraphs very briefly, there was  
16 a protocol signed by Canada on 29 April 1998 and you see  
17 that from paragraph 4 -- this is all about the Kyoto  
18 protocol for creating cleaner air and the imposition  
19 of --

20 LORD CARNWATH: Climate change.

21 MR EADIE: Climate change, yes, emissions and reductions and  
22 initially as they noted in paragraph 3, the original  
23 convention, the UN Convention on Climate Change, had not  
24 set, as it were, hard edged reduction targets. You see  
25 that from paragraph 3, and the effect of the Kyoto

1 protocol was to introduce those sorts of targets.

2 That protocol is signed on 29 April 1998,  
3 paragraph 4. There was a non-binding resolution of the  
4 Canadian House of Commons. There is the first parallel  
5 in relation to our accession, a non-binding resolution  
6 of the Canadian House of Commons calling for  
7 ratification on 10 December 2002. See paragraph 5.  
8 Paragraph 4, I am so sorry, it is the bottom of  
9 paragraph 4, my note was wrong.

10 So non-binding resolution of the House of Commons  
11 and then there was legislation ie after that, so the  
12 sequence is there, protocol is signed, non-binding  
13 resolutions, and then there is an Act, as you see from  
14 paragraph 6.

15 LORD CARNWATH: The key thing there was that the Act, the  
16 statute passed by the opposition --

17 MR EADIE: To force their hand.

18 LORD CARNWATH: To keep the Government to its Kyoto  
19 commitments, and in spite of that, it was held that the  
20 prerogative is effective to withdraw.

21 MR EADIE: Exactly. Quite where that takes one --

22 LORD CARNWATH: One may debate whether that was  
23 a proposition which would have been supported if it had  
24 gone higher, but it is quite a good example of how the  
25 prerogative -- the question of abuse of power might have

1           come into it.

2   MR EADIE:   Quite.

3   LORD SUMPTION:  The prerogative in this case having been  
4           exercised would presumably -- I have not gone through  
5           all the subsequent facts, but presumably the Act giving  
6           effect to Kyoto would have been unaffected by the  
7           withdrawal from the treaty on the international plane.

8   LORD CARNWATH:  It is more subtle than that.  Yes, I suppose  
9           if the Act ... sorry, I was -- I didn't want you to  
10          spend too much of your short time.  It is a case which  
11          interests me partly because I am interested in the  
12          climate change aspects.

13  MR EADIE:  I will not take too long on it --

14  LORD CARNWATH:  It seemed to me one of the interesting  
15          examples of the prerogative being used in the  
16          circumstance where Parliament had actually said exactly  
17          the opposite argument, and yet it was held that the  
18          prerogative (Inaudible).

19  MR EADIE:  Yes, and it might be thought --

20  LORD CARNWATH:  Your case is a fortiori in the sense that  
21          you could say ...

22  MR EADIE:  That struck us as being the similarity, although  
23          of course one can pick away at it, as it were, on the  
24          basis that there are specialities in the Canadian  
25          constitution.  There were some issues that were declared

1 to be non-justiciable and so on. There were interesting  
2 parallels, both -- that is the central one, there it is,  
3 an act of Parliament which requires the protocol to be  
4 kept to, effectively, and then they withdraw from the  
5 protocol. Then subsequently there is an act.

6 But there is also a sequencing interest there, which  
7 is the Government acting on the international plane, in  
8 effect to commit Canada under the previous  
9 administration, then the legislation, then another act  
10 on the international plane, which was, as you say,  
11 directly contrary to the legislation itself and then  
12 a repealing act, ultimately, as one sees from  
13 paragraph 12 but my Lords, my Lady, there it is.

14 If you want it, it is in tab 26.

15 EFTA, we have dealt with, if you have the separate  
16 note in relation to that.

17 THE PRESIDENT: Yes.

18 MR EADIE: It might be worth, if I could invite you just to  
19 cast a quick eye down EFTA, then I can be pretty short  
20 on it, I think.

21 THE PRESIDENT: You would like us to read the whole note.

22 MR EADIE: Yes, it is only a couple of pages.

23 THE PRESIDENT: If you want to sit down while we do that,  
24 you are most welcome.

25 MR EADIE: I am grateful. (Pause)

1 THE PRESIDENT: Thank you very much.

2 MR EADIE: You see the parallels, you see the sequence in  
3 particular and the sequencing of international acts and  
4 legislation and it is an interesting comparison,  
5 an interesting analogue, we respectfully submit,  
6 precisely because it ends as it were -- it is directly  
7 in our context and it ends with the ECA.

8 LORD MANCE: Did the EFTA scheme involve any sort of  
9 directly effective rights such as is the subject of  
10 section 2 of the 1972 Act?

11 MR EADIE: Not in that way. The domestic implementation, as  
12 I understand it, is through the Free Trade Association  
13 Act of 1960 and the import duties.

14 LORD MANCE: Is there a slight curiosity here, in that when  
15 we signed up to the EEC, we recognised that there were  
16 two types of legislative process, one rather less  
17 imperative than the other; that is the process of EU or  
18 EC legislation by directives, which, as my Lady pointed  
19 out, has led to a large body of law in this country  
20 which you accept will remain effective after withdrawal.  
21 And yet the directly effective rights under the treaties  
22 and non-discrimination and all the regulations which are  
23 directly effective, are conditional, you say, on  
24 membership. So that one body of legislation under the  
25 treaty is not conditional, but another body is



1 conditional; is there an oddity there?

2 MR EADIE: True that it is, but, as it were, that is because  
3 of the way in which the directive side of things is  
4 transposed, but what will go when we go is the  
5 obligation to comply with the directives.

6 LORD SUMPTION: That will, I suppose, effect a legal  
7 alteration, even to the extent that rules have been  
8 transposed. The alteration will be that whereas before  
9 they were entrenched by the fact that they could not  
10 validly be amended or repealed without -- inconsistently  
11 with the treaties.

12 MR EADIE: Now they can be.

13 LORD SUMPTION: That will change, they now can be so they  
14 will be less secure rights.

15 MR EADIE: That is true, my Lord. We don't quibble with  
16 that. That is another consequence. I think the point  
17 my Lord, Lord Mance was putting to me is doesn't it all  
18 feel a bit adventitious, because you have one body of  
19 rights which are already domestically implemented in  
20 that way and will stay, as it were. But the key point  
21 is that when we go, the obligation to continue to  
22 comply, to continue to achieve as a result will also go.

23 LORD MANCE: Marleasing will no longer --

24 MR EADIE: It will not.

25 LORD MANCE: For good or ill.

1 MR EADIE: My Lords, I think given the time, what I would  
2 prefer to do if I may is leave double taxation as  
3 a point that says double taxation, not least because of  
4 the incredible complexity of it, and it would take me  
5 quite some time to walk you through it, and I would  
6 probably be asked all sorts of answers I didn't know the  
7 answer to.

8           So in part based on cowardice, can I leave double  
9 taxation to be taken from our case. We rely upon it as  
10 another example of a similar type to EFTA, indicating in  
11 effect that the sequencing can work in that way, that  
12 this is not some form of strange aberration or --

13 THE PRESIDENT: You are not saying it is identical in all  
14 respects; it is merely an example?

15 MR EADIE: I am not saying it is identical in all respects,  
16 it is an example, but it does at least serve to  
17 demonstrate that one can have that sort of set-up  
18 without throwing one's hands up in constitutional  
19 horror.

20           In summary, if I may and before coming to my final  
21 brief topic which will be parliamentary sovereignty, can  
22 I summarise ultimately where we are on the statutory  
23 scheme, and we do submit that it is at least of interest  
24 to note the stages in the tightrope walking that the  
25 other side's case involves.

1           Their arguments, we submit, involving -- ignoring  
2           legislation altogether, in other words ignoring the  
3           legislative scheme altogether, CRAG and EU, on the basis  
4           that they say in effect that the prerogative never  
5           existed to change the law, and so you don't need to  
6           bother with the legislative scheme.

7           It involves them saying: well, the next stage in the  
8           argument, even if that is wrong, is stop the clock at  
9           1972. It involves saying that in 1972, even if you do  
10          stop the clock there, you ignore the basic dualist  
11          structure on which that Act was fundamentally premised.  
12          It involves saying that you ignore all of the  
13          legislation that followed the 1972 Act, and all of the  
14          confirmation of the dualist structure which that  
15          subsequent legislation entailed, and all of the fact and  
16          nature of the controls that that legislation  
17          subsequently brought with it.

18          It then involves saying you also ignore the  
19          constitutional elephant in the room with its dualist  
20          premise, which is the 2015 Act.

21          Finally, or perhaps consequentially, it involves  
22          saying, ignore also De Keyser, and that line of  
23          authority and its careful and principled approach to the  
24          alteration of the delicate constitutional balance  
25          between the powers of the Government and control by

1 Parliament.

2 What we respectfully submit is that the divisional  
3 court did not properly take a long established  
4 constitutional principle and apply its inevitable logic;  
5 what they did instead was to take a number of different  
6 and generally expressed principles, and invented a new  
7 principle. They took those general principles and, if  
8 you will, pressed them into service as absolutes, and  
9 outside the context in which they were deployed, and in  
10 the cases for which those general statements of  
11 principle as general statements were sufficient unto the  
12 day.

13 We do submit that the principle that they identified  
14 as a background but in truth dispositive constitutional  
15 principle as they put it, is not sound and should not  
16 have dictated the answer to this case.

17 Finally, if I may, parliamentary sovereignty as the  
18 last topic; it is not a separate point, we submit. It  
19 is said that the Government giving Article 50 notice is  
20 an affront to parliamentary sovereignty, because  
21 Parliament has created rights, and only it can alter  
22 them. My submission is that our case fully respects and  
23 offers no affront to parliamentary sovereignty.

24 Four short points on that.

25 Parliament has indicated -- the first of them is

1           that Parliament has indicated those matters on which it  
2           is required to be involved further. It has specified  
3           when, it has specified in relation to what, and it has  
4           specified how it is to be involved, and the scheme is as  
5           described, and Government giving the notice under  
6           Article 50 is entirely, it might be thought, expressly,  
7           in accordance with that scheme and its specific  
8           consideration of Article 50.

9           Secondly, that consideration by Parliament has  
10          included most recently the 2015 Act. I have made my  
11          submissions on that, the various ways in which you can  
12          view it, the fundamental aspect of it and Lord Dyson's  
13          accurate description of it as being --

14       LORD MANCE: Not totally accurate, I think you submit,  
15          because in a later paragraph, he contemplates that after  
16          the referendum, it will go back to Parliament.

17       MR EADIE: Well, I will go back to that if you wish, but in  
18          my respectful submission, he does not contemplate that.  
19          To the extent that he says what he says, which the other  
20          side alight upon, that needs to be very carefully viewed  
21          in the context of the issue that he was actually dealing  
22          with in Shindler. He was not addressing how ultimately  
23          Article 50 should be given, how ultimately whether it  
24          should be parliamentary control or no parliamentary  
25          control.

1 LORD MANCE: I will leave it to you; if you have time we can  
2 go back to it.

3 MR EADIE: Perhaps I will see what they make of it and come  
4 back to it in reply if I need to. But we respectfully  
5 do not accept that, but in any event, you know the bit  
6 we do accept and assert.

7 LORD MANCE: We know that.

8 MR EADIE: Which is the description of it as being  
9 a constitutionally important thing, and we respectfully  
10 submit that it was hard to see how parliamentary  
11 sovereignty issues could avoid considering that Act.

12 Thirdly, and again, these are broader points, and  
13 I am not going to get back into territory involving  
14 inconsistent answers to questions asked by Lord Sumption  
15 again, but thirdly, just as a matter of note, with the  
16 legal submissions having already been made about their  
17 legal significance, Parliament is already deeply  
18 involved and unsurprisingly involved in the whole  
19 process of withdrawal. Of course now hereafter it can  
20 choose whatever level of involvement it wishes to have  
21 in those matters, but there have, as you know, already  
22 been debates concerning withdrawal. There was  
23 an opposition debate in October, there was an opposition  
24 debate set down for Wednesday, and it is perhaps of some  
25 interest that on neither occasion has either party, or

1 has any party, or has anyone in Parliament called for  
2 primary legislation to be enacted in advance of the  
3 giving of the notice.

4 Put another way and perhaps rather more  
5 contentiously, Parliament does not seem to want the  
6 obligation that the divisional court has thrust upon  
7 them.

8 But of course it could decide to have more, or to  
9 pass legislation on the very subject if it wishes to.  
10 The point is that its interests are protected and its  
11 sovereignty is protected by its own decisions and  
12 processes, and there is no force in the point that says  
13 the court needs to intervene to protect it.

14 Fourthly, it will inevitably also be involved in all  
15 the ways we have been discussing this morning, including  
16 in the detail of the legal transformation of withdrawal  
17 after notice is given. Article 50 merely starts the  
18 process. It effects in itself no change in the law once  
19 it is given. Negotiations will be needed. The outcome  
20 cannot be known. The aim will be to secure agreement  
21 but the negotiations will no doubt be long and arduous.

22 We do know however, already, that Parliament will  
23 inevitably be involved in that process of withdrawal.  
24 We have the Great Repeal Bill which you have now seen  
25 the announcement in relation to; we have the very likely

1 CRAG involvement if agreement is reached; and we have  
2 got the fact that they will inevitably have to address  
3 policy area by policy area, irrespective of the source  
4 of EU law, what the brave new world should look like.

5 So in the end, we respectfully submit, the  
6 propositions that we advance are or can be reduced into  
7 something which is at least almost as short and simple  
8 as the basic case which my learned friend Lord Pannick  
9 advances against us. Again, can I just give you five  
10 brief submissions in closing, my submissions summarising  
11 our case.

12 Firstly, the prerogative to make and unmake or  
13 withdraw from treaties exists today as a key part of our  
14 constitution, and as Parliament well knew in 1972 and  
15 well knows today.

16 Secondly, in recognition of that, Parliament has  
17 quite deliberately chosen to regulate some parts of  
18 those prerogative powers. It has done so expressly and  
19 in detail and it is unsurprising it has done so  
20 expressly and in detail, setting out the when and the  
21 how of those controls and it has not touched the  
22 prerogative power to give Article 50 notice again and  
23 evidently quite deliberately.

24 Thirdly, there is no basis, we submit, for the  
25 imposition of some form of hidden legislative



1 presumption on Parliament's intention. The application  
2 of the strands of general principle about altering the  
3 law of the land relied on by the divisional court in the  
4 present context is wrong, we submit. The rights in  
5 question are those created on the international plane  
6 and they are simply recognised by our law.

7 Indeed, it is of the very essence of the 1972 Act,  
8 if one focuses only on that, that EU rights created on  
9 that plane will be altered and removed directly through  
10 the exercise of prerogative powers, and that is a step,  
11 and a significant step along the road to finding the  
12 intention in relation to withdrawal.

13 So fourthly, we submit that the apparent simplicity  
14 of the position that the respondents put forward  
15 represents, we submit, a serious constitutional trap.  
16 The principle and its application in a context such as  
17 the present is at best highly controversial. That is  
18 not, we submit, a proper premise, a proper basis for  
19 a presumption as a tool for imputing intention to  
20 Parliament.

21 By applying that broad principle, outside its proper  
22 confines, we submit that it takes the court or would  
23 take the court over the line, a line which it has been  
24 assiduous to respect, between interpretation and  
25 judicial legislation. The courts would be imposing in

1 effect a new control of a most serious kind in a highly  
2 controversial and, by Parliament, carefully considered  
3 area.

4 Fifthly, the court would be doing so in  
5 circumstances in which the 2015 Act and the fact of the  
6 referendum undermine any possible suggestion at the very  
7 least that the use of that power was objectionable or  
8 anything other than entirely consistent with the will of  
9 Parliament.

10 My Lords, my Lady, those are my submissions. I am  
11 going to hand over to Lord Keen unless there are further  
12 questions I can seek to help with.

13 THE PRESIDENT: Thank you very much, Mr Eadie. Advocate  
14 General.

15 Submissions by THE ADVOCATE GENERAL FOR SCOTLAND  
16 THE ADVOCATE GENERAL FOR SCOTLAND: Good morning, my Lady,  
17 my Lords. In addressing the devolution issues, it is  
18 necessary to bear in mind that I am addressing those  
19 interveners in the Miller case who have raised points  
20 with regard to the devolved legislation, and also  
21 responding to the devolution issues that have been put  
22 forward in the Agnew and McCord cases for Northern  
23 Ireland.

24 With regard to the latter, I am of course  
25 anticipating submissions that are yet to be made, and it

1           may be that on Thursday, I will seek leave to make some  
2           short response to any additional points that are made in  
3           regard to these matters.

4           Your Lordships will have the additional written case  
5           that has been submitted with regard to devolution  
6           issues. In addition I am grateful to my learned friends  
7           Dr Tony McGleenan and Paul McLaughlin from the Northern  
8           Ireland Bar for producing a written case in respect of  
9           the devolution issues from Northern Ireland. I readily  
10          adopt that written case as part of my submission in  
11          respect of these matters.

12          In the time available, I am not going to attempt to  
13          address each of the issues that are raised in the  
14          separate interveners' cases, but what I will attempt to  
15          do is to address three themes that seem to percolate  
16          through all of these cases. Those are, first of all,  
17          sovereignty and the prerogative; secondly, the  
18          constitutional status of the devolution legislation, and  
19          thirdly, the Sewell convention, and attempts to elevate  
20          it into some form of constitutional requirement for the  
21          purposes of Article 50.

22          So taking the first of those, in his written case,  
23          at paragraph 30, the Lord Advocate quotes Lord Hope in  
24          Jackson v Attorney General on the question of  
25          sovereignty. If I can just give references, my Lords,

1 to save time rather than taking your Lordships to and  
2 quoting from the particular cases, it is MS 12583,  
3 paragraph 30 of his written case.

4 Building on this reference, he then goes on to say  
5 that Lord Cooper's dictum that the principle of  
6 unlimited sovereignty of Parliament is a distinctly  
7 English principle, which has no counterpart in Scottish  
8 constitutional law, quoting of course from Lord  
9 President Cooper in *MacCormick v Lord Advocate* in 1953.  
10 That passage from Lord Cooper's judgment is often cited  
11 as a possible exception to the question of parliamentary  
12 sovereignty, but it has never gained traction in any  
13 court of law as far as I am aware.

14 It is, of course, repeatedly referred to in  
15 a political context, and I quote from an essay published  
16 in 2013 by my learned friend Mr Aidan O'Neill QC, in the  
17 *Juridical Review* of that year, where he observed:

18 "Lord Cooper's words, though oft cited by Scottish  
19 legal nationalists, have never, in the 60 years or so  
20 since they were written, resulted in the courts  
21 accepting the validity of any challenge to any provision  
22 of an act of the Union or Parliament for its  
23 incompatibility with the requirements of the 1707 Union.  
24 It may be better, therefore, to regard these remarks as  
25 a form of poetic or romantic licence."

1           My learned friend Mr O'Neill then submits a written  
2           case on behalf of one intervener, the Independent  
3           Workers Union of Great Britain, which could be described  
4           as poetic or romantic licence, and I refer to part three  
5           of that case.

6   THE PRESIDENT:   Yes.

7   THE ADVOCATE GENERAL FOR SCOTLAND:  I refer to part three of  
8           that case, which goes on at some length to establish  
9           what he considers to be the sovereignty of the people  
10          under Scots law, rather than the sovereignty of  
11          Parliament.  Again I shall give the reference.  I do not  
12          intend to take your Lordships through it.  It is MS  
13          12658 in core volume 2.

14   THE PRESIDENT:  Thank you.

15   THE ADVOCATE GENERAL FOR SCOTLAND:  What is, however, useful  
16          is that in paragraph 3.4 of that written case, my  
17          learned friend cites an act of the Scottish Parliament  
18          of 1703, (Inaudible) peace and war, which expressly  
19          states that:

20                "Everything which relates to treaties of peace,  
21                alliance and commerce is left to the wisdom of the  
22                sovereign."

23                In other words, four years after the claim of right,  
24                the Scottish Parliament made it perfectly clear that the  
25                prerogative right in respect of foreign affairs remained

1 the prerogative right of the sovereign. I have in fact  
2 provided a copy of the relevant Act which is in very  
3 short terms, as acts of the Scottish Parliament often  
4 were at the time.

5 THE PRESIDENT: Thank you.

6 THE ADVOCATE GENERAL FOR SCOTLAND: It is not in the bundle,  
7 I apologise for that, but for completeness your  
8 Lordships do have a sheet with it.

9 THE PRESIDENT: It is an unusual pleasure to find a statute  
10 that runs to less than half a page.

11 THE ADVOCATE GENERAL FOR SCOTLAND: My Lord, it is, by the  
12 standards of the Scottish Parliament, quite wordy.

13 My Lords, moving from sovereignty, if I may briefly  
14 touch upon the question of the prerogative, the  
15 equivalent in the law of Scotland and England concerning  
16 the control and exercise of prerogative powers was  
17 specifically accepted by the House of Lords in the case  
18 of *Burmah Oil v Lord Advocate* which has already been  
19 referred to. The case can be found in volume A4,  
20 tab 34, or at MS 1313.

21 I briefly quote from Lord Reid at MS 1336, where he  
22 observed that it does not appear that as regards the  
23 issues on the appeal, there is any material difference  
24 between the law of Scotland and the law of England, and  
25 indeed the law of Burma. He went on at 1345 to observe

1           that:

2           "When the prerogative took shape, it was that part  
3           of sovereignty left in the hands of the King by the true  
4           sovereign, the King and Parliament."

5           These points were also underlined by Lord Hodson and  
6           Lord Upjohn, and so there appears to be clear authority,  
7           legal authority for the proposition that there is no  
8           material distinction between the exercise of the foreign  
9           affairs prerogative as between Scotland and England.

10          I would just finally observe in passing a point made  
11          by Lord Keith in the case of Lord Advocate v Dumbarton  
12          District Council in 1989, a case with which my Lord  
13          Hodge may be familiar as he appeared for the respondent,  
14          and the late Lord Rodger appeared for the Lord Advocate.

15          Context is everything, I appreciate, but the court  
16          had to address the matter of how the Crown prerogative  
17          survived in the context of statutory provision, both  
18          north and south of the border. The case is at A21,  
19          tab 265, and at MS 7384. Because this is a short  
20          quotation, I will not take your Lordships to the case,  
21          but Lord Keith, after a very lengthy consideration of  
22          historical and minute detail on the development of the  
23          law, said this:

24          "In my opinion the law has developed to a point  
25          where it is not helpful to refer to writings of greater

1 or less antiquity which discuss the prerogatives of the  
2 Crown."

3 It would appear in light of that that one can take  
4 the position as having been settled in the case of  
5 Burmah Oil. Some later writings are referred to by the  
6 Lord Advocate in his case. I would simply notice this,  
7 that those writings pertaining to the constitutional law  
8 of Scotland that we have make it perfectly clear that  
9 the foreign affairs prerogative was considered to be  
10 operative under Scots law, very much in the same way as  
11 it operates under the law of England.

12 I would simply mention these references for your  
13 Lordships, first of all Professor Mitchell on  
14 constitutional law, it is at volume A37, tab 504, that  
15 is the supplementary MS at 908; Professor Tomkins in  
16 volume A37 at tab 507; and also an interesting article  
17 published by WJ Wolffe, now the Lord Advocate, which is  
18 to be found in volume A31 at tab 420.

19 My Lords, can I move on from questions concerning  
20 the sovereignty and prerogative, as it operates in Scots  
21 law, to consider the devolution legislation. My Lords,  
22 there is no dispute that the devolution statutes  
23 comprise very significant pieces of legislation.  
24 Nothing in the issue of Article 50 or its notification  
25 or indeed withdrawal from the EU altogether alters the



1 existence of the devolved legislatures, or the essential  
2 structure and architecture of the devolution  
3 settlements.

4 Much emphasis is laid by the various intervening  
5 parties on the status of the devolution legislation as  
6 constitutional statutes, and I quite accept that they  
7 are to be regarded as constitutional statutes, just as  
8 the Referendum Act of 2015 should be so regarded, as  
9 Lord Dyson has already observed in *Shindler*.

10 I would make one reference to the Inner House  
11 decision, that is the Scottish Court of Appeal decision  
12 in *Imperial Tobacco v Lord Advocate* which is at volume  
13 A5, tab 41, MS 1592, and in particular to the  
14 observations of my Lord Reed in that case where he was  
15 invited to take a particular view of the interpretation  
16 of the Scotland Act or of any act enacted by the  
17 Scottish Parliament on the basis that they had been  
18 democratically elected. The passage, I think, is at MS  
19 1619.

20 THE PRESIDENT: Thank you. Paragraph?

21 THE ADVOCATE GENERAL FOR SCOTLAND: Paragraph 71, my Lord,  
22 and he observed that the Scotland Act is not a  
23 constitution but an Act of Parliament. There are  
24 material differences. The context of the devolution of  
25 legislative and executive power within the

1 United Kingdom is evidently different from some of the  
2 examples he had been given.

3 "The Scotland Act can be amended more easily than  
4 a constitution, a factor which is relevant since the  
5 difficulty of amending a constitution is often a reason  
6 for concluding that it was intended to be given  
7 a flexible interpretation. Although the UK Government's  
8 stated policy on legislation concerning devolved matters  
9 currently embodied in the memorandum of understanding  
10 [which I will come to in a moment] known colloquially as  
11 the Sewell Convention, may impose a political  
12 restriction upon Parliament's ability to amend the  
13 Scotland Act unilaterally, there have nevertheless been  
14 many amendments made to the Act."

15 I think also an earlier reference at MS 1616 at  
16 paragraph 58 where he observed:

17 "Insofar as this submission invited the court to  
18 adopt an approach to the interpretation of acts for the  
19 Scottish Parliament which is different from that  
20 applicable to other legislation and different from that  
21 authorised by section 101 of the Scotland Act, I am  
22 unable to accept it."

23 He goes on about the point made with regard to the  
24 democratic legitimacy of the Scottish Parliament, but  
25 not as something which impacted upon the approach to the

1 interpretation. So there is no particular or distinct  
2 tenet of interpretation to be employed simply because we  
3 are dealing with what in that context is  
4 a constitutionally important act.

5 I recollect that Lord Hope said something similar in  
6 the Supreme Court case in Imperial Tobacco. I regret  
7 that the Supreme Court case has not been incorporated  
8 into the bundle, but your Lordships may well be familiar  
9 with at that case. Lord Hope made his observations at  
10 paragraph 16 of the report.

11 THE PRESIDENT: Thank you.

12 LORD SUMPTION: What is the case called?

13 THE ADVOCATE GENERAL FOR SCOTLAND: Again, it is the  
14 Imperial Tobacco case, my Lord, against the Lord  
15 Advocate, as heard before the Supreme Court.

16 I have a recollection of having lost the case,  
17 my Lords.

18 THE PRESIDENT: They tend to be the cases one forgets. It  
19 is paragraph 16, you say.

20 THE ADVOCATE GENERAL FOR SCOTLAND: Paragraph 16, my Lord.

21 THE PRESIDENT: Thank you.

22 THE ADVOCATE GENERAL FOR SCOTLAND: My Lord, Lord Reed also  
23 made some observations in the Agricultural Sector  
24 (Wales) Bill case, which is at tab 246 of volume A20, MS  
25 6827, if I can invite your Lordships to bring that up.

1 LORD SUMPTION: Sorry, which bundle, again?

2 THE ADVOCATE GENERAL FOR SCOTLAND: It is volume 20,  
3 my Lord, tab 246. This was the case of the competence  
4 of the Welsh Assembly in respect to certain legislation.

5 At paragraph 6 which begins at MS 6829, his Lordship  
6 observed the description of the 2006 Act as an act of  
7 great constitutional significance:

8 "It cannot be taken in itself to be a guide to its  
9 interpretation. The statute must be interpreted in the  
10 same way as any other statute."

11 He refers there to the case of Attorney General v  
12 National Assembly for Wales Commission in support of  
13 that proposition.

14 So again, it is not that there is any particular or  
15 exceptional tenet of interpretation to be employed  
16 simply because we are addressing the matter of this  
17 particular form of legislation. Now, again, in the  
18 context of the Northern Ireland Act 1998, it has been  
19 asserted that the Northern Ireland Act is  
20 a constitutional statute, and that as a consequence of  
21 that, it enjoys some particular enhanced status.

22 The authority usually cited in support of that  
23 proposition is, of course, the speech of Lord Bingham in  
24 the case of Robinson, and I think your Lordships will  
25 find that in core volume 4, tab 81, MS 3272, with

1 Lord Bingham's observation at 3280.

2 He didn't actually describe the 1998 Act as  
3 a constitutional statute, but he did describe the Act as  
4 in effect a constitution, and stated that it should,  
5 consistently with the language used, be interpreted  
6 generously and purposefully, bearing in mind the value  
7 which the constitutional provisions are intended to  
8 embody. I don't believe anyone would take exception to  
9 that in the context of all those acts which are regarded  
10 as of constitutional significance.

11 It is also worthwhile noting the observations of  
12 Lord Hoffmann in that case at 3284, where he made the  
13 point that the 1998 Act was framed by the Belfast  
14 agreement, and that was of course an extremely  
15 important, and remains an extremely important political  
16 agreement, which also incorporated an element of  
17 international treaty in the form of the British-Irish  
18 agreement that was appended to the Belfast agreement,  
19 sometimes referred to as the Good Friday agreement.

20 I would have no difficulty with that approach to the  
21 interpretation of any of the devolution legislation, but  
22 can I move on to the conduct of foreign relations and  
23 the context of that legislation. My Lords, the conduct  
24 of foreign relations is a matter expressly reserved in  
25 the devolution legislation, such that the devolved

1 legislatures have no competence in that matter. The  
2 Scotland Act section 30(1) gives effect to schedule 5  
3 which defines reserved matters. As a point of  
4 reference, that is at MS 4361.

5 Those reserved matters include, amongst others, and  
6 I quote:

7 "International relations, including relations with  
8 territories outside the United Kingdom, the  
9 European Union and their institutions and other  
10 international organisations."

11 The Northern Ireland Act is in materially identical  
12 terms with the legislative competence of the assembly  
13 being restricted in terms of section 6, where there is  
14 a reference to what are termed "accepted matters".

15 THE PRESIDENT: Yes.

16 THE ADVOCATE GENERAL FOR SCOTLAND: Those accepted matters  
17 are expressed in almost identical terms to the  
18 Scotland Act, which is hardly surprising, given the  
19 passage of the legislation in the same year, and  
20 includes express reference to the European Union. In  
21 the same way, the Government of Wales Act 2006 makes  
22 provision to determine competence of the Welsh Assembly,  
23 and provides at section 108 for those matters which  
24 relate to one or more of the subjects listed under the  
25 headings in schedule 7 of the Act, and that includes

1           conduct of foreign relations.

2           So again, it is perfectly clear and express on the  
3           face of this legislation that the matter of foreign  
4           relations and foreign affairs, and in particular the  
5           matter of our relationship with the European Union, is  
6           not within the competence of the devolved legislatures.  
7           I will submit that these reservations are fatal to  
8           reliance on the devolution legislation as giving rise to  
9           any necessary implication, or indeed any other  
10          indication that the Government cannot exercise its  
11          foreign affairs and treaty prerogative in the ordinary  
12          way.

13          Therefore, it respectfully appears to me that there  
14          is nothing in this legislation that could abrogate the  
15          exercise of the foreign affairs prerogative, and that  
16          the court is not assisted by lengthy (Inaudible) that  
17          attempts to bring the exercise of that prerogative or to  
18          qualify the exercise of that prerogative, by reference  
19          to the devolved legislation.

20          Now, there are --

21   LORD CLARKE:   You mean the answer is the same in Scotland as  
22                   it is here?

23   THE ADVOCATE GENERAL FOR SCOTLAND:   Essentially the same.

24                   And in Northern Ireland and in Wales.

25                   Now, various attempts are made in the interveners'

1 cases to try and circumvent that issue. They point out  
2 that there are of course express references to EU law in  
3 the devolved legislation, and that is absolutely true,  
4 because of course that legislation assumed that the  
5 United Kingdom was a member of the EU, but of course  
6 that legislation does not require that the  
7 United Kingdom should be a member of the EU.

8 Indeed, the Lord Advocate rightly put the matter in  
9 this way at paragraph 66 of his own case, where he said  
10 that the references to EU law and the devolution  
11 legislation, and I quote, "simply reflected the fact  
12 that by the time that the devolution statutes were  
13 enacted, EU law had become the law of the land in each  
14 of the United Kingdom's jurisdictions".

15 So be it.

16 It is of significance that EU law is defined in the  
17 devolved legislation in an equivalent ambulatory fashion  
18 to that set out in section 2, subsection 1 of the ECA.  
19 That is, section 126(9) of the Scotland Act 1998 adopts  
20 the following definition, at MS 4374 --

21 LORD MANCE: That is the significant point, isn't it? The  
22 fact that foreign affairs are reserved to the  
23 United Kingdom Government doesn't necessarily mean that  
24 it didn't, in the devolution legislation itself, commit  
25 itself to exercise or not to exercise the prerogative in



1 a particular respect, and your argument is that it  
2 didn't, because essentially the references to the EU are  
3 ambulatory.

4 THE ADVOCATE GENERAL FOR SCOTLAND: Precisely so.

5 I accept, my Lord, that the devolved legislation can  
6 act as the ECA does, as a conduit, whereby rights and  
7 obligations that exist in EU law, or exist in EC law,  
8 can flow into Scots law, just as they flow into English  
9 law, and indeed flow out again, because one has to  
10 remember that the conduit created by section 2(1) flows  
11 in two directions; it not only brings in rights and  
12 obligations but it takes them out again according to  
13 what is done at the EU level, in exercise of the foreign  
14 affairs prerogative, to determine regulations and  
15 directives under EU law.

16 I should just add, my Lord, that so far as Wales is  
17 concerned, the definition that I have just alluded to at  
18 section 126 of the Scotland Act appears essentially in  
19 the same form at section 158 of the Government of Wales  
20 Act, and materially equivalent wording is adopted by  
21 section 98 of the Northern Ireland Act, albeit for some  
22 reason the words "from time to time", which we know  
23 appear in section 2(1), do not appear in section 98; but  
24 I don't suppose anyone is going to argue that the  
25 intention was to freeze EU laws at 1998 for the purposes

1 of Northern Ireland.

2 My Lord, in these circumstances, it doesn't appear  
3 that the continued references to EU law in the devolved  
4 legislation really take the interested parties' case  
5 anywhere. They also attempt to make something of the  
6 fact that there is a restriction on the competence of  
7 the devolved legislatures to legislate contrary to EU  
8 law, and there are, of course, specific provisions for  
9 that in the Scotland Act, the Government of Wales Act  
10 and the Northern Ireland Act.

11 I would just observe, my Lord, that even if they  
12 were not there, that prohibition would exist in any  
13 event because of the status of EU law. It would not be  
14 possible for the Scottish Parliament or the Scottish  
15 Government to proceed contrary to EU law. So those are  
16 there as a point of emphasis and in order to ensure that  
17 the exercise of these devolved powers does not conflict  
18 with the UK's legal obligations as set at the level of  
19 the EU.

20 Certainly these restrictions say nothing about the  
21 exercise of the prerogative in foreign affairs. As  
22 I say, they are strictly unnecessary.

23 In addition to the foregoing, each of the  
24 interveners appears to argue that withdrawal from the EU  
25 will somehow have an impact on domestic law, and they

1 point to a range of EU secondary legislation that has  
2 effect in Scots law or in Wales or in the law of  
3 Northern Ireland, but again with respect, what we are  
4 dealing with is the impact of the United Kingdom's  
5 withdrawal from the EU. This secondary legislation may  
6 go at that time, but it may well go even if we don't  
7 withdraw. It is open to the United Kingdom Government  
8 in the exercise of the prerogative to agree to  
9 regulations that have direct effect, to agree to  
10 directives under EU law, which will have the effect of  
11 revoking existing domestic law rights and obligations  
12 which flow from or through the conduit of section 2(1),  
13 or the conduit of the devolved legislation.

14 So again, there is simply nothing in this point.

15 If I could turn for a moment to the Agnew case, the  
16 Agnew printed case presents three arguments in respect  
17 of the Northern Ireland Act, and these begin at  
18 paragraph 80 of their case. If I can just summarise  
19 them very briefly, the first seems to be that Article 50  
20 notification would deprive Northern Ireland's citizens  
21 of rights granted by the Northern Ireland Act 1998.

22 Strictly speaking, what it would deprive them of are  
23 rights that would flow into Northern Ireland by virtue  
24 of the conduit which allows for EU law rights to arise.

25 The second argument advanced in Agnew is that

1 Article 50 notification would alter the distribution of  
2 powers between the Northern Ireland assembly and the  
3 United Kingdom by eliminating the constitutive role that  
4 EU law currently plays in the definition of competences  
5 under the Northern Ireland Act.

6 I have already touched upon that, my Lords, and it  
7 doesn't appear to me that that takes the case anywhere.

8 Thirdly, it is argued that notification would  
9 frustrate the purpose and intention of the Act, as it  
10 would run contrary to the continued application of EU  
11 law in Northern Ireland, and more particularly would  
12 impact upon the operation of cross-border bodies.

13 This is quite a complex area, and it is a point that  
14 was majored upon by those appearing for Agnew before  
15 Mr Justice Maguire. It is possible that one could deal  
16 with this at some considerable length, but in view of  
17 the time available, what I would say is this: that the  
18 line of argument is simply unfounded. The relevant  
19 implementation bodies that are referred to, one in  
20 particular which is relied upon is the special EU  
21 programme body, are not fixed and determined for all  
22 time coming by the Northern Ireland Act.

23 What I would ask is that I might respond to any  
24 point that is made by my learned friends with regard to  
25 this issue in reply, but shortly put, first of all, they

1           seek to rely upon the Belfast agreement --

2   LORD MANCE:   Have you got some response in writing on this?

3   THE ADVOCATE GENERAL FOR SCOTLAND:   There is a response in

4           the form of the case that Dr McGleenan has prepared,

5           my Lord.

6   THE PRESIDENT:   We will have, of course, the transcript of

7           what you say today.

8   THE ADVOCATE GENERAL FOR SCOTLAND:   Indeed.

9   THE PRESIDENT:   You were going to give the transcript

10           reference.   I am sorry to interrupt you.

11   LORD CARNWATH:   It is not covered by Mr Justice Maguire's

12           judgment, is it?

13   THE ADVOCATE GENERAL FOR SCOTLAND:   Mr Justice Maguire did

14           make a summary point with regard to this, and can I just

15           say, my Lords, it is a little surprising in my

16           respectful submission that the divisional court was

17           quite so dismissive of Mr Justice Maguire's analysis of

18           the case in Agnew, which was carefully argued and

19           carefully presented, and expressed very clearly in my

20           respectful submission by Mr Justice Maguire, but that is

21           perhaps another point.

22   THE PRESIDENT:   You were going to give Lord Mance the

23           reference.   If you want to give it to us after the short

24           adjournment --

25   THE ADVOCATE GENERAL FOR SCOTLAND:   Can I do that, my Lord.

1 THE PRESIDENT: Of course you can.

2 THE ADVOCATE GENERAL FOR SCOTLAND: Can I move on from the  
3 Agnew point, which I suspect will be developed by  
4 reference to the special --

5 THE PRESIDENT: One point, if I can interrupt, would be to  
6 annotate your submissions as recorded on the transcript  
7 by cross-referencing -- that may be the best way to do  
8 it, but let's leave that for the moment.

9 THE ADVOCATE GENERAL FOR SCOTLAND: I do not have the  
10 passage from Mr Justice Maguire to hand, so I will do  
11 that, my Lord. On this part of the case, my Lord, there  
12 is the McCord reference which essentially is in these  
13 terms: does the giving of notice pursuant to Article 50  
14 of TEU impede the operation of section 1 of the  
15 Northern Ireland Act 1998?

16 Here it appears to be argued on behalf of McCord  
17 that the sovereignty of the Westminster Parliament is  
18 now attenuated in some way by the devolution Acts and  
19 indeed by the Belfast agreement, which is a critically  
20 important political agreement, and has to be seen in  
21 that context. But it respectfully appears to me that  
22 this submission pays no regard to the fact that  
23 constitutional balance between affording the devolved  
24 institution scope to legislate on transferred matters  
25 while retaining sovereignty over reserved matters is

1 a constant theme of all the devolution legislation.

2 THE PRESIDENT: It comes back to the point you opened with,  
3 effectively.

4 THE ADVOCATE GENERAL FOR SCOTLAND: Exactly so, my Lord, and  
5 again, I don't want to develop that too far, but what  
6 McCord attempts to suggest is that section 1 of the  
7 Northern Ireland Act is directed to maintaining Northern  
8 Ireland within the EU, when in fact, of course, it is  
9 concerned with a more binary decision, which is whether  
10 Northern Ireland should cease to be part of the  
11 United Kingdom and form part of united Ireland. There  
12 is not scope for introducing into that binary question  
13 the question of its status within the EU.

14 So the case simply doesn't get off the ground in  
15 that context, and in that regard I would notice that  
16 Mr Justice Maguire addressed this point at paragraph 152  
17 of his judgment. That is in volume 1 of the Northern  
18 Ireland material, tab 14, MS 20372, where he observed:

19 "The court is unaware of any specific provision in  
20 the Good Friday agreement ... 1998 Act which confirms  
21 the existence of the limitation which the applicant  
22 contends for and which establishes a norm that any  
23 change to the constitutional arrangements for the  
24 Government of Northern Ireland and in particular  
25 withdrawal by United Kingdom from the EU can only be

1           effected with the consent of the people of Northern  
2           Ireland. While it is correct that section 1 of the 1998  
3           Act does deal with the question of the constitutional  
4           status of Northern Ireland, it is of no benefit to the  
5           applicant in respect of the question now under  
6           consideration, as it is clear that under this section,  
7           and the relevant portion of the Good Friday agreement,  
8           being the Belfast agreement, is considering the issue  
9           only in the particular context of whether Northern  
10          Ireland should remain as part of the United Kingdom or  
11          united Ireland."

12                 I would respectfully observe that that correctly  
13                 states the relevant position.

14                 So in summary, my Lord, the devolved legislation  
15                 actually takes the court nowhere in the determination of  
16                 the issue which it has to decide in the present case.

17                 There is no means by which you can suggest that the  
18                 exercise of the foreign affairs prerogative, which is  
19                 what we are actually here to address, is in any way  
20                 impinged or qualified by the devolution legislation.

21                 Can I move on, from the legislation as such, to the  
22                 operation of the Sewell convention. This is perhaps  
23                 where the Lord Advocate seeks to make as much as of  
24                 a case as he can, with regard to the idea that somehow  
25                 the constitutional requirements of Article 50 are



1 qualified by the consequences of the devolved  
2 legislation. The convention, as your Lordships will be  
3 aware, takes its name from the statement of Lord Sewell  
4 when he was minister of state in the Scotland office  
5 during the second reading of the Scotland bill in 1998.  
6 The relevant quotation can be found in volume A29,  
7 tab 388 --

8 LORD CLARKE: This is set out in your case?

9 THE ADVOCATE GENERAL FOR SCOTLAND: It is, my Lord, page 18  
10 and MS 10127, and shortly stated:

11 "As happened in Northern Ireland earlier in the  
12 century [he is referring to the period between 1920 and  
13 1972, of course] we would expect a convention to be  
14 established that Westminster would not normally  
15 legislate with regard to devolved matters in Scotland  
16 without the consent of the Scottish Parliament."

17 LORD MANCE: Can you just give me a MS reference to your  
18 case.

19 THE ADVOCATE GENERAL FOR SCOTLAND: MS 10127.

20 LORD HODGE: I think you asked about your case reference.

21 THE ADVOCATE GENERAL FOR SCOTLAND: It is at page 18, and  
22 I do not have a MS number on the copy of my case,  
23 I regret, my Lord.

24 Now, although Lord Sewell was speaking in the  
25 particular context of the establishment of the Scottish

1 Parliament, an equivalent convention applies in relation  
2 to the Welsh and Northern Irish assemblies and in that  
3 context, it is appropriate to look at a memorandum of  
4 understanding which was entered into by the respective  
5 governments in 2013. Your Lordships will find that  
6 memorandum of understanding at A28, tab 346, beginning  
7 at MS 9560. It may be appropriate just to look briefly  
8 at the memorandum of understanding because it is  
9 referred to in the --

10 LORD CLARKE: A20, did you say?

11 THE ADVOCATE GENERAL FOR SCOTLAND: A28, my Lord, tab 346.

12 LORD CLARKE: I beg your pardon.

13 THE ADVOCATE GENERAL FOR SCOTLAND: And MS 9560.

14 I apologise if I am going through this at something  
15 of a rate of knots.

16 THE PRESIDENT: I understand your position.

17 THE ADVOCATE GENERAL FOR SCOTLAND: I hope, of course, your  
18 Lordships might be able to go back to the transcript and  
19 make some headway with what I am trying to say.

20 THE PRESIDENT: We are making a lot of headway and we will  
21 make even more headway when we see the transcript, thank  
22 you.

23 THE ADVOCATE GENERAL FOR SCOTLAND: If we look, my Lords, at  
24 the memorandum of understanding, and just go to  
25 paragraph 2 at 9563, paragraph 2:

1            "This memorandum is a statement of political intent  
2            and should not be interpreted as a binding agreement.  
3            It does not create legal obligations between the  
4            parties. Nothing in this memorandum should be construed  
5            as conflicting with the Belfast agreement."

6 THE PRESIDENT: Thank you.

7 THE ADVOCATE GENERAL FOR SCOTLAND: Then at MS 9567,  
8            paragraphs 14 to 15:

9            "The United Kingdom Parliament retains authority to  
10            legislate on any issue ... whether devolved or not ...  
11            it is ultimately for Parliament to decide what use to  
12            make of that power."

13 THE PRESIDENT: Yes.

14 THE ADVOCATE GENERAL FOR SCOTLAND: "However, the UK  
15            Government will proceed in accordance with the  
16            convention that the UK Parliament would not normally  
17            legislate with regard to devolved matters except the  
18            agreement of the devolved legislature."

19            My Lords will notice with regard to devolved  
20            matters, that is the first question that would arise, is  
21            any piece of legislation with regard to devolved  
22            matters, but we don't know until we see it.

23            Secondly, even if it is with regard to devolved  
24            matters, what is Parliament expressing? It is  
25            expressing what amounts to a self-denying ordinance,

1           albeit a qualified one. If it is with regard to  
2           a devolved issue, and we are not there, but if we go  
3           past that, then normally we will not legislate in  
4           respect of that. But it is our self-denying ordinance,  
5           and indeed, that was brought out by an observation that  
6           in fact I have already touched upon by my Lord,  
7           Lord Reed in the case of *Imperial Tobacco v Lord*  
8           *Advocate*, which is at volume A5, tab 41, MS 1592, but  
9           particularly paragraph 71 at MS 1619.

10   THE PRESIDENT: Yes, we looked at this earlier.

11   THE ADVOCATE GENERAL FOR SCOTLAND: We touched upon this  
12           earlier but just to go back for a moment.

13   LORD HODGE: That is the reference to the Sewell convention.

14   THE ADVOCATE GENERAL FOR SCOTLAND: And making it clear,  
15           my Lord, in my respectful submission that this is  
16           a political --

17   LORD SUMPTION: Which paragraph are you referring to?

18   THE PRESIDENT: 71.

19   LORD REED: I did write that some years before the 2016 Act  
20           had been passed, and no doubt the issue you will have to  
21           come on to address is whether that makes a difference.

22   THE ADVOCATE GENERAL FOR SCOTLAND: I would just observe,  
23           my Lord, that it doesn't, but I will come on just to  
24           make that point. Clearly, what my Lord says in my  
25           submission remains true, that this is a political

1 restriction upon Parliament's ability to act, no more  
2 and no less than that.

3 In our case, we also make reference to the Rhodesian  
4 case, the southern Rhodesian case of Madzimbamuto. I am  
5 not going to take your Lordships to it, you have it in  
6 the case, but in my submission essentially Lord Reed in  
7 that case was making the same point that: here you have  
8 a convention but it is just that, it is no more than  
9 that; it is not some qualification or inhibition upon  
10 parliamentary sovereignty.

11 The Lord Advocate does seek to make the case that  
12 somehow a convention can transmogrify into a legal  
13 requirement, and he makes reference, amongst other  
14 things, to the Crossman Diaries case, the Jonathan Cape  
15 case. It is at CA4, volume CA4, tab 245. I am not  
16 going to go to it, but I simply draw your Lordship's  
17 attention to a commentary, a very helpful commentary on  
18 that case, from Professor Bradley in one of his works,  
19 and that can be found at volume A31, tab 416, MS 10531,  
20 where he puts the Jonathan Cape case in its proper  
21 context. It is a context that clearly conflicts with  
22 the approach adopted by the Lord Advocate.

23 There is reference, particularly in the McCord case,  
24 to a great deal of Canadian material which is not of any  
25 great assistance, but again, I would just mention in

1 passing a decision of the Supreme Court of Canada in the  
2 Manitoba reference case in this context. It is at  
3 volume A25, tab 305, MS 8783, and it is a passage that  
4 I am not going to quote, from MS 8795 to MS 8799.  
5 Essentially, the majority judgment of the Supreme Court  
6 in Canada is that there is no authority for the  
7 proposition then being advanced that a convention can  
8 crystallise into law.

9 That chimes very readily with the Dysian observation  
10 that conventions are not in reality laws at all, since  
11 they are not enforced by the courts.

12 So, my Lords, the Sewell convention is a political  
13 convention concerning the legislative functions of the  
14 Westminster Parliament. It is, as I say, essentially  
15 a self-denying ordinance on the part of Parliament. It  
16 was never intended to be a justiciable legal principle,  
17 and as my Lord, Lord Reed has already correctly  
18 observed, it is a political restriction on Parliament's  
19 ability to legislate in respect of devolved matters.

20 The correct legal position is that Parliament is  
21 sovereign, and may legislate at any time on any matter,  
22 and that is specifically set out in the devolved  
23 legislation itself, section 28(7) of the Scotland Act,  
24 section 5(6) of the Northern Ireland Act, section 107(5)  
25 of the Government of Wales Act.

1           In my respectful submission the Lord Advocate is  
2           plainly wrong as a matter of constitutional law to  
3           assert, as he does, at paragraph 30 of his printed case  
4           that I took your Lordships to at the outset, that the  
5           freedom of the United Kingdom Parliament is constrained  
6           by the constitutional conventions which apply when  
7           Parliament legislates with regard to devolved matters.

8           That, in my respectful submission, is clearly not  
9           the case.

10          Now, to take up my Lord, Lord Reed's point, nothing  
11          in that analysis is affected by the amendment of  
12          section 28 of the Scotland Act by section 2 of the  
13          Scotland Act 2016. Section 2 of the Scotland Act 2016  
14          has the headnote, "Sewell convention". It was not  
15          taking the matter any further than the expression of the  
16          convention that we have already seen. That is now  
17          section 28(8) of the Scotland Act 1998, which says  
18          that -- so again I pause to observe:

19                 "It is recognised that the Parliament of the  
20                 United Kingdom will not normally [again, I emphasise  
21                 "normally"] legislate with regard to devolved matters  
22                 without the consent of the Scottish Parliament."

23   LORD SUMPTION: But it cannot be described as a purely  
24                 political force once it is enacted in a statute.

25   THE ADVOCATE GENERAL FOR SCOTLAND: It is a statutory

1 expression of that political convention, my Lord, which  
2 is what it was intended to be in light of the Smith  
3 agreement that was entered into and -- from the  
4 foundation and reason for the amendments to the  
5 Scotland Act 1998.

6 LORD SUMPTION: Do you submit that its incorporation in  
7 an act of Parliament makes no legal difference to its  
8 effect?

9 THE ADVOCATE GENERAL FOR SCOTLAND: I do, my Lord, yes, and  
10 it was made perfectly clear during the passage of the  
11 Scotland Act 2016 that the intention was simply to  
12 incorporate in statutory form the existing convention  
13 and no more than that, and indeed there were attempts  
14 both by the -- in the House of Commons and in the House  
15 of Lords to amend the proposed clause 2 in order to  
16 extend it to incorporate aspects of the practical  
17 operation of the convention, and those amendments did  
18 not proceed.

19 THE PRESIDENT: Surely if it is a convention, it must be  
20 questionable -- if it is a parliamentary convention, it  
21 may be questionable whether the courts can rule on it.  
22 Once it is statutory, then it is plain that we can.

23 THE ADVOCATE GENERAL FOR SCOTLAND: You can look at its  
24 interpretation --

25 THE PRESIDENT: Indeed we have to.



1 THE ADVOCATE GENERAL FOR SCOTLAND: I have no difficulty  
2 with that; it is a question of where that takes one.

3 LORD CLARKE: It depends what is meant by normally.

4 THE ADVOCATE GENERAL FOR SCOTLAND: What is meant by  
5 "recognised as" or what is meant "by regard to", but  
6 ultimately it will be for Parliament to decide whether  
7 or not it adheres to the convention as interpreted by  
8 the court.

9 LORD REED: It strikes me as part of the problem about  
10 regarding it as imposing a justiciable obligation is the  
11 fact that the obligee would be Parliament. It doesn't  
12 impose an obligation on the Government.

13 THE ADVOCATE GENERAL FOR SCOTLAND: It doesn't impose  
14 an obligation on Parliament, strictly speaking.

15 LORD REED: But the institution which it is said will not  
16 normally legislate, et cetera is Parliament.

17 THE ADVOCATE GENERAL FOR SCOTLAND: Indeed. Indeed.

18 Just to take up my Lord Reed's point, it does not  
19 appear to me there is any practical change as a result  
20 of section 28(8) emerging into the Scotland Act 1998.

21 THE PRESIDENT: I think the point being made is that if the  
22 issue before us is whether it has to go to Parliament or  
23 not, the Sewell convention is concerned with what  
24 Parliament will or will not do, and therefore if it does  
25 not go to Parliament, we don't get to the Sewell

1 convention anyway.

2 LADY HALE: Article 9 of the Bill of Rights might be a bit  
3 of an impediment to our -- I think that is the point  
4 that my Lord was making.

5 THE ADVOCATE GENERAL FOR SCOTLAND: I began with that point  
6 that in the context of this appeal, this case, we don't  
7 even get close to addressing the Sewell convention, and  
8 indeed the legal irrelevance of the Sewell convention is  
9 actually expressly accepted by the Counsel General for  
10 Wales in his printed case at paragraph 70.

11 He makes clear that he is not arguing that the  
12 Welsh Assembly has a legally enforceable right to veto  
13 any Westminster legislation authorising Article 50 to be  
14 triggered, although he then argues that the use of the  
15 prerogative to trigger Article 50 will circumvent the  
16 application of the convention, a point that I will come  
17 back to in a moment.

18 The Lord Advocate in his intervention does, however,  
19 maintain that a legislative consent motion of the  
20 Scottish Parliament is, as he puts it, a constitutional  
21 requirement within Article 50 alongside an act of the  
22 Westminster Parliament before a valid decision in the  
23 United Kingdom could be made with regard to withdrawal  
24 from the EU.

25 Now, I would just observe this, my Lord. A great

1 deal is made by the Lord Advocate in his case of the  
2 legislative consent procedure. The idea of the  
3 legislative consent motion. But the Sewell convention  
4 in fact says nothing about LCMs; it says nothing about  
5 the practice by which consent, if required or sought,  
6 should be given with regard to legislation that relates  
7 to a devolved matter.

8 So although LCMs are the currently preferred  
9 procedure, that is a matter entirely for the internal  
10 standing orders of the devolved legislatures. The  
11 seeking of an LCM is commenced and controlled entirely  
12 by the devolved legislatures, not by Parliament. If the  
13 devolved legislatures wish to indicate their consent in  
14 some other form, then they are perfectly free to go and  
15 do that.

16 Conversely, there have been instances where, for  
17 example, the Welsh Assembly has put up a legislative  
18 consent memorandum and then refused to pass a motion in  
19 circumstances where the UK Parliament did not consider  
20 that it was legislating with regard to a devolved  
21 matter, but the Welsh Assembly wished to make  
22 a political statement that they felt that they were, and  
23 that happened, I believe, with regard to the  
24 Agricultural Workers bill at an earlier stage.

25 Again, I emphasise a point that has already been

1           made, the issue of the Sewell convention and of  
2           legislative consent motion simply does not arise in this  
3           appeal. This case does not concern the passage of  
4           legislation and that, in my respectful submission, is  
5           a complete answer to the rather surprising proposition  
6           made by the Lord Advocate that there is an issue  
7           properly in dispute between the parties with regard to  
8           that matter. That is a point he seeks to make at  
9           paragraph 84 of his case.

10           At the end of the day, the Sewell convention is  
11           wholly irrelevant to this appeal and indeed to the  
12           conduct of foreign affairs. I would just note that in  
13           his written case, the Lord Advocate provides an annex  
14           setting out where legislative consent motions have been  
15           sought or have been passed with regard to devolved  
16           legislation, and it is perhaps notable that what is  
17           absent from the annex is the European Communities  
18           (Amendment) Act 2002, the European Parliamentary  
19           Elections Act 2002, the European Union (Amendment) Act  
20           2008, the European Union Act 2011 or indeed the European  
21           Union Referendum Act 2015.

22           So it would be somewhat surprising if those had been  
23           overlooked, if they do have the relevance in the context  
24           of a constitutional convention that the Lord Advocate  
25           now seeks to argue.

1           The conclusion of the Article 50 case advanced by  
2           the Lord Advocate is that there is by virtue of the  
3           Sewell convention a constitutional requirement, using  
4           the terms of Article 50, that must apply before the  
5           United Kingdom -- and takes steps in terms of Article 50  
6           to leave the EU.

7           However, the Lord Advocate makes no effort in his  
8           case to explain how a convention which provides in terms  
9           that it does not apply as a rule in all circumstances,  
10          could even be a requirement, let alone a constitutional  
11          requirement and therefore there is doubt as to where  
12          that case actually goes.

13          In my respectful submission, there is no substance  
14          in the case that is being advanced there by the Lord  
15          Advocate.

16          I mentioned a moment ago the Counsel General for  
17          Wales' argument that the exercise of the prerogative  
18          would be an avoidance of the Sewell convention or would,  
19          as he puts it, short-circuit the Sewell convention and  
20          in my respectful submission that simply cannot be right.  
21          The convention could not apply to legislation  
22          authorising the issue of the Article 50 notification,  
23          because it is a reserved and not a devolved matter, so  
24          nothing in general is being avoided.

25          The convention cannot be enforced in law in

1           circumstances in which it might appear to fall within  
2           the purview, where there is a bill of the Westminster  
3           Parliament which might affect devolved competences. So  
4           it cannot possibly apply in regard to the invocation of  
5           the prerogative.

6           It just does not follow.

7           In any event, if there was a dispute on that, it  
8           would not be justiciable.

9           In summing up on the question of the Sewell  
10          convention my Lords, what I would say is this: it is not  
11          necessary and certainly not appropriate to consider the  
12          functions of the Sewell convention in the context of  
13          this appeal. No basis for that has been made out.

14          My Lords, I was going to move on to certain  
15          particular points that arise in the context of Northern  
16          Ireland and the consideration of the  
17          Northern Ireland Act against the background of the  
18          Belfast agreement, because as Lord Hoffmann observed in  
19          the Robinson case, the Belfast agreement essentially  
20          frames the (Inaudible) constitutional statute. In view  
21          of the time available, I will just make one short  
22          observation.

23          The Belfast agreement, which can be found in the  
24          Northern Ireland materials at volume 1, tab 14 at MS  
25          20372 provides at paragraph 7 for parties to address any

1 difficulties that would arise in the context of the  
2 agreement being implemented. If I could just turn to  
3 that.

4 All it indicates, and I invite your Lordships to  
5 consider it, is the inherently flexible nature of the  
6 Belfast agreement to deal with events that had not been  
7 anticipated at the time the agreement was entered into.  
8 The Belfast agreement is not a legally enforceable  
9 agreement in one sense, but it is a critically important  
10 political agreement which does have appended to it  
11 an international treaty in the form of a British-Irish  
12 agreement.

13 We entirely concur with Lord Hoffmann's  
14 observations, that it (Inaudible) the  
15 Northern Ireland Act, but there is nothing in the  
16 Belfast agreement that fixes in all time coming  
17 something such as the joint implementation bodies which  
18 are referred to in the Agnew case, for example, and that  
19 should be borne in mind.

20 The second distinct question that arises in the  
21 Agnew reference concerns section 75 of the  
22 Northern Ireland Act 1998, which is the equalities  
23 provision. It is the equivalent of section 149 of our  
24 own equalities Act, and I am content there to adopt the  
25 analysis of that case, which is set forth at pages 50 to

1           63 of the written case that has been provided to me by  
2           Dr McGleenan and sets out why that is not relevant to  
3           the determination of the present issue.

4           My Lords, that, rather swiftly and briefly, is all  
5           that I would have to say at this time with regard to  
6           devolved legislation in the context of the present  
7           appeal.

8           Could I just make one further observation. My Lord  
9           Mance referred to the Referendum Act 2015 as leaving us  
10          in the air. In my respectful submission, it does no  
11          such thing. One has to consider the foreign affairs  
12          prerogative today in light, not just of the 1972 Act but  
13          also in light of the 2015 Act. Both are of  
14          constitutional significance.

15          Now, it is argued against us that as a consequence  
16          of the 1972 Act and in particular section 2, the  
17          executive was restrained in the exercise of the foreign  
18          affairs prerogative. It certainly didn't disappear, it  
19          was used constantly for the next 43 years in order to  
20          bring EU law into our domestic domain, but one has to  
21          look at the foreign affairs prerogative in the context  
22          not only of the 1972 Act but the 2015 Act.

23          What was Parliament doing? Parliament was aware of  
24          Article 50. Parliament was aware of the foreign affairs  
25          prerogative. Parliament passed the Referendum Act for



1 the purpose of letting the people decide whether or not  
2 we would leave the EU, and as my Lord Clarke observed,  
3 Parliament was silent as to whether and when Article 50  
4 would be triggered by the giving of notice. It was  
5 silent on the matter.

6 It knew that it was open to the executive to  
7 exercise the foreign affairs prerogative, particularly  
8 after the 2015 Act. If Parliament wished to intervene  
9 to prevent the executive exercising that prerogative, it  
10 would do so. It is a matter for Parliament. Parliament  
11 has remained silent and in my respectful submission, and  
12 with all due respect to the court, it is not for the  
13 court to fill in that which Parliament declined to.  
14 Parliament could decide tomorrow to prohibit the  
15 executive from exercising the foreign affairs  
16 prerogative in order to give notice under Article 50.

17 THE PRESIDENT: The argument the other way would be if on  
18 this hypothesis, which I think is the case, we accept  
19 that the 1972 Act imposed some sort of clamp, then your  
20 argument could be turned against you by saying that if  
21 Parliament had wished to remove the clamp in the  
22 2015 Act, they could have said so and they didn't.

23 THE ADVOCATE GENERAL FOR SCOTLAND: With respect, my Lord,  
24 any clamp is only with regard to whether in the context  
25 of a statutory provision to enter, to accede to the EU,

1           there should be implied some limitation on the foreign  
2           affairs prerogative to leave, but of course once we get  
3           to the Referendum Act of 2015, its purpose was to  
4           determine the question of whether or not we should  
5           leave.

6   THE PRESIDENT:   I see.

7   THE ADVOCATE GENERAL FOR SCOTLAND:   You cannot then infer  
8           that the clamp would remain and as I say, if Parliament  
9           wanted to determine that that prerogative should not be  
10          exercised, Parliament could decide that tomorrow, it  
11          could have decided that yesterday, and as my Lord Clarke  
12          observed, Parliament decided to remain silent on that,  
13          and in my submission for a very particular purpose and  
14          for a very particular reason.

15                Unless there is anything I can assist with --

16   LORD REED:   Since you have chosen to go down this road,  
17           could I ask you a follow-up question.  It occurs to me  
18           that if there is a clamp, one way of envisaging it is in  
19           terms of legal powers.  Either the prerogative remains  
20           or it does not in relation to withdrawal from the EU  
21           treaties.

22                Another way of looking at it might be looking at it  
23           in the same sort of way that it was discussed in Laker  
24           as being to do with whether the power is being properly  
25           exercised or abusively exercised, in which event one

1           might say that if Parliament passes the act and a week  
2           later, for no apparent reason, the Government decides to  
3           withdraw, and then that is an abuse of a power; if on  
4           the other hand the Wilson Government holds a referendum  
5           as it does, and if it had gone the way that this one has  
6           gone, it then decides to withdraw, then there is  
7           a rational and a basis with support in a principle of --  
8           a constitutional principle of democracy for exercising  
9           power, and you see the point I am making --

10       THE ADVOCATE GENERAL FOR SCOTLAND: I do, my Lord.

11       LORD REED: The clamp is not necessarily an on/off switch.

12           It could be to do with ideas about abuse of power.

13       THE ADVOCATE GENERAL FOR SCOTLAND: This is why analogies  
14           can be so dangerous, because we try and analyse what has  
15           happened. We know the foreign affairs prerogative  
16           survives the 1972 Act. It has been exercised constantly  
17           for 43 years with regard to EU law, so the term clamp is  
18           perhaps an exaggeration, and it might be more  
19           appropriate to say, as my Lord indicates, that post the  
20           1972 Act, it might be seen as an abuse of that foreign  
21           affairs prerogative to exercise it in order to take us  
22           out of the EU; but clearly there could be no such abuse  
23           after the Referendum Act 2015 and the result of the  
24           referendum was known.

25           So it is not a case of the foreign affairs

1 prerogative being limited or cut down or clamped. It is  
2 simply a question of whether it would be proper and  
3 appropriate for the executive to exercise the  
4 prerogative in particular circumstances, and the  
5 circumstances that we have to address are those which  
6 exist today in light of the 2015 Act, which is of  
7 considerable constitutional importance and the decision  
8 made in the referendum, knowing that if Parliament  
9 wanted to intervene and limit the exercise of that  
10 prerogative right, it is free to do so and has chosen to  
11 remain silent.

12 THE PRESIDENT: Is that a convenient moment then? I think  
13 you have --

14 THE ADVOCATE GENERAL FOR SCOTLAND: I think that is the  
15 terminus for me.

16 THE PRESIDENT: Okay, and as you say, subject to time and  
17 sorting it out with Mr Eadie and the Attorney General,  
18 you will have some possibly more specific points to make  
19 in answer to the submissions that are made on the  
20 devolution issues.

21 THE ADVOCATE GENERAL FOR SCOTLAND: I am sure my Lord Kerr  
22 knows that the question of cross-border bodies is one of  
23 some complexity, and I have simply given a garbled  
24 summary, but if I am required to come back on that,  
25 I will speak to my learned friend Mr Eadie about time

1 for that.

2 THE PRESIDENT: Thank you very much. I think some  
3 rearranging of the personnel is to be done over the  
4 adjournment. I hope everyone will have enough time to  
5 have lunch, but we will resume again at 2.00 and I think  
6 we are due to hear from the Attorney General for  
7 Northern Ireland.

8 Thank you very much. We will adjourn until 2.00.  
9 (1.05 pm)

10 (The Luncheon Adjournment)

11 (2.05 pm)

12 THE PRESIDENT: Mr Attorney.

13 Submissions by THE ATTORNEY GENERAL FOR NORTHERN IRELAND

14 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: My Lady, my  
15 Lords, this (Inaudible, off microphone), with four  
16 questions, and they are set out in the bundle at  
17 page 23674 is question four and over the page at 75 --

18 THE PRESIDENT: Could you give me that page number again.

19 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: It is 23674 for  
20 devolution issues one to three and then over the page at  
21 5 is number four. The McCord question referred by the  
22 Court of Appeal, one finds in the McCord core volume 1  
23 at page 24232.

24 THE PRESIDENT: Thank you.

25 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I am conscious,

1 my Lady, my Lords that obviously time is tight. In  
2 respect of devolution questions three and four, that is  
3 whether the prerogative, if it is operative, has been  
4 significantly interfered with by aspects of the 1998  
5 Act, I am sure that doesn't do it justice, and the  
6 section 75 point, I am content to rely on our written  
7 submissions in respect of that and to adopt the written  
8 submissions on behalf of the Secretary of State for  
9 Northern Ireland, which are rather fuller than my own.

10 These are all submissions that address devolution  
11 question one and two and the McCord question. And then  
12 I would like to conclude with making some general  
13 observations because obviously the outcome of, if I can  
14 call it the Miller litigation, is relevant, particularly  
15 for the Northern Ireland case, especially as respects  
16 the second devolution question.

17 Can I start with the McCord question.

18 THE PRESIDENT: Yes.

19 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: The McCord  
20 question asks, potentially, whether the triggering of  
21 Article 50 by the exercise of prerogative power without  
22 the consent of the people of Northern Ireland impedes  
23 the operation of section 1 of the Northern Ireland Act  
24 1998. Can I ask the court to look at Northern Ireland  
25 authorities, volume 1, and at tab 3, where one finds the

1 Act. I should say and I hope it is of assistance and  
2 I hope that I stick to it, that the only authorities  
3 volumes that I will be referring to are Northern Ireland  
4 authorities, volumes 1 and 9.

5 THE PRESIDENT: 1 and 9.

6 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: 1 and 9 and core  
7 authority volumes 1 and 4.

8 THE PRESIDENT: That is helpful, thank you.

9 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Could I ask your  
10 Lordships and your Ladyship to look at the  
11 Northern Ireland Act 1998 --

12 LORD CARNWATH: Just a moment we are just trying to catch up  
13 with Northern Irish volumes, are they in the memory  
14 stick somewhere.

15 LORD HODGE: Can you give us the MS numbers.

16 LORD KERR: It is in a separate electronic file.

17 LADY HALE: There are three electronic files, the main one,  
18 an additional one in Miller, and the Agnew.

19 LORD KERR: And the Northern Ireland Act is at 20001.

20 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Section 1 is at  
21 MS 20044. And the McCord case is about section 1 of the  
22 1998 act.

23 Now, section 1 deals with three things. Officially  
24 it confirms the existing status of Northern Ireland as  
25 part of the United Kingdom. Secondly it provides that

1           there is to be no change in that status without  
2           a majority of people voting that way in a referendum  
3           held for that purpose; schedule 1 makes provision for  
4           that. Then thirdly, in subsection (2), it makes  
5           provision for effect being given to the wishes of the  
6           majority if the majority, voting in such a poll, express  
7           a wish to leave the United Kingdom.

8           It is entirely and exclusively about the status of  
9           Northern Ireland within the UK, and we say that not even  
10          the most daring eisegesis transforms the provision that  
11          is addressed solely to the status of Northern Ireland as  
12          part of the United Kingdom into a provision that is also  
13          somehow about the EU membership of the United Kingdom.

14          Naturally, a variety of factors will come into play  
15          to determine the relative electoral attractiveness of  
16          the options that are available to voters in Northern  
17          Ireland if a poll is held under section 1 of the Act,  
18          but they -- any factor that makes it more or less  
19          attractive to vote one way or another in a poll held for  
20          the purposes of section 1, does not, to use the words of  
21          the McCord issue, impede the operation of section 1 of  
22          the 1998 Act. In fact that is precisely what section 1  
23          is designed to accommodate and to address.

24          So we say that the answer to the McCord question is  
25          simply no.



1           I am now going to turn, my Lady and my Lords, to the  
2           first of the High Court devolution issues and that is  
3           whether any provision of the Northern Ireland Act  
4           excludes expressly or by necessary implication the  
5           operation of prerogative power to give notice under  
6           Article 50, and I am going, if it is convenient, to  
7           approach that under four headings.

8           Firstly I am going to look briefly at the assistance  
9           that one has to the interpretation of the  
10          Northern Ireland Act 1998, and secondly and thirdly I am  
11          going to look at the Belfast agreement and the  
12          British-Irish agreement, and then fourthly I am going  
13          to, I hope speedily, go through the 1998 Act and draw  
14          attention to the EU aspects that might be said to be  
15          contained within it.

16          So firstly, then, to the interpretative approach to  
17          the Northern Ireland Act 1998. Lord Bingham in *Robinson*  
18          famously, and I know the court has been over this,  
19          observed that the Northern Ireland Act 1998 is in effect  
20          a constitution, which Lord Hoffmann in the same case was  
21          a little bolder and described it as a constitution. He  
22          suggested that these provisions should be interpreted  
23          generously and purposively. For the note, *Robinson* is  
24          in core volume 4 at tab 81.

25        THE PRESIDENT: Thank you.

1 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Can I make  
2 a summary, which -- I can go through the authorities in  
3 some detail if this is required but can I say that it  
4 seems to me that the trend of constitutional  
5 interpretation since 2002 has been to place perhaps  
6 rather more emphasis on a purposive interpretation than  
7 a generous one, and your Lordships and your Ladyship  
8 will have seen the reference in our printed case to the  
9 Local Government Byelaws case and to the Recovery of  
10 Medical Costs for Asbestos Diseases case.

11 Famously in the Asbestos Diseases case, there was --  
12 argument on behalf of the Welsh Government for  
13 a generous interpretation was rejected, and in summary,  
14 the position seems to be that merely because a statute  
15 is quite properly to be classed as a constitutional  
16 statute, it really does not mean that it is interpreted  
17 in any different way. The emphasis is on the purpose.  
18 Of course the purpose --

19 LORD KERR: Is there a distinction to be drawn between the  
20 use of the expression, constitutional statute, or as  
21 Lord Bingham put it, a constitution?

22 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Of course in the  
23 HS2 case, this court has assigned a particular  
24 significance to constitutional statutes in that they are  
25 protected against implied repeal. When one looks at the

1 trend since 2002, and of course I bear the scars of  
2 Robinson on my back, it seems to me that  
3 constitutional -- whether or not an act of the  
4 Westminster Parliament is a constitution or not, that  
5 does not attract to it significantly or materially  
6 different rules of interpretation.

7 LORD REED: I wonder if it may depend on the issue. The  
8 more recent cases that you have referred to, to do with  
9 mostly Welsh devolution, have been cases where there was  
10 a question of where to demarcate the powers of the  
11 devolved budget on the one hand and the powers reserved  
12 to Whitehall or Westminster on the other hand, and in  
13 that situation you cannot really take a generous view on  
14 one side of the equation without taking a narrow view on  
15 the other.

16 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I respectfully  
17 agree.

18 LORD REED: The court has simply applied ordinary principles  
19 of statutory interpretation. On the other hand, in  
20 Robinson and also I think in the Scottish case of Axa,  
21 the court had a more fundamental issue to deal with;  
22 obviously in Robinson whether or not the assembly could  
23 be established in accordance with the statutory  
24 timetable, and in Axa about the scope for judicial  
25 review of devolved legislation. The court did take

1 a rather more -- generous is one way of putting it, but  
2 a different sort of approach, conscious of the fact that  
3 these were constitutional fundamentals of new  
4 institutions that it was having to decide.

5 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Well, I would  
6 suggest that there is a distinction between the Robinson  
7 case and the Axa case. Axa, at least insofar as  
8 I understand my Lord's reference, is really about the  
9 decision of the court about the extent of the  
10 irrationality standard of review, because otherwise Axa  
11 should be a question about competence, in relation to  
12 the classic limitations on all of the devolved  
13 parliaments' EU law, the conventions and so forth.

14 Robinson is an enormously important case and I will  
15 tie, I hope, this in towards the end of these  
16 submissions, but if I can flag up the issue, it is that  
17 Robinson is about letting government work.

18 LORD REED: Yes.

19 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Government is to  
20 be carried on.

21 THE PRESIDENT: Lord Bingham says that in terms.

22 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Yes, he does,  
23 paragraph 11 and 12 of Robinson.

24 THE PRESIDENT: Yes.

25 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I will come back

1 to it in the conclusion, because I do think that is  
2 enormously important for this case overall.

3 LORD KERR: Just to go back to my question, is there any  
4 distinction as are they to be assimilating  
5 a constitutional status according to the statute, or is  
6 it to be regarded as a constitution?

7 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: A constitution  
8 will also benefit from the status of constitutional  
9 statute, and not every constitutional statute is  
10 a constitution. The Human Rights Act, enormously  
11 important constitutional statute, isn't a constitution.  
12 The Northern Ireland Act 1998 is a plainly  
13 a constitution, and the House of Lords has told us so,  
14 so I am not sure there is a huge distinction,  
15 particularly bearing in mind the approach to  
16 interpretation will always be context specific, but may  
17 not in fact differ from the approach one would take to  
18 another statute. That is plainly not constitutional in  
19 nature.

20 So if I can then turn to the Belfast agreement, that  
21 is in the Northern Ireland authorities, tab 14. It is  
22 the first volume, sorry, my Lords, of the Northern  
23 Ireland authorities at 14.

24 (Pause)

25 It is not a particularly good omen, I am afraid.

1 I break the rule very early on, it is --

2 LORD KERR: The MS number is 20,342 if that is of any  
3 assistance.

4 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: It is, I am very  
5 grateful. I was not proposing to take the court through  
6 that, simply to draw attention to the fact that at the  
7 end of the tab, one has the British-Irish agreement. So  
8 at MS 20373.

9 THE PRESIDENT: Thank you. Yes.

10 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: The Belfast  
11 agreement is not an international agreement; it is  
12 a political agreement hammered out after extensive  
13 negotiations. It has an interplay with the  
14 British-Irish agreement which we will come to, but, and  
15 since the Northern Ireland Act was enacted, at least in  
16 part to give effect to it, the Belfast agreement is  
17 plainly relevant to the interpretation of the Act.

18 There are some references, of course, to  
19 European Union law in strand two.

20 LORD CLARKE: In what two?

21 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Strand two in  
22 the Belfast agreement at paragraph 17.

23 THE PRESIDENT: Have you got the page number?

24 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: 20357.

25 LORD MANCE: 54, isn't it -- oh, I see --

1 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: This is dealing  
2 with the North South Ministerial Council, the council to  
3 consider the European Union dimension of relevant  
4 matters, including the implementation of EU policies and  
5 programmes and proposals under consideration in the EU  
6 framework:

7 "... arrangements to be made to ensure that the  
8 views of the council are taken into account and  
9 represented appropriately at relevant EU meetings."

10 So one can even see from, if one likes, the prose  
11 style of paragraph 17 of strand two, it is not drafted  
12 as a statute. It is a political agreement and it bears  
13 that stamp on its face. Paragraph 17 apparently assumes  
14 that relevant background that both Ireland and the  
15 United Kingdom will be members of the European Union.

16 But the consideration that is referred to in  
17 paragraph 17 can continue to occur whether or not the  
18 United Kingdom remains in the European Union as long as  
19 Ireland does. Paragraph 16 of strand two might indeed  
20 be denuded of effect if both Ireland and the  
21 United Kingdom were to leave the European Union, but as  
22 long as one state remains, there will in all likelihood  
23 remain EU matters to be discussed.

24 The two work streams under paragraph 17 to consider,  
25 arrangements to be made, are of course subject to

1 a criterion of relevance, and even if the UK were to  
2 withdraw from the European Union, there would still be  
3 matters with a European Union dimension to discuss, and  
4 it could still be appropriate for the views of the North  
5 South Ministerial Council to be represented at relevant  
6 EU meetings.

7 LORD WILSON: It is difficult for you in the short time  
8 available to know what to major on, but Dr McGleenan has  
9 dealt with this in detail and so have you. We have read  
10 all this. There are these references, and the argument  
11 is they simply don't carry the argument far enough.

12 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I won't spend  
13 more time on this.

14 I then ask the court to look then towards the end of  
15 the tab at the British-Irish agreement which is the  
16 international law agreement, and of course the trite  
17 proposition that it is binding as a matter of  
18 international law does not itself have domestic effect;  
19 and the only reference, of course, is in the third  
20 recital, as friendly neighbours and as partners in the  
21 European Union, 20373; and again, no operative part of  
22 the British-Irish agreement can be remotely construed as  
23 containing the least commitment to remaining in the  
24 European Union; and even if it did, absent some domestic  
25 limitation, binding only at the level of international



1 law.

2 Of course as I have mentioned, the Belfast agreement  
3 is not a statute, not drafted as a statute; it is  
4 a political text. In Robinson, if I could ask the court  
5 to perhaps keep the Belfast agreement open and this time  
6 to keep it open at strand one, at paragraphs 3 and 4 of  
7 strand one, which are at page 20348. Then if the court  
8 would look very briefly at the passage from the opinion  
9 of Lord Hoffmann in Robinson at paragraph 26, so that is  
10 core authorities, volume 4. And the report begins at  
11 3272.

12 THE PRESIDENT: Yes.

13 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: If one goes to  
14 paragraph 26, this is Lord Hoffmann, 3284:

15 "The agreement provided that the assembly was to be  
16 the prime source of authority in respect of devolved  
17 responsibilities and would exercise full legislative and  
18 executive authority."

19 That is Lord Hoffmann's quotation from paragraph 3  
20 of strand one.

21 Of course, almost certainly my fault because  
22 I should have pre-emptively attempted to correct him,  
23 but when one looks at the Northern Ireland Act, that  
24 flatly contradicts what one finds in that provision. If  
25 one looks at section 23 of the Northern Ireland Act, at

1 Northern Ireland authorities volume 1, page 20068, 23,  
2 subsection (1):

3 "(1) The executive power in Northern Ireland shall  
4 continue to be vested in Her Majesty.

5 "(2) As respects transport matters, the prerogative  
6 and other executive powers of Her Majesty in relation to  
7 Northern Ireland shall, subject to subsection (3) ..."

8 It deals with the Civil Service Commission, the  
9 exercise, on Her Majesty's path, of any minister or  
10 Northern Ireland department.

11 So not only does in this important respect the  
12 Northern Ireland Act not implement this aspect of strand  
13 one, it flatly contradicts it.

14 So the purpose of that really is --

15 LORD CLARKE: Which was the bit you should have corrected in  
16 Robinson?

17 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: It is  
18 paragraph 26 of Robinson, where Lord Hoffmann quotes  
19 paragraph 3 of strand one of the Belfast agreement.

20 LORD KERR: Your point in a nutshell is that was not  
21 translated into the Northern Ireland Act.

22 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: And flatly  
23 contradicted by it.

24 It points to the use of caution, that must be  
25 exercised, we respectfully submit, when attempting to

1 use the Belfast agreement as an aid to construction. It  
2 is undoubtedly of use but it must be approached with  
3 some caution.

4 LORD MANCE: Sorry, which bit of paragraph 26 do you say is  
5 wrong -- is it 26 really?

6 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: It is the  
7 quotation, he quotes with apparent approval a passage  
8 from paragraph 3 of strand one about the assembly being  
9 the source of the legislative and executive authority.

10 LORD HUGHES: Full executive responsibility, is it?

11 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Again, it is the  
12 standard constitutional position that all prerogative  
13 and executive authority comes from the Crown. One can  
14 perhaps see why a political agreement took a different  
15 view, but when it came to drafting the statute, which is  
16 what matters, the correct constitutional orthodoxy was  
17 expressed.

18 While of course the constitutional status of  
19 Northern Ireland is given protection, as respects  
20 membership of the United Kingdom in section 1, there is  
21 no protection in the 1998 Act, or any provision even  
22 addressing membership of the European Union.  
23 Consistently with its status as a constitution for  
24 Northern Ireland, the Northern Ireland Act, in a number  
25 of places, imposes limitations on legislative

1 competence, on the competence of ministers, but -- and  
2 it does also confer certain powers and duties on the  
3 Secretary of State for Northern Ireland. No provision  
4 in the Northern Ireland Act purports to limit or has the  
5 effect of limiting the powers of the United Kingdom  
6 Government in international affairs.

7 There is no provision of the 1998 Act, nor any part  
8 of the Belfast agreement, nor the British-Irish  
9 agreement which, however they are constructed and taken  
10 apart singly or collectively, which imposes any  
11 constitutional requirement, the word used in the  
12 claimant's case, which the UK Government must satisfy  
13 before giving notice under Article 50.

14 I won't open it to the court but the North/South  
15 Cooperation (Implementation Bodies) (Northern Ireland)  
16 Order 1999, and that is in tab 8 of the Northern Ireland  
17 authorities, does no more than give effect to another  
18 international agreement which is set out in schedule 1  
19 to those regulations.

20 Article 1 of that agreement establishes the special  
21 EU programme body, and part 5 of the regulations gives  
22 domestic effect to the agreement as respects the EU  
23 programmes body.

24 To suggest that anything in the 1999 regulations  
25 prevents the prerogative being used to give notice under

1 Article 50 is to ignore the role of the prerogative in  
2 creating the EU programmes body.

3 Plainly the Northern Ireland Act 1998 can only be  
4 amended by or under another Act of Parliament, and we  
5 say simply that notifying the European Council under  
6 Article 50 will amend not a comma or a full stop of the  
7 1998 Act. That is true of all of the Act's provisions,  
8 but I can look at perhaps nine of them, because they  
9 seem to have, in the eyes of the Agnew claimants,  
10 a particular significance, so that is section 6,  
11 section 7, section 12, section 24, section 27,  
12 section 98, section 14 and sections 26 to 27.

13 Starting with section 6(2) --

14 THE PRESIDENT: If you are going to take us through all of  
15 them, you may run into a bit of time trouble. It is up  
16 to you; I am aware how attenuated your time is.

17 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I am acutely  
18 conscious of that, my Lord, so can I simply make that --  
19 the claim that these expressly or by necessary  
20 implication dislodge the prerogative is defeated by  
21 a simple reading of those provisions.

22 THE PRESIDENT: Speak for themselves effectively.

23 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I respectfully  
24 commend such a reading.

25 LORD KERR: The syntax and punctuation remain intact.

1 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: They do, and  
2 much more than that, my Lord.

3 THE PRESIDENT: In a sense, we are looking for a dog that  
4 doesn't bark; we are looking for no bark and you say we  
5 will not find any barking in any of it.

6 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Yes, and again,  
7 the argument here is not one of textual exegesis; it is  
8 one of eisegesis; it is putting stuff in that simply is  
9 not there.

10 THE PRESIDENT: Thank you.

11 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Then can I look  
12 perhaps to -- and tie together some general themes. In  
13 the United Kingdom, we have an essentially political  
14 constitution. That is to say we don't have a written  
15 constitution of the kind, for example, contemplated by  
16 my Lord, Lord Neuberger in his Lord Rodger memorial  
17 lecture, written text which can only be interpreted  
18 authoritatively and definitively by our independent  
19 judiciary.

20 Our constitution is shaped by historic and daily  
21 practice, and whether or not something is constitutional  
22 is primarily determined, we say by Parliament. In our  
23 constitution courts do not make or remake the  
24 constitution and legitimate judicial law-making, and of  
25 course it occurs, but especially in the constitutional

1 sphere, must be interstitial.

2 Obviously I will not take the court to the Bill of  
3 Rights or to Godman-Hales, but if I can give a thumbnail  
4 in relation to Godman-Hales, the point with Godman-Hales  
5 was that Godman-Hales was the then constitutional  
6 orthodoxy. It was orthodox to dispense from the  
7 operation of penal statutes. The judges in  
8 Godman-Hales, and there was a judicial consensus in  
9 favour of the King dispensing power, in favour of  
10 Colonel Hales. The revolution, and it was a revolution,  
11 was one effected by the convention, by the convention  
12 Parliament, and where revolutions occur in our  
13 constitutional order, they are the product of the  
14 representative institutions.

15 Historically, the judicial role in the shaping of  
16 the constitution has been modest, and judges, as  
17 Lord Bingham famously pointed out, did not establish the  
18 doctrine of parliamentary sovereignty and they cannot by  
19 themselves change it. That is tab 108 of the rule of  
20 law. Obviously, speaking extra-judicially, others,  
21 clearly members of the court have taken a different  
22 view.

23 THE PRESIDENT: Lord Steyn in Jackson for example.

24 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Indeed.

25 Now, the enduring value, we say, of the Robinson

1 decision, the decision of the majority in Robinson, is  
2 what it says about larger constitutional principles.  
3 I want to draw attention to two of them. In Robinson,  
4 core authorities volume 4, the report beginning 3272,  
5 paragraph 11.

6 THE PRESIDENT: Yes.

7 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: At 3280 and Lord  
8 Bingham, perhaps channeling the first Duke of  
9 Wellington, includes as a constitutional ideal that  
10 government should be carried on.

11 The majority in Robinson was surely right to adopt  
12 an approach that approved a constitutionally plausible  
13 course of conduct. Paragraph 12 is one which  
14 I particularly, with respect, commend to the court:

15 "It would no doubt be possible, in theory at least,  
16 to devise a constitution in which all political  
17 contingencies would be the subject of ... pre-determined  
18 mechanistic rules to be applied as and when the  
19 particular contingency arose, but such an approach would  
20 not be consistent with ordinary constitutional practice  
21 in Britain."

22 Then of course one sees how this has become dated  
23 with the advent invent of fixed Parliaments.

24 The last sentence is important:

25 "Where constitutional arrangements retain scope for



1 the exercise of political judgment, they permit  
2 a flexible response to differing and unpredictable  
3 events in a way which the application of strict rules  
4 would preclude."

5 That is an approach I respectfully commend to this  
6 court.

7 With respect, the first claimant is wrong, we say,  
8 as she does in her printed case, the outcome of the  
9 referendum and the Government's stated position with  
10 respect to that are not matters for the court. In our  
11 political constitution, these constitutional features  
12 cannot be overlooked.

13 So while, of course, the determination by the  
14 Government of the United Kingdom that the constitutional  
15 requirements of the United Kingdom were met if  
16 notification under Article 50 is given under the royal  
17 prerogative is of course a justiciable question, in so  
18 far as the court can quite properly be asked to look at  
19 that question, a determination of this nature should be  
20 regarded as constitutionally proper unless shown to  
21 conflict clearly with statute.

22 Or, to put the matter another way, unless it can be  
23 shown by the claimant, or those on that side, that some  
24 statute expressly, or where by necessary implication,  
25 has taken away the prerogative in that sphere.

1           Our constitution, quite rightly, does not  
2           acknowledge executive supremacy any more than it does  
3           judicial supremacy but it does acknowledge the present  
4           and historic capacity of the executive, accountable as  
5           it is to Parliament to shape our constitution. The  
6           English constitution before 1707, the Irish constitution  
7           before 1800, the Scottish constitution before 1707, and  
8           now the constitutions of Great Britain and the  
9           United Kingdom have been shaped primarily by the  
10          interplay between the Crown and representative  
11          institutions. Practice or convention are important  
12          elements of the UK constitution but obviously must yield  
13          to statute.

14          Of course public law barristers in private  
15          practice -- and this is in part a confession -- are fond  
16          of yielding to the Archimedean temptation that a well  
17          placed litigation lever can move the world, and of  
18          course there are occasions when litigation can produce  
19          extraordinary results, but this should not normally  
20          occur in constitutional matters. Constitutional change  
21          in a constitution such as ours is primarily and  
22          overwhelmingly a matter for the politically accountable  
23          actors in it.

24          I want to conclude, my Lady and my Lords, by saying  
25          something about what we say is the skewing and

1           distorting effect created by the bullet from the gun  
2           analogy. It is of course all rather slower than that.  
3           The gap between pulling the trigger and what happens at  
4           the end is an enormously important gap, and possesses  
5           some significance, but can I invite the court to  
6           consider this. Assuming that the two-year period  
7           prescribed by Article 50(3) is not extended, and  
8           assuming, as all of the claimants appear to do, the  
9           consequences for the three categories of rights in  
10          paragraphs 58 to 61 of the divisional court judgment,  
11          those consequences are not the result of notification  
12          under Article 50 but would be, on the claimant's case,  
13          consequences of leaving the European Union. Of course  
14          the law cannot be changed, save directly or indirectly  
15          by Act of Parliament. Yet the assumption, and we say it  
16          is an unjustified assumption, on which the divisional  
17          court rests is that any law, that is statute, that would  
18          be necessary to avoid these consequences if indeed they  
19          exist would not be made.

20                 This could be tested a little through the European  
21          Parliamentary Election Act 2002 and that is in core  
22          authorities 1, beginning at 6550. As matters stand at  
23          present, the next election to the European Parliament  
24          will be held in 2019. Insofar as there is a domestic  
25          law right in suitably qualified persons under the 2002

1 Act, and I must say it is not clear to me that there is,  
2 to stand for election to the European Parliament, that  
3 right could not be taken away by the giving of notice  
4 under Article 50. If, depending on the timing of that  
5 notice, the events contemplated by Article 50 had not  
6 occurred before the date of the 2019 election to the  
7 European Parliament, anything that the 2002 Act required  
8 to be done would have to be done. There would be  
9 a proper complaint of domestic illegality if it were not  
10 done.

11 On the other hand, no rights that are derived only  
12 from the 2002 Act alone are lost by withdrawal from the  
13 treaties. If the treaties ceased to apply pursuant to  
14 Article 50(3), that doesn't mean that use of the royal  
15 prerogative to get notice has repealed or undermined the  
16 2002 Act. It simply means that with the inapplicability  
17 of the treaties, the 2002 Act is no longer  
18 a particularly useful part of the statute book or  
19 a useful portal, which is the term which we use in our  
20 printed case.

21 Since this an abstract case, because giving notice  
22 gives rise to the consequences in terms of  
23 representation and Government participation in Europe,  
24 but notice by itself has no effect whatsoever and the  
25 assumption that -- and, certainly, one can see that

1 giving notice may give Government and Parliament more  
2 work to do -- but the assumption that that necessary  
3 work, if it exists, won't be done, is one on which the  
4 claimants' case rests and we say it is a platform which,  
5 when examined, falls away.

6 LORD MANCE: Does that amount to saying that it is necessary  
7 to restore precisely the present position and that this  
8 will be done?

9 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: No, not at all.  
10 But take for example --

11 LORD MANCE: Then it must follow that you are accepting that  
12 there is some effect of the notice which is given?

13 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: No. Notice in  
14 itself has no effect.

15 LORD MANCE: Of course not, it is notice plus time. We know  
16 there a two-year period but --

17 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: The question is,  
18 what happens? So, for example, I think the 2002 Act is  
19 a useful case study, so plainly if for whatever reason  
20 notice is delayed and the 2019 elections come around,  
21 then individuals who are interested can dust down their  
22 copies of the treaties and the 2002 Act, and say,  
23 "I would like to stand", and --

24 LORD MANCE: That simply demonstrates that, during the  
25 two-year period, the position remains unchanged. What

1 I don't understand is what you are saying about  
2 restoring the position by necessary legislation, which  
3 couldn't just be domestic, it would have to be  
4 international agreements to restore some of the  
5 reciprocal arrangements and so on, wouldn't it?

6 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Of course, but  
7 if it is necessary, and that is why I return to the 2002  
8 Act, because plainly if notice had been given a month  
9 before the elections, the relevant period for giving  
10 notice of one's intention to stand as a candidate in the  
11 2019 elections -- it would be absurd, one would imagine,  
12 for Government to run an election that was going to  
13 plainly serve no useful purpose when the two-year period  
14 had run its course but the Government couldn't dispense  
15 back to Godman-Hales with the 2002 Act, it would have to  
16 do something about it by another Act of Parliament.

17 So my point, my Lords and my Lady, is simply that,  
18 that there might well be work to be done by Parliament  
19 and Government but the assumption that it wouldn't be  
20 done is one that it is not proper to make.

21 So, my Lords and my Lady, unless there is anything  
22 else, those are our submissions.

23 THE PRESIDENT: Thank you very much, Mr Attorney. Thank  
24 you. We appreciate you managing to accommodate your  
25 submissions in that relatively short time.

1 THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I am very  
2 grateful.

3 THE PRESIDENT: Thank you.  
4 Lord Pannick.

5 Submissions by LORD PANNICK

6 LORD PANNICK: My Lords, my Lady, the case for Ms Gina  
7 Miller is that the prerogative power to enter into and  
8 terminate treaties does not allow ministers to nullify  
9 statutory rights and duties.

10 In any event we say, Parliament did not intend that  
11 the rights and duties, which it had created by the  
12 1972 Act, could be nullified by ministers acting on the  
13 international plane.

14 The court has heard that the case for the appellant  
15 is that the 1972 Act is a conduit. It is said it  
16 creates only contingent rights and obligations -- that  
17 is paragraph 63(d) of the appellant's written case, MS  
18 page 12356 -- and these rights are said to be contingent  
19 on the decision of the appellant to exercise prerogative  
20 powers to terminate the EU treaties.

21 My Lords, and my Lady, I say at the outset that the  
22 courts have rightly recognised that the 1972 Act has  
23 a constitutional status. It creates a new source of  
24 domestic law, and indeed it gives priority to it. My  
25 friend Mr Eadie accepted this constitutional status in

1 answer to my Lord, Lord Wilson yesterday.

2 The appellants' argument, however, if correct, would  
3 mean that the 1972 Act, far from having a constitutional  
4 status, would have a lesser status than any other act,  
5 a lesser status than the Dangerous Dogs Act because on  
6 the appellants' argument, Parliament has made this  
7 fundamental constitutional change to domestic law only  
8 for as long as the executive does not take action on the  
9 international plane to terminate the treaty commitments.

10 We say that in the context of an act of Parliament,  
11 which expressly states, expressly states in  
12 section 2(4), that its provisions take priority, even  
13 over other legislation, the words "passed or to be  
14 passed", it would, with respect, be quite extraordinary  
15 if nevertheless the 1972 Act could be set at nought by  
16 the actions of a minister acting without parliamentary  
17 authority.

18 LORD SUMPTION: When you say in the first sentence of your  
19 submissions that your case is that the executive cannot  
20 alter rights and duties, are you actually limiting it to  
21 rights and duties in the sense of the content of the  
22 substantive law, or are you including the change which  
23 arguably would be brought about if we left the union, to  
24 our constitutional arrangements to the question what is  
25 our source of law, as opposed to the question what are



1           its contents.

2   LORD PANNICK: The two are plainly connected, but I take  
3           your Lordship's point.

4   LORD SUMPTION: You are not limiting yourself to the --

5   LORD PANNICK: I am certainly not, because the 1972 Act, as  
6           your Lordship well knows, did not merely introduce  
7           rights and duties; it created a new source of rights and  
8           duties and that is part of its constitutional status.  
9           So I say this is an even stronger case than some of the  
10          cases that appear in the books, where the courts have  
11          said that this prerogative power cannot be used to amend  
12          domestic law, this is an even more fundamental question.

13   LORD KERR: It is a second dimension beyond merely the  
14          constitutional status, and you can recognise that there  
15          is a constitutional status, whatever that slightly  
16          amorphous term means, but your point is that this Act of  
17          Parliament created an entirely new source of laws, and  
18          even if you don't regard it as an act of constitutional  
19          status, that aspect alone invests it with a particular  
20          significance.

21   LORD PANNICK: That is my submission, and my submission is  
22          that it is inherently unlikely in that context that  
23          Parliament, when it enacted the 1972 Act, can possibly  
24          have intended that something so fundamental, so  
25          fundamental change, could be set aside by a minister.

1           Your Lordships and your Ladyship will be well aware  
2           that there was in 1972 a debate, which we hear much less  
3           of nowadays, as to whether Parliament itself could have  
4           revoked the 1972 Act. I think we all now accept that,  
5           of course, Parliament, by reason of parliamentary  
6           sovereignty, can do what it likes, but the idea that  
7           ministers could revoke this fundamental change to our  
8           constitutional order, in my submission, is inherently  
9           unlikely. It would require the strongest of indications  
10          in the materials for the court, in my submission, to  
11          accept any such proposition.

12          The enormity of the proposition for which my friends  
13          contend is that they say the Secretary of State can  
14          nullify what is otherwise part of domestic law, and  
15          a central part of domestic law, as indicated in the  
16          scores, hundreds of statutes which implement EU law,  
17          despite the fact that so many of the obligations under  
18          the 1972 Act are obligations imposed on ministers  
19          themselves; so the idea that ministers could revoke this  
20          scheme, again, is even less plausible.

21          Now, I respectfully submit that the submissions that  
22          the court has heard from the appellants are wrong in  
23          principle. And they are wrong in principle for seven  
24          main reasons. Can I identify them and then seek to  
25          develop each of the points if I may in turn.

1 LORD MANCE: Can I ask you, before you do that,  
2 Lord Pannick, you said that in 1972 there was a debate  
3 whether Parliament itself could revoke the 1972 Act; did  
4 that find expression or reference in any case or are you  
5 simply referring to something else?

6 LORD PANNICK: No, I am simply speaking of the academic  
7 debate that there was at the time, but I am not aware of  
8 any case.

9 LORD MANCE: Can you give us a reference?

10 LORD SUMPTION: Was it not part of Mr Blackburn's  
11 submissions?

12 LORD PANNICK: Yes, your Lordship is right --

13 LORD MANCE: It would be interesting to have a reference or  
14 cross-reference.

15 LORD PANNICK: Indeed. My Lords and my Lady, there are  
16 seven points I want to make. The first point is the  
17 European Union Referendum Act 2015. I say it does not  
18 assist the appellants' arguments on the issue in this  
19 appeal, and the issue is the scope of the appellants'  
20 prerogative power.

21 Second, I want to make some submissions as to why  
22 the prerogative power to enter into or resile from  
23 treaties cannot validly be exercised so as to nullify  
24 statutory rights or obligations, far less, to take  
25 my Lord, Lord Sumption's point, a new constitutional

1 order that Parliament has created.

2 Our case, as my Lord, Lord Sumption put to Mr Eadie,  
3 our case is that there is no relevant prerogative power  
4 in this context. The appellants' proposed conduct  
5 exceeds the permitted limits of his prerogative power.

6 The third head of argument that I have is I say that  
7 the court should pay regard, I say respectfully, the  
8 court should pay regard to important principles of  
9 statutory interpretation which are relevant in this  
10 context. These principles show that it is for the  
11 appellant to demonstrate that Parliament has clearly  
12 conferred a power to nullify a statutory scheme, and  
13 I am thinking of the case law on Henry VIII powers, on  
14 the principle of legality, and on the principle of no  
15 implied repeal and I will develop that submission.

16 The fourth head of argument that I have to put  
17 before the court is that in any event, in the light of  
18 the purpose and the content of the 1972 Act, Parliament  
19 did not intend that what it had created could be  
20 nullified by a minister exercising the prerogative.

21 LORD WILSON: You have obviously chosen your words  
22 carefully; Parliament did not intend that the  
23 prerogative was used; so you are not saying that  
24 Parliament did intend that the prerogative should not be  
25 used; or am I being too pedantic?

1 LORD PANNICK: Your Lordship is never pedantic. The fourth  
2 point follows from the third, because the third  
3 proposition is that there are principles of statutory  
4 construction, and so the appellant has to show something  
5 clearly. But I am quite happy to bear the burden if  
6 I need to. I say, if necessary, I can persuade the  
7 court that Parliament clearly intended that ministers  
8 should not have this power.

9 LORD KERR: Your point is, if the background is that it is  
10 for the appellant to demonstrate that it did intend,  
11 then you don't really have to address the question of  
12 whether or not it formed a positive intention.

13 LORD PANNICK: Absolutely. If I need to, I say I can  
14 demonstrate from the contents of the legislations, as  
15 from its purpose, that Parliament itself had imposed  
16 a clear system of parliamentary control on changes to  
17 the treaties. It is therefore, I say, most unlikely  
18 that Parliament can have intended that if the whole  
19 scheme is set aside, it can be done without  
20 parliamentary control.

21 The fifth point, is I say, with respect, the  
22 appellant is wrong to regard De Keyser as somehow  
23 setting out an exclusive principle as to the limits on  
24 the use of prerogative powers. I say there is no  
25 relevant prerogative power here and in any event, ex

1           parte Fire Brigades Union recognises, as my Lord,  
2           Lord Mance, pointed out yesterday, that whether or not  
3           De Keyser applies, it is not open to ministers to use  
4           prerogative powers to frustrate a statutory scheme.

5           The sixth submission I want to make is, I say,  
6           Mr Eadie's reliance on the post 1972 statutes cannot  
7           assist him. If, as we submit, there was no prerogative  
8           power to nullify the 1972 Act after it was enacted, the  
9           question is whether Parliament intended by the later  
10          legislation to confer a new power to that effect.

11          I say only the clearest of statements by Parliament  
12          to that effect could create a new prerogative power.  
13          I say that the post 1972 legislation is very far from  
14          containing any such clear statement and in any event,  
15          the absence in the later legislation, the absence in the  
16          later legislation of any relevant restriction, Mr Eadie  
17          relies on the absence of any provision, cannot assist  
18          him because the lack of a prerogative power to frustrate  
19          a statutory scheme is so basic a constitutional  
20          principle, that one cannot infer from the absence of  
21          an express provision to that effect that Parliament  
22          intended to remove that basic common law restriction.  
23          Parliament didn't need to address the point, it is so  
24          obvious, it is so basic.

25          Seventh, and finally, I am going to say it is no

1 answer for the appellant to say that Parliament of  
2 course can choose how to be involved; it will later be  
3 involved in various ways. The fact of the matter is  
4 that notification will cause the nullification of  
5 statutory rights and obligations and a statutory scheme  
6 of fundamental importance. There is no prerogative  
7 power to notify and only an Act of Parliament can give  
8 such authorisation.

9 The first point, my Lords, is the 2015 Act. The  
10 2015 Act says nothing whatsoever about the consequences  
11 of a referendum decision. As the court has heard, when  
12 Parliament wishes to make a referendum binding, it says  
13 so, and there are many examples, section 8 of the  
14 Parliamentary Voting System and Constituencies Act 2011  
15 is one example, MS 4611, volume 13, tab 136; that was  
16 the alternative vote.

17 If Parliament meant the 2015 Act to have a legal  
18 effect, it could and it would have said so. My friend  
19 Mr Eadie nevertheless submits, and I wrote what he said  
20 down, he said the 2015 Act "gave the decision on  
21 withdrawal to the people".

22 Well, I respectfully submit that is impossible to  
23 understand as a legal proposition. Indeed, it is  
24 particularly difficult to understand when the Government  
25 resisted an amendment to give legal force to the

1 referendum and explained why they were doing so.

2 Can I invite the court's attention, please, to  
3 authorities volume 34. It is tab 479 and MS page 11688.  
4 Volume 34, tab 479 and it is MS page 11688.

5 THE PRESIDENT: We are looking at a debate, are we?

6 LORD PANNICK: Your Lordships are.

7 THE PRESIDENT: This is justified on what basis?

8 LORD PANNICK: It is justified on the basis that it is well  
9 established that the court may have regard to Hansard to  
10 identify the purpose of a statute. The authority for  
11 that not in the bundles is what my Lord, Lord Reed said  
12 for this court in the SG case [2015] 1 WLR 1449,  
13 paragraph 16.

14 LORD REED: That was specifically in the context of  
15 assessing proportionality of legislation in relation to  
16 the European Convention on Human Rights. The Strasbourg  
17 court does look at Hansard and British courts have  
18 followed suit.

19 LORD PANNICK: I can give your Lordship other authorities.

20 LORD REED: I think other authorities might be better.

21 LORD PANNICK: Can I show your --

22 THE PRESIDENT: We can look at it at the moment de bene  
23 esse, but in due course you will take us to --

24 LORD PANNICK: I will.

25 LORD MANCE: Is your point that if one is looking for the



1 mischief or the aim of the statute, the aim was shown to  
2 be advisory by this statement?

3 LORD PANNICK: I say it is well established, one can look at  
4 Hansard in order to identify the purpose, the mischief,  
5 at its particular --

6 LORD MANCE: Shall we look at it then.

7 THE PRESIDENT: I think the trouble is, if I am right in my  
8 recollection, Mr Eadie suggests there are other passages  
9 where other things are said in Parliament on this point.

10 LORD PANNICK: He has not cited it, no.

11 THE PRESIDENT: I think he referred to some.

12 LORD PANNICK: Your Lordships will take a view on whether it  
13 assists or it doesn't assist. It is at tab 479 and  
14 a specific amendment was proposed, and it was proposed  
15 by Mr Alex Salmond, and it is called amendment 16. Your  
16 Lordships see it at the bottom of page 11688:

17 "The chief counting officer shall declare ... the  
18 result of the referendum if the majority wish the UK to  
19 leave the EU ... the chief counting officer may declare  
20 that a majority wish the UK to leave the EU only if  
21 a majority of total votes passed in a referendum are  
22 against the United Kingdom remaining and a majority of  
23 the votes cast in the referendum in each of England,  
24 Scotland, Wales and Northern Ireland are against the  
25 United Kingdom ..."

1           That was the proposed amendment to the bill, and it  
2           was addressed by the minister at the previous tab.

3   LORD HUGHES:   Sorry, Lord Pannick, I am not following, it is  
4           my fault; did you say that this was going to demonstrate  
5           that it was an amendment to give the referendum legal  
6           force?

7   LORD PANNICK:   Yes.

8   LORD HUGHES:   Why does it do that?  It tells you how to  
9           count it.

10   LORD PANNICK:  The purpose of the amendment, as I understand  
11           it, was to specify what result would be, but I take your  
12           Lordship's point, but can I show your Lordship what was  
13           said about this at 478, which is the previous tab, and  
14           if your Lordships go to page 11687, and in the left-hand  
15           column, column 231, halfway down, the court will see the  
16           Minister for Europe, Mr David Lidington, and in the  
17           second paragraph, in line 5, he says he is going to  
18           start by addressing amendment 16, and he makes the point  
19           that he is not surprised that the amendments should be  
20           moved.  Then he says:

21                 "Amendment 16 does not make sense in the context of  
22           the bill.  The legislation is about holding a vote.  It  
23           makes no provision for what follows ... the referendum  
24           is advisory ..."

25           That is simply the point I want to make, and I say

1 that is entirely consistent with the contents of the  
2 Act. It did not address any consequence, far less, far  
3 less, did it address the process by which the UK would  
4 leave the EU if the people voted as they did to leave.  
5 In particular, it did not address the respective roles  
6 of Parliament and ministers, and my submission, the very  
7 simple submission, my submission is that whatever the  
8 proper legal scope of prerogative power in this context,  
9 it is entirely unaffected by the 2015 Act.

10 I can understand a submission that the referendum  
11 result justifies the use of prerogative power to notify,  
12 but the court is not concerned with justification, there  
13 is no issue as to justification. The question for the  
14 court is one of law. The question is: does the  
15 appellant have a prerogative power to notify under  
16 article 50(2).

17 This is not, as Mr Eadie submitted, to deny an  
18 effect to the referendum. The referendum is plainly  
19 an event of considerable political significance, but my  
20 answer to -- in particular to my Lord, Lord Reed is that  
21 the political significance, whatever it is, is not, with  
22 respect, a matter for the court, and it is not a matter  
23 for the court because it is irrelevant to the legal  
24 issue of whether ministers enjoy a prerogative power to  
25 set aside the 1972 Act.

1           In any event, if, as I shall submit, if the proper  
2           interpretation of the 1972 Act is that ministers have no  
3           power to nullify its terms by the exercise of the  
4           prerogative, the court would need a much clearer  
5           statement by Parliament in 2015 that the inhibition is  
6           removed by anything in the 2015 Act.

7           Both the Attorney General and Mr Eadie said  
8           yesterday that if the divisional court judgment is  
9           correct, then Parliament is to be asked the same  
10          question, they said precisely the same question, that  
11          was put by Parliament to the electorate, and which the  
12          electorate answered in the referendum.

13          Now, the court will recognise of course, it is  
14          entirely a matter for Parliament what issues it may wish  
15          to consider if a bill authorising notification is put  
16          before it. But I do submit, respectfully, that the  
17          court cannot assume that the question put to the  
18          electorate in the referendum, should we remain or should  
19          we leave, is the only question which Parliament may wish  
20          to consider.

21          Since the appellant raises the point, we are  
22          entitled to say that Parliament may wish to express  
23          a view on what information it needs from ministers  
24          before approving notification. Parliament may wish to  
25          impose conditions or requirements on the Government,

1           either substantive or procedural. By procedural I mean  
2           reporting back to Parliament. I emphasise these are  
3           matters for Parliament. I am not inviting the court to  
4           rule on them; I am simply responding to the submission  
5           that if the divisional court is right, the same question  
6           is being put to Parliament as was put to the electorate,  
7           and that in my submission is not the case.

8           My friend Mr Chambers is going to have more to say  
9           on the 2015 Act, but that is what I want to say. In my  
10          submission it doesn't assist the court on the scope of  
11          the prerogative power that is enjoyed by the  
12          executive(?).

13        THE PRESIDENT: Before we move on, we were taken by  
14          Mr Eadie, and I think you should have an opportunity to  
15          deal with it, it is volume 18, tab 203, MS 6312. He  
16          cited what Mr Hammond, the Secretary of State for  
17          Foreign Affairs, said:

18                "This is a simple but vital piece of legislation  
19                which has one clear purpose ... deliver on our promise  
20                to give the British people the final say on our EU  
21                membership."

22        LORD PANNICK: My answer to that is there are various  
23          statements at various times.

24        THE PRESIDENT: That was my point.

25        LORD PANNICK: But since the point has been raised, I am,

1 I hope, entitled to point to different statements.  
2 Mr Chambers, if it assists the court, will show the  
3 court more statements in this context. I respectfully  
4 submit that what really matters is the content --  
5 THE PRESIDENT: I quite agree with that. That is more or  
6 less what I was suggesting.  
7 LORD PANNICK: I would respectfully accept that, my Lord.  
8 LORD REED: If the question is the scope of the prerogative,  
9 then clearly the outcome of the referendum cannot affect  
10 that. If a question is whether a prerogative which  
11 exists is properly being exercised, then a referendum  
12 result could be a relevant consideration to that  
13 question.  
14 LORD PANNICK: If the question is, is it an abuse of  
15 power --  
16 LORD REED: Quite.  
17 LORD PANNICK: -- then I take your Lordship's point, but we  
18 are submitting that there is simply no prerogative power  
19 to interfere, frustrate, nullify a statutory scheme.  
20 That is how I put the case, but I entirely understand  
21 your Lordship's point. Once we are into questions of  
22 abuse(?), of whether it is proportionate, the court will  
23 plainly give the broadest of discretion, and that is not  
24 our case. It has never been our case. So that is how  
25 I put that point.

1           That is the first point.

2           The second point, my Lords, is the limits of  
3 prerogative power relating to treaties, and the  
4 appellant relies on the well-established, and it is well  
5 established, prerogative power to enter into and resile  
6 from international treaties. Mr Eadie emphasised the  
7 continuing importance of that prerogative power, and  
8 nothing that I say is intended to dispute those  
9 propositions.

10          My case is that the appellant fails to recognise the  
11 well-established limit on that prerogative power, and  
12 the limit is that that prerogative power relating to  
13 treaties cannot be used to nullify, to frustrate,  
14 domestic law, in particular, rights or a scheme created  
15 by Parliament. The limitation is based in part,  
16 importantly in part, on the principle of parliamentary  
17 sovereignty. Again, Mr Chambers is going to deal with  
18 parliamentary sovereignty, and with the general case law  
19 relating to it, and we have addressed that in our  
20 written case, paragraphs 20 to 21, but I am not going to  
21 take time in relation to that.

22          Now, we say that the crucial point is that the  
23 reason why the Crown enjoys a broad power in the making  
24 and unmaking of treaties is precisely because what is  
25 agreed on the international plane cannot affect, does

1 not affect, the content of domestic law.

2 The prerogative power in relation to treaties is not  
3 an independent and overarching power. It is a power  
4 which is defined and limited by the other principles of  
5 our constitutional law; in particular, parliamentary  
6 sovereignty. These propositions that the power in  
7 relation to treaties is limited by the inability of the  
8 prerogative to change domestic law are supported by high  
9 judicial authority.

10 The court will have seen, and I will not go back to  
11 it unless I am asked to do so, Lord Oliver's statement  
12 for the appellate committee in *JH Rayner*, core  
13 authorities 3, tab 43, MS page 1779; and the statement  
14 by Lord Hoffmann for the board in the Privy Council in  
15 *Higgs, Higgs v Minister of National Security*, which is  
16 core authorities 4, tab 260, MS page 7244. Lord  
17 Hoffmann there speaks of it being the corollary, that is  
18 his word, the corollary of the unrestricted  
19 treaty-making power that it cannot change the law of the  
20 land.

21 My criticism, my respectful criticism, of the  
22 appellants' submissions is that they emphasise the scope  
23 of the prerogative power in the context of treaties, but  
24 they seek to avoid what Lord Hoffmann described as the  
25 corollary: the power ends where domestic law rights



1 begin.

2 Now, it is of course rare to find examples of the  
3 treaty-making prerogative being used by ministers in  
4 an attempt to frustrate statutory or common law rights  
5 without authorisation from Parliament. This is a rare  
6 phenomenon and it is rare because ministers normally  
7 recognise and respect the basic constitutional  
8 principles that are set out from The Case Of  
9 Proclamations onwards, but there are examples in the  
10 books of ministers stepping over the line or the Crown  
11 stepping over the line.

12 Two particular examples in the papers, one of them  
13 is the example that Lord Hoffmann refers to in Higgs.  
14 It is the Parlement Belge case, perhaps we could just  
15 take a moment to look at Parlement Belge, it is  
16 volume 24, it is tab 294, and it is MS page 8392.

17 THE PRESIDENT: Would you give me that reference again.

18 LORD PANNICK: Yes, my Lord, it is volume 24, tab 294, MS  
19 page 8392.

20 If the court has that authority, tab 294.

21 LORD CARNWATH: It is in core volume 4.

22 LORD PANNICK: I am grateful, I had not spotted that, thank  
23 you.

24 No, it is not. Not in mine.

25 LORD CARNWATH: Well, it is in my index but not actually in

1 my file. (Pause)

2 LORD PANNICK: The court will see the headnote: a packet  
3 conveying mails and carrying on commerce, that is  
4 a ship, does not, notwithstanding she belongs to the  
5 sovereign of a foreign state, officers commissioned by  
6 him, come within the category of vessels which are  
7 exempt from the process of law:

8 "It is not competent to the Crown without the  
9 authority of Parliament to clothe such a vessel with the  
10 immunity of a foreign ship of war so as to deprive a  
11 British subject of his right to proceed against her."

12 This is the judgment of Sir Robert Phillimore, and  
13 the relevant passage is at 154. In the penultimate  
14 paragraph on that page, MS page 8417, page 154,  
15 Sir Robert says:

16 "If the Crown had power without the authority of  
17 Parliament by this treaty to order that the  
18 Parlement Belge should be entitled to all the privileges  
19 of a ship of war, then the warrant which is prayed for  
20 against her as a wrongdoer on account of the collision  
21 cannot issue, and the right of the subject, but for this  
22 order unquestionable, to recover damages for the  
23 injuries done to him by her is extinguished. This is  
24 a use of the treaty-making prerogative of the Crown  
25 which I believe [he says] to be without precedent and in

1 principle contrary to the laws of the constitution."

2 There is a bit more detail but that is the point,  
3 that is the principle. Another example to which the  
4 court has already been referred but can I please take  
5 the court back to it is Laker Airways and Laker Airways  
6 is core authorities 2 at tab number 12, MS 307. The  
7 court has already seen this authority.

8 What I want to show the court, if I may, is the  
9 argument from the Attorney General, Mr Sam Silkin, which  
10 appears in the report at page 727, MS 391. If your  
11 Lordships have that page, MS 391, page 727, at B, this  
12 is the judgment of Lord Justice Lawton:

13 "The Attorney General based his submission on the  
14 well known and well founded proposition that the courts  
15 cannot take cognisance of Her Majesty's Government's  
16 conduct of international relations. Laker Airways'  
17 designation as a British carrier for the purpose of the  
18 Bermuda agreement was an act done in the course of  
19 conducting international relations ... the Civil  
20 Aviation Act did not apply ... that Act nowhere refers  
21 to designated carriers. An airline might be granted  
22 a licence to operate a scheduled route but not become  
23 a designated carrier. It could not by any legal process  
24 compel the Secretary of State to designate it as  
25 a British carrier. It followed, submitted the Attorney,

1           that the withdrawal of designation must be within the  
2           prerogative powers exercisable by the Secretary of State  
3           on behalf of the Crown."

4           Lord Justice Lawton rejects that submission at the  
5           bottom of the page:

6           "The Attorney General's answer to the question was  
7           that the Secretary of State was empowered to act in this  
8           way [that is, take away the designation] because there  
9           was nothing in the Act which curbed the prerogative  
10          rights of the Crown in the sphere of international  
11          relations. Far from curbing these powers, by  
12          section 19(2)(b), Parliament recognised that the Crown  
13          had them."

14          The content of section 19(2)(b) appears in the  
15          judgment of Lord Justice Roskill at page 719, letters B  
16          to C, MS page 383. It is there set out if the court is  
17          interested. Going back to Lord Justice Lawton, his  
18          Lordship says:

19          "This is so but the Secretary of State cannot use  
20          the Crown's powers in this sphere in such a way as to  
21          take away the rights of citizens, see *Walker v Baird*."

22          That is another example, although I recognise, of  
23          course, there are two strands of reasoning in *Laker*, the  
24          other being that the act had occupied the field.

25          It may just assist to look at *Walker v Baird*, which

1 is volume 9 of the authorities, tab 88 and it is MS  
2 3409. Volume 9, tab 88, MS 3409. The facts of the case  
3 appear in the advice from Lord Herschell at 495, MS  
4 page 3413, middle of the page, page 495, Lord Herschell:

5 "The respondents by their statement of claim alleged  
6 that the appellant wrongfully entered their messuage and  
7 premises and took possession of their lobster factory  
8 and of the gear and implements therein and kept  
9 possession of the same for a long time, and prevented  
10 the respondents from carrying on the business of  
11 catching and preserving lobsters at their factory. By  
12 the statement of defence, the appellant said he was  
13 captain of the HMS Emerald and the senior officer of the  
14 ships of Her Majesty the Queen."

15 Missing four lines:

16 "He said he was giving effect to an agreement  
17 embodied in a modus vivendi for lobster fishing in  
18 Newfoundland during the said season, which as an act and  
19 matter of state and public policy had been by  
20 Her Majesty entered into with the government of the  
21 Republic of France."

22 That was the defence. We have an agreement with  
23 France.

24 Then page 497, picking it up if I may at the bottom  
25 of 496, MS page 3414:

1            "In their Lordships' opinion, the judgment below was  
2            clearly right ... unless the defendant's acts can be  
3            justified on the grounds that they were done by the  
4            authority of the Crown for the purpose of enforcing  
5            obedience to a treaty or an agreement entered into  
6            between Her Majesty and a foreign power ... the  
7            suggestion that they can be justified as acts of state  
8            or that the court was not competent to enquire is wholly  
9            untenable. The learned Attorney General who argued the  
10           case before their Lordships on behalf of the appellant  
11           conceded he could not maintain the proposition that the  
12           Crown could sanction an invasion by its officers of the  
13           rights of private individuals whenever it was necessary  
14           in order to compel obedience to the provisions of the  
15           treaty."

16           The proposition he contended for was a more limited  
17           one and the more limited one was that the treaty was for  
18           the purpose of putting to an end to a state of war, and  
19           that argument failed on its merits.

20        LORD SUMPTION: In that case, it would have been lawful if  
21           Walker had been a foreigner. I think that is right,  
22           isn't it? Walker v Baird is the main authority for the  
23           proposition that the act of state does not apply to  
24           those owing allegiance to the Crown.

25        LORD PANNICK: Yes, I take your Lordship's point.

1 LORD SUMPTION: If he had been French, it would have been  
2 fine.

3 LORD MANCE: It is difficult, but was it a case which --  
4 where the events took place outside the jurisdiction?

5 LORD PANNICK: They did take place outside the jurisdiction.

6 LORD KERR: It was taking away the rights of a British  
7 citizen.

8 LORD PANNICK: Yes, and the court notes the concession,  
9 accepts it is a concession but it is cited by Lord  
10 Justice Lawton, and rightly so, as a statement of  
11 principle: you cannot use the prerogative to take away  
12 the rights of a citizen -- by the prerogative. That is  
13 simply not acceptable, so as I say, it is not easy to  
14 find cases in the books, because these are rare events,  
15 but there are cases and they are all, in my submission,  
16 to the same effect.

17 Now, in this respect as to what the scope of the  
18 prerogative is, we for our part commend to the court the  
19 valuable historical analysis in Ms Mountfield's written  
20 case, she will speak in due course, in her written case  
21 for the Grahame Pigney group of interested parties, core  
22 volume 2, it is MS 12483 and following.

23 LORD MANCE: Can I just press you on that. This took place,  
24 did it not, in respect of lobster factories on the coast  
25 of Newfoundland.

1 LORD PANNICK: It did.

2 LORD MANCE: It is a Privy Council appeal from the courts of  
3 Newfoundland, so it took place within the relevant  
4 jurisdiction.

5 LORD PANNICK: Your Lordship is right, it took place within  
6 the jurisdiction.

7 LORD MANCE: It is simply authority for the proposition,  
8 isn't it, therefore, that was established in Entick v  
9 Carrington.

10 LADY HALE: I was going to say, Entick v Carrington is the  
11 source of the doctrine.

12 LORD MANCE: It is not to do with foreign acts of state; it  
13 is dealing with the suggestion that you can -- it is  
14 a Crown act of state which is not admissible within your  
15 own jurisdiction.

16 LORD PANNICK: I accept that. I cite it also for the  
17 proposition that it is no defence to what is otherwise  
18 an unlawful act, that the individual concerned is acting  
19 pursuant to a treaty which has been agreed on the  
20 international plane. That cannot affect the rights,  
21 whatever they are, that are enjoyed in the domestic  
22 level.

23 LORD MANCE: Because the royal prerogative in respect of  
24 foreign affairs has very limited -- well, is essentially  
25 external. There are some domestic prerogatives but not



1 in this context.

2 LORD PANNICK: Indeed. The proposition for which I contend,  
3 which is there accepted, is the proposition relevant to  
4 the circumstances of this appeal.

5 Now, my friend -- and Mr Eadie, and the appellant  
6 refers in his written case, to a number of other  
7 examples of the use of prerogative powers, and we have  
8 addressed them, each of them, in our written case at  
9 paragraph 29, beginning at MS page 12402. The court  
10 will understand that I do not have time to address all  
11 of them in oral argument. We have set out our  
12 responses.

13 I respectfully adopt what my Lord, Lord Sumption put  
14 to Mr Eadie: none of these examples concern the use of  
15 the prerogative to alter the content of domestic law, in  
16 particular, by removing a source of our domestic law.  
17 Whether one looks at *Post Office v Estuary Radio* or any  
18 of the other examples, we say they simply do not assist  
19 on the issue before the court.

20 May I comment, however, on the new example that is  
21 given this morning, and that is the way in which the UK  
22 withdrew from EFTA, because there are significant  
23 distinctions between the EFTA regime and the 1972 Act.  
24 The most crucial of which is that the EFTA Act, which  
25 I won't take your Lordships to but it is in volume 35,

1 at tab 480, and it is supplementary MS page 4, 35/480,  
2 supplementary MS 4, that Act does not create, does not  
3 create, in national law, rights which are incorporated  
4 from international law. It doesn't incorporate any  
5 rights created on the international plane, far less give  
6 them priority; there is no equivalent of section 2(1),  
7 section 2(4) or section 3(1).

8 THE PRESIDENT: It reads a bit like a sort of implementation  
9 of a directive, almost.

10 LORD PANNICK: What it does is it gives power to the  
11 minister. It gives the minister power to make  
12 regulations, no more than that, and therefore I say that  
13 a decision to notify under EFTA does not raise, cannot  
14 raise, the same issues as to destruction of statutory  
15 rights as in this appeal, and of course it is also  
16 unrealistic, I say respectfully, to look at the EFTA  
17 notification in isolation. We were leaving EFTA because  
18 of course we were joining the EU.

19 LORD SUMPTION: Did the statutory powers conferred by the  
20 Act relate to the fixing of duty levels?

21 LORD PANNICK: Yes, they did.

22 LORD SUMPTION: That was not a power that was derived from  
23 the general Customs and Excise Act but from that  
24 specific Act.

25 LORD PANNICK: No, it was a specific power to deal with the

1 tariffs that were applicable, and your Lordship will see  
2 it at 35/480.

3 My Lords, my Lord, Lord Carnwath referred to the  
4 Canadian case of Turp and my friend Mr Eadie took the  
5 court to it this morning. Can I ask your Lordships to  
6 go back to it at volume 26, tab 308 and it is MS  
7 page 8950, volume 26. Tab 308, MS 8950. And I take the  
8 court to it just for this reason. If the court would  
9 go, please, to MS page 8953, the court will see  
10 paragraph 8 of the judgment, this was a judgment at  
11 first instance of the federal court.

12 At page 8953, paragraph 8, the judge,  
13 Mr Justice Simon Noel, referred to an earlier judgment  
14 on the relevant Act, the KPIA, and at the end of  
15 paragraph 42 of that earlier Act, which the judge refers  
16 to, we see the final sentence:

17 "If Parliament had intended to impose a justiciable  
18 duty upon the Government to comply with Canada's Kyoto  
19 commitments, it could easily have said so in clear and  
20 simple language."

21 That judgment, see paragraph 9, was upheld by the  
22 federal court of appeal and the Supreme Court refused  
23 leave to appeal.

24 So the Act which was being displaced by the  
25 prerogative, was an act which imposed no justiciable

1 duty upon the Government. So it was not an act that  
2 created any obligations at all in domestic law, and  
3 therefore it doesn't assist my friends to show that it  
4 is open to the appellant by the exercise of  
5 a prerogative power to displace legislation which does,  
6 1972 Act --

7 LORD CARNWATH: I agree it doesn't deal with that point,  
8 because it didn't create a body of law, which was your  
9 main point, but I think it does assist in the sense  
10 that, insofar as you are relying on frustrating some  
11 more generalised intention upon, then here is a case  
12 that the executive is using --

13 LORD PANNICK: It is a very weak contention by Parliament,  
14 if it didn't intend even to create a justiciable duty in  
15 domestic law, it is the statutory scheme that is at best  
16 exhortatory, no more than that.

17 LORD CARNWATH: We don't want to get into a debate about  
18 that. But it seems to me important to draw  
19 a distinction -- I mean, some of your cases are talking  
20 about frustrating intentions, which is rather woolly in  
21 this respect, whereas I think the much better way of  
22 putting your case is the way you put it earlier on in  
23 response to my Lord, Lord Sumption about interfering  
24 with a body of law, a source of law.

25 LORD PANNICK: I take your Lordship's point but that is my

1 point on Turp.

2 Looking at all the material, and the court has all  
3 the material, we say there is no relevant prerogative  
4 power in this case. The prerogative cannot be used to  
5 remove rights and duties created by Parliament, far less  
6 to remove a whole body of law. That is our second  
7 submission.

8 Our third submission is that in any event, there are  
9 relevant principles of statutory construction. The  
10 consequence of those principles is that the appellant  
11 must show, the burden is on him, he must show that  
12 Parliament has clearly conferred on him a power to  
13 defeat statutory rights and duties, to defeat a body of  
14 law that Parliament has created.

15 There are three relevant principles to which we draw  
16 the attention of the court, or more accurately we remind  
17 the court about. The first principle is the principle  
18 applicable in relation to Henry VIII powers, that is  
19 a delegated power conferred by Parliament on a minister  
20 to use subordinate legislation to amend or repeal  
21 primary legislation.

22 The court has looked at this, the court is very  
23 familiar with this, the court has looked at it recently.  
24 The case is the Public Law Project case, it is  
25 volume 23, tab 277. Volume 23, tab 277, MS page 7791.

1 THE PRESIDENT: Yes.

2 LORD PANNICK: The Queen on the application of  
3 Public Law Project v Lord Chancellor, and because the  
4 court is so familiar with this, I can take it very  
5 quickly. The court in the judgment of my Lord, the  
6 President, speaking for the court, addressed the  
7 principle at page 395, MS page 7799, paragraph 27, where  
8 my Lord cited with approval and applied the observation  
9 of Lord Donaldson, Master of the Rolls, in McKiernon.  
10 This is just under letter C:

11 "Whether subject to the negative or affirmative  
12 resolution procedure, subordinate legislation is subject  
13 to much briefer, if any, examination by Parliament. It  
14 cannot be amended ... the duty of the courts being to  
15 give effect to the will of Parliament ... it is in Lord  
16 Donaldson's judgment legitimate to take account of the  
17 fact that a delegation to the executive of power to  
18 modify primary legislation must be an exceptional course  
19 and if there is any doubt about the scope of the power  
20 conferred upon the executive or upon whether it has been  
21 exercised, it should be resolved by a restrictive  
22 approach."

23 Our submission is that the courts will be even more  
24 reluctant to recognise a power in the executive to  
25 defeat statutory rights or a statutory scheme, when

1 Parliament has conferred no such express power on the  
2 executive. Ministers cannot sensibly claim to have  
3 a greater power to interfere with primary legislation by  
4 use of the prerogative than they would have if  
5 Parliament had expressly conferred a Henry VIII power.  
6 That is the submission.

7 The second principle is the principle of legality.  
8 And I won't tire the court by going through the  
9 authorities. They are very, very familiar.  
10 Morgan Grenfell, and *ex parte Pierson* in particular.  
11 Morgan Grenfell is core authorities 2, tab 17, it is MS  
12 page 570, Lord Hoffmann at paragraph 8 approving what he  
13 had said in the *Simms* case; and *Pierson* is volume 9,  
14 tab 78, MS page 3093.

15 The point is this. Since the courts presume that  
16 Parliament did not intend itself to defeat or frustrate  
17 fundamental statutory rights, or basic common law  
18 principles, unless Parliament has clearly so provided,  
19 all the more so, I say, will the courts conclude that  
20 Parliament did not intend to authorise the use of  
21 prerogative powers to defeat important rights and  
22 principles created by Parliament, unless Parliament has  
23 itself clearly so provided.

24 The test cannot be a looser test, where one is  
25 concerned about the powers of the executive, than where

1 one is concerned as to what Parliament itself intended.

2 The third principle that we draw attention to is the  
3 exclusion of implied repeal. The status of the  
4 1972 Act, and indeed what it expressly says in  
5 section 2(4), is that the doctrine of implied repeal is  
6 excluded. Only a clear later statute will be recognised  
7 by the court as demonstrating a parliamentary intention  
8 to repeal or amend the 1972 Act, or do something  
9 inconsistent with it.

10 That of course was the principle in *Factortame*, that  
11 is what *Factortame* was all about and Mr Eadie accepts  
12 the constitutional status of the 1972 Act and he accepts  
13 the common law principle and the principle in  
14 section 2(4), that the 1972 Act is not subject to  
15 implied repeal, but he says this tells us nothing of  
16 relevance to the present case.

17 The answer is given by the divisional court at  
18 paragraph 88 of its judgment, being in core volume 1, at  
19 MS page 11796, if I could just take the court to what  
20 the divisional court said at paragraph 88, it is the end  
21 of paragraph 88. The divisional court says this:

22 "Since enacting the ECA 1972 as a statute of major  
23 constitutional importance, Parliament has indicated it  
24 should be exempt from casual implied repeal by  
25 Parliament itself. Still less can it be thought to be



1           likely that Parliament nonetheless intended that its  
2           legal effects could be removed by the Crown through the  
3           use of its prerogative power."

4           I can't improve on that.

5   THE PRESIDENT: Does this play into your argument on the  
6           2015 Act as well?

7   LORD PANNICK: Certainly, my Lord, yes.

8   THE PRESIDENT: It seems to me you may be able to make  
9           something of this point insofar as it says the 2015 Act  
10          impliedly changes the landscape.

11   LORD PANNICK: Your Lordship is absolutely right. If these  
12          principles, as we submit, are relevant in this context,  
13          then one does need the clearest of statements by  
14          Parliament in the 2015 Act, in order to show that  
15          Parliament intended to authorise the Secretary of State  
16          by the use of the prerogative to remove, frustrate,  
17          nullify that which Parliament had created, absolutely  
18          so.

19   THE PRESIDENT: I suppose it depends how one sees the  
20          1972 Act. If one sees it as impliedly imposing some  
21          sort of fetter or clamp, then it might be easier to see  
22          the 2015 Act as removing it, but if we see it through  
23          your lens, then the argument on the 2015 Act may have  
24          more force.

25   LORD PANNICK: Well, I say those principles are applicable,

1           those principles of interpretation, of construction,  
2           they themselves are important constitutional principles,  
3           and what they come to is that they mean that it is  
4           necessary for my friend to show that there is some clear  
5           parliamentary indication of an intention to authorise  
6           the Secretary of State to do what he is otherwise not  
7           entitled to do; that is how I put it.

8   THE PRESIDENT:   Thank you.

9   LORD PANNICK:   That is my third point.  My fourth point is  
10           to move to the purpose and the contents of the 1972 Act  
11           itself.

12   THE PRESIDENT:   Yes.

13   LORD PANNICK:   We say, if one looks at the purpose and the  
14           contents of this legislation, far from there being  
15           a clear parliamentary statement that the rights could be  
16           removed by executive action, the position is to the  
17           contrary; there is no clear statement to that effect;  
18           and if I need to, I say there are a number of strong  
19           indications that Parliament intended that the appellant  
20           did not enjoy any such power.

21           Our first point under this head is we say that the  
22           appellant has failed to recognise the nature and the  
23           significance of the 1972 Act in domestic law.  It has  
24           failed to recognise the new source of law that  
25           Parliament has approved and authorised; this is, to

1 quote what the European Court of Justice said in the van  
2 Gend en Loos case, it is a new legal order; MS page 764,  
3 I don't ask the court to turn it up, MS page 764, it is  
4 core authorities 5, tab 24.

5 The new legal order as implemented by the 1972 Act  
6 has at least three important characteristics. The first  
7 of them is that the new legal order agreed at  
8 international level does not just create relations  
9 between states, or even as with some international  
10 treaties, the European Convention on Human Rights is  
11 an example, it does not merely confer rights on  
12 individuals in international law. My Lord, Lord Mance  
13 explained for the Court of Appeal in the Ecuador case  
14 that international treaties do sometimes confer rights  
15 on individuals at the international level. That  
16 authority is core authorities 4, tab 290, MS 8295.

17 The new legal order is far more than that. The new  
18 legal order, as recognised by the 1972 Act, recognises  
19 a body of rights created at international level which  
20 take effect in national law and which national courts  
21 are obliged to protect and enforce.

22 That is the first feature of this new legal order.  
23 The second feature is that those rights and duties  
24 created in national law take priority over inconsistent  
25 national law and they take priority whether the

1 inconsistent national law was enacted previously or  
2 subsequently. That is section 2(4).

3 There is no other example that I am aware of of that  
4 in our domestic law.

5 The third feature of this new legal order is that  
6 the proper interpretation of the scope and meaning of  
7 these rights and duties created at international level  
8 but now part of the national law, is that their scope  
9 and meaning is conclusively determined by a court of  
10 justice in Luxembourg whose rulings take priority over  
11 those of domestic courts, however senior. That is  
12 section 3(1).

13 Again, there is no other example of that in domestic  
14 law. These features of EU law were established well  
15 before we joined the EEC. I have mentioned van Gend en  
16 Loos, volume 2, tab 24, MS page 754. There is also the  
17 Costa case, Costa v ENEL, core authorities 5, tab 96, MS  
18 page 3794.

19 My Lords and my Lady, there is an irony to these  
20 legal proceedings, and the irony is that the new -- the  
21 features of the new legal order and the constitutional  
22 status of the 1972 Act is both one of the main reasons  
23 why the appellant wishes to notify under article 50(2),  
24 he wishes to remove the powerful effect of EU law in  
25 domestic law, but it is also, I say, the reason why the

1           appellant cannot so act without the authorisation of  
2           Parliament. It is Parliament itself which has brought  
3           this new legal order into effect.

4           The court has seen -- I won't go through it -- that  
5           when we joined the EEC, what happened was that the  
6           1972 Act was brought into force before the treaty of  
7           accession was ratified and we have dealt with this at  
8           paragraph 7 of our written case, MS 12387, and I will  
9           not take further time on that but we do say, and the  
10          court has put questions to Mr Eadie on this subject, we  
11          do say that just as Parliament needed to legislate  
12          before we joined, so parliamentary authorisation is  
13          required before steps are taken to remove those rights  
14          from domestic law.

15          There is one other statutory provision that the  
16          court may think throws some light on this, and that is  
17          section 18 of the European Union Act 2011.

18          If your Lordships, please, would go to core  
19          authorities, volume 1, at tab 6, it is MS page 153.  
20          Core authorities, volume 1, tab 6, the European Union  
21          Act 2011, MS page 153.

22   THE PRESIDENT: Yes.

23   LORD PANNICK: Your Lordships and your Ladyship will see  
24          section 18 of the European Union Act 2011, and the  
25          heading is of significance:

1           "Status of EU law dependent on continuing statutory  
2 basis".

3           Not dependent on whether prerogative powers may or  
4 may not in the future be exercised; it is dependent on  
5 "continuing statutory basis".

6           Then the substance:

7           "Directly applicable or directly effective EU law  
8 [that is the rights, powers, liabilities et cetera]  
9 referred to in section 2(1) falls to be recognised and  
10 available in law in the United Kingdom only by virtue of  
11 that Act or where it is required to be recognised as  
12 available in law by virtue of any other act."

13           Now, I can see that that begs questions, but  
14 nevertheless it is a strong indication that Parliament  
15 thought and was reaffirming that it is Parliament that  
16 is in control here. That is the purpose of that  
17 provision. It is very difficult in my submission to  
18 reconcile that statement by Parliament with a contention  
19 that no -- that all depends on whether or not ministers  
20 may decide to exercise prerogative powers.

21 THE PRESIDENT: It is interesting to read the footnote which  
22 tells you, although having criticised you impliedly for  
23 reading what was in Parliament, here I am looking at  
24 what is in Parliament.

25 LORD PANNICK: Parliament is sovereign.

1 LORD HUGHES: It is a public declaration of dualism, is it?

2 LORD PANNICK: It is, but it is a recognition that as part  
3 of the dualist theory, Parliament has acted, and once  
4 Parliament has acted, only Parliament can remove that  
5 which Parliament has incorporated into domestic law.  
6 That is my submission.

7 LORD HUGHES: That is your submission; it depends entirely  
8 on whether the whole basis of the 1972 Act is that it  
9 lasts as long as we are members, which we are no doubt  
10 going to come to.

11 LORD PANNICK: I am coming to the substance of it.

12 I am submitting first of all that if one looks at  
13 what the 1972 Act was intended to achieve, it was  
14 intended to achieve a constitutional revolution in legal  
15 terms, and that it is inherently implausible that  
16 Parliament intended in 1972 when it created this  
17 constitutional reform, when it recognised this new  
18 source of legal rights and duties, that it intended that  
19 it could all be set at nought by the exercise of  
20 prerogative powers.

21 LORD SUMPTION: The purpose of section 18 was presumably to  
22 pre-empt the argument that the primacy of EU law meant  
23 that you could never withdraw.

24 LORD PANNICK: That was, indeed.

25 LORD REED: We looked at it in the HS2 case and we

1           interpreted it as effectively ensuring that the van Gend  
2           en Loos/Costa v ENEL doctrine did not form part of UK  
3           constitutional law.

4   LORD PANNICK: I say it is an assertion of parliamentary  
5           supremacy, that Parliament has created and Parliament  
6           may take away, and that is the value that I place on it.

7   LORD MANCE: It was probably not dealing with withdrawal,  
8           was it, because by then the treaty of Lisbon had given  
9           a base for withdrawal, or the base anyway. It was  
10          probably designed to demonstrate that even if we  
11          remained a member, it was still open to Parliament to do  
12          what it wanted.

13   LORD PANNICK: Yes.

14   LORD MANCE: Now, that might lead to a breach at the  
15          international level and trouble with the Commission and  
16          others but that is the --

17   LORD PANNICK: I recognise the limits of the submission, but  
18          I say it is at least consistent with my submission that  
19          Parliament regards itself as in charge in this area.

20   LORD MANCE: You can certainly say that it gives the weight  
21          to Parliament as the progenitor of the rights, rather  
22          than treats Parliament as a conduit at any rate.

23   LORD PANNICK: Indeed, that is what I say.

24   THE PRESIDENT: It treats Parliament as the source rather  
25          than the communicator as it were.



1 LORD PANNICK: Parliament as the source?

2 THE PRESIDENT: As the source rather than the communicator  
3 or the conduit.

4 LORD PANNICK: Indeed.

5 Reference has been made on a number of occasions to  
6 the decision of the appellate committee in the Robinson  
7 case, the Northern Ireland case. Perhaps we should look  
8 at it. It is core authorities number 4 and it is tab  
9 number 81 and it is MS page 3272. The relevant passage  
10 that has been referred to in the speech of Lord Bingham  
11 is at 32 -- it is paragraph 11, which appears on  
12 page 3280, thank you. The relevant part of it that has  
13 been referred to is in the fifth line. It is talking  
14 about the Northern Ireland Act 1998, of course:

15 "The provisions should, consistently with the  
16 language used, be interpreted generously and  
17 purposively, bearing in mind the values which the  
18 constitutional provisions are intended to embody."

19 Our submission is that the values inherent in the  
20 1972 Act were a commitment by Parliament, unless and  
21 until Parliament changed its mind, but a commitment by  
22 Parliament to the inclusion of EU law as part of  
23 domestic law. Those are the values that Parliament was  
24 signing up to in 1972, with all the profound legal  
25 consequences which that entails, as seen, not just in

1 the 1972 Act but in any other, any number of other  
2 pieces of legislation which Parliament has enacted.  
3 There is a reference, my friend Mr Eadie drew attention  
4 to the statement by Lord Bingham as to flexibility.  
5 I think it also appears in that paragraph.

6 THE PRESIDENT: At the end of paragraph 12.

7 LORD PANNICK: I am grateful. Flexible response. Yes,  
8 flexible response. Our submission is the values are  
9 very clear in the 1972 Act. I say that however flexible  
10 our constitution, it cannot be bent so that ministers  
11 are able through the exercise of the prerogative to take  
12 away that which Parliament has created.

13 The same point, I submit, can be made by reference  
14 to the Axa case. The Axa case appears in volume 4, it  
15 is the main authority of volume 4, and it is at tab  
16 number 31, and it is MS page 1205, in the judgment of  
17 Lord Hope of Craighead, with whom the other members of  
18 the court agree.

19 LORD WILSON: Paragraph, sorry?

20 LORD PANNICK: It is paragraph 46 in Lord Hope's judgment,  
21 talking about the Scotland Act and it is simply the  
22 passage where Lord Hope says:

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

1           Then he deals with the particular matters, and I say  
2           again, the general message that is conveyed by the  
3           1972 Act is very clear indeed as to Parliament's  
4           commitment to the new source of law.

5           It does not advance the appellants' argument for him  
6           to point out that as part of the EU legislative  
7           processes, the Crown, through ministers, has a role as  
8           a member of the Council of Ministers. Parliament  
9           recognised when it implemented EU law into domestic law,  
10          it recognised that EU law confers a legislative  
11          competence on the institutions of the EU, and as part of  
12          that, through the Council of Ministers, of course the  
13          representatives of the Crown, Her Majesty's Government  
14          have that legislative competence, or rather they play  
15          a part in the legislative competence of the Council of  
16          Ministers, but in so acting, ministers are exercising  
17          powers under the treaty framework which Parliament  
18          adopted and gave effect to by section 2(1) of the  
19          1972 Act. So I don't accept that that can assist my  
20          friends.

21          Now, we have addressed for our part the contents of  
22          the 1972 Act at paragraphs 48 through to 65 of our  
23          written case. It begins at MS page 12415.

24        THE PRESIDENT: Yes.

25        LORD PANNICK: But can I take you, the court, through these

1 provisions briefly.

2 THE PRESIDENT: Yes.

3 LORD PANNICK: The starting point is the long title --

4 THE PRESIDENT: Yes.

5 LORD PANNICK: -- to the 1972 Act:

6 "An act to make provision in connection with the  
7 enlargement of the European Communities to include the  
8 United Kingdom".

9 Now, our point is that it cannot be consistent with  
10 the long title, speaking as it does of the enlargement  
11 of the EU, for the executive to use prerogative powers  
12 to reduce the size of the EU by taking the  
13 United Kingdom out. I say it is no answer for my  
14 friends to say that the long title says nothing about  
15 withdrawal. That is precisely the point. Parliament  
16 decided to make permanent provision in national law  
17 consequent on the UK becoming a member of what is now  
18 the EU, permanent, that is, unless and until Parliament  
19 decided otherwise.

20 Nor, in my submission, is it an answer for Mr Eadie  
21 to say, this is an argument based on Professor Finnis'  
22 lecture, that the long title says "in connection with",  
23 and not "for and in connection with", and the court has  
24 seen the contrast, the point made about the contrast  
25 between the 1972 Act and, for example, the

1 Barbados Independence Act.

2 We for our part respectfully agree with the point  
3 that was made yesterday by my Lord, Lord Mance, that the  
4 1972 bill was being considered against the background of  
5 earlier parliamentary debates and votes on the very  
6 subject of whether it was appropriate for this country  
7 to join the EU, and we have put on the desks of your  
8 Lordships and your Ladyship, I hope it has arrived, the  
9 passage from the second reading of the 1972 bill.

10 LORD CLARKE: This is Mr Enoch Powell, is it?

11 LORD PANNICK: It starts, Mr Geoffrey Rippon, who is the  
12 Chancellor of the Duchy of Lancaster, who speaks for the  
13 Government, and then Mr Enoch Powell raises a point of  
14 order. The point of order goes on a bit on and then at  
15 column 269, your Lordships and your Ladyship will see,  
16 at the bottom of 268, Mr Rippon begs to move that the  
17 bill be now read a second time. At column 269, in the  
18 second, third and fourth paragraph, Mr Rippon sets out  
19 the history. The only reason we have put this before  
20 the court is it confirms what was mentioned by my Lord,  
21 Lord Mance.

22 LORD MANCE: It takes place against the background of the  
23 previous debate --

24 LORD PANNICK: Yes.

25 LORD MANCE: -- and decisions of the House about the

1 principle of membership.

2 LORD PANNICK: Yes, it just gives the relevant dates. It  
3 might be a useful source of the material.

4 THE PRESIDENT: Can it not be said that, insofar as this  
5 "for and in connection with" take goes anywhere, insofar  
6 as it does, that until this Act was passed, it is clear  
7 that the accession was not going to be ratified, and to  
8 that extent, it would have been appropriate to say "for  
9 and in connection with"?

10 LORD PANNICK: Well, yes, but the ratification, of course,  
11 takes place on the international plane.

12 THE PRESIDENT: I know, but nonetheless it was not going to  
13 happen unless the bill became an act.

14 LORD PANNICK: Yes.

15 THE PRESIDENT: Therefore, whatever may be the background,  
16 the "for and in connection" point, for what it is worth,  
17 still has some mileage; that is all I am saying to you.

18 LORD PANNICK: Yes. Well, my answer to that, my Lord, is  
19 that everybody understood and appreciated that the  
20 parliamentary approval by the Act would be followed;  
21 that was what Parliament intended. It would be followed  
22 by a ratification, and I say the point does not  
23 answer -- Professor Finnis' point, with great respect,  
24 does not answer the relevant question. The relevant  
25 question is this: once Parliament has recognised that

1 all -- that this new legal order should be introduced  
2 into domestic law, can Parliament have intended, really  
3 intended, that the executive could thereafter defeat  
4 that which Parliament had created, by the act of  
5 withdrawing the UK from the EU without parliamentary  
6 authorisation. That is the real question. And I say --

7 THE PRESIDENT: I understand that is your point, yes.

8 LORD CARNWATH: Can I ask you, I mean, I tried to sort of  
9 slow Mr Eadie down when he was spending a lot of --  
10 speed him up actually, he was spending a lot of time on  
11 this, and he was rather stopped. I, for my part, don't  
12 see how helpful it is, trying to look at the intention  
13 of Parliament in 1972. There was no doubt that they  
14 were incorporating a new legal order in the  
15 United Kingdom, and that was the intention. No one was  
16 contemplating the possibility of withdrawal and there  
17 was no provision in the treaty for withdrawal.

18 Presumably, if anyone had asked, they would have  
19 said we can do it under the Vienna convention but  
20 obviously we will have to go through the process of  
21 negotiation, and at the end of all that we will pass  
22 whatever legislation is needed. You know, that is  
23 fairly obvious, but it doesn't really help one as to how  
24 one looks at the matter when many years later, one has  
25 this Article 50 being brought in, which creates

1 a completely new situation, because it enables a notice  
2 to be served with this cut-off. So how helpful is it to  
3 look at 1972 to find out what was intended in 2008?

4 LORD PANNICK: It is not the position of the appellant, nor  
5 is it our position, that the United Kingdom could not  
6 leave the EU in 1973 or 1974. That is not the position.

7 LORD CARNWATH: No, but the point is whether it could do it  
8 by prerogative or whether it would need an Act of  
9 Parliament, and I have no doubt that, in 1973, there  
10 would have been a parliamentary debate, the Government  
11 would have proceeded and it would have been negotiated  
12 and at the end of it all there would have been an Act of  
13 Parliament.

14 LORD PANNICK: Article 50 in my submission, the existence of  
15 Article 50, does not change the position as to  
16 prerogative power.

17 LORD CARNWATH: We will come to Article 50.

18 LORD PANNICK: Can I just make the submission, my Lord.

19 Since your Lordship asked the question, the reason why  
20 Article 50 does not alter that is because we all agree  
21 that Article 50, although it gives a power to leave the  
22 EU, it refers to the constitutional requirements of the  
23 member state and we all agree that that is a matter for  
24 domestic law. It doesn't alter that question.

25 Therefore, I say, the real question, the two real



1 questions, what was the position in 1972 as to whether  
2 Parliament can have intended that what it had created  
3 could be set at nought by the existence of the  
4 prerogative, and whether or not anything that has  
5 happened since any of the later legislation, to which  
6 I will come, has altered that position. But I don't  
7 accept, with respect, that the existence of  
8 Article 50(2) of itself can possibly make a difference  
9 to --

10 LORD CARNWATH: That is a debate we are going to have when  
11 you get to it, and no doubt I am obviously very  
12 interested to see how you put that, but all I am say is  
13 it is not very surprising to find the elements in 1972  
14 which you are highlighting, that was reflecting the  
15 position at the time.

16 LORD PANNICK: But that is still the Act. It is the Act of  
17 Parliament which remains which creates and continues the  
18 legal order by which these important rights and duties  
19 are part of domestic law, and therefore I say it must be  
20 fundamental to analysis what is the purpose of the Act,  
21 not just when it was created but going forward and what  
22 does the Act say.

23 LORD KERR: Your argument is that it establishes a starting  
24 point and the question is whether there has been any  
25 departure from that starting point.

1 LORD PANNICK: Yes. I am grateful, my Lord, yes, and I say,  
2 for the reasons I have given, there has to be a clear  
3 indication of a departure, not anything less than that.  
4 Section 1, we address section 1 of the 1972 Act in  
5 our written case at paragraphs 59 to 63, MS 12421.  
6 I say it is very important that section 1, subparagraph  
7 (2) provides that, if there is to be an amendment to the  
8 treaties, it requires a new treaty; or rather there is  
9 a requirement under the Act that the new treaty has to  
10 be included in section 1(2) if it is to have any effect  
11 in domestic law. It is not left to the executive to  
12 take such action as it sees fit on the international  
13 plane. What it does on the international plane is  
14 irrelevant to domestic law unless Parliament itself has  
15 included the new treaty as part of section 1(2), and we  
16 have set all this out in paragraph 60 of our printed  
17 case and I am not going to take time on that, unless it  
18 would assist.  
19 I simply make this point, which is we say the core  
20 point. It would really make no sense for an Act of  
21 Parliament to be required, as it is, to authorise  
22 an amendment to section 1(2), to add a new treaty, when  
23 this will alter domestic law, but for no Act of  
24 Parliament to be required if ministers are to notify  
25 that we are going to leave the EU and destroy the whole

1 of the structure. That makes no sense at all. It means  
2 that parliamentary involvement is required for the  
3 lesser but not for the greater. It is required for  
4 an amendment but not for a destruction.

5 LORD REED: It is interesting if we are trying to understand  
6 the context in which the 1972 Act was enacted, the  
7 passage you gave us from Hansard goes on with the  
8 responsible minister quoting the previous Prime Minister  
9 to tell us that:

10 "It is important to realise that if the law is  
11 mainly concerned with industrial and commercial  
12 activities, with corporate bodies rather than private  
13 individuals, by far the greater part of our domestic law  
14 would remain unchanged."

15 That is then endorsed in the next couple of  
16 paragraphs. It is been enacted in a very different  
17 world.

18 LORD PANNICK: I entirely understand. It is a different  
19 world but perhaps what is relevant, following on from  
20 what my Lord puts to me, is that the scheme of the Act  
21 was not changed. It remains the case, and remains the  
22 case today, that if there is to be an alteration of the  
23 treaties, that has no effect in domestic law unless  
24 section 1(2) is amended.

25 There is one qualification to that and it is the

1           qualification that Article 48.6, which your Lordships  
2           saw, 48.6 of the TEU, provided a simplified revision  
3           procedure. It was obviously thought in Brussels that it  
4           should be easier to amend the treaties and Parliament  
5           responded to that, and your Lordships saw this, and your  
6           Ladyship saw this, in section 6(1) and (2) of the 2008  
7           Act.

8   THE PRESIDENT: Yes.

9   LORD PANNICK: Parliament's response was to say, if the  
10           simplified amendment procedure was used, then you didn't  
11           any longer need primary legislation to bring that change  
12           into domestic law. It was sufficient to have a motion  
13           in both Houses. But nevertheless you still needed  
14           Parliament to act and it was because Parliament thought  
15           that a motion sufficed that this change occurred.

16   LADY HALE: Lord Pannick, I am a little bit puzzled about  
17           your saying an Act of Parliament was required to add to  
18           the treaties, because I am looking at section 1(3) --

19   LORD PANNICK: But that is different, my Lady.

20   LADY HALE: That is different, is it?

21   LORD PANNICK: That is different. It is different because  
22           that deals with ancillary treaties. There  
23           a distinction, if we go to it -- let me find the core  
24           authorities. Is your Ladyship looking at tab 2 or  
25           tab 1?

1 LADY HALE: I am looking at tab 1, the enacted version.

2 LORD PANNICK: Your Ladyship will see that section 1(2)  
3 concerns "the Treaties", capital T, and at the end of  
4 section 1(2) it says, after original B:

5 "... and any other treaty [lower case] entered into  
6 by any of the communities with or without any of the  
7 member states or entered into as a treaty [lower case]  
8 ancillary to any of the Treaties [capital T] by the  
9 United Kingdom."

10 Then (3) is defining these ancillary treaties:

11 "If Her Majesty by ordering council declares the  
12 treaty [lower case] specified in the order is to be  
13 regarded as one of the community Treaties [upper case]  
14 as herein defined, the order shall be conclusive that it  
15 is to be so regarded."

16 The explanation of that is that there are treaties,  
17 lower case, which are ancillary to the main community  
18 Treaties, but what has happened on all occasions when  
19 the main Treaties have been amended, is that they have  
20 been the subject of express parliamentary approval under  
21 section 1(2) before ratification. That is the  
22 explanation of the distinction between the --

23 LADY HALE: But what you are saying is that a new Treaty,  
24 with a capital T, has been approved by an Act of  
25 Parliament?

1 LORD PANNICK: Yes, all of them -- Lisbon, Maastricht. All  
2 of them have been approved by Act of Parliament. The  
3 caveat to that is the power under Article 48.6 under the  
4 2008 Act where there is the simplified amendment  
5 procedure, but that of course existed from 2008 until it  
6 was repealed in 2011.

7 So there is that distinction but, in any event, what  
8 this shows is parliamentary control. However one puts  
9 the point, whatever the overlap or the distinction  
10 between 1(2) and 1(3), the point I make is that  
11 Parliament in 1972, and ever since, has required  
12 parliamentary control if there is to be any variation in  
13 treaties. Of course --

14 LORD SUMPTION: You are agreed with Mr Eadie on that. You  
15 both say there is a great scheme of parliamentary  
16 control here. He says that shows that what is not  
17 specifically mentioned is left unfettered; you say that  
18 in the spirit of the thing you have to carry it through  
19 to all powers. But you are both agreed on the  
20 construction of the Act.

21 LORD PANNICK: We are, and I respectfully commend my  
22 approach to your Lordships.

23 LORD SUMPTION: I rather thought you might.

24 LORD PANNICK: Which will not surprise your Lordship,  
25 because, I say, it would be quite extraordinary if

1 Parliament had intended that parliamentary control for  
2 variation was required but had not intended there to be  
3 any parliamentary control in respect of nullification.

4 THE PRESIDENT: I see the force of that, but it could be  
5 said that it is one thing to say "We will join a club on  
6 certain terms, and we want to keep control of what those  
7 terms are, but if you want to withdraw that is fine."

8 LORD PANNICK: Yes, it could be said, but for the reasons  
9 I give I say, with great respect, that unrealistic that  
10 Parliament can have intended to maintain such control  
11 but nevertheless to have intended that the whole scheme  
12 should be open to nullification by the minister without  
13 prior parliamentary authorisation. That is the way  
14 I put it and that was the approach that the divisional  
15 court adopted.

16 The divisional court's reasoning, particularly on  
17 section 1(3), appears at paragraph 93.8 of their  
18 judgment. It is MS page 11800 and it is paragraph 93.8  
19 of the judgment. It is the end of 93.8, looking at  
20 11800, the last four lines, they says:

21 "Moreover, the fact that Parliament's approval is  
22 required to give even an ancillary treaty made by  
23 exercise of the Crown's prerogative effect in domestic  
24 law is strongly indicative of a converse intention that  
25 the Crown should not be able by exercise of its

1 prerogative powers to make far more profound changes in  
2 domestic law by unmaking all of the EU rights set out in  
3 or arising by virtue of the principal EU treaties."

4 That is the point. Parliament should not be assumed  
5 to have strained at a gnat that has swallowed a camel.  
6 That is the point.

7 I am grateful to Mr Thompson, if one looks in the  
8 consolidated version of the 1972 Act, it helpfully sets  
9 out all the amendments to section 1(2), and indeed all  
10 the amendments to section 1(3). If the court is  
11 interested in that, you will find all the detail there  
12 set out.

13 So that is section 1. Then the next indication is  
14 the heading to section 2.

15 THE PRESIDENT: Yes.

16 LORD PANNICK: The heading to section 2 is "General  
17 implementation of treaties", and the treaties as I have  
18 indicated are those specified in section 1(2) and I say  
19 it would conflict with that heading as an indication of  
20 purpose if the minister could use prerogative powers to  
21 remove the UK from the treaties, so that the rights and  
22 obligations they create are no longer implemented in  
23 national law. This is concerned with implementation in  
24 national law.

25 I say it is no answer that the treaties include the



1 TEU which contains Article 50. Mr Eadie stated in  
2 answer to a question from my Lord, Lord Mance, he  
3 stated, my friend, that Article 50 "is not part of  
4 domestic law and it does not have direct effect", he  
5 agreed:

6 "Article 50 requires notification to be in  
7 accordance with the constitutional requirements of the  
8 member state. It does not alter those constitutional  
9 requirements."

10 Therefore it cannot assist the Government's case, in  
11 my submission.

12 Section 2(1) of the 1972 Act, the phrase "from time  
13 to time" recognises that the rights and duties  
14 consequent on EU membership will change. They will  
15 evolve. They will evolve through the acts of the EU  
16 institutions, the Parliament, the Council, the  
17 Commission, the Court of Justice, and in section 2(1) is  
18 simply intended to give effect to this feature of EU  
19 law.

20 My Lord, Lord Sumption put to Mr Eadie, my friend  
21 Mr Eadie, that section 2(1) is concerned with changes to  
22 the content of EU law, it is not concerned with  
23 nullification of the whole statutory scheme and we say  
24 that is so. My Lord, Lord Reed put to my friend that  
25 his difficulty is he is proposing to make the conduit

1           seen in section 2(1) redundant, and we would  
2           respectfully agree.

3           My friend expressly confirmed in answer to my Lord,  
4           Lord Mance, that the words "from time to time" do not  
5           mean membership from time to time, and we respectfully  
6           agree.

7   LORD CARNWATH:   Could I just ask you to clarify this.

8           Article 90, the provision for notice, Mr Eadie I think  
9           says, well, that is an international law provision and  
10          therefore does not need a base in domestic law and  
11          doesn't have one.

12   LORD PANNICK:   Did your Lordship say Article 90?

13   LORD CARNWATH:   Article 50, sorry.

14          But if you do need a base in domestic law, why  
15          doesn't section 2 provide it?

16   LORD PANNICK:   My Lord, because, as my friend Mr Eadie  
17          accepted, Article 50 has no direct effect. It is not  
18          part of domestic law.

19   LORD CARNWATH:   But that is on his premise.

20   LORD PANNICK:   It is my premise as well.

21   LORD CARNWATH:   This all part of the prerogative. You  
22          cannot have it both ways. If you say you need  
23          a domestic base for it, why does --

24   LORD PANNICK:   It is nothing to do with the prerogative, in  
25          my submission. It is a question of EU law, whether

1 Article 50 is a provision of EU law which has effect in  
2 national law, and it only has effect in national law if  
3 it is directly effective and it is not a directly  
4 effective provision, it is not intended --

5 LORD CARNWATH: I don't think you understand me.

6 If on your premise you need to find a UK domestic  
7 law statutory base for it, then if you look at  
8 section 2(1), arguably this a power created by EU law  
9 which is effective. Obviously, if you don't need  
10 a domestic law base for it, it doesn't matter but if on  
11 your premise you do, why is section 2(1) not such a --

12 LORD PANNICK: First of all, it is no part of the case  
13 against me --

14 LORD CARNWATH: I understand that, I would just like to  
15 understand it myself, because it has been raised in some  
16 of the commentaries.

17 LORD PANNICK: It is no part of the case against me that  
18 section 2(1) provides a statutory basis for notification  
19 and my answer is that that is correct and it is correct  
20 not least because Article 50 is not part of domestic  
21 law, but also because Article 50 does no more than  
22 recognise that it is a matter for the domestic  
23 constitutional requirements of the member state  
24 concerned and therefore Article 50 of itself cannot  
25 provide any basis, if one does not otherwise exist, in

1 domestic law for the notification. Article 50 is  
2 completely neutral as to the domestic law basis and  
3 power for making the notification. It doesn't assist.

4 That, as I understand it, has been accepted by the  
5 Government at all stages and I say they are plainly  
6 right to accept that. That is my answer to your  
7 Lordship.

8 So that is section 2(1), and we say that section  
9 2(1) is intended to implement the rights under the  
10 treaties. The rights from time to time created or  
11 arising under the treaties cannot in my submission  
12 sensibly mean the absence of rights under the treaties.

13 That may be enough for today, or probably more than  
14 enough for your Lordships for today.

15 LORD CLARKE: Could I just ask one question, which is purely  
16 for my own personal benefit. I don't know if anybody  
17 else would like to have a printed copy of the  
18 transcript, but speaking for myself I should like one if  
19 it were possible.

20 LORD PANNICK: Certainly. I am sure we can facilitate that.

21 THE PRESIDENT: I dare say, all for one and therefore one  
22 for all. 11 each -- or one each, rather.

23 LORD MANCE: Preferably with four pages on one.

24 THE PRESIDENT: Yes, could it be the mini one, with four  
25 pages printed on one. I think we would appreciate that.

1           If you could let us have 11.

2   LORD PANNICK: My Lord, I think I have another hour and  
3           a half and I will ensure I finish within that time.

4   THE PRESIDENT: That is very good of you. Thank you very  
5           much, Lord Pannick.

6           In that case the court is now adjourned and we are  
7           due to resume again tomorrow morning at 10.30, when your  
8           argument, Lord Pannick, will continue.

9   LORD PANNICK: Thank you.

10   THE PRESIDENT: Thank you very much. Court is now  
11           adjourned.

12   (4.31 pm)

13           (The hearing adjourned until 10.30 am the following day)

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